In the Supreme Court of Canada

(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF ONTARIO)

B E T W E E N :

HER MAJESTY THE QUEEN

Respondent

- and -

DR. HENRY MORGENTALER
DR. LESLIE FRANK SMOLING
DR. ROBERT SCOTT

Appellants

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I N D E X

		PAGES
PART I	THE FACTS	1
	I) EVIDENCE ON THE CONSTITUTIONAL ARGUMENT	1
	ABORTION IN CANADA	
	A) GENERAL SUMMARY	2
	B) DEVELOPMENT OF THE FOETUS	5
	C) NUMBER OF ABORTIONS	6
	D) TIMING OF THE ABORTION	6
	E) METHOD OF TERMINATION	6
	F) ACCESS TO ABORTION SERVICES	8
	G) THE THERAPEUTIC ABORTION COMMITTEE	9
	H) ABORTION FACILITIES: HOSPITALS V. CLINICS	10
	I) ABORTION AND TEENAGERS	11
	J) APPLICATION OF THE LAW IN QUEBEC	11
	II) EVIDENCE LED ON THE TRIAL	12
	FORMATION OF THE CONSPIRACY AND THE ARREST	12
	OPERATION OF THE MORGENTALER CLINIC	13
	TECHNIQUES OF ABORTION	13
	RISKS OF ABORTION	15
	EMERGENCY NECESSITATING CONSPIRACY	16
	1) THE EVIDENCE AS TO RISK IN ONTARIO	16
	2) ACCESS TO ABORTION FOR ONTARIO RESIDENTS	19
	DR. MORGENTALER'S BELIEFS AS TO THE NEED FOR HIS TORONTO CLINIC	22
PART II	RESPONDENT'S POSITION WITH RESPECT TO THE POINTS IN ISSUE	24
PART III	MEMORANDUM OF ARGUMENT	25
	I) CONSTITUTIONAL ISSUES	25
	VALIDITY OF SECTION 251 OF THE CRIMINAL CODE	25
	A) INTERPRETATION OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS	25
	B) SECTION 7 OF THE CHARTER	25
	LIFE, LIBERTY AND SECURITY OF THE PERSON	26
	THE PRINCIPLES OF FUNDAMENTAL JUSTICE	32
	VOID FOR VAGUENESS AND OVERBREADTH	33
	C) SECTION 2(a) OF THE CHARTER: FREEDOM OF CONSCIENCE AND RELIGION	35
	D) SECTION 12 OF THE CHARTER: CRUEL AND UNUSUAL TREATMENT OR PUNISHMENT	37
	E) SECTION 15 AND 28 OF THE CHARTER: EQUALITY RIGHTS	38

F) APPLICATION OF SECTION 1 OF THE CHARTER TO SECTION 251 OF THE CRIMINAL CODE 41
G) SECTION 91(27) OF THE CONSTITUTION ACT, 1867 44
H) UNCONSTITUTIONAL DELEGATION AND ABDICATION OF FEDERAL POWER 45
I) SECTION 96 OF THE CONSTITUTION ACT, 1867 46

POWER OF THE CROWN TO APPEAL: VALIDITY OF SECTION 605 OF THE CRIMINAL CODE 47

COSTS: THE VALIDITY OF SECTION 610(3) OF THE CRIMINAL CODE 49

II) THE DEFENCE OF NECESSITY 50
(i) QUESTION OF LAW 50
(ii) EVIDENCE OF NECESSITY 51
a) GENERAL NATURE OF THE DEFENCE 51
b) EMERGENCY 52
c) LEGAL WAY OUT 53
d) PROPORTIONALITY 54
(iii) CHARGE TO THE JURY ON NECESSITY 54

FAILURE OF CROWN COUNSEL TO OBJECT 55

JUDGMENT IN THE COURT BELOW 56

III) DEFENCE COUNSEL'S ADDRESS 56
(i) QUESTION OF LAW 56
(ii) PROPRIETY OF ADDRESS 57
(iii) JUDGMENT IN THE COURT BELOW 58

NO SUBSTANTIAL WRONG OR MISCARRIAGE OF JUSTICE 59

PART IV ORDER REQUESTED 60

PART V TABLE OF AUTHORITIES 61

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RESPONDENT'S STATEMENT

PART I

THE FACTS

1. This appeal raises questions concerning the constitutional validity of the Canadian law governing abortion, the power of the Crown to appeal against a jury verdict of acquittal, the parameters of the defence of necessity, and the issues of law arising out of defence counsel's address to the jury in this particular case. The Respondent agrees with the history of the case as set out in the Appellants' factum, but does not necessarily agree with the comments, factual inferences or conclusions made throughout the Appellants' factum.

I) EVIDENCE ON THE CONSTITUTIONAL ARGUMENT:

2. Most of the evidence called by the Appellants on the Constitutional issue at trial related to the application of the abortion law in Canada. Objection was taken by the Crown at trial to the introduction of the evidence, at least insofar as it was to be related to the administrative efficiency of legislation. It was agreed that evidence could be called relating to the purpose or object of the challenged legislation. The learned trial judge ruled that evidence could be called, and did not limit the scope of the evidence. For the purposes of the issues relating to constitutional validity, the Respondent Crown continues to take the position that much of the evidence called on the motion is

irrelevant to the issues before this Honourable Court.

Appeal Case,
Argument and Ruling re Calling of Evidence, Vol. 1, Page 105M, 129-30M.

ABORTION IN CANADA: A SUMMARY OF SOME OF THE STATISTICAL EVIDENCE:

10 3. Oral and statistical evidence was introduced relating to the abortion procedure, the availability of facilities, and the administrative efficiency of section 251.

A) GENERAL SUMMARY:

4. The rates of morbidity and mortality associated with medically supervised abortions in Canada are extremely low. Although statistically the
20 physical and mental risk to women obtaining an abortion increases with the length of gestation, nonetheless, a lawful, medically supervised abortion is one of the safest medical procedures that a woman can undergo. In the rare cases where there are complications, the statistics do not show that these are a result of the hospital and committee requirements of Section 251 of the Criminal Code, as opposed to some other cause, such as a medical problem unique to a particular woman. One medical witness testified that he could not in all honesty connect the time delay associated with the committee to a patient's physical complication.

30 Appeal Case,
Dr. Tietze, Vol. 2, Page 483M, line 18 to Page 485, line 14.
Dr. David, Vol. 6, Page 1245M, lines 8 to 25.
Dr. Lamont, Vol. 4, Page 807M, line 24 to Page 808M, line 1; Page 876M, line 28 to Page 877M, line 7.
Dr. Carr, Vol. 6, Page 1333M, lines 22 to 24.

Exhibit 33/72, Table 74, Vol. 22, Page 4765.
Exhibit 75, Table 7, Vol. 26, Page 5402.

40 5. Medical services, in general, are provided unequally across Canada. Those living in remote areas have trouble gaining access to medical services. This is also true for the United States. The vast majority of abortions performed under the liberal American regime are still performed in metropolitan areas. By necessity, abortion services are limited, since hospitals have budgetary, time, space and staff constraints as well as many medical responsibilities. As a result of these problems, a woman may have to apply to several hospitals. However, notwithstanding the restrictions of Section 251(4), the evidence does not establish that abortions are simply not available to women wishing to have an abortion who meet the legal requirements. The evidence does disclose that

virtually all of the applications submitted by the witnesses Doctors Lamont, Cohen and Sacks were ultimately approved. Written reasons were given where applications were initially rejected, and when deficiency in the application was corrected, the applications were accepted. The evidence discloses that committees can meet and work very quickly where circumstances warrant this.

Appeal Case,
C. Egan, Vol. 1, Page 207M, lines 13 to 21.
Dr. Tietze, Vol. 7, Page 1613M, line 11 to Page 1616M, line 12.
Dr. Lamont, Vol. 4, Page 764M, lines 8 to 15; Page 770M lines 11 to 27; Page 872M, line 23 to Page 875M, line 13; Page 1037M, lines 7 to 9.
Dr. Cohen, Vol. 8, Page 1752M, lines 8 to 14; Page 1756M, lines 12 to 20; Page 1758M, line 5 to Page 1759M, line 32; Page 1761M, line 17 to Page 1762M, line 32; Page 1836M, lines 20 to 28.
Dr. Sacks, Vol. 10, Page 2173M, lines 18 to 28; Page 2178M, lines 19 to 22; Vol. 11, Page 2279M, line 24 to Page 2280M, line 23.
Dr. Roy, Vol. 3, Page 581M, line 10 to Page 582M, line 6.
Dr. Watters, Vol. 6, Page 1268M, line 29 to Page 1269M, line 6.
Dr. Carr, Vol. 6, Page 1296M, lines 8 to 21.

6. Saline abortions involve greater risks of complication, but the Canadian and American systems are statistically somewhat comparable. Canadian statistics for 1982 indicate that 94.6 per cent of abortions were done by some method of instrumental evacuation. American statistics for 1980 indicate that 95.5 per cent of abortions were done by instrumental evacuation. Much of the anguish associated with abortions is inherent and unavoidable.

> ... there is really no psychologically painless way to cope with an unwanted pregnancy.

Teenagers as a group are notorious for delays in seeking help, and are often not emotionally or psychologically mature. Pregnancy presents a bigger crisis for them.

Appeal Case,
Dr. David, Vol. 5, Page 1068M, lines 25 to 29; Page 1069M, lines 11 to 17; Page 1123M, lines 12 to 14; Page 1127M, line 29 to Page 1128M, line 20; Page 1140M, line 25 to Page 1141M, line 14.
Dr. Cohen, Vol. 8, Page 1718M, line 13 to Page 1719M, line 12; Page 1739M, lines 15 to 19; Page 1739M, line 27 to Page 1741M, line 17.
M. Orton, Vol. 9, Page 2027M, lines 28 to 31.

Exhibit 75, Table 7, Vol. 26, Page 5402.
Exhibit 16, Table 14, Vol. 20, Page 4355.

7. There is in general great pressure on the provincial health care system. Even in the United States, the counselling of women seeking abortion services is not mandatory, although all clinics have "some sort" of counselling.

While many clinics in the United States provide safe and supportive abortion services, some are "sloppy" or run by "greedy" operators. Abortion clinics can be lucrative ventures.

Appeal Case,
C. Egan, Vol. 1, Page 207M, lines 13 to 16.
Dr. Lamont, Vol. 4, Page 770M lines 11 to 27; Page 872M, line 27 to Page 874M, line 21.
Dr. Cohen, Vol. 8, Page 1752M, lines 8 to 14; Page 1756M, lines 12 to 16; Page 1758M, lines 5 to 18; Page 1759M, lines 29 to 32; Page 1836M, lines 20 to 28.
Dr. Sacks, Vol. 10, Page 2173M, lines 18 to 28; Page 2178M, lines 19 to 22; Page 2279M, line 24 to Page 2280M, line 23.
Dr. Roy, Vol. 3, Page 581M, line 10 to Page 582M, line 6.
Dr. Tietze, Vol. 3, Page 527M, lines 14 to 19; Page 529M, lines 11 to 20.

8. The full extent of the problem in more remote areas is unclear. No woman testified that she had been refused by her local therapeutic abortion community and was unable to obtain an abortion elsewhere. Some women leave their communities for reasons of anonymity. Even in more liberalized regimes there is a problem of access: some women still choose to leave Quebec in order to obtain abortions, and women in some areas of the United States have difficulty in finding convenient facilities for abortion.

Appeal Case,
C. Egan, Vol. 1, Page 209M, lines 19 to 23.
Dr. Roy, Vol. 3, Page 691M, lines 15 to 22; Page 723M, line 25 to Page 724M, line 8.
Dr. Carr, Vol. 6, Page 1334M, line 26 to Page 1335M, line 12.
Dr. Cohen, Vol. 8, Page 1825M, line 30 to Page 1826M, line 14.

9. It is submitted that the evidence could not be characterized as "uncontradicted" because it was not always consistent and conclusions to be drawn from the evidence are open to interpretation. Defence witnesses were openly supportive of liberalized abortion laws or critical of existing legislation and some belonged to organizations characterized by a pro-choice outlook (as is their unquestioned right). However, the statistics did not always coincide with the opinions of these witnesses. For example, 81 per cent of Canadian teenagers obtaining abortions in 1981 had them performed in the first trimester. Dr. Cohen testified that teenagers have generally sought help in the second trimester.

Appeal Case,
C. Egan, Vol. 1, Page 172M, line 17 to Page 174M, line 19.
M. Buckham, Vol. 1, Page 218M, line 31 to Page 220M, line 12.
Dr. Stubblefield, Vol. 2, Page 305M, lines 15 to 17; Page 388M, lines 5 to 11.

Dr. Tietze, Vol. 3, Page 524M, lines 5 to 27.
Dr. Roy, Vol. 3, Page 609M, lines 8 to 12; Page 609M, line 31 to Page 613M, line 23.
Dr. Lamont, Vol. 4, Page 845M, lines 12 to 14.
Dr. David, Vol. 6, Page 1241M, lines 15 to 28.
Dr. Watters, Vol. 6, Page 1262M, lines 6 to 18.
R. Christianson, Vol. 7, Page 1409M, line 26 to Page 1410M, line 17.
T. Venne, Vol. 7, Page 1544M, line 24 to Page 1545M, line 1; Page 1564M, lines 17 to 27.
Dr. Cohen, Vol. 8, Page 1756M, line 12 to Page 1757M, line 26; Page 1718M, lines 6 to 11.
M. Orton, Vol. 9, Page 2021M, line 8 to Page 2022M, line 21.
Dr. Hodgson, Vol. 11, Page 2472M, line 11 to Page 2473M, line 25.

Exhibit 33/72, Table 77, Vol. 22, Page 4768.

B) DEVELOPMENT OF THE FOETUS:

10. The type of abortion procedure that can be used is in large part determined by the stage of development of the foetus. At early stages a small cannula and syringe suction abortion can be done. As the foetus develops a larger cannula and machine vacuum suction are necessary. Until the development of new, more powerful suction and forcep procedures in the 1970's, abortions in the second trimester were usually done by instillation methods of saline, urea and prostoglandin.

Appeal Case,
Dr. Stubblefield, Vol. 2, Pages 321M to 341M, 377M.

11. The nervous system of the embryo begins to develop at the end of the third week. The heart is beating by 28 days. At four weeks, the embryo is 5 millimetres long. The upper limbs begin to develop by the end of the fourth or fifth week. By the end of the first eight weeks, most of the organs that make up a human being have already been formed in the embryo, in a primitive way. The foetal heart beat can be detected at nine weeks by ultrasound. At the end of the twelfth week, the heart is completely formed and pumping blood. By the end of the twelfth or thirteenth week, the foetus can be said to be fully formed, in terms of having all the various organs. By the end of the sixteenth week, the foetus is surrounded by a skin. The joints of the limbs can move, and the fingers and toes are separated and fully formed. The mother can feel movement. At twenty weeks, the kidneys are producing a dilute urine.

Appeal Case,
Dr. Carr, Vol. 6, Page 1329M, line 12 to Page 1330M, line 10.
Dr. Hodgson, Vol. 11, Page 2412M, lines 12 to 20; Page 2414M, lines 11 to 21; Page 2416M, lines 15 to 27; Page 2417M, lines 14 to 29; Page 2418M, lines 10 to 16.

Exhibits 52.1 to 52.17, Vol. 23, Pages 4886 to 4902.

C) NUMBER OF ABORTIONS:

12. Following the 1969 amendments to the Criminal Code, the number of abortions performed in Canada increased steadily by at least a few thousand per year up until 1979. In 1970, 11,200 abortions were performed. From 1979 to 1982, the total number of abortions changed little: 65,855 in 1980, 65,127 in 1981, 66,319 in 1982.

Appeal Case,
Exhibit 75, Table 1, Vol. 26, Page 5399.

D) TIMING OF THE ABORTION:

13. Canada experienced a definite trend towards earlier abortions between 1974 and 1982. Between 1973 and 1980, the United States experienced a similar trend towards earlier abortions. The statistics also disclose that approximately the same percentage of abortions are performed at 16 weeks or earlier in both countries. Evidence was led that the earlier an abortion is done, the less chance a woman has of experiencing a complication.

Appeal Case,
Exhibit 16, Table 13, Vol. 20, Pages 4347 to 4348.
Exhibit 33/72, Table 44, Vol. 22, Page 4737; Table 48, Vol. 22, Page 4740; Table 69, Vol. 22, Page 4758, Table 73, Vol. 22, Page 4764; Table 95, Vol. 22, Page 4783.
Exhibit 75, Table 1, Vol. 26, Page 5399; Table 6, Vol. 26, Page 5401; Table 7, Vol. 26, Page 5402.

14. The trend in Canada towards earlier abortions has contributed in part to a steady decline in the complication rate for abortions. Complication rates are quite low, indicating that abortion is very safe.

Appeal Case,
Dr. Carr, Vol. 6, Page 1333M, lines 22 to 24.
Dr. Paquin, Vol. 9, Page 1976M, line 12 to Page 1977M, line 8.

Exhibit 33/72, Table 74, Vol. 22, Page 4765.
Exhibit 75, Table 7, Vol. 26, Page 5402.

E) METHOD OF TERMINATION:

15. Statistics indicate that the Suction D and C procedure is the safest method of pregnancy termination. Between 1974 and 1982, the use of the Suction D and C method grew in Canada. The popularity of instrumental evacuation methods, in general, grew during this period. In conjunction, the number of saline abortions decreased during this same period. The increasing use of the Suction D

and C method and decreasing use of the saline instillation method apparently contributed to the steady decline in the complication rate for abortions between 1976 and 1981. Dr. Paquin testified that he thought that increasing numbers of doctors would learn to use the new, safer techniques being developed. The United States experienced a similar trend with respect to the use of various methods.

Appeal Case,
Dr. Paquin, Vol. 9, Page 1974M, line 10 to Page 1976M, line 23.

Exhibit 16, Table 14, Vol. 20, Page 4355.
Exhibit 33/72, Table 50, Vol. 22, Page 4741; Table 78, Vol. 22, Page 4769;
Exhibit 75, Table 7, Vol. 26, Page 5402.

16. Evidence was led through a number of witnesses who testified that, in their opinion, owing to delays caused by the hospital and committee requirements of Section 251 of the Criminal Code, many women cannot obtain instrumental evacuation abortions in the first trimester but are forced to wait until their 17th week to have a riskier instillation abortion. However, studies conducted by Dr. Tietze for the Population Council clearly indicate the popularity of instrumental evacuation methods over the instillation methods up to the 17th week of pregnancy in both Canada and the United States. These studies indicate, inter alia, that the percentage of abortions performed during the critical 13 to 16 week period by instrumental evacuation is virtually the same and quite high for both Canada and the United States.

A comparison of the Canadian and American statistics for the crucial early second trimester period showed a statistical parallel between the two countries.

Appeal Case,
Exhibit 16, Table 14, Vol. 20, Page 4355; Table 15, Vol. 20, Page 4356.

17. Concerning the oral evidence that some women were required to wait until their 17th week to have an instillation abortion, the evidence discloses two distinct reasons for this. Even doctors like Dr. Lamont and Dr. Paquin, with expertise in the area of abortions, have not become qualified to perform instrumental evacuation procedures, notably D and E's, much beyond the first trimester. Dr. Cohen testified that to her mind there is very little difference between D and E's and D and C's. D and E's are basically D and C's in which forceps are used to assist in the evacuation of the uterus. Some of Dr. Cohen's colleagues did not accept the D and E as a safe or "acceptable" procedure. Many doctors now doing D and C's could do D and E's if they could overcome the

"psychological hurdle" associated with this procedure. This psychological block is the second reason why doctors do not perform second trimester D and E's. Some simply refuse to perform them, as they find such abortions gruesome. Dr. Sacks, citing lack of interest as one of the reasons why more D and E's are not being performed, agreed that the medical profession has let patients down in this area.

Appeal Case,
Dr. Stubblefield, Vol. 2, Page 395M, line 22 to Page 396M, line 32.
Dr. Tietze, Vol. 7, Page 1692M, line 27 to Page 1694M, line 24.
Dr. Paquin, Vol. 9, Page 1974M, lines 22 to 31.
Dr. Lamont, Vol. 4, Page, 776M, lines 9 to 16; Page 883M, line 13 to Page 885M, line 1; Page 896M, line 17 to Page 897M, line 9; Page 931M, line 17 to Page 932M, line 7; Vol. 5, Page 1011M, line 13 to Page 1020M, line 30; Page 1031M, line 32 to Page 1032M, line 14.
Dr. David, Vol. 6, Page 1240M, line 16 to Page 1241M, line 10.
Dr. Cohen, Vol. 8, Page 1736M, line 28 to Page 1737M, line 12; Page 1801M, line 12 to Page 1803M, line 26; Page 1806M, line 12 to Page 1809M, line 10; Page 1834M, line 28 to Page 1835M, line 6.
Dr. Sacks, Vol. 10, Page 2281M, line 17 to Page 2282M, line 7.

Exhibit 33/72, Table 78, Vol. 22, Page 4769.

18. Dr. Tietze testified that there will always be a need for second trimester abortions. Life or health threatening complications and foetal defects can manifest themselves in the later stages of pregnancy. The evidence does not disclose what percentage of second trimester abortions were performed during this gestation period because of pregnancy complications and foetal defects arising late. Nor does the evidence disclose what percentage of second trimester abortions were performed during this gestation period because of the woman's late resolution of ambivalence about the pregnancy.

Appeal Case,
Dr. Tietze, Vol. 7, Page 1672M, lines 22 to 27.

F) ACCESS TO ABORTION SERVICES:

19. In 1982, all 10 provinces and both territories had at least one hospital with a therapeutic abortion committee (but it is the understanding of the Respondent that this situation has changed). From 1972 until 1979, the number of Canadian women obtaining abortions in the United States decreased steadily (with minor exceptions).

In Ontario in 1982, abortions were performed by 81 of 99 hospitals with therapeutic abortion committees. Those 81 hospitals were found throughout the province. Those in northern Ontario included hospitals in Dryden, Kenora, Kirkland Lake, North Bay, Sault Ste. Marie, Sudbury and Thunder Bay. In 1982,

second trimester abortions were performed by 75 of these 81 hospitals. All northern Ontario hospitals listed above performed second trimester abortions in 1982.

Appeal Case,
Exhibit 33772, Table 65, Vol. 22, Page 4754, Exhibit 75, Table 1, Vol. 26, Page 5399; Tables 3 and 4, Vol. 26, Page 5400; Table 5, Vol. 26, Page 5401, Exhibit 114, Vol. 27, Pages 5643 to 5644, Exhibit 115, Vol. 27, Pages 5645 to 5646, Exhibit 122, Vol. 27, Pages 5671 to 5724.

20. It was agreed that medical services generally are better provided in some areas, and that people requiring procedures other than abortions who live in remote areas have trouble obtaining services. According to Dr. Tietze, there is an access problem even in the United States. Abortion services are still not readily available, both geographically and economically, to all American women. Ten years after the decision of the United States Supreme Court in Roe v. Wade, only slight access gains had been made in rural areas. Dr. Tietze agreed that the concentration of services in metropolitan areas is a general problem in health delivery. Cities tend to attract specialists and facilities. There is a tendency for women to go to larger metropolitan areas to have an abortion.

Appeal Case,
Mrs. Egan, Vol. 1, Page 207M, lines 13 to 21.
Dr. Tietze, Vol. 7, Page 1613M line 1 to Page 1616M, line 6; Page 1673M, line 24 to Page 1676M, line 23.

Exhibit 15, Vol. 20, Pages 4173 to 4182, 4229.

G) THE THERAPEUTIC ABORTION COMMITTEE:

a) The Term "Health" in Section 251:

21. A number of the medical witnesses testified that the medical assessment as to whether the continuation of a pregnancy would be likely to endanger the life or health of a woman can only be made in a broad statistical sense. Although they felt the test set out in Section 251 was open to interpretation, they were unanimous in their approval of the broad World Health Organization definition of health. Dr. Cohen expressed the opinion that most Canadian doctors use a broad definition of health. Both Doctors Cohen and Hodgson said that doctors frequently make judgments about the life and health of patients. Dr. Lamont agreed that in submitting an application to a therapeutic abortion committee, he was making a judgment as to whether the continuation of a pregnancy would likely be harmful. Dr. Carr testified that the medical profession is best suited to make this determination.

Appeal Case,
Dr. Stubblefield, Vol. 2, Page 351M, line 30 to Page 359M, line 1.
Dr. Roy, Vol. 3, Page 663M, lines 15 to 25; Page 668M, line 10 to Page 669M, line 8.
Dr. Lamont, Vol. 4, Page 782M, lines 5 to 17; Page 799M, line 14 to Page 801M, line 21; Page 859M, lines 1 to 13.
Dr. Watters, Vol. 6, Page 1266M, lines 25 to 28; Page 1271M, line 32 to Page 1272M, line 31.
Dr. Carr, Vol. 6, Page 1295M, lines 10 to 17; Page 1310M, line 24 to Page 1311M, line 6.
Dr. Cohen, Vol. 8, Page 1745M, line 16 to Page 1746M, line 25; Page 1764M, line 18 to Page 1765M, line 16.
Dr. Hodgson, Vol. 10, Page 2376M, lines 8 to 22; Vol. 12, Page 2438M, lines 15 to 22.

b) The Term "Miscarriage":

22. Doctors Lamont, Carr and Cohen testified that they understood the word "miscarriage" standing alone to refer to a spontaneous (as opposed to induced) abortion. Dr Carr testified that there is no question in the minds of the committee members what the law is talking about in referring to "procuring miscarriage". Similarly, Dr. Cohen testified that she thought "miscarriage" in Section 251 of the Criminal Code is intended to refer to induced abortions.

Appeal Case,
Dr. Lamont, Vol. 4, Page 781M, lines 20 to 22.
Dr. Carr, Vol. 6, Page 1297M, lines 27 to 31; Page 1312M, line 31 to Page 1313M, line 25.
Dr. Cohen, Vol. 8, Page 1728M, lines 7 to 12; Page 1799M, lines 1 to 12.

H) ABORTION FACILITIES: HOSPITALS V. CLINICS:

23. Dr. Lamont testified that the main reason why abortions might not be permitted outside of hospital settings is the problem of complications. Although some complications are minor, some can be quite serious. For example, Dr. Lamont stated that instillation abortions should only be done in hospitals. Dr. Roy also testified about complications associated with abortions. Immediate complications, like perforation of the uterus, although rare, should be treated in a hospital. In Quebec, it has been recommended that clinics have a "relationship" with a hospital. The mortality rate statistics for United States' abortion clinics and hospitals suggested that a first trimester abortion done in a free-standing clinic is "as safe" as one done in a hospital, and that for second trimester abortions, the mortality rate is lower for abortions in a free-standing clinic. One of the reasons for the higher rate in hospitals is that higher risk women go to, or are sent to, hospitals rather than clinics.

Appeal Case,
Dr. Lamont, Vol. 4, Page 788M, lines 23 to 25; Page 794M, lines 8 to 11; Page 809M, lines 21 to 30; Page 889M, line 22 to Page 890M, line 6; Page 917M, line 20 to Page 918M, line 1; Page 942M, line 26 to Page 943M, line 12; Vol. 5, Page 949M, lines 1 to 23.
Dr. Roy, Vol. 3, Page 686M, lines 6 to 13.
Dr. Tietze, Vol. 2, Pages 483M to 485M.

Exhibit 5, National Abortion Federation Guidelines, Vol. 19, Page 4105.

I) ABORTION AND TEENAGERS

24. The statistics show that a large proportion of abortions are performed on teenagers, a very great majority of these are done in the first trimester, and a very large majority are done by instrumental evacuation methods. Dr. Cohen testified that teenagers are notorious for delays in seeking help. This delay can be attributed to ignorance of the signs of pregnancy, denial, ambivalence, embarrassment, coercion from others such as parents, and lack of knowledge of available services. Doctors also sometimes fail to diagnose teenage pregnancies or miscalculate the gestation week.

Appeal Case,
Dr. Cohen, Vol. 8, Page 1718M, line 6 to Page 1719M, line 12; Page 1734M, line 23 to Page 1736M, line 14; Page 1787M, lines 18 to 20.
Dr. Tietze, Vol. 3, Page 532M, lines 13 to 18.
Dr. Sacks, Vol. 10, Page 2165M, line 24 to Page 2167M, line 29; Page 2280M, lines 25 to 30; Page 2282M, lines 23 to 31.

Exhibit 33/72, Table 25, Vol. 22, Page 4714; Table 29, Vol. 22, Page 4719; Table 75, Vol. 22, Page 4766; Table 77, Vol. 22, Page 4768.
Exhibit 75, Table 7, Vol. 26, Page 5402; Table 8, Vol. 26, Page 5403.
Exhibit 118, Vol. 27, Pages 5665 to 5667.

J) RE: APPLICATION OF THE LAW IN QUEBEC:

25. Section 251 of the Criminal Code or any of its subsections has not been declared unconstitutional in Quebec. The evidence is simply that some requirements are not being enforced. The evidence does not suggest that Section 251 is not being enforced in the remaining nine provinces and two territories in Canada. Notwithstanding the liberal regime in Quebec, some women still choose to leave the province to have an abortion. Two reasons were cited for this: the unavailability of abortion services for women at 20 weeks or more gestation; and the desire for anonymity. Just like hospitals, the clinics in Quebec have many responsibilities and do not simply provide abortion services. The number of abortions performed must be limited, resulting in delays or referral to other clinics or a hospital.

Appeal Case,
Dr. Roy, Vol. 3, Page 723M, line 25 to Page 725M, line 24.
Dr. Carr, Vol. 6, Page 1334M, lines 27 to 32.
T. Venne, Vol. 7, Page 1508M, lines 9 to 22; Page 1561M, line 12 to Page 1562M, line 30; Page 1565M, line 29 to Page 1566M, line 8.

Exhibit 33/72, Table 52, Vol. 22, Page 4743.
Exhibit 73, Vol. 25, Pages 5344 to 5380.

II) EVIDENCE LED ON THE TRIAL:

FORMATION OF THE CONSPIRACY AND THE ARREST:

26. On November 18, 1982, the Appellant Dr. Morgentaler declared his intention to open an abortion clinic in Toronto in conjunction with the Appellant Dr. Smoling. By March or April of 1983 it was agreed that the clinic which was located at 85 Harbord Street, was to be administered by a corporation. The original agreement was that Morgentaler and Smoling were to be partners in that corporation. The police seized certain unexecuted documents which indicated that the clinic was to be called "The Morgentaler Clinic". Morgentaler was to be the sole spokesman and he was to be paid a consultant's fee of $2,165.00 per month. Each doctor who performed an abortion at the clinic would receive $75.00 per abortion. Any money left after expenses would be divided equally between Morgentaler and Smoling. A few days prior to the official opening of the clinic, the Appellant Dr. Scott agreed to perform abortions at the clinic for a fee of $75.00 per abortion. On June 15, 1983 Dr. Morgentaler gave a public address from the steps of the clinic officially opening it. The clinic was neither an "approved" nor "accredited" "hospital" within the meaning of s. 251 of the Criminal Code.

Appeal Case
Dr. Morgentaler, Vol. 17, Page 3655, line 29 to Page 3656, line 6; Page 3661, lines 10 to 26; Page 3662, line 3 to Page 3663, line 1; Page 3674, line 1 to Page 3675, line 10.
M. Walker, Vol. 13. Page 2846, lines 22 to 27.
Dr. Murray, Vol. 12, Page 2718, line 22 to Page 2719 line 4.
Sgt. Young, Vol. 12, Page 2795, lines 5 to 10.

Exhibit 4, Vol. 27, Page 5753, Exhibit 35, Vol. 30, Pages 6235 to 6236, Exhibit 37, Vol. 30, Page 6251, Exhibit 50, Vol. 31, Pages 6387 to 6410

27. On July 5, 1983, an undercover police officer attended at the Harbord Street clinic seeking an abortion. She was informed that the abortion would take 15 to 20 minutes followed by an hour rest. The fee was $250.00 (which was paid in cash) plus a $50.00 consultation fee covered by OHIP. Shortly after her entry, the police entered the premises and conducted a search, pursuant to a warrant.

Among items seized was material from a garburator found to be derived from a pregnant woman, including foetal bone, various receipt books, various forms and certain appointment books.

On his arrest, Dr. Smoling stated:

> Well, I say I don't think I did anything wrong because the present law on abortion violates the Charter of Rights and is unconstitutional.

Dr. Morgentaler stated:

> Look, I operate a luxury clinic. I mean my clinics are better equipped than your hospitals. I am proud of what I do. The law is stupid.

He was further cautioned and he then stated,

> I don't care, I have nothing to hide. If I wanted to make money I would go back to Montreal and just do abortions.

Appeal Case,
Const. Wilson, Vol. 14, Page 3076, line 26 to Page 3078, line 24.
Const. Lyon, Vol. 14, Page 3089, line 1 to Page 3092, line 10; Page 3109, line 25 to Page 3110, line 9.
Const. Massey, Vol. 13, Page 2893, line 6 to Page 2894, line 19; Page 2897, line 15 to Page 2899, line 18; Vol. 13, Page 2913, line 19 to Page 2914, line 15.
Dr. Jaffe, Vol. 13, Page 2872, line 29 to Page 2880, line 19.

Exhibit 7, Vol. 27, Page 5764, Exhibit 8, Vol. 28, Page 5774, Exhibit 10, Vol. 28, Page 5899, Exhibit 11, Vol. 28, Page 5904, Exhibit 14, Vol. 28, Page 5931, Exhibit 16, Vol. 28, Page 5935, Exhibit 18, Vol.28, Page 5939.

OPERATION OF THE MORGENTALER CLINIC:

28. The evidence as to the operation of the clinic is summarized in the judgment of the Ontario Court of Appeal at pages 6951 to 6958.

Appeal Case,
Judgment of the Ontario Court of Appeal, Vol. 33, Pages 6951 to 6958.

Dr. Morgentaler, Vol. 17, Page 3670, line 1 to Page 3692, line 5.

Exhibit 8, Preprinted Forms, Vol. 28, Pages 5774 to 5843, Exhibit 43, Guidelines to Morgentaler Clinic, Affidavits of Dr. Morgentaler and Dr. Smoling, Vol. 30, Pages 6341 to 3646, 6336 to 6351, 6352 to 6362.

TECHNIQUES OF ABORTION:

29. There are two principle methods of abortion used in contemporary practice. One is curettage which consists of stretching open the cervix and evacuating the contents of the uterus either by suction or instruments. The alternative, which is used almost exclusively during the second trimester

(commencing at 13 weeks after the last menstrual period) is induction of labour by administering any one of a number of drugs which causes the woman to go into labour resulting in the expulsion of the foetus and placenta.

Appeal Case,
Dr. Grimes, Vol. 15, Page 3222, line 10 to Page 3223, line 30; Page 3231, line 13 to Page 3257, line 5.

30. The term "D and C" procedure means dilatation and curettage which is the instrumental removal of whatever is in the uterus. Another term is suction curettage or vacuum aspiration which are also curettage procedures performed in the first trimester. The term "D and E" stands for dilatation and evacuation which described curettage procedures utilized at 13 weeks into the pregnancy. This distinguishes them from suction procedures which are used earlier in the pregnancy.

Appeal Case,
Dr. Grimes, Vol. 15, Page 3222, lines 5 to 23; Page 3233, lines 1 to 14.

31. The induction method of abortion involves introducing a solution into the uterus which induces labour. If it is not augmented by other medication this labour can last on average thirty hours. The procedures are done under local anesthetic. Dr. Grimes indicated that in the United States this procedure is utilized from 16 weeks on up towards 20 to 24 weeks. After delivery of the foetus the woman may have to have a D and C if the afterbirth is not delivered or in cases of extra bleeding. In Hamilton, if a D and C is required, a patient is likely to stay in hospital for a third day. Induction can not be used prior to 16 weeks as there is not sufficient fluid in the sac inside the uterus until four months into pregnancy. Until recently, it was thought that there was no safe method of doing an abortion between 13 and 15 weeks of pregnancy. That is no longer thought to be true and D and E abortions can be done during that time period. Dr. Grimes refused to describe induction as horrible. He indicated that while it was not "nice" much in medicine is not "nice". He agreed it was not a "pleasant experience" for women.

Appeal Case,
Dr. Grimes, Vol. 15, Page 3243, line 12 to Page 3244, line 30; Page 3257, lines 1 to 15.
Christianson, Vol. 15, Page 3353, line 15 to Page 3354, line 10.

32. The Statistics Canada Report filed as Exhibit 52 indicated that in

fact, a large proportion of second trimester abortions performed in Canada are done by some type of D and C procedures as opposed to induction. In addition, there was evidence to suggest that certain doctors in Hamilton were doing D and E procedures in the second trimester. Dr. Morgentaler indicated that while he believed most physicians in Toronto stopped doing D and E after 12 weeks of pregnancy there were "one or two" in Toronto who did D and E.

Appeal Case,
R. Christianson, Vol. 15, Page 3355, line 1 to Page 3356, line 15; Page 3357, line 29, to Page 3358, line 29; Page 3381, line 29 to Page 3383, line 10.
Dr. Grimes, Vol. 15, Page 3285, line 25 to Page 3287, line 10.
Dr. Morgentaler, Vol. 19, Page 3672, lines 14 to 20.

Exhibit 51, Statistics Canada Report, Vol. 31, Page 6438 .

33. Dr. Grimes admitted that the rate of abortions performed in Canada by suction method as reflected in the 1982 Statistics Canada Report on Therapeutic Abortions (Exhibit 51) was high, being 89.8 per cent. He also confirmed that the rate of induction abortions, which totalled 5.1 per cent, was very small.

Appeal Case,
Dr. Grimes, Vol. 15, Page 3265, line 25 to Page 3269, line 5.

Exhibit 51, Statistics Canada Report, Vol. 31, Page 6437.

THE RISKS OF ABORTION:

34. Dr. Grimes, an expert in abortion safety, stated that the most important criteria for safety in abortion is the skill of the operator. This is exceedingly difficult to quantify or measure but physicians who do a large number of abortions develop expertise and maintain clinical skills which people who do operations infrequently do not. The next most determinative factors of the risk of complications are the state in pregnancy in which the procedure takes place and the method by which the abortion is done. The earlier an abortion is done, the safer it is both in terms of risk of complications and risk to life.

Appeal Case,
Dr. Grimes, Vol. 15, Page 3229, line 1 to Page 3230, line 8;, Page 3237, line 14 to Page 3238, line 9.
Dr. Hodgson, Vol. 17, Page 3610, lines 2 to 12.

35. There was evidence which suggested that generally (after seven weeks of pregnancy) the earlier an abortion was done the safer it was in absolute terms (i.e., lower rates of complication and lower risk of death). In addition, there

was evidence to suggest that D and C abortions are safer in the same sense than induction abortions.

Appeal Case,
Dr. Grimes, Vol. 15, Page 3229, lines 1 to 16.
Dr. Murray, Vol. 12, Page 2750, lines 1 to 16; Page 2780, line 25 to Page 2781, line 5; Page 2781, lines 23 to 27.
Dr. Sack, Vol. 16, Page 3420, line 30 to Page 3423, line 12; Page 3423, line 15 to Page 3424, line 20.
Dr. Roy, Vol. 16, Page 3455, line 12 to Page 3458, line 30; Page 3466, lines 24 to 32; Page 3496, line 25 to Page 3497, line 15.
Dr. Watters, Vol. 16, Page 3559, line 30 to Page 3560, line 7.
Dr. Hodgson, Vol. 17, Page 3608, lines 16 to 24.
Dr. Morgentaler, Vol. 17, Page 3644, lines 25 to 32; Page 3672, line 5 to Page 3673, line 1.

Exhibit 7, Guidelines to Morgentaler Clinic, Vol. 7, Page 5764.

36. There was however no evidence as to the actual significance of the "initial risk" or indeed of the significance of the "increased risk" itself. Indeed, there was very little evidence that indicated the real impact that such complications would, in all likelihood, have on women even assuming one occurred. Dr. Grimes indicated that most perforations of the uterus are innocuous. They generally need management, sometimes merely observation but they rarely present an urgent problem. Moreover, he indicated that abortion performed in a medical setting leads to sterility only in very rare circumstances, about one case in ten thousand. This could result if a very severe infection occurred. Moreover, there was evidence that all the risks of abortion are less than the risks associated with child birth itself.

Appeal Case,
Dr. Watters, Vol. 16, Page 3559, line 30 to Page 3560, line 7.
Dr. Grimes, Vol. 15, Page 3247, line 22 to Page 3249, line 15; Page 3250, line 23 to Page 3251, line 18; Page 3264, line 28 to Page 3265, line 10.

37. In general, the risk of dying from a legal abortion in the United States is about one-seventh that of dying from child birth. The risk of dying from all types of abortions lumped together is about 2 deaths per 100,000 abortions. This is the same risk of dying from getting a shot of penicillin.

Appeal Case,
Dr. Grimes, Vol. 15, Page 3245, lines 15 to 30.

EMERGENCY NECESSITATING CONSPIRACY?

(1) The Evidence as to the Risks in Ontario

38. Dr. Grimes indicated that it was very difficult to measure the

increase in the risk of death due to delay in obtaining a legally induced abortion in Canada as it has not occurred at all since 1975. He noted that the 1982 Statistics Canada Report reflected that there were only three deaths in Canada from 1975 to 1982 all due to natural miscarriages as opposed to abortions. He agreed that this a "pretty good rate".

Appeal Case,
Dr. Grimes, Vol. 15, Page 3245, lines 15 to 30; Page 3278, line 15 to Page 3280, line 1; Page 3280, line 25 to Page 3281, line 20.

39. Dr. Grimes agreed that the national complication rate of 2.4 percent as reflected in the Statistics Canada Report was a very low rate although he noted one could reasonably expect a higher complication rate if one used a broader definition of complication.

Appeal Case,
Dr. Grimes, Vol. 15, Page 3267, line 25 to Page 3269, line 25.

40. The Statistics Canada Report showed that in 1982, 97 per cent of all abortions performed in Canada occurred prior to 16 weeks of pregnancy or less and 86.9 per cent are done at 13 weeks or less. Dr. Grimes indicated that this was comparable to the U.S. rates.

Appeal Case,
Dr. Grimes, Vol. 15, Page 3268, lines 20 to 25.

41. The statistics prepared by Ontario's Ministry of Health showed that in Ontario 75.9 per cent of all abortions in 1982 were done at 11 weeks and less. Another 20.4 per cent were done from 12 to 16 weeks of pregnancy. Toronto's hospitals did approximately 16,000 abortions in 1982.

Appeal Case,
Exhibit 53, Ontario Statistics, Vol. 31, Page 6557.

42. Statistics Canada's Report for 1982 showed that more abortions were being done earlier in Canada than ever before. In 1974, 78.8 per cent of all abortions occurred prior to 13 weeks of pregnancy while in 1982 the figure had risen to 86.9 per cent. In addition, the number of abortions done during that period had increased from 41,227 to 65,812.

Appeal Case,
Exhibit 51, Statistics Canada Report, Vol. 31, Page 6432.

43. The percentage of abortions terminated by way of suction D and C rose

from 62.6 per cent in 1975, to 89.8 per cent in 1982. Surgical D and C's represented another 4.3 percent for a total of 94.1 per cent. Induction abortions in 1982 were done in only 5.1 per cent of the cases. Of abortions that occurred in Canada between 13 and 16 weeks, that is, the early part of the second trimester, approximately 6,000 were done by some form of D and C procedure while approximately 1300 were done by induction.

Appeal Case,
Exhibit 51, Statistics Canada Report, Vol. 31, Pages 6437 to 6438.

44. Subsequent surgical procedures to treat therapeutic abortion complications were only necessary in 1.7 percent of the total of 65,812 abortions performed in Canadian hospitals in 1982. The most common subsequent procedure was a D and C.

Appeal Case,
Exhibit 51, Statistics Canada Report, Vol. 31, Pages 6437 to 6438.

45. The overall rate of therapeutic abortion complications has declined from 3.1 per cent in 1974 to 2.4 per cent in 1982. This complication rate can be broken down as follows, for 1982:

Retained products of conception	1.6/100 abortions
Laceration of cervix	0.3/100 abortions
Haemorrhage	0.2/100 abortions
Infection	0.1/100 abortions
Perforation of uterus	0.1/100 abortions
Death	0.0/100 abortions
Other	0.0/100 abortions

In 1982, Statistics Canada reported no complications in 30,638 of the 31,290 abortions done in Ontario.

Appeal Case,
Dr. Roy, Vol. 16, Page 3451, line 6 to Page 3456, line 14; Page 3496, line 25 to Page 3497, line 15.

Exhibit 51, Vol. 31, Pages 6439 to 6440.

46. Dr. Sacks contended that although Canadians are getting a lot more abortions they are not getting the safest possible medical treatment and people are suffering from having to go through red tape. Although she admitted that there had been no deaths from 1975 to 1982 in a therapeutic abortion and she admitted that the complication rate at her clinic was a very low rate, she indicated there can be emotional complications. These are not included in the Statistics Canada rate of 2.4 per 100. She also indicated that the rate of

spontaneous abortion in teenagers goes up as the pregnancy continues. She had no idea as to how much the increase was per 100,000.

Appeal Case,
Dr. Sacks, Vol. 16, Page 3420, line 30 to Page 3423, line 12; Page 3423, line 15 to Page 3424, line 20.

47. Dr. Watters agreed that the current requirement of approval from a committee causes stress in women seeking abortions. This stress exists notwithstanding the fact that most people are approved for abortions as the applicants do not know this when they seek an abortion.

Appeal Case,
Dr. Watters, Vol. 16, Page 3561, line 10 to Page 3562, line 25.

(2) Access to Abortion for Ontario Residents

48. Dr. Grimes indicated there was initially an accelerated number of abortions performed after legalization but there has been a plateauing of the number of abortions and the rate of increase has almost stopped in the United States. He noted a similar trend in the number of abortions that were performed in Canada as reflected in the Statistics Canada Report of 1982, from 1969 to 1982, although these figures were not determinative of the demand for abortions.

Appeal Case,
Dr. Grimes, Vol. 15, Page 3240, lines 23 to 30; Page 3241, lines 6 to 30; Page 3275, line 15 to Page 3276, line 15; Page 3284, lines 7 to 20.

49. There was evidence from a number of sources that some women travelled out of Ontario to have an abortion each year. The Statistics Canada Report suggested a minimum of 3,256 Canadian women left the country in 1982 for abortions in the United States. Some defence witnesses from the United States testified in a way that suggested that this number was inaccurate and was too low. There was also evidence that the numbers going to certain clinics outside the Province was increasing.

Appeal Case,
M. Buckham, Vol. 15, Page 3188, line 16 to Page 3190, line 24; Page 3208, line 25 to Page 3221, line 27.
Dr. Sacks, Vol. 16, Page 3396, lines 5 to 26.
M. Orton, Vol. 16, Page 3520, line 15 to Page 3531, line 30.
Dr. Chasse, Vol. 17, Page 3587, line 30 to Page 3594, line 23.
Dr. Hodgson, Vol. 17, Page 3606, line 27 to Page 3607, line 30.
Dr. Morgentaler, Vol. 17, Page 3659, line 20 to Page 3660, line 5.

Exhibit 51, Statistics Canada Report, Vol. 31, Pages 6427 to 6467.

50. Various reasons were suggested by the evidence as to why these women left Ontario to get abortions. Some left because they were rejected by abortion committees in Ontario, some left because of the stage of their pregnancy, because they wanted to get an abortion more quickly than they could get it in Ontario, some left because they did not want to go through the hassles of an application to a committee, some left because if they were not on OHIP it would be cheaper to get an abortion outside Ontario. Some go for anonymity. Historically some have been misinformed about the Ontario system. In addition, there was evidence to show that some American abortion clinics advertise in Canadian papers.

Appeal Case,
M. Buckham, Vol. 15, Page 3189, lines 5 to 20; Page 3205, line 20 to Page 3208, line 19; Page 3217, lines 10 to 15.
J. Tripp, Vol. 15, Page 3289, line 20 to Page 3290, line 24; Page 3316, line 25 to Page 3320, line 30.
R.Christianson, Vol. 15, Page 3354, line 15 to Page 3356, line 22.
Dr. Sacks, Vol. 16, Page 3396, lines 5 to 25; Page 3406, line 5 to Page 3407, line 12; Page 3417, lines 15 to 25.
Dr. Watters, Vol. 16, Page 3552, line 1 to Page 3557, line 20; Page 3567, line 15 to Page 3568, line 26.
Dr. Hodgson, Vol. 17, Page 3608, lines 10 to 25; Page 3617, line 14 to Page 3618, line 10.
Dr. Roy, Vol. 16, Page 3479, line 23 to Page 3483, line 24; Page 3494, line 15 to Page 3496, line 25.

Exhibit 59, Badgeley Report (separately filed) Page 161-2

51. The Badgeley Report indicated that there was an average of 8 weeks delay between the first visit a woman had with a physician after she suspected she was pregnant and the performance of the abortion. This was the Canada-wide average as of the time of the Report which was published on January 1, 1977. Dr. Watters indicated in his evidence that the number of committees had remained roughly the same and "nothing had come across his desk to make him think things were any different". There was, however, no evidence as to the speed of access into the system in Ontario or more particularly in Toronto during 1982 and 1983 for women who entered it other than through public clinics attached to certain hospitals. Certain witnesses were called to describe the experiences of women entering Ontario's system through certain of those public clinics. There was very little if any evidence led regarding the experience of women entering the system through private gynecoloists and obstetricians.

Appeal Case,
Dr. Watters, Vol. 16, Page 3551, line 5 to Page 3557, line 18.
J. Tripp, Vol. 15, Page 3288, line 5 to Page 3339, line 15.
R. Christianson, Vol. 15, Page 3345, line 10 to Page 3379, line 14.
Dr. Sacks, Vol. 15, Page 3386, line 15 to Page 3425, line 30.

52. In essence, all these witnesses indicated that there was a delay in obtaining an abortion in Toronto and Hamilton. Some of these witnesses mentioned a two to three week delay. Some women arriving at these clinics were counselled to go to the United States so as to avoid a second trimester induction abortion. These witnesses also indicated that some women found the process of application for a therapeutic abortion very stressful. Dr. Sacks indicated that those women intent on getting an abortion manage to get one, some going into financial difficulties, others waiting for a more dangerous termination procedure. Some of these witnesses also described the system of phoning certain Toronto hospitals for an "OHIP" abortion and described the process as a "lottery".

Appeal Case,
J. Tripp, Vol. 15, Page 3289, line 20 to Page 3322, line 30.
Dr. Murray, Vol. 12, Page 2760, line 30 to Page 2761, line 30.
R. Christianson, Vol. 15, Page 3345, line 15 to Page 3381, line 25.
Dr. Sacks, Vol. 15, Page 3386, line 15 to Vol. 16, Page 3417, line 25.

53. Dr. Watters indicated that all women who had gone to McMaster Hospital received an abortion except one who it was discovered was being coerced by her husband. Not all committees act as "rubber stamps". He also indicated that the system can become a lottery for some women. Her community may not have a hospital that does abortions. If it does she may not meet their criteria and she may have to go to another community. If there is delay she may find that many hospitals do not do second trimester procedures. Consequently, he indicated that women often go to the United States for an abortion.

Appeal Book,
Dr. Watters, Vol. 16 Page 3562, line 30 to Page 3568, line 30.

54. Dr. Chasse who worked at a C.L.S.C. (Centre Locale Sante Communante) in Hull, Quebec was called to describe abortion services in Ottawa. He indicated that 20 per cent of the women on whom he performs abortions in Hull are from Ottawa. Sometimes women from Ottawa who cannot be handled at the C.L.S.C. are referred to Montreal or a place may be found for them in an Ottawa hospital.

Appeal Case,
Dr. Chasse, Vol. 17, Page 3587, line 30 to Page 3596, line 12.

55. A comparison of abortion statistics showed that Ontario performed significantly more abortions annually than the Province of Quebec since 1970. It

should be noted that after 1976 the Quebec statistics did not reflect the total number of abortions performed in that Province.

Appeal Case,
Dr. Roy, Vol. 18, Page 3463, line 10 to Page 3464, line 16; Page 3478, line 30 to Page 3479, line 12.

Exhibit 51, Statistics Canada, Vol. 31, Page 6454.

56. There was no evidence that any "butchery" type abortions occurred in Ontario since the enactment of section 251 in 1964. Dr. Jaffe indicated that he had performed autopsies on women who had been victims of such procedures but they had simply disappeared in Ontario since the change in the law.

Appeal Case,
Dr. Jaffe, Vol. 13, Page 2884, line 20 to Page 2885, line 20; Page 2891, lines 10 to 26.
Dr. Sacks, Vol. 16, Page 3417, line 26 to Page 3418, line 10.
Dr. Grimes, Vol. 15, Page 3239, lines 5 to 27.

DR. MORGENTALER'S BELIEFS AS TO THE NEED FOR HIS TORONTO CLINIC

57. Dr. Morgentaler indicated that he opened his clinic in Toronto so that women from Toronto and the rest of Ontario would not have to travel to Montreal for an abortion. He felt the beauty and safety of free standing clinics had been amply established and he had to do something to bring a "necessary" medical service to the women of Ontario.

Appeal Case,
Dr. Morgentaler, Vol. 17, Page 3641, line 8 to Page 3642, line 8.

58. Dr. Morgentaler indicated that he was not satisfied with the reform in the law in 1969 as it was a partial reform. It permitted a certain number of women to receive abortions and it left out "maybe half of Canadian women", those who lived far away from accredited hospitals, immigrant women, poor women, women who do not have connections. He believed that many women in Canada just did not have access to good abortion services and when they did, they got it after an average wait of five to eight weeks.

Appeal Case,
Dr. Morgentaler, Vol. 17, Page 3644, lines 15 to 25.

59. Dr. Morgentaler testified that "there was abundant evidence that every week that goes by increases the danger of complications. Major complications by 20 per cent and mortality by 30 percent."

Appeal Case,
Dr. Morgentaler, Vol. 17, Page 3644, lines 25 to 30.

60. Every week there were on average about nine women from Ontario who travelled to the Morgentaler Clinic in Montreal. He indicated one or two in three hundred came for anonymity. They came because they could not get an abortion within a reasonable time in Ontario. They knew of the danger of complication increases each day. He indicated some had been rejected by a committee and were 11, 12, or 13 weeks pregnant. Some women do not want to go through the hassle of having to apply to a committee. Dr. Morgentaler indicated that his clinic's method is three times safer than a saline abortion.

Appeal Case,
Dr. Morgentaler, Vol. 17, Page 3645, lines 5 to 29; Page 3670, lines 17 to 25.

61. Dr. Morgentaler indicated that he had had the idea of opening a Toronto clinic for many years but had hoped it would not be necessary. He indicated that it was three years earlier that he realized the situation was deteriorating. Some committees were closing and some were doing fewer abortions than they could. The number of women from Ontario he saw coming to his clinic increased from six per week to the current nine per week.

Appeal Case,
Dr. Morgentaler, Vol. 17, Page 3659, line 10 to Page 3660, line; Page 3668, lines 5 to 21.

62. Dr. Morgentaler agreed that Ontario had more efficiently and earlier implemented the Criminal Code amendments than Quebec had, however, he indicated that he still saw nine women per week from Ontario.

Appeal Case,
Dr. Morgentaler, Vol. 17, Page 3683, line 15 to Page 3684, line 5.

63. Over and above his oral evidence a tape of his November 18, 1982 O.I.S.E. speech was introduced and that speech related to his dissatisfaction with the law and his views on the need for additional abortion services in various parts of Canada including Ontario and Toronto. At one point he indicated that he believed that no jury conviction was possible against any doctor in any major city in Canada, and consequently it was now possible to open free standing clinics in those major cities.

Appeal Case,
Exhibit 50, Transcript of Tape, Vol. 31, Pages 6387 to 6410, in particular, Pages 6387 to 6388, 6393, 6397 to 6404, 6040 to 6410.

PART II
RESPONDENT'S POSITION WITH RESPECT TO THE POINTS IN ISSUE

63. It is the position of the Attorney General of Ontario that the Court of Appeal for Ontario did not err in law in ruling that section 251 of the Criminal Code does not infringe or deny the rights or freedoms guaranteed by sections 2(a), 7, 12, 15, 27 and 28 of the Charter of Rights and Freedoms.

64. It is in any event the position of the Attorney General of Ontario that any infringement or denial of such rights would be justified by section 1 of the Charter, and that therefore section 251 is not inconsistent with the Constitution Act, 1982.

65. It is the position of the Attorney General of Ontario that section 251 is intra vires the Parliament of Canada; that it does not violate section 96 of the Constitution Act, 1867; and that it does not unlawfully delegate federal criminal power.

66. It is the position of the Attorney General of Ontario that the Court of Appeal for Ontario did not err in holding that section 605 of the Criminal Code is consistent with subsections 7, 11(d), 11(f) and 11(h) of the Charter.

67. It is the position of the Attorney General of Ontario that section 610(3) of the Criminal Code is constitutionally valid legislation, and that in any event costs would not properly be awarded in this case.

68. It is the position of the Attorney General of Ontario that the Court of Appeal for Ontario did not err in law in finding that the defence of necessity was not applicable, and in finding that the learned trial judge erred in charging the jury on the defence of necessity, and that such errors constituted a question of law alone.

69. It is the position of the Attorney General of Ontario that the Court of Appeal for Ontario did not err in law in finding that the jury did not have a right to ignore the law, and that defence counsel's address to the jury gave rise to a question of law necessitating a new trial.

PART III
MEMORANDUM OF ARGUMENT

I) CONSTITUTIONAL ISSUES:

VALIDITY OF SECTION 251 OF THE CRIMINAL CODE:

A. INTERPRETATION OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS:

70. It is respectfully submitted that the Canadian Charter of Rights and Freedoms is a Constitutional instrument designed to preserve the respective rights of the individual and community. The Courts are a guardian of the individual rights guaranteed by the Constitution.

Outside of these constitutional limitations, the Courts must allow Parliament full scope to discharge its discretion concerning the resolution of questions of policy, in the manner which Parliament deems most beneficial to the public, in accordance with its own constitutional mandate.

Reference Re Section 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486, at 496-500, 504, 509, per Lamer, J. for the majority.

71. There is nothing inconsistent with giving the Charter of Rights a broad, liberal construction and acknowledging the wisdom of leaving a resolution of specific policy issues to Parliament. It is submitted that in the case of abortion law, section 251 of the Criminal Code reflects a legitimate resolution by Parliament of the issue, without infringing the rights and freedoms guaranteed by the Charter.

Appeal Case,
Judgment of the Ontario Court of Appeal, Vol. 33, at 6890-1, 6909-10, 6915, 6966
Morgentaler v. the Queen, [1976] 1 S.C.R. 616, at 671, per Dickson, J. (as he then was), for the majority
City of Akron v. Akron Center for Reporductive Health Inc. et al, 103 S.Ct. 2481 (1983) at 2505, 2511, per O'Connor, J. (dissenting)

B. SECTION 7 OF THE CHARTER:

72. It is respectfully submitted that section 251 of the Criminal Code of Canada does not infringe or deny the right to life liberty and security of the person as guaranteed by section 7 of the Charter.

73. The Court of Appeal for Ontario held that the guarantee to life, liberty and security of the person is not limited to protection against arbitrary arrest and detention. Rather, there are some rights so deeply rooted in tradition and our way of life as to be fundamental, and therefore a part of life, liberty

and security of the person. However, given the long-standing statutory prohibition against abortion in Canada, it could not be said that there is a right to procure an abortion so deeply rooted in Canadian tradition as to be fundamental. A woman's only right to an abortion was that statutorily created by section 251(4) of the Criminal Code of Canada.

The Court of Appeal also assessed whether section 251 of the Criminal Code of Canada deprives a woman of her right to terminate her pregnancy otherwise than in accordance with the principles of fundamental justice. The Court held that substantive review of legislation should only take place in exceptional cases where there has been a marked departure from the norms of civil or criminal liability resulting in the infringement of liberty or in some other injustice. The policy and wisdom of legislation should otherwise remain first and foremost a matter for Parliament and the Legislature. The Court concluded that section 251 of the Criminal Code of Canada does not contain any such exceptional provisions.

With respect to procedural aspects, the Court held that legislation must meet the minimum acceptable standard, and noted that in the within case no specific decision of a therapeutic abortion committee was being impugned. The Court found that section 251(4) of the Criminal Code did not on its face offend the principles of fundamental justice.

Finally, the Court of Appeal held that section 251 of the Criminal Code was not vague. From a reading of the section including the exception in section 251(4) there is no difficulty in determining what activity is proscribed and what is permitted. The Court also found that in any event, there could be no doubt that the Appellants knew that the acts they proposed and carried out were in violation of the section. The fact that the Appellants did not approve of the law did not make it uncertain.

Appeal Case,
Judgment of the Ontario Court of Appeal, Vol. 33, at 6893-6919

LIFE, LIBERTY AND SECURITY OF THE PERSON:

74. It is respectfully submitted that the right to "life, liberty and security of the person" embraces a single concept encompassing three conjunctively related elements.

Re Singh and Minister of Employment and Immigration, [1985] 1 S.C.R. 177 at 204-5
Reference Re Section 94(2) of the Motor Vehicle Act, (supra), at 500-1
Operation Dismantle Inc. et al v. the Queen et al, [1985] 1 S.C.R. 441 at 487-8
Constitution Act, Article 7, section 57

75. It is respectfully submitted that while the concept of "life, liberty and security of the person" must be broadly interpreted, it ought not to be interpreted so broadly as to render all Government action which in any way impinges upon the individual's ability to act, an infringement of section 7. The right to life, liberty and security of the person is not absolute.

Operation Dismantle Inc. et al v. the Queen et al, (supra), at 488-90
Re Singh and Minister of Employment and Immigration, (supra), at 205-7
Regina v. Czuczman (1986), 54 O.R. (2d) 574 (C.A.) at 577
Regina v. Fisher; Regina v. Prest (1985), 49 C.R. (2d) 223 (Man. Q.B.) at 225-6
Regina v. Robson (1985), 19 C.C.C. (3d) 137 (B.C.C.A.) at 144-5

76. The phrase "life, liberty and security of the person" has a long history of antecedents in English jurisprudence. Historically the right has been held to relate to matters of death, arrest, detention, and physical liberty and security.

The concept of life, liberty and security of the person has been considered as relating to one's physical and mental integrity and one's control over these. Blackstone defined security of the person as including the "enjoyment of one's life, limbs, body, health and reputation", although "reputation" has been held to be excluded from the definition where property rights are not contiguously covered.

The term "liberty" in Section 7 has been said to be concerned with the physical liberty of the person, the right to dispose of one's own body. The right of an individual to be free from unconsented invasions of his or her physical security or dignity has also been acknowledged.

The phrase "security of the person" encompasses freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself.

Article 5 of the European Convention on Human Rights protects the right to liberty and security of person. Liberty has been defined as protecting only the freedom of physical movement, "la liberté d'aller et de venir".

It is also submitted that economic freedoms must be considered to be excluded from Section 7, particularly given the lack of any reference to "enjoyment of property" as referred to in Section 1(a) of the Bill of Rights.

Re Singh and Minister of Employment and Immigration, (supra), at 202-8
Operation Dismantle Inc. et al v. the Queen et al, (supra), at 487-91
R v. Videoflicks (1984), 48 O.R. (2d) 395 (C.A.) at 433 (judgment reserved in S.C.C.)
Blackstone, Commentaries on the Laws of England (1765-1769) Vol. 1, p. 125

Ogg-Moss v. the Queen, [1984] 2 S.C.R. 173
Morgentaler v. the Queen, (supra), at 633, per Laskin, C.J.C. (dissenting)
Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357
MacBain v. Canadian Human Rights Commission, [1984] 1 F.C. 696 (T.D.) at 709-10, overruled on another point [1985] 1 F.C. 856 (C.A.)
Re Becker and the Queen (1983), 148 D.L.R. (3d) 539 (Alta. Q.B.), aff'd (Alta. C.A.)
Curr v. the Queen, [1972] S.C.R. 889
Regina v. Quesnel (1985), 53 O.R. (2d) 330 (C.A.) at 346-7
Regina v. Oquatag (1985), 18 C.C.C. (3d) 440 (N.W.T.S.C.) at 451-3
Kindler v. Minister of Employment and Immigration, A.G. Canada and Chief of Arbitration Division (Quebec/Atlantic), [1985] 1 F.C. 676 (T.D.) at 770-3
European Commission on Human Rights, Decisions and Report, #5573/72 and 5670/72, Decision 7, Oct. 1977; #7050/75 Decision 19, Oct. 1980
P. Garant, "Fundamental Freedoms and Natural Justice", Canadian Charter of Rights and Freedoms, Tarnopolsky and Beaudoin, ed (Carswell, Toronto: 1982) at 270
Stefan Trechsel, "The Right to Liberty and Security of the Person" (1980), 1 Human Rts. L.J. 88 at 91
Nedjati, Human Rights Under the European Convention (North-Holland Publishing, New York: 1978) 85-87

77. It is submitted, adjunctively, that the meaning of the right to "life" in Section 7 is not directly in issue on this appeal, as it would be in a case where the exact scope of the rights of the unborn child were necessarily determined. Whether or not life begins at the time of conception, or birth, or some stage in between, need not be determined in a judicial sense in the context of the issue raised by the Appellants on this appeal. The value to be placed on "potential life", the life of the foetus, is of significance to the Court's assessment of underlying rationale for Section 251, but legal resolution of the philosophical question of when life begins, it is submitted, is not requisite in this case.

Morgentaler v. the Queen, (supra), at 671, per Dickson, J. (as he then was)
Roe v. Wade, 93 S. Ct. 705 (1973)
Borowski v. A.G. Canada (1983), 8 C.C.C. (3d) 392 (Sask. Q.B.)
Paton v. U.K. (1980), 3 E.H.H.R. 408
Patrice Garant, "Fundamental Freedoms and Natural Justice", (supra), at 258-261
Blackstone, Commentaries, (supra), at 125

78. It is submitted that the liberty of the person envisaged by Section 7 must be distinguished from those liberties enumerated in Section 2, which is also concerned with the person, but from its moral, spiritual or psychological aspect. Liberty in the context of Section 7 therefore does not import all privacy rights associated with 'liberty' in the U.S. Bill of Rights.

Patrice Garant, "Fundamental Freedoms and Natural Justice", (supra) at 263
Regina v. Big M Drug Mart, (supra) at 336-7

79. It is submitted that the Courts below correctly inquired into the question of whether the right to an abortion was so "deeply rooted in the conscience and traditions of our country" as to be ranked as fundamental.

Appeal Case,
Judgment of the Ontario Court of Appeal, Vol. 33, at 6907-8
Re Ontario Film and Video Appreciation Society and Ontario Board of Censors (1984), 45 O.R. (2d) 80 C.A.)
Re Southam and the Queen (No. 1) (1983), 41 O.R. (2d) 113 (C.A.)

80. It is submitted that there was no absolute right to an abortion at common law. Before codification of the law in England, abortion was an offence after the woman was quick with child. The law has been codified in England since 1803, at which time abortion at any stage of foetal life was a crime: a capital offence in the case of a quick foetus and a lesser offence at earlier stages. Since 1861, the law in England has not differentiated on the basis of the stage of development. The law was liberalized by The Abortion Act of 1967, providing for an exemption on the basis of the opinion of two doctors. The Infant Life Preservation Act (1929) continues to protect the life of the viable foetus, by placing greater restrictions on termination after viability.

In Canada, abortion at any stage of the pregnancy has been an indictable offence (or felony) since pre-Confederation times. The abortion section was included in the first Canadian Criminal Code in 1892, and abortion continued to be prohibited until the 1969 amendments providing for an exemption on the basis of the opinion of three doctors: the therapeutic abortion committee.

Appeal Case,
Judgment of the Ontario Court of Appeal, Vol. 33, at 6894-6
Morgentaler v. the Queen, (supra), at 633, per Laskin, C.J.C. (dissenting)
Glanville Williams Textbook of Criminal Law (Stevens, London: 1978) at 252 et. seq.
Martin's 1955 Annotated Criminal Code, at 445
Lord Ellenborough's Act, 1803, 43 Geo. 3, c. 58
Roe v. Wade, (supra), at 718-721, per Blackmun, J., and at 737, per Rehnquist, J.

81. Even in the majority judgment of Roe v. Wade, it was held that the right to an abortion included in a qualified right of privacy, was not absolute. The right had to be considered against state interests in regulation, including the protection of prenatal life. It was decided that the point at which that

interest became "compelling", as against the privacy right of the mother, was the point of viability.

Roe v. Wade, (supra), at 725, 727-8, 732
City of Akron v. Akron Center for Reproductive Health, (supra)

10 82. It is respectfully submitted that the Court of Appeal for Ontario accurately observed that "the situation respecting a woman's right to control her own person becomes more complex when she becomes pregnant, and that some statutory control may be appropriate". It is submitted that section 251 represents a balancing of interests which, considered substantively, reflects a policy having a rational relation to the valid objective of Parliament in protecting foetal life.

20 83. It is submitted that the underlying rationale for the prohibition against abortion is inherent in the very meaning of abortion or procuring a miscarriage. That interest is in the sanctity of human life and the preservation of it, including, in the case of abortion, the interest in preserving the potential life of the foetus. This rationale continues to exist.

The rationale manifests itself in the wording of section 251(1) and (2), as well the requirement that exemptions be assessed by a committee, and that any abortions be done by a medical practitioner in a hospital.

30 Appeal Case,
Judgment of the Ontario Court of Appeal. Vol. 33, at 6908
Morgentaler v. the Queen, (supra), at 626-7, per Laskin, C.J.C. (dissenting) and at 671, per Dickson, J. (as he then was)
Dehler v. Ottawa Civic Hospital (1979), 25 O.R. (2d) 748 (H.C.)
La Rivière v. the Queen (1957), 119 C.C.C. 160 (Que. C.A.)
Roe v. Wade, (supra)
Doe v. Bolton, 93 S.Ct. 739 (1973), at 746-7, per Blackmun, J.
Beal v. Doe, 97 S.Ct. 2366 (1977)
J.T. Noonan, "An Absolute Value in History", in The Morality of Abortion 4th printing (Harvard University Press, Cambridge: 1977)
40 L. Tribe, American Constitutional Law, (supra), at 927 fn 53
House of Commons Debates, Canada, January 23, 1969, p. 4717-18, 4722, April 28, 1969, p. 8058, May 6, 1969, p. 8385 et. seq.
cf. English Legislation: The Abortion Act (1967), The Infant Life Preservation Act (1929)

84. It is respectfully submitted that nothing in the decision of the United States Supreme Court in Roe v. Wade provides a satisfactory explanation of why the foetal interest should not be deemed overriding prior to viability (as well as after) particularly when the legislature has chosen to regard the foetus as an entity worthy of protection.

> ... holding that a woman's right to decide whether to give birth is fundamental does not preclude the possibility that the state's interest in preserving the fetus might override the woman's claim.

The extreme difficulty in determining the parameters of a woman's right to an abortion is illustrated by the results in the world-wide judicial activity concerning abortion statutes at the time of Roe v. Wade. Six major western courts ruled on abortion statutes between 1973 and 1975; Austria, France, Italy, West Germany, the United States and Canada. Opposite views were reached by West Germany - holding that the legislation had not gone far enough in protecting the unborn - and the United States - holding that abortion to the point of viability had to be left to personal choice, (subject to state interests in the mother's health).

It is respectfully submitted that there is no clear answer as to the result that should be reached in balancing the competing interests.

L. Tribe, American Constitutional Law, (supra), at 927, 929, fn 60
Curr v. the Queen, (supra), at 898, per Laskin, J. (as he then was)

85. It is submitted that the end result of the process of judicial review by the United States Supreme Court of abortion laws is a most cumbersome and unsatisfactory process of constitutional litigation. The Court is left to assess medical developments and social mores and to "amend" its prior decisions to accord with medical developments. The constitutional validity of a statute is left uncertain, always subject to change on the basis of new medical techniques.

Roe v. Wade, (supra), at 737, per Rehnquist, J. (dissenting)
City of Akron v. Akron Center for Reproductive Health Inc., (supra), at 2506-8, per O'Connor,J. (dissenting)
G. Gunther, Constitutional Law, (supra), at 131-2

86. It is respectfully submitted that the present parameters of a woman's right to an abortion under section 251, reflecting as they do a difficult balancing of competing values, are best left for determination by Parliament. It is neither desirable nor appropriate for this Honourable Court to evaluate the policy reflected by this balancing.

Appeal Case,
Judgment of the Ontario Court of Appeal, Vol. 33, at 6890-1, 6909-10, 6915, 6966
Morgentaler v. the Queen, (supra), at 671, per Dickson, J. (as he then was) for the majority
City of Akron v. Akron Center for Reproductive Health Inc. et al, (supra), at 2505, 2511, per O'Connor, J. (dissenting)
Re Global Communications and A.G. Canada (1984), 44 O.R. (2d) 609 (C.A.), at 619-21

87. It is further respectfully submitted that the concept of 'liberty and security of the person' cannot be extended by the fact that a patient-physician relationship is involved, since that relationship must operate within the confines of the law.

Regina v. R.S. (1985), 19 C.C.C. (3d) 115 (Ont. C.A.)
Charboneau et al v. College of Physicians and Surgeons on Ontario (1985), 52 O.R. (2d) 552 (H.C.J.) at 560-1
Re Mia and Medical Services Commission of British Columbia (1985), 16 C.R.R. 233 (B.C.S.C.) at 260-4
Isabey v. Manitoba Health Services Commission et al, [1985] 6 W.W.R. 712 (Man. Q.B.) at 719

THE PRINCIPLES OF FUNDAMENTAL JUSTICE:

88. It is respectfully submitted that section 251 of the Criminal Code does not deprive a woman of her right to an abortion otherwise than in accordance with the principles of fundamental justice.

89. It is respectfully submitted that the principles of fundamental justice "are to be found in the basic tenets of our legal system". They are those principles which are "rooted in the tradition and conscience of the people" and which are the "essence of ordered liberty". The Court must look to the historical assessment of moral views underlying the criminal law.

Reference Re Section 94(2) of the Motor Vehicle Act, (supra), at 302, 309-10, per Lamer, J., for the majority
Law Society of Upper Canada v. Skapinker, (supra)
Re R.L. Crain et al and Couture et al (1983), 6 D.L.R. (4th) 478 (Sask. Q.B.)
Palko v. State of Connecticut, 58 S.Ct. 149 (1937)
Powell v. Texas, 88 S.Ct. 2145 (1968)

90. It is submitted that the Appellants have mounted an attack on the policy of Parliament, but have failed to establish any breach of a principle of fundamental justice. The Court of Appeal for Ontario properly found that section 251 does not contain any "Draconian" elements warranting intervention by the Courts.

Appeal Case,
Judgment of the Ontario Court of Appeal, Vol. 33, at 6910-16
cf. Reference Re Section 94(2) of the Motor Vehicle Act, (supra), at 513-5, per Lamer, J., for the majority, and at 532-4, per Wilson, J.
Regina v. Robson, (supra)
Regina v. Young (1984), 46 O.R. (2d) 520 (C.A.), at 551
Regina v. Stevens (1983), 3 C.C.C. (3d) 198 (Ont. C.A.)(leave to appeal to the S.C.C. granted, 51 N.R. 320n)

Regina v. Roche (1985), 20 C.C.C. (3d) 524 (Ont. C.A.)
R.L. Crain Inc. et al v. Couture and Restrictive Trade Practice Commission et al (1983), 10 C.C.C. (3d) 119 (Sask. Q.B.)
Operation Dismantle Inc. et al v. the Queen, (supra), at 472-3

VOID FOR VAGUENESS, OVERBREADTH AND THE PRINCIPLES OF FUNDAMENTAL JUSTICE:

91. It is respectfully submitted that Section 251 presents no degree of uncertainty or vagueness as to potential criminal liability: anyone charged with an offence would know whether prohibited conduct was being undertaken and whether an exemption certificate had been received. Equally, any official entrusted with enforcing this section would know whether an offence had been committed.

92. It is respectfully submitted that the term 'fundamental justice' in Section 7 of the Charter constitutionally enshrines the right to know with sufficient particularity the nature of an offence alleged. This principle is analogous to the "void for vagueness" doctrine that has been developed by the United States Supreme Court.

R v. Langevin (1984), 45 O.R. (2d) 705 (C.A.)
R v. Cohn (1984), 48 O.R. (2d) 65 (C.A.)
Regina v. Red Hot Video Ltd. (1985), 18 C.C.C. (3d) 153 (B.C.C.A.)
cf. Kolender v. Lawson, 103 S.Ct. 1855 (1983)

93. It is submitted that it is essential to distinguish between two different American constitutional doctrines, the "void for vagueness" doctrine and the "overbreadth" doctrine. The vagueness challenge rests on the Fifth and Fourteenth Amendments' procedural due process requirement of notice: the language in a statute defining an offence must convey "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices".

The overbreadth doctrine is a First Amendment doctrine. A statute is void for overbreadth if "it offends the constitutional principle that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." It is respectfully submitted that the overbreadth doctrine has no relevance to the argument concerning section 7 of the Charter.

New York v. Ferber, 102 S.Ct. 3348 (1982)
Zwickler v. Koota, 88 S.Ct. 391 (1967)
Gunther, Constitutional Law, 10th ed., p. 1189 n.9

94. It is respectfully submitted that the word "miscarriage" in Section

251 is not vague. The evidence disclosed no difficulty with respect to the interpretation of this word by doctors, or with respect to the scope of the proscribed conduct. Even if the existence of marginal cases in which it might be difficult to determine whether certain activities fall within the meaning of the word "miscarriage" could be hypothesized, this would not render Section 251 of the Criminal Code unconstitutional for indefiniteness.

R v. Stevenson and McLean (1980), 57 C.C.C. (2d) 526 (Ont. C.A.)
R v. Cohn, (supra)
R v. Popert et al (1981), 58 C.C.C. (2d) 505 (Ont. C.A.), at 508-9
Kolender v. Lawson, (supra), citing United States v. Petrillo, 67 S.Ct. 1538 (1947)
French text of Section 251

95. It is submitted that it is well established that vagueness challenges to statutes which do not involve First Amendment freedoms (such as the case before this Honourable Court) must be examined in the light of the facts of the case, and that one to whose conduct a statute clearly applies may not successfully challenge it for vagueness. It is submitted that the Court of Appeal for Ontario properly invoked this principle in the instant case.

Village of Hoffman Estate v. Flipside, 102 S.Ct. 1186 (1982),at 1191
United States v. Raines, 80 S.Ct. 519 (1960),at 522
Law Society of Upper Canada v. Skapinker, (supra), at 383
Re Anti-Inflation Act, [1967] 2 S.C.R. 373, at 419
Regina v. Videoflicks et al (1984), 48 O.R. (2d) 395 (C.A.)at 439-40

96. It is respectfully submitted that any doctor charged with an offence under Section 251 of the Criminal Code would know whether he had received a certificate from a therapeutic abortion committee. The Appellants' conduct was, therefore, clearly proscribed by Section 251 of the Criminal Code, and the section provided them with sufficient notice that their conduct would render them liable to its penalties.

97. It is further respectfully submitted that the standard set out in Section 251(4) of the Criminal Code is not unconstitutionally vague. The question of whether "continuation of the pregnancy...would or would be likely to endanger... life or health" is addressed to the hospital's therapeutic abortion committee, not to those such as police officers who otherwise enforce this section. The requirement of a certificate in writing provides an explicit standard that makes arbitrary and discriminatory enforcement of Section 251 impossible.

Regina v. Robson, (supra), at 141, 148 citing Papachristou v. Jacksonville, 92 S.Ct. 839 (1972)
Regina v. Duguay (1985), 50 O.R. (2d) 375 (C.A.)
Grayned v. City of Rockford, 92 S.Ct. 2294 (1972)
Kolender v. Lawson, (supra)

98. It is further submitted that the allegations of inconsistent, arbitrary, or capricious applications of the standard set out in section 251(4) of the Criminal Code, do not raise a constitutional void for vagueness issue as that doctrine is understood in American and Canadian jurisprudence. It is submitted that even if the words of a statute are otherwise ambiguous, the Courts must say what meaning the statute is to bear, rather than reject it as a nullity. If the standard in section 251(4) is being applied arbitrarily, inconsistently, or capriciously, such applications are more properly the subject of judicial review on a case by case basis.

Appeal Case,
Judgment of Ontario Court of Appeal, Vol. 33 at 6916-19
Fawcett Properties Ltd. v. Buckingham County Council, [1960] 3 All E.R. 503 (H.L.)
Marcotte v. The Deputy Attorney General of Canada, [1976] 1 S.C.R. 108
Regina v.Hislop et al, Ont. C.A., September 22, 1980, unreported
Morgentaler v. the Queen, (supra), at 634, per Laskin, C.J.C.
United States v. Vuitch, 91 S.Ct. 1294 (1971)
Re D & H Holdings Ltd. and City of Vancouver (1985), 21 D.L.R. (4th) 230 (B.C.S.C.), at 237
Carruthers v. Therapeutic Abortion Committee of Lions Gate Hospital (1983), 6 D.L.R. (4th) 57 (F.C.A.)(leave to appeal to S.C.C. refused)
Dehler v. Ottawa Civic Hospital (1979), 25 O.R. (2d) 748 (H.C.)
R v. Medhurst and Medhurst et al (1984), 45 O.R. (2d) 575 (H.C.)
Re Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311
S.A. de Smith, Judicial Review of Administrative Action 4th ed. (Stevens, London: 1980) at 346
Reid, Administrative Law and Practice 2d ed. (Butterworths, Toronto: 1976)

C) SECTION 2(a) OF THE CHARTER: FREEDOM OF CONSCIENCE AND RELIGION:

99. It is respectfully submitted that Section 251 of the Criminal Code has no underlying religious purpose, and that its effects cannot be said to infringe freedom of religion. This Honourable Court has said that "the guarantee of freedom of conscience and religion prevents the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others". In the case of laws governing abortion, the legislation has no religious content and cannot be said to be otherwise harmless.

The Queen v. Big M Drug Mart, [1985] 1 S.C.R. 295 at 336-7, 350

100. It is submitted that where the tenets of a religion or the dictates of conscience do not prescribe a particular practice regarded as essential to the observance of the religion or conscience, but rather permit the individual to choose whatever course of action he or she feels is appropriate in the circumstances, with the assistance of spiritual consultation if desired, then the individual's decision and action cannot be characterized as a religious or conscientious practice.

Regina v. Videoflicks et al (1984), 48 O.R. (2d) 395; 15 C.C.C. (3d) 353 (C.A.)
Wisconsin v. Yoder, 406 U.S. 205 (1972)
Thomas v. Review Board of the Indiana Employment Security Division et al., 450 U.S. 707 (1981)

101. In the instant case the evidence indicates that the United Church, the Anglican Church and Reform Judaism do not forbid a pregnant woman from having an abortion if she decides it is the appropriate choice after considering secular factors such as her responsibilities to existing children and her husband, rape, incest, foetal abnormality and social and economic factors, as well as her moral conscience. It is submitted that this choice is not an essential practice demanded by any religious tenet and thus is not encompassed by "freedom of religion and conscience".

That religious groups may express their convictions on the matter does not make the matter instrinsically religious. It is therefore submitted that section 251 does not, in either purpose or effect, conflict with any religious tenet or practice.

Appeal Case,
Judgment of the Ontario Court of Appeal, Vol. 33, p. 6921
L. Tribe, American Constitutional Law, (New York: Foundation Press Inc., 1978) at 928

102. It is submitted that freedom of conscience and religion protects a single integrated concept. Conscientiously held beliefs and manifestations in matters having to do with religion are protected equally to religiously held beliefs. It is submitted that the definition of freedom as it applies to conscience must be approached purposively, in the context of the same political and philosophical values underlying the freedom as it applies to religious belief. Expressions and manifestations of religious non-belief and refusal to participate in religious practice are thereby protected. However, freedom of

conscience does not protect an individual's mere decision to act or not act as he or she chooses. In any event, there was no evidence to suggest an infringement of conscience in a non-religious sense in this case.

Appeal Case,
Judgment of the Ontario Court of Appeal, Vol. 33, p. 6920-21
The Queen v. Big M Drug Mart, (supra) at 345-6
Regina v. Videoflicks et al, (supra)
Re Attorney General of British Columbia and Cowichan Board of Trustees (1985), 19 D.L.R. (4th) 166 (B.C.S.C.) at 171

D) SECTION 12: THE RIGHT NOT TO BE SUBJECTED TO ANY CRUEL AND UNUSUAL TREATMENT OR PUNISHMENT:

103. It is respectfully submitted that the provisions of section 251 of the Criminal Code do not involve the "subjection" of anyone to either "treatment" or "punishment" within the meaning of section 12 of the Charter. "Punishment" has been construed as being limited to situations of state imposed punishment occasioned by particular conduct. "Treatment" extends the protection to other forms of state control, but does not, it is submitted, alter the underlying principle that the treatment or punishment be derived from the exercise of state authority over the individual. It is submitted that there is no authority for the proposition that an individual who consents to submit to a procedure such as an abortion under the exemption provisions of section 251(4) is being "subjected" to either "treatment" or "punishment".

Appeal Case,
Judgment of the Ontario Court of Appeal, Vol. 33, Page 6922.
Re Soenen and Thomas (1983), 8 C.C.C. (3d) 224 (Alta. Q.B.), at 227-35
R v. Miller and Cockriel, [1977] 2 S.C.R. 680, at 685-705

104. In any event, it is submitted that, irrespective of the breadth of the above definitions, the requirements of section 251(4) could not be construed as being "cruel and unusual". The exemption prerequisites of committee approval and hospital setting are inherently safe. Problems of access and delay may exist in jurisdictions without such requirements, as evidenced by the experience in the United States since Roe v. Wade. It is submitted that the essence of the Appellants' argument in this regard is more logically considered in the context of the protections of sections 7 and 15 of the Charter.

R v. Miller and Cockriel, (supra), at 688
Re Mitchell and the Queen (1983), 6 C.C.C. (3d) 193 (Ont. H.C.), at 215
Re Soenen and the Queen, (supra), at 235

E) SECTIONS 15 AND 28 OF THE CHARTER: EQUALITY RIGHTS:

105. It is respectfully submitted that the constitutional requirement of equality guaranteed by section 15 essentially requires that persons who are similarly situate with respect to the purpose of the law be similarly treated. It is submitted that section 15 is aimed at protecting the dignity and worth of the human person, by ensuring that governments not make irrational distinctions between individuals based on certain enumerated personal attributes such as their race, religion or sex, or based on certain unenumerated personal attributes. "Discrimination" in section 15 does not mean "distinction": if that were so, most if not all legislative classifications would constitute an automatic violation of section 15, requiring an analysis of justification under section 1 of the Charter. Such a definition would deprive the term "without discrimination" of all content, and would thereby trivialize section 15. "The interests of true equality may well require differentiation."

It is submitted that the correct purposive approach to the definition of "discrimination" in section 15 is to incorporate into the definition principles of justification and reasonableness independently of those found within section 1.

The Queen v. Big M Drug Mart, (supra), at 336, 347, per Dickson, C.J.C.
Reference Re Section 94(2) of the Motor Vehicle Act, (supra)
Smith, Kline & French Laboratories Ltd. et al v. Attorney General of Canada (1985), 24 D.L.R. (4th) 321 (F.C.T.D.) at 367-8
McKay v. the Queen, [1980] 2 S.C.R. 370; 54 C.C.C. (2d) 129
Regina v. R.L. (1986), 14 O.A.C. 318 at 329
Reference re an Act to Amend the Education Act (1986), 53 O.R. (2d) 513 (C.A.) at 544-5
Re McDonald and the Queen (1985), 51 O.R. (2d) 745 (C.A.)
Aluminum Co. of Canada Ltd. v. the Queen (Ont. Div. Ct., July 16, 1986, unreported)
Andrews v. Law Society of B.C., [1986] 4 W.W.R. 242 (B.C.C.A.)
Rebic v. Attorney General of British Columbia (1986), 2 B.C.L.R. (2d) 364 (C.A.)
Kask v. Shimizu et al, (Alta. Q.B., April 11, 1985, unreported)
Johnstone, Johnstone and Goler v. Regina, (N.S.C.A., March 20, 1986, unreported)
Williamson v. Lee Optical, 348 U.S. 483, 489 (1955)
McGlothen v. Department of Motor Vehicles, 72 Cal. App. 3d 542 (1977)
W.S. Tarnopolsky, "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983), 61 Can. Bar. Rev. 241
Gold, "A Principled Approach to Equality Rights" (1983), 4 Sup. Ct. L.R. 131 at p. 151-3
Tussman and tenBroek "The Equal Protection of the Laws", (1949), 37 Calif. L. Rev. 341

106. It is respectfully submitted that section 251 of the Criminal Code

does not infringe the rights guaranteed by sections 15 and 28 of the Charter. The Appellants' arguments may be categorized under two classifications: inequality on the face and inequality in administration:

i) Inequality on the Face:
- it discriminates on the basis of sex;
- it perpetuates a stereotype that women are incapable of moral and practical decision-making;
- it denies women equality of opportunity and limits the role of women in society;
- it does not ensure equal protection and benefit of the law;
- it singles out abortion from other medical procedures.

ii) Inequality in Administration:
- it is applied and administered unequally;
- it discriminates against economically deprived women;
- it results in unequal access based on geographic disparity.

i) Inequality on the Face:

107. It is submitted that the scheme of section 251 is based on a valid federal objective and a legitimate legislative purpose. Parliament, in decreeing that potential human life is to be protected, has created a system under subsections (4) and (5) which best serves that objective. This legislative purpose is evidenced on a reading of section 251:

> What is patent on the face of the prohibitory portion of Section 251 is that Parliament has in its judgement decreed that interference by another, or even by the pregnant woman herself, with the ordinary course of conception is socially undesirable conduct subject to punishment. That was a judgment open to parliament in the exercise of its plenary criminal law power, and the fact that there may be safe ways of terminating a pregnancy or that any woman or women claim a personal privilege to that end, becomes immaterial. I need cite no authority for the proposition that Parliament may determine what is not criminal as well as what is, and may hence introduce dispensations or exemptions in its criminal legislation.
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> Morgentaler v. the Queen, (supra), per Laskin, C.J.C. (dissenting in the result) at 627 S.C.R.; at 457 C.C.C.
> Beal v. Doe, 432 U.S. 281; 97 S.Ct. 2366 (1977)

108. It is respectfully submitted that section 251 is not discriminatory on the basis of sex. The gender-based orientation of the law respecting abortion vis-a-vis women in particular occurs only as a matter of biological necessity, and it is submitted that this "distinction" in the law is therefore rationally based, and consequently not discriminatory.

109. It is submitted that for a law to be discriminatory on the basis of

sex, it must manifest a distinction between the way in which it treats one sex over the other. In other words, for section 251 to be decreed invalid as discriminatory on the basis of sex, it would have to be established that a man seeking an abortion would not be required to comply with section 251. Clearly this is an impossibility, and therefore section 251 by its very nature cannot be attacked as discriminatory on the basis of sex, per se. Everyone in Canada is subjected to its requirements.

A.G. Canada v. Lavell, [1974] S.C.R. 1349; 38 D.L.R. (3d) 481 (S.C.C.), per Laskin J. (dissenting)
Michael M. v. Superior Court, 450 U.S 464 (1981)
Craig v. Boren, 429 U.S. 190 (1976)
Reed v. Reed, 404 U.S. 71 (1971)
Frontiero v. Richardson 411 U.S. 677 (1973)
Harris v. McRae, 448 U.S. 297 (1980)

ii) Inequality in Administration:

110. It is respectfully submitted that any administrative unevenness which may exist in the provision of services related to section 251(4) and (5) does not constitute a justifiable basis of attack on the constitutionality of the law. Any inefficiency in carrying out the procedure is not mandated by the law itself.

It is submitted that the constitutionalization of equality rights does not now require the Court to adopt judicially unmanageable standards formerly rejected, with respect to the administration of an otherwise valid law. It is submitted that the Appellant is asking the Court to assess not legislated standards, but the potential application of those standards to individual cases. In this regard, it is submitted that the approach of the Court of Appeal in this case is the correct approach.

Appeal Case,
Judgment of the Ontario Court of Appeal, Vol. 33, Pages 6922-7
Morgentaler v. the Queen, (supra), per Laskin, C.J.C. (dissenting in the result) at 629-30 S.C.R; 459 C.C.C.
Hunter v. Southam, [1984] 2 S.C.R. 145 at 168-9
Maher v. Roe, 432 U.S. 464; 97 S.Ct. 2376 (1977) per Burger, C.J. at 2386
Beal v. Doe, (supra)
Poelker v. Doe, 432 U.S. 519; 97 S.Ct. 2391 (1977)

111. Since section 15 of the Charter was not in force at the time of the offences, and was not raised at trial, it is respectfully submitted that in any event any ruling with respect to the validity of section 251 in the context of section 15 cannot affect the validity of the Order of the Court of Appeal for a new trial in this case.

R v. Seo (1986), 54 O.R. (2d) 293 (Ont. C.A.)
R v. Lucas and Neely (1986), 14 O.A.C. 124
Re Mcdonald and the Queen, (supra)
Re Chapman and the Queen (1984), 12 C.C.C. (3d) 1 (Ont. C.A.)
R v. James (Ont. C.A., July 23, 1986, unreported)
Dubois v. the Queen, [1985] 2 S.C.R. 350

F) APPLICATION OF SECTION 1 OF THE CHARTER TO SECTION 251 OF THE CRIMINAL CODE

112. It is respectfully submitted that the limits in section 251 are demonstrably justified. The objective of Parliament in passing a law governing abortion, the objective of protection of the unborn child, is a pressing and substantial concern of sufficient importance to justify a limit on the rights in issue. A review of the laws governing abortion demonstrates that this issue has been a moral and philosophical concern in society throughout history.

Appeal Case,
Judgment of the Ontario Court of Appeal, Vol. 33.
R v. Oakes, [1986] 1 S.C.R. 10 at 135-140
Morgentaler 1975, (supra), at 626-7, 671
Roe v. Wade, (supra), at 715-24, 725-7, 737
J.T. Noonan, "An Absolute Value in History", in The Morality of Abortion 4th printing (Harvard University Press, Cambridge: 1977)

113. It is submitted that, in legislating a scheme directed towards achieving a balance between the interests of pregnant women and potential life by enacting a prohibition against abortions subject to exemption provisions, the measures adopted by Parliament are proportional to the diametrically opposed interests involved. Most countries throughout the world restrict abortion to some degree. Some prohibit abortion absolutely; some permit abortion only on very restrictive grounds; some permit abortion on broader medical and/or social grounds; some permit abortion on request at certain stages of pregnancy. Where abortion is permitted on certain grounds, approval or review of the grounds is generally required from some type of medical committee.

Appeal Case,
Exhibit 16, Vol. 20, pages 4271 to 4392.
C. Tietze, Induced Abortion, A World Review (New York: The Population Council, 1983)

114. It is submitted that the measures set out in section 251 are fair and rationally connected to the objective of the section. It is submitted that establishing measures which permit this balance to be assessed in an individual case by an independent medical determination is a rational method of resolving this balance. None of the restrictions in section 251, either the general

prohibitions of subsections (1) and (2), or the specific prerequisites in the exemption provisions of subsection (4), are arbitrary in the context of the interests sought to be protected. The governments of several other free and democratic societies have made similar efforts to balance the interests of pregnant women and potential life.

England: The Abortion Act
Australia: Northern Territory: Criminal Law Consolidations Act and Ordinance, s. 79A; South Australia: Criminal Law Consolidation Act, s. 82a
Germany: Criminal Code, Art. 218a and 218b
Israel: Penal Law 5737-1977, sections 312 to 321
New Zealand: Crimes Act, sections 182 to 187A
Switzerland: Code Pénal Suisse, Art. 120

115. It is respectfully submitted that this balance could not be achieved in a less restrictive manner. The decision of the legislature to place some value on the potential life of the foetus could not be given effect by a scheme which left the decision to the individual. Therefore a less restrictive means is not feasible: the balancing requires the interposition of an independent party in making the decision.

116. It is further respectfully submitted that there is proportionality between the objective of section 251 and any effects which may be said to limit the particular right or freedom in question.

117. It is respectfully submitted that the provisions of section 1 of the Charter have application to the infringement of a right which itself involves a balancing of governmental interests, such as a right under sections 7 or 12 of the Charter.

R v. Oakes, (supra), at 136-41
R v. Singh, (supra), at 217-9
Reference re Section 94(2) of the Motor Vehicle Act, (supra), at 517-8

118. With respect to any limitation on section 7 of the Charter, it is respectfully submitted that even if it were found that section 251 did violate section 7, then given the irreconcilable and diametrically opposed interests involved, this Court would properly find that the restrictions imposed by section 251 constitute a reasonable limit.

Reference re Section 94(2) of the Motor Vehicle Act, (supra)
R v. Ayres (1984), 15 C.C.C. (3d) 208 (Ont. C.A.)

Re U.S.A. v. Smith (1984), 44 O.R. (2d) 705; 10 C.C.C. (3d) 540 (C.A.) aff'g 42 O.R. (2d) 668 (Ont. H.C.)
Morgentaler v. the Queen, (supra), at 626-7, per Laskin, C.J.C. (dissenting) and at 671 per Dickson, J. (as he then was)
Dehler v. Ottawa Civic Hospital (1979), 25 O.R. (2d) 748 (H.C.)
La Rivière v. the Queen (1957), 119 C.C.C. 160 (Que. C.A.)
Roe v.Wade, (supra)
Doe v. Bolton, (supra), per Blackmun, J. at 746-7
Beal v. Doe, (supra)
Minutes of Special Joint Committee, (supra), Proceedings re: Abortion 22:36-49; 24:99-102, 108-10; 29:9-10, 13-14, 37-49, 86; 34:119-21, 124-7; 43:49-51; 49:17-20
L. Tribe, American Constitutional Law, (supra) at 927 fn 53
House of Commons Debates, Canada, January 23, 1969, p. 4717-8, 4722; April 28, 1969, p. 8058; May 6, 1969, p. 8385 et. seq.

119. With respect to any limit on the freedom of conscience and religion, it is submitted that any infringement of individual religious liberty resulting from section 251(4) is purely incidental and could not be achieved in a less intrusive manner such as would eliminate any infringement of the freedom. This Honourable Court has recognized that our constitutionally protected freedoms are subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. Freedom on conscience and religion has been conceptualized as being subject to such limitations in other human rights legislation.

R v. Big M Drug Mart, (supra), at 337
International Covenant on Civil and Political Rights, Article 18

120. The Respondent agrees that the guarantee of equality of the sexes is a right of fundamental importance, as demonstrated by the inclusion of section 28 in the Charter of Rights. With respect to any potential finding of infringement of equality rights, it is submitted, in addition to the arguments set out above, that the gender distinction in section 251, because it is a matter of biological necessity, is a difference that is incapable of legal remedy. Having regard to the nature of the pressing and substantial concern addressed by the section, the fact that abortion is differentiated from other medical procedures is not an unjustified distinction, as there is no other medical operation comparable in results to abortion. It is the fundamental difference and not its similarities which distinguishes abortion from all other medical procedures.

121. It is therefore respectfully submitted that to the extent of any infringement of the rights and freedoms set out in the Charter, section 251 is a reasonable limit on those rights, demonstrably justified in a free and democratic society.

G) SECTION 91(27) OF THE CONSTITUTION ACT, 1867:

122. Parliament has exclusive authority to legislate in relation to matters of criminal law under section 91(27) of the Constitution Act, 1867. Even before Confederation, Parliament had determined that interference with pregnancy was a crime. The supporting purpose is not simply the protection of the mother's health, as asserted by the Appellants, but the protection of the life of the unborn child. Parliament's view was and is reflected in the fact that upon conviction an accused is liable to life imprisonment.

Morgentaler v. the Queen, [1976] 2 S.C.R. 616, at 627 per Laskin, C.J.C., at 671-2 per Dickson, J. (as he then was)
Dehler v. Ottawa Civic Hospital (1979), 25 O.R. (2d) 748 (H.C.) at 755

123. It is submitted that in modifying the earlier absolute prohibition on interference with pregnancy by recognizing an exception to the application of section 251(1) and (2), Parliament was reflecting contemporary standards of what constitutes socially undesirable behaviour by defining more narrowly the criminal activity.

Morgentaler v. the Queen, [1976], (supra)
Dehler v. Ottawa Civic Hospital, (supra)

124. It is submitted that the technique of creating exceptions to the application of the offence provisions of the Criminal Code and other criminal statutes has been accepted as a valid exercise of the criminal law power.

Lord's Day Alliance of Canada v. A.G.B.C., [1959] S.C.R. 497
Abel, Laskin's Canadian Constitutional Law, (Toronto: Carswell Compnay Ltd.: 1975) 4th ed., at 825

125. It is submitted that section 251 has already been upheld as a valid exercise of the criminal law power in a unanimous judgment of the Supreme Court of Canada. The reasoning in that case applies with equal force today for the purposes of a division of powers argument.

Morgentaler v. the Queen, [1976], (supra)
The Queen v. Big M Drug Mart, (supra) at 334-5

126. It is therefore submitted that the Court of Appeal for Ontario was correct in ruling that section 251 of the Criminal Code is valid federal legislation in relation to section 91(27) of the Constitution Act, 1867.

Appeal Case,
Judgment of Court of Appeal, Vol. 33, p. 6927-29

H) UNCONSTITUTIONAL DELEGATION AND ABDICATION OF FEDERAL POWER:

i) Unconstitutional Delegation (Interdelegation):

127. It is submitted that constitutionally impermissible delegation occurs only when Parliament delegates its exclusive legislative authority to the Legislature of a Province. Parliament may delegate power to regulate a matter within its exclusive legislative authority to a provincially constituted board or to a provincial minister of the Crown. The delegation of administrative functions to subordinate bodies, whether constituted pursuant to provincial or federal legislation, is not a violation of the constitutional principle against interdelegation.

A.G. Nova Scotia v. A.G. Canada, [1951] S.C.R. 31
Coughlin v. Ontario Highway Transport Board, [1968] S.C.R. 569 at 575
Re Peralta et al and the Queen in right of Ontario (1985), 49 O.R. (2d) 705; 16 D.L.R. (4th) 259 (C.A.)
Driedger, "The Interaction of Federal and Provincial Laws" (1976), 54 Can. Bar Rev. 695

128. It is submitted that the recognition in section 251(4) of the Criminal Code of the certificate of the therapeutic abortion committee as one of the circumstances (in combination with others) necessary to constitute an exception to the application of section 251(1) and (2) does not delegate any power to the Legislature of a Province. There is no provincial legislation purportedly enacted pursuant to a matter exclusively within federal legislative competence in issue in this case.

129. It is submitted that the definitions in section 251(6) which refer to persons or bodies constituted under the authority of provincial legislation (for example, "approved hospital", "board", "Minister of Health", "qualified medical practitioner") result in an incorporation by reference for federal purposes of the provincial legislation defining or creating these persons or bodies. Incorporation by reference is not an unconstitutional interdelegation.

R v. Glibbery, [1963] 1 O.R. 232 (C.A.)
Driedger, "The Interaction of Federal and Provincial Laws", (supra)

130. The definitions in section 251(6) constitute a technique for identification which include both incorporation by reference and the delegation of administrative responsibility to the Minister of Health. It is submitted that, in certifying its opinion that the continuation of the pregnancy would or would be likely to endanger the life or health of a particular woman, the therapeutic abortion committee is performing an administrative act.

Re Medhurst and Medhurst (1984), 45 O.R. (2d) 575 (H.C.)

131. It is therefore submitted that there is no unconstitutional inter-delegation effected by section 251(4), (5) and (6) of the Criminal Code.

ii) Abdication of the Criminal Law Power by Parliament:

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132. It is submitted that Parliament is not restricted in its power to delegate authority except as outlined in paragraph 128 above.

Hodge v. the Queen (1983), 9 A.C. 117 (P.C.)
Reference re Chemicals, [1943] S.C.R. 1

133. The cases cited by the Appellants at pages 41 to 43 discuss the issue of when the power to sub-delegate is to be inferred in legislation where it is not explicitly given. These cases are concerned with delegation in subordinate

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legislation. It is submitted that there is no sub-delegation in section 251 and that these cases are inapplicable.

134. It is therefore submitted that the Court of Appeal for Ontario was correct in ruling that there was no abdication by Parliament of its authority to enact the criminal law respecting abortions.

Appeal Case,
Judgment of Ontario Court of Appeal, Vol. 33, p. 6929

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I) SECTION 96 OF THE CONSTITUTION ACT, 1867:

135. Section 96 of the Constitution Act, 1867 provides as follows:

> The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

This section has been interpreted by the Courts as prohibiting the conferral on administrative tribunals appointed by the Province of functions which broadly

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conform to those exercised in 1867 exclusively by Courts within the purview of section 96.

Reference re Adoption Act, [1938] S.C.R. 398
Reference re B.C. Family Relations Act, [1982] 1 S.C.R. 62
Reference re Residential Tenancies Act, [1981] 1 S.C.R. 714 at 734-5

136. It is submitted that the function performed by the therapeutic abortion committee does not conform broadly to any function exercised by the superior, district or county courts in 1867. It was not the function of any court

to issue the certificates referred to in section 251(4). The possible effect of the existence of a certificate in a future criminal trial does not mean that the committee is itself determining guilt or innocence.

137. Furthermore, it is submitted that in its institutional setting this function is not a "judicial" power. There is no dispute between parties, and no lis.

Reference re Residential Tenancies Act, (supra) at 735
Re Medhurst and Medhurst, (supra), at 578

138. It is therefore submitted that the Court of Appeal for Ontario did not err in ruling that section 251(4) does not offend against section 96 of the Constitution Act, 1867.

Appeal Case,
Judgment of Ontario Court of Appeal, Vol. 33, p. 6930.

POWER OF THE CROWN TO APPEAL:

139. It is respectfully submitted that Section 605 of the Criminal Code is not inconsistent with Sections 7, 11(d), 11(f), 11(h) or 13 of the Charter of Rights.

140. It is respectfully submitted that Section 11(h) contemplates that appellate rights will be available to the Crown. It is submitted that a person charged with an offence is only "finally" acquitted within the meaning of Section 11(h) after a verdict of acquittal has been rendered, and the right to review such an acquittal has been exhausted.

Appeal Case,
Judgment of the Ontario Court of Appeal, Vol. 33, Page 6935-40
Regina v. Duhamel (No. 2) (1981), 64 C.C.C. (2d) 538 (Alta.C.A.) at 543, aff'd (1985), 15 C.C.C. (3d) 491 at 494 (S.C.C.)
Minister of Fisheries and Oceans et al v. Curbera (1983), 7 C.C.C. (3d) 289 (S.C.C.) at 292
R v. Elendiuk (No. 1) (1986), 67 A.R. 219 (C.A.) at 220
Re Regina and Green (1983), 5 C.C.C. (3d) 95 (Ont. H.C.)
Welch v. the King, [1950] S.C.R. 412 at 428
Linkletter v. Walker 85 S. Ct. 1731 at 1734 note 5; 381 U.S. 618 (1965) at 622 note 5
Griffin v. Illinois, 76 S. Ct. 585 at 590; 351 U.S. 12 (1956) at 18
P.W. Hogg, Canada Act 1982 Annotated (Carswell, Toronto: 1982) p. 45
The Honourable D.C. McDonald, Legal Rights in the Canadian Charter of Rights and Freedoms (Carswell, Toronto: 1982) pp. 112-113
M.L. Friedland, "Legal Rights Under the Charter" (1982), 24 Crim. L.Q. 430 at p. 449

Spencer, Bower and Turner, Res Judicata 2nd ed. (Butterworths, London: 1969) pp. 131-145
cf. Charter of Rights, 11(g), 11(h), 11(i)

142. It is respectfully submitted that Section 7 of the Charter requires that the procedures by which a person is deprived of life, liberty and security of the person accord with the Canadian concept of fundamental justice. It is apparent from a review of the statutory history of the current Section 605 that Canadians have not regarded a right in the Crown to appeal acquittals as an anathema to the doing of justice. Rather, it is submitted that such a right has been deemed by Parliament to be a necessary part of the balancing of the interests of the accused and the interests of society so as to do fundamental justice to all concerned.

Appeal Case,
Judgment of the Ontario Court of Appeal, Vol. 33, p. 6930-40
The Queen v. Osborn, [1971] S.C.R. 184 at 190-4
R v. Jewitt, [1985] 2 S.C.R. 128 at 137-48
V.M. Del Buono, "The Right to Appeal in Indictable Cases: A Legislative History" (1979), 16 Alta. L. Rev. 446
Spencer, "Criminal Law and Criminal Appeals - The Tail that Wags the Dog", [1982] Crim. L.R. 260
M.L. Friedland, Double Jeopardy (Clarendon Press, Oxford: 1969) at 279-311
P.C. Stenning, Appearing for the Crown, (Brown Legal Publications Inc: Cowansville, 1986)
Brett Waller, Criminal Law: Text and Cases 4th ed (Butterworths, Melbourne: 1978) at 56, 57
Palko v. Conneticut 58 S. Ct. 149 at 153; 302 U.S. 319 at 328 (1937) (over-ruled in part)
New Jersey v. Tate, 505 A. 2d 941 (1986) at 942
"Bis Vexari: New Trials and Successive Prosecutions", 74 Harv. L. Rev. 1-15 (1960)
"Appeals by the State in Criminal Cases", 36 Yale L.J. 486 (1927)

143. It is submitted that the restricted right of appeal currently available to the Crown does not encroach on the role of the jury. The Crown's right to appeal on questions of law such as those involved in the case at bar ensures that prior to exercising its role a jury is properly instructed on the law, and that the trial has been conducted in accordance with proper legal principles.

Palko v. Conneticut, (supra), at 152
Belyea and Weintraub v. the King [1932] S.C.R. 279 at 337

144. It is further submitted that the concept of "other proceedings" is limited in its application to section 13 of the Charter and should not be read to

preclude an appeal from an acquittal as provided in section 605(1)(a) of the Criminal Code.

Dubois v. the Queen, [1985] 2 S.C.R. 350 at 366, 371-86, per McIntyre, J., (dissenting)

145. It is also respectfully submitted that even if section 605 were found to infringe the rights guaranteed by the Charter, the limits imposed by section 605 are reasonable limits demonstrably justified in a free and democratic society. The concern of Parliament in permitting Crown appeals on questions of law in criminal matters is a pressing and substantial concern, given the historical background and division of criminal law powers in Canada. It is submitted that the restrictions on the right of appeal address a proper proportionality between the interests of the accused and the interests of society.

R v. Oakes, (supra)
References under paragraphs 140 to 144 above

COSTS: THE VALIDITY OF SECTION 610(3) OF THE CRIMINAL CODE:

146. It is respectfully submitted that the Ontario Court of Appeal did not err in law in declining to award costs in this case. The constitutional validity of section 610(3) was not raised before the Court of Appeal. The section did not, however, operate to deny the Appellants anything before that Court. The Court of Appeal clearly indicated that this was not a case for costs even assuming they had a power to make such an award. The Appellants' conspiracy amounted to an attack on the rule of law. Defence counsel at trial conducted the defence in a manner which continued that attack. The Attorney General of Ontario in bringing this appeal was doing no more than discharging his duty to enforce the law as enacted by Parliament. There are no circumstances in this case which call for an award of costs to be made against Her Majesty in the Right of the Province of Ontario.

Re Ange, [1970] 3 O.R. 153; 5 C.C.C. 371 (Ont. C.A.)
Johnson v. the King (1904), A.C. 817 P.C. at 825
Regina v. Ouellette (1980), 1 S.C.R. 571 at 572
R.S. Reid and P.T. Burns, "Costs in Criminal Proceedings" Criminal Procedure; Canadian Law and Practice (Butterworths: 1981
20 C.J.S. Costs s. 439 (1940)

147. It is further submitted, should this Honourable Court feel the need to consider the issue, that section 610(3) of the Code does not itself violate

any of the provisions of the Charter of Rights relied on by the Appellants. There is no evidence before this Honourable Court or before the Ontario Court of Appeal which demonstrates that the Crown's appeal has put the Appellants in a position where they are financially unable to present their defence. It is submitted that it is important that prosecutorial decisions in connection with serious criminal offences be made independent of any consequences flowing from an adverse awarding of costs.

Nelles v. the Queen (1985), 51 O.R. (2d) 513 (C.A.) at 527-8 (leave to appeal to S.C.C. granted 54 O.R. (2d) 776)
Richman v. McMurtry (1983), 41 O.R. (2d) 559 (Ont. S.C.)
Re White and the Queen (1976), 32 C.C.C. (2d) 478 (Alta S.C.)
Regina v. Lyons (1982), 70 C.C.C. (2d) 1 (B.C.C.A.)
Legal Aid Act, R.S.O. 1980, ch. 234, s. 12, 13, 14
Criminal Code, ss. 611, 623

148. It is respectfully submitted that the fact that no costs could be awarded to or against the Crown on the appeal to the Court of Appeal did not lessen the burden of proof on the Crown at the first trial. Nor would it on a new trial. Nor would it render a new trial any the less a trial by jury. Nor would it render a new trial a violation of section 11(h) of the Charter. It is further submitted that section 610(3) is not a violation of section 15 of the Charter of Rights in that all persons charged with indictable offences who come before the Court of Appeal are equally treated. Nor would an award of costs be appropriate under section 24(1) of the Charter as the Appellants have not shown a breach of a constitutionally protected right of a nature which would make such an order a just and appropriate remedy.

Re McDonald and the Queen, (supra), at 763-8
Re Blainey v. O.H.A. (1986), O.R. 513 (C.A.) at 520-7
R v. R.L., (supra), at 24-5

II) THE DEFENCE OF NECESSITY:

(i) Question of Law:

149. It is respectfully submitted that the Ontario Court of Appeal did not err in holding that the Crown may appeal from a trial judge's ruling on whether there was any evidence to support a defence which was left to the jury. It is respectfully submitted that This Honourable Court has made it clear on a number of occasions that the trial judge's decision to leave a defence, involves a question of law.

Appeal Case,
Judgment of the Ontario Court of Appeal, Vol. 33, Pages 6940-66

Pappajohn v. the Queen, [1980] 2 S.C.R. 120 at 510
Kelsey v. the Queen, [1953] 1 S.C.R. 220 at 102
Morgentaler v. the Queen, [1976] 1 S.C.R. 616 at 225-6

150. It is further submitted that the question of whether or not the learned trial judge put matters which were legally irrelevant or failed to put matters which were legally relevant to the question of necessity raises a question of law. Such errors go to whether or not the various components of necessity have been properly placed before the jury.

Perka v. the Queen, [1984] 2 S.C.R. 232 at 259-62

ii) Evidence of Necessity:

a) A General Nature of the Defence:

151. It is acknowledged that the defence of necessity is available in Canada to the extent that it is preserved by section 7(3) of the Criminal Code. It operates so as to excuse an admittedly wrongful act.

Criminal Code, section 7(3)
Perka v. the Queen, (supra), at 259-60

152. It is submitted that the rationale for the defence as recognized in Canada is that the criminal law ought not to hold people to strict obedience in emergent situations where normal human instincts overwhelmingly impel disobedience. Criminal liability ought not to attach to acts which are truly involuntary. This defence, however, must be strictly controlled and scrupulously limited to situations which correspond to this underlying rationale.

Perka v. the Queen, (supra), at 245-51

153. It is respectfully submitted that this Honourable Court in Perka fashioned three prerequisites to the raising of this defence which can be generally described as follows: a) "emergency", (b) "no lawful way out" and (c) "proportionality". There must be evidence on all three elements before necessity becomes a live issue for the jury.

Perka v. the Queen, (supra), at 249-53

154. It is respectfully submitted that the defence of necessity is to be judged by the objective standard of society's expectation of appropriate and normal resistance to pressure.

Perka v. the Queen, (supra), at 256-60

Morgentaler v. the Queen, (supra), at 680-82
Regina v. Graham, [1982] 1 All E.R. 801 (C.A.) at 804-6
People v. Hubbard, 320 N.W. 2d 294 (Mich. C.Ct. 1982) at 1296-8
Lefave and Scott, Criminal Law, West, (1972) p. 386
G. Fletcher, Re-Thinking the Criminal Law (Little Brown and Co., (1978, Ch. 9, 10

b) Emergency

155. It is respectfully submitted that the defence of necessity is a residual defence, which in Canada, only operates to the extent that Parliament itself has not addressed the question of necessity in the Code. It is not open to a citizen or a jury to reassess the values fixed by Parliament in section 251 under the guise of the defence of necessity. It is submitted that in light of section 251, the necessity defence is only available to excuse someone who is confronted with a particular woman who is, at that time, in a situation of urgent necessity, a case which in a sense, does not fall within the true intendment of section 251 at all.

Criminal Code, section 7(3)
Perka v. the Queen, (supra), at 247-9, 259
Morgentaler v. the Queen, (supra), at 658-9, 679-80
Lefave and Scott, Criminal Law, (supra) at 832
Fletcher, Re-Thinking Criminal Law, (supra), at 792-6
"The Necessity Plea in English Criminal Law" (1972), Cambridge Law Journal 87 at 90-1
State v. Warshow, 410 A. 2d 1000 (Vt. Sup. Ct. 1979)
State v. Dorsey, 395 A. 2d 855 (N.H. Sup. Ct. 1978)
People v. Hubbard, (supra)
Cleveland v. Municipality of Anchorage 631 P. 2d 1073 (1981)

156. It is moreover submitted that the Appellants placed themselves in a position where they comtemplated that women would come to them seeking illegal abortions, which were to be provided as a matter of business routine. Consequently it can only be said that they chose their course of action as opposed to being remorselessly compelled to respond by virtue of an emergency thrust upon them. Their planning, deliberation and reliance on previous acquittals was all the very antithesis of truly involuntary conduct.

Perka v. the Queen, (supra), at 252-7
Fletcher, Re-Thinking the Criminal Law, (supra) at 811-2

157. It is, in any event, respectfully submitted that there was no evidence that gave an air of reality to the proposition that an emergency of the nature described in Perka, (supra) existed. This Honourable Court described the type of emergency required in a number of fashions, including:

> ... emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience.
>
> ... urgent situations of clear and imminent peril
>
> ... at a minimum the situation must be so emergent and the peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable.
>
> ... the defence only applies in circumstances if imminent risk where the action is taken to avoid a direct and immediate peril ...

Perka v. the Queen, (supra), at 248-52

158. It is respectfully submitted that the mere increase in the possibility of a complication arising in some future operation voluntarily sought is not capable of satisfying these tests. This is particularly true in the case at bar given the absence of evidence that such complications would, in all likelihood, have a serious or permanent effect on the patients health even if they did arise.

Morgentaler v. the Queen, (supra) at 652-3, 658-9
Stephen's Digest of Criminal Law, Carswell's 1980, p. 36
State v. Walton, 311 N.W. 2d 113 (Iowa Sup. Ct., 1981)
People v. Handy, 603 P. 2d 941 (Col. Sup. Ct., 1979)
State v. Warshow, (supra)
State v. Dorsey, (supra)
Commonwealth v. Capitolo, 498 A. 2d 806 (1985)

159. It is further submitted that the risk of death during a lawful abortion is extremely remote, none having occurred between 1975 and 1982. An increase in the possibility that such a remote eventuality would come to pass is equally incapable of giving rise to an emergency within the meaning of Perka.

c) Legal Way Out:

160. It is respectfully submitted that the second element of the defence requires that compliance with the law is demonstrably impossible. The wrongful act must not be avoidable.

Perka v. the Queen, (supra), at 251-2, 259

161. It is respectfully submitted that the evidence failed to raise the issue of "no legal way out". If anything the evidence showed that there are legal ways to obtain abortions. There is no evidence to show that compliance with the law is impossible.

Morgentaler v. the Queen, (supra), at 677-8
Gordon, The Criminal Law of Scotland, (W. Green & Son, 1978) at 420

d) Proportionality:

162. It is respectfully submitted that the defence of necessity is only available if there is proportionality between the harm inflicted by the actor and the harm sought to be avoided.

Perka v. the Queen, (supra), at 251-3

163. It is submitted that there is no evidence in the case at bar that the harm inflicted by the Appellants was less than the harm sought to be avoided.

Perka v. the Queen, (supra) at 251-3
Morgentaler v. the Queen, (supra) at 626-7, 674
The Necessity Plea in English Law, (supra), at 91
People v. Brown, 333 N.Y. Supp. 342 (N.Y.S. Sup. Ct., 1972)
Regina v. Dudley and Stephens (1884), 14 Q.B.D. 275
United States v. Simpson, 460 F. 2d 515 (9th Cir. U.S.A., 1972)

iii) Charge to the Jury on Necessity:

164. It is respectfully submitted that the Court of Appeal was correct in holding that the learned trial judge erred in law in improperly leaving matters for the jury on the question of emergency. Some of those matters can be listed as follows:

a) the fact that some people went outside the Province to get an abortion and the fact that people who wanted abortions could not get them without some delay;

Appeal Case,
Vol. 18, page 3817, line 13 to Page 3825, line 25.

b) inequal access between rich and poor;

Appeal Case,
Vol. 18, Page 3825, line 25 to Page 3826, line 2.

c) the stress of unwanted pregnancy compounded by the requirements of the law that an abortion be obtained through a therapeutic abortion committee;

Appeal Case,
Vol. 18, Page 3826, line 20 to Page 3828, line 26, Vol. 19, Page 4040, lines 15 to 25.

d) the question as to whether or not hospitals were unsuitable facilities to perform an abortion;

Appeal Case,
Vol. 18, Page 3830, line 30 to Page 3832, line 16, Vol. 19, Page 4041, line 30 to Page 4042, line 22.

e) good faith beliefs of the Appellants;

Appeal Case,
Vol. 18, Page 3805, lines 20 to 30; Page 3826, lines 15 to 25; Page 3838, lines 6 to 12; Page 3878, lines 4 to 19; Vol. 19, Page 4029, line 28 to Page 4030, line 14; Page 4072, lines 20 to 30.

f) the fact that appointments were made at the Morgentaler Clinic.

Appeal Case,
Vol. 18, Page 3822, line 20 to Page 3823, line 9.

165. It is respectfully submitted that the learned trial judge did not properly put the question of proportionality before the jury in that he suggested that the jury consider the consequences of Dr. Morgentaler's breaking the law in Quebec and whether or not freestanding clinics were generally beneficial. In addition he failed to instruct the jury that the harm done included the termination of the foetus's development and existence without the sanction of an independent committee.

Appeal Case,
Vol. 18, Page 3837, line 25 to Page 3846, line 5, Page 4031, lines 23 to 31, Vol. 19, Page 4042, lines 24 to Page 4043, line 22, Page 4046, line 20 to Page 4050, line 24.

FAILURE OF CROWN COUNSEL TO OBJECT:

166. It is respectfully submitted that Crown counsel made it clear in his address to the jury that in his view the defence of necessity was not available and he briefly outlined the reasons why. It is in that context that Crown counsel's comments occurring at the end of the day preceding the charge, must be read. Following the charge, Crown counsel objected in no uncertain terms to the defence being left with the jury.

Appeal Case,
Vol. 17, Page 3761, line 14 to Page 3762, line 30; Page 3767, line 22 to Page 3768, line 14; Vol. 18, Page 3950, line 20 to Page 3974, line 17, Vol. 19, Page 3983, lines 9 to 20.

167. It is therefore submitted that objection was raised to the putting of the defence of necessity. In any event, the alleged failure to object to the defence of necessity did not ipso facto relieve the Court of Appeal of the obligation to ensure that this trial was conducted in accordance with the law.

Cullen v. the King, [1949] S.C.R. 658; 94 C.C.C. 337
Stirland v. D.P.P., [1944] 2 All E.R. 13 (P.C.)

JUDGMENT IN THE COURT BELOW:

168. It is respectfully submitted that the Court of Appeal properly looked to the evidence to determine if the issue of necessity had been truely raised on this record. It is respectfully submitted that the Court of Appeal was correct in holding that the defence of necessity was "misconceived" in the case at bar. It is further submitted that the Court of Appeal was correct in holding that in any event the learned trial judge erred in law in instructing the jury as to how the tests in Perka could be met on this evidence.

Pappajohn v. the Queen, (supra), at 130-2

III) DEFENCE COUNSEL'S ADDRESS:

(i) Question of Law:

169. It is respectfully submitted that the Court of Appeal for Ontario was correct in holding that defence counsel's address to the jury in this case raised a question of law so as to found a proper basis for an appeal pursuant to section 605 of the Criminal Code.

Boucher v. the Queen, [1955] S.C.R. 16 at 17-9, 24-5, 26-9
Pisani v. the Queen, [1971] S.C.R. 738 at 738-42
Regina v. Cashin (1981), 65 C.C.C. (2d) 56 (N.S.C.A.) at 58-9
Regina v. Schwartz and Schwartz (1973), 13 C.C.C. (2d) 161 (N.S.C.A.) at 164

170. It is respectfully submitted that this address invited the jury to find that section 251 of the Code was "a bad law, an immoral law". Defence counsel suggested that the guilt or innocence of the accused was not the issue but rather the question was really whether or not Canadian women should be entitled to have an abortion at a place of their choice. He suggested it was up to the jury to bring about change in the law. Counsel told the jury they should send a message with their verdict to the authorities. The address was designed to imbue the jury with the belief that they had the "right" not to apply the law. The address amounted to an invitation to ignore the trial judge's instructions and amounted to an invitation to the jury members to violate their oaths.

Appeal Case,
Judgment of the Ontario Court of Appeal, Vol. 17, Page 3703, lines 13 to 19; Page 3704, line 25 to Page 3705, line 19; Page 3705, lines 27 to 30; Page 3707, line 24 to Page 3708, line 4; Page 3710, lines 22 to 23; Page 3711, lines 24 to 31; Page 3716, line 29 to Page 3719, line 5; Page 3719, lines 20 to 27; Page 3725, lines 25 to 26; Page 3735, line 28 to Page 3736, line 30; Page 3740, line 6 to Page 3742, line 4; Page 3743, line 4 to Page 3746, line 12; Page 3747, lines 1 to 11.

ii) Propriety of Address:

171. It is respectfully submitted that it is a fundamental principle of our system of trial by jury that the judge is to direct the jury on the law and the jury must take that law from the trial judge. To inform the jury that they have the "right" not to apply the law as directed is not only to invite them to violate their oath to render a "true" verdict but it is a serious attack on the authority of the trial judge.

Kelsey v. the Queen, [1953] 1 S.C.R.220 at 226
Joshua v. Reginam, [1955] All E.R. 22 at 25 (P.C.)
Sparf and Hansen v. United States, 15 S.Ct. 273; 156 U.S. 51 at 63, 71-2, 90-1, 102-3, 105
The King v. Shipley (1794), 9 Dougl 73; 99 E.R. 774 at 823
Court Room Procedure Handbook (1979) Oath of a Juror in Criminal Proceedings
Practice Note, [1984] All E.R. 528
United States v. Trujillo, 714 F. 2d 102 at 106 (11th Cir., 1983)
United States v. Boardman, 419 F. 2d 110 (1st Cir., 1969)
Devlin, The Judge, (Oxford Univ. Press, 1979) at 75-6, 88-9, 124-6
Regina v. Schumiatcher, [1966] 2 C.C.C. 76 (Sask. C.A.)

172. It is submitted that because the jury is asked for a general verdict of guilty or not guilty they have a de facto power to violate their oath and render what could be termed a "perverse" verdict. This however does not mean that they have the "right" to decline to apply the law which the trial judge instructs them to apply and to tell the jury that they have this right is a serious misstatement of the law and prejudicial to the due administration of justice.

Bushell's Case (1670), Howell's St. Tr. 999; 89 E.R. 2
The King v. Shipley, (supra)
Devlin, The Judge, (supra), at 117-148
Sparf and Hansen v. United States, (supra)
United States v. Dougherty, 473 F. 2d 1113 (D.C. Cir. Ct. App., 1972)
United States v. Simpson, (supra)
United States v. Moylan, 417 F. 2d 1002 (4th Cir., 1969)
United States v. Trujillo, (supra)
United States v. Anderson, 716 F. 2d 446 (7th Cir., 1983)
State v. Champa 494 A. 2d 102 (R.I.S.C., 1985)
Regina v. Holden (1974), 2 N.S.W.L.R. 548 (C.A.)

173. It is respectfully submitted that it is the duty of counsel, as an officer of the court, to represent his client "within the limits of the law". To invite jurors to nullify the law based on their own standards of what is morally right and wrong effectively degrades the rule of law to which counsel owes a duty and upon which the system is predicated and derives its credibility.

United States v. Moylan, (supra)

United States v. Dougherty, (supra)
Law Society of Upper Canada, Professional Conduct Handbook, Rule 8
The King v. Shipley, (supra)
Sparf and Hansen v. United States, (supra)
Arshack v. United States, 321 A. 2d 845 (D.C. Ct. App., 1974)
United States v. Washington, 705 F. 2d 489 (D.C. App., Ct., 1983)
Wyley v. Warden, 372 F. 2d 742 (4th Cir., 1967)
G.J. Simpson "Jury Nullification in the American System: A Skeptical View" (1976), 54 Texas L.R. 488

174. It is further submitted that it was improper for counsel to in effect invite the jury to ignore the ruling of the learned trial judge that section 251 was constitutionally valid and it was also improper for counsel to invite the jury to look to the consequences of their verdict.

Regina v. Cashin, (supra)
Regina v. Webb (1914), 22 C.C.C. 424 (Man. C.A.)
Regina v. Labarre (1978), 45 C.C.C. (2d) 171 (Que. C.A.)

175. It is submitted with the greatest respect that the learned trial judge failed, to fully, forcefully and specifically disabuse the juror's minds of defence counsel's comments but, more importantly, it is submitted that, given the nature of this address, the Court of Appeal for Ontario was correct in finding that nothing could be done to save this trial once this address was delivered.

Appeal Case,
Vol. 17, Page 3722, lines 28 to 20; Page 3743, lines 4 to 11; Vol. 18, Page 3849, line 26 to Page 3852, line 16; Page 3854, lines 25 to 30; Page 3855, lines 13 to 16; Vol. 19, Page 4024, lines 10 to 20; Page 4025, line 4 to Page 4026, line 24; Page 4053, lines 20 to 25; Page 4054, lines 20 to 21; Page 4068, lines 2 to 21.
Regina v. Taylor (1979), 46 C.C.C. (2d) 105

iii) Judgment in the Court Below:

176. It is respectfully submitted that the Court of Appeal for Ontario did not err in law in holding that the Crown appeal must succeed on this basis as well. Although Crown Counsel did not seek a mistrial that is not determinative of the question as the Ontario Court of Appeal had and This Honourable Court has the ultimate responsibility to ensure that the trial, in the case at bar, was conducted in accordance with the rule of law.

Cullen v. the King, (supra)
Stirland v. the Queen, (supra)
Regina v. Ambrose (1975), 25 C.C.C. (2d) 90 (N.B.C.A.)
Regina v. Hortopan (1964), 2 C.C.C. 306 (Ont. C.A.)

NO SUBSTANTIAL WRONG OR MISCARRIAGE OF JUSTICE:

177. It is respectfully submitted that the Ontario Court of Appeal was correct in holding that there were "substantial" errors in law that occurred in the case at bar. Indeed, the Court of Appeal found the errors so "fundamental" as to conclude that there has been "no trial according to law". The only defence put to the jury by the learned trial judge was held to be unavailable. The learned trial judge was found to have instructed the jury to consider irrelevant matters. Defence counsel's comments invited the jury to violate their oaths and impaired the authority of the trial judge. Whatever test is applied it is submitted that the Ontario Court of Appeal did not err in holding that this verdict could not stand.

Appeal Case,
Judgment of the Ontario Court of Appeal, Vol. 33, Page 6966, lines 20 to 40.
Vezeau v. the Queen, [1977] 2 S.C.R. 277

178. It is submitted that, to the extent that any of the items in paragraph 146 have relevance:

i) the trial judge did not comment on the failure of two of the accused to testify or, if he did, the offence having been in effect admitted, it made no difference.

McConnell and Beer v. the Queen, [1968] 4 C.C.C. 257; 4 C.R.N.S. 269

ii) the trial judge adequately instructed the jury on the theory of the defence and the evidence relating to it .

Kelsey v. the Queen, (supra), at 102-3

iii) comments made by Crown Counsel were largely prompted by the improper address by defence counsel.

iv) the trial judge did not fail to display neutrality. If anything he was overly favourable to the Appellants in permitting necessity to go to the jury at all.

v) nor did the learned trial judge err in holding that the onus was on the Appellants to raise the defence that the clinic was an accredited or approved hospital.

Regina v. Lee's Poultry (1985), 17 C.C.C. (3d) 539 at 542
Regina v. Conrad (1984), 8 C.C.C. (3d) 482, at 487
Regina v. Edwards, [1975] 1 Q.B. 27
Morgentaler v. the Queen, (supra), at 672-4

PART IV
ORDER REQUESTED

179. It is respectfully submitted that the appeal should be dismissed, and the order of the Court of Appeal for Ontario for a new trial be affirmed.

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180. It is further respectfully submitted that the constitutional questions should be answered as follows:

1) Section 251 of the Criminal Code of Canada does not infringe or deny the rights and freedoms guaranteed by the Charter.
2) If there is an infringement by section 251 of the rights and freedoms guaranteed by the Charter, the limits on the rights and freedoms are justified by section 1 of the Charter.

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3) Section 251 of the Criminal Code of Canada is within the legislative powers of the Parliament of Canada.
4) Section 251 of the Criminal Code of Canada does not violate section 96 of the Constitution Act, 1867.
5) Section 251 of the Criminal Code of Canada does not unlawfully delegate federal criminal power.
6) Sections 605 and 610(3) of the Criminal Code do not infringe or deny the rights and freedoms guaranteed by the Charter.

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7) If there is any infringement by sections 605 or 610(3) of the rights and freedoms guaranteed by the Charter, the limits on the rights and freedoms are justified by section 1 of the Charter.

ALL OF WHICH is respectfully submitted.

DATED at Toronto this 22nd day of September, 1986.

40

W. James Blacklock,
of Counsel for the Respondent,
The Attorney General for the
Province of Ontario

Bonnie J. Wein,
of Counsel for the Respondent,
The Attorney General for the
Province of Ontario

PART V
TABLE OF AUTHORITIES

CASES	PAGE NO.	PARA NO.
A.G.. Canada v. Lavell, [1974] S.C.R. 1349	40	109
A.G. Nova Scotia v. A.G. Canada, [1951] S.C.R. 31	45	127
Aluminum Co. of Canada Ltd. v. the Queen (Ont. Div. Ct., July 16, 1986, unreported)	38	105
Andrews v. Law Society of B.C., [1986] 4 W.W.R. 242 (B.C.C.A.)	38	105
Arshack v. United States, 321 A. 2d 845 (D.C. Ct. App., 1974)	58	173
Beal v. Doe, 97 S.Ct. 2366 (1977)	30 39 40 43	83 107 110 118
Belyea and Weintraub v. the King [1932] S.C.R. 279	48	143
Borowski v. A.G. Canada (1983), 8 C.C.C. (3d) 392 (Sask. Q.B.)	28	77
Bushell's Case (1670), Howell's St. Tr. 999; 89 E.R. 2	57	172
Boucher v. the Queen, [1955] S.C.R. 16	56	169
Carruthers v. Therapeutic Abortion Committee of Lions Gate Hospital (1983), 6 D.L.R. (4th) 57 (F.C.A.) (leave to appeal to S.C.C. refused)	35	98
Charboneau et al v. College of Physicians and Surgeons of Ontario (1985), 52 O.R. (2d) 552 (H.C.J.)	32	87
City of Akron v. Akron Center for Reporductive Health Inc. et al, 103 S.Ct. 2481 (1983)	25 30 31 31	71 81 85 86
Cleveland v. Municipality of Anchorage 631 P. 2d 1073 (1981)	52	155
Commonwealth v. Capitolo, 498 A. 2d 806 (1985)	53	158
Coughlin v. Ontario Highway Transport Board, [1968] S.C.R. 569	45	127
Craig v. Boren, 429 U.S. 190 (1976)	40	109

RESPONDENT'S FACTUM — PART V — TABLE OF AUTHORITIES

Cullen v. the King, [1949] S.C.R. 658; 94 C.C.C. 337	55	167
	58	176
Curr v. the Queen, [1972] S.C.R. 889	28	76
	31	84
Dehler v. Ottawa Civic Hospital (1979), 25 O.R. (2d) 748 (H.C.)	30	83
	35	98
	43	118
	44	122
	44	123
Doe v. Bolton, 93 S.Ct. 739 (1973)	30	83
	43	118
Dubois v. the Queen, [1985] 2 S.C.R. 350	41	111
	49	144
Fawcett Properties Ltd. v. Buckingham County Council, [1960] 3 All E.R. 503 (H.L.)	35	98
Frontiero v. Richardson, 411 U.S. 677 (1973)	40	109
Grayned v. City of Rockford, 92 S.Ct. 2294 (1972)	35	97
Griffin v. Illinois, 76 S.Ct. 585 (1956)	47	140
Harris v. McRae, 448 U.S. 297 (1980)	40	109
Hodge v. the Queen (1983), 9 A.C. 117 (P.C.)	46	132
Hunter v. Southam, [1984] 2 S.C.R. 145	40	110
Isabey v. Manitoba Health Services Commission et al, [1985] 6 W.W.R. 712 (Man. Q.B.)	32	87
Johnson v. the King (1904), A.C. 817 P.C.	49	146
Johnstone, Johnstone and Goler v. Regina, (N.S.C.A., March 20, 1986, unreported)	38	105
Joshua v. Reginam, [1955] All E.R. 22 at 25 (P.C.)	57	171
Kask v. Shimizu et al, (Alta. Q.B., April 11, 1985, unreported)	38	105
Kelsey v. the Queen, [1953] 1 S.C.R. 220	51	149
	57	171
	59	178
Kindler v. Minister of Employment and Immigration, A.G. Canada and Chief of Arbitration Division (Quebec/Atlantic), [1985] 1 F.C. 676 (T.D.)	28	76

RESPONDENT'S FACTUM — PART V — TABLE OF AUTHORITIES

Kolender v. Lawson, 103 S.Ct. 1855 (1983)	33	92
	34	94
	35	97
La Rivière v. the Queen (1957), 119 C.C.C. 160 (Que. C.A.)	30	83
	43	118
Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357	28	76
	32	89
	34	95
Linkletter v. Walker 85 S. Ct. 1731	47	140
Lord's Day Alliance of Canada v. A.G.B.C., [1959] S.C.R. 497	44	124
MacBain v. Canadian Human Rights Commission, [1984] 1 F.C. 696 (T.D.)	28	76
Maher v. Roe, 432 U.S. 464; 97 S.Ct. 2376 (1977)	40	110
Marcotte v. The Deputy Attorney General of Canada, [1976] 1 S.C.R. 108	35	98
McConnell and Beer v. the Queen, [1968] 4 C.C.C. 257	59	178
McGlothen v. Department of Motor Vehicles, 72 Cal. App. 3d 542 (1977)	38	105
McKay v. the Queen, [1980] 2 S.C.R. 370	38	105
Michael M. v. Superior Court, 450 U.S 464 (1981)	40	109
Minister of Fisheries and Oceans et al v. Curbera (1983), 7 C.C.C. (3d) 289 (S.C.C.)	47	140
Morgentaler v. the Queen, [1976] 1 S.C.R. 616	25	71
	28	76
	28	77
	29	80
	30	83
	31	86
	35	98
	39	107
	40	110
	41	112
	43	118
	44	122
	44	123
	44	125
	51	149
	52	154
	52	155
	53	158
	53	161
	54	163
	59	178

Nelles v. the Queen (1985), 51 O.R. (2d) 513 (C.A.)	50	147
New Jersey v. Tate, 505 A. 2d 941 (1986)	48	142
New York v. Ferber, 102 S.Ct. 3348 (1982)	33	93
Ogg-Moss v. the Queen, [1984] 2 S.C.R. 173	28	76
Operation Dismantle Inc. et al v. the Queen et al, [1985] 1 S.C.R. 441	26 27 27 33	74 75 76 90
Palko v. State of Connecticut, 58 S.Ct. 149 (1937)	32 48	89 143
Pappajohn v. the Queen, [1980] 2 S.C.R. 120	51 56	149 168
Paton v. U.K. (1980), 3 E.H.H.R. 408	28	77
People v. Brown, 333 N.Y. Supp. 342 (N.Y.S. Sup. Ct., 1972)	54	163
People v. Handy, 603 P. 2d 941 (Col. Sup. Ct., 1979)	53	158
People v. Hubbard, 320 N.W. 2d 294 (Mich. C.Ct. 1982)	52 52	154 155
Perka v. the Queen, [1984] 2 S.C.R. 232	51 51 51 51 51 52 52 53 53 54 54	150 151 152 153 154 155 156 157 160 162 163
Pisani v. the Queen, [1971] S.C.R. 738	56	169
Poelker v. Doe, 97 S.Ct. 2391 (1977)	40	110
Powell v. Texas, 88 S.Ct. 2145 (1968)	32	89
Practice Note, [1984] All E.R. 528	57	171

RESPONDENT'S FACTUM — PART V — TABLE OF AUTHORITIES

R v. Ayres (1984), 15 C.C.C. (3d) 208 (Ont. C.A.)	42	118
R v. Cohn (1984), 48 O.R. (2d) 65 (C.A.)	33	92
	34	94
R v. Elendiuk (No. 1) (1986), 67 A.R. 219 (C.A.)	47	140
R v. Glibbery, [1963] 1 O.R. 232 (C.A.)	45	129
R v. James (Ont. C.A., July 23, 1986, unreported)	41	111
R v. Jewitt, [1985] 2 S.C.R. 128	48	142
R v. Langevin (1984), 45 O.R. (2d) 705 (C.A.)	33	92
R v. Lucas and Neely (1986), 14 O.A.C. 124	41	111
R v. Medhurst and Medhurst et al (1984), 45 O.R. (2d) 575 (H.C.)	35	98
	46	130
	47	137
R v. Miller and Cockriel, [1977] 2 S.C.R. 680,	37	103
	37	104
R v. Oakes, [1986] 1 S.C.R. 10	41	112
	42	117
	49	145
R v. Popert et al (1981), 58 C.C.C. (2d) 505 (Ont. C.A.)	34	94
R v. Seo (1986), 54 O.R. (2d) 293 (Ont. C.A.)	41	111
R v. Stevenson and McLean (1980), 57 C.C.C. (2d) 526 (Ont. C.A.)	34	94
R v. Videoflicks (1984), 48 O.R. (2d) 395 (C.A.)	27	76
	34	95
	36	100
	37	102
Re Ange, [1970] 3 O.R. 153; 5 C.C.C. 371 (Ont. C.A.)	49	146
Re Anti-Inflation Act, [1967] 2 S.C.R. 373	34	95
Re Attorney General of British Columbia and Cowichan Board of Trustees (1985), 19 D.L.R. (4th) 166 (B.C.S.C.)	37	102
Re Becker and the Queen (1983), 148 D.L.R. (3d) 539 (Alta. Q.B.)	28	76
Re Blainey v. O.H.A. (1986), O.R. 513 (C.A.)	50	148
Re Chapman and the Queen (1984), 12 C.C.C. (3d) 1 (Ont. C.A.)	41	111

Re D & H Holdings Ltd. and City of Vancouver (1985), 21 D.L.R. (4th) 230 (B.C.S.C.	35	98
Re Global Communications and A.G. Canada (1984), 44 O.R. (2d) 609 (C.A.)	31	86
Re Mia and Medical Services Commission of British Columbia (1985), 16 C.R.R. 233 (B.C.S.C.)	32	87
Re McDonald and the Queen (1985), 51 O.R. (2d) 745 (C.A.)	38 41 50	105 111 148
Re Mitchell and the Queen (1983), 6 C.C.C. (3d) 193 (Ont. H.C.)	37	104
Re Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311	35	98
Re Ontario Film and Video Appreciation Society and Ontario Board of Censors (1984), 45 O.R. (2d) 80 C.A.)	29	79
Re Peralta et al and the Queen in right of Ontario (1985), 49 O.R. (2d) 705; 16 D.L.R. (4th) 259 (C.A.)	45	128
Re Regina and Green (1983), 5 C.C.C. (3d) 95 (Ont. H.C.)	47	140
Re R.L. Crain et al and Couture et al (1983), 6 D.L.R. (4th) 478 (Sask. Q.B.)	32 33	89 90
Re Singh and Minister of Employment and Immigration, [1985] 1 S.C.R. 177	26 27 27 42	74 75 76 117
Re Soenen and Thomas (1983), 8 C.C.C. (3d) 224 (Alta. Q.B.)	37 37	103 104
Re Southam and the Queen (No. 1) (1983), 41 O.R. (2d) 113 (C.A.)	29	79
Re U.S.A. v. Smith (1984), 44 O.R. (2d) 705	43	118
Re White and the Queen (1976), 32 C.C.C. (2d) 478 (Alta S.C.)	50	147
Rebic v. Attorney General of British Columbia (1986), 2 B.C.L.R. (2d) 364 (C.A.)	38	105
Reed v. Reed, 404 U.S. 71 (1971)	40	109
Reference re Adoption Act, [1938] S.C.R. 398	46	135

Reference re an Act to Amend the Education Act (1986), 53 O.R. (2d) 513 (C.A.)	38	105
Reference re B.C. Family Relations Act, [1982] 1 S.C.R. 62	46	135
Reference re Chemicals, [1943] S.C.R. 1	46	132
Reference re Residential Tenancies Act, [1981] 1S.C.R. 714	46 47	135 137
Reference Re Section 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486	25 26 32 38 42 42	70 74 89 105 117 118
Regina v. Ambrose (1975), 25 C.C.C. (2d) 90 (N.B.C.A.)	58	176
Regina v. Cashin (1981), 65 C.C.C. (2d) 56 (N.S.C.A.)	56 58	169 174
Regina v. Conrad (1984), 8 C.C.C. (3d) 482	59	178
Regina v. Czuczman (1986), 54 O.R. (2d) 574 (C.A.)	27	75
Regina v. Dudley and Stephens (1884), 14 Q.B.D. 275	54	163
Regina v. Duguay (1985), 50 O.R. (2d) 375 (C.A.)	35	97
Regina v. Duhamel (No. 2) (1981), 64 C.C.C. (2d) 538 (Alta.C.A.)	47	140
Regina v. Edwards, [1975] 1 Q.B. 27	59	178
Regina v. Fisher; Regina v. Prest (1985), 49 C.R. (2d) 223 (Man. Q.B.)	27	75
Regina v. Graham, [1982] 1 All E.R. 801 (C.A.)	52	154
Regina v.Hislop et al, (Ont. C.A., September 22, 1980, unreported)	35	98
Regina v. Holden (1974), 2 N.S.W.L.R. 548 (C.A.)	57	172
Regina v. Hortopan (1964), 2 C.C.C. 306 (Ont. C.A.)	58	176
Regina v. Labarre (1978), 45 C.C.C. (2d) 171 (Que. C.A.)	58	174
Regina v. Lee's Poultry (1985), 17 C.C.C. (3d) 539	59	178
Regina v. Lyons (1982), 70 C.C.C. (2d) 1 (B.C.C.A.)	50	147

Regina v. Oquatag (1985), 18 C.C.C. (3d) 440 (N.W.T.S.C.)	28	76
Regina v. Ouellette (1980), 1 S.C.R. 571	49	146
Regina v. Quesnel (1985), 53 O.R. (2d) 330 (C.A.)	28	76
Regina v. Red Hot Video Ltd. (1985), 18 C.C.C. (3d) 153 (B.C.C.A.)	33	92
Regina v. R.L. (1986), 14 O.A.C. 318	38	105
Regina v. R.S. (1985), 19 C.C.C. (3d) 115 (Ont. C.A.)	32	87
Regina v. Robson (1985), 19 C.C.C. (3d) 137 (B.C.C.A.)	27 32 35	75 90 97
Regina v. Roche (1985), 20 C.C.C. (3d) 524 (Ont. C.A.)	33	90
Regina v. Schumiatcher, [1966] 2 C.C.C. 76 (Sask. C.A.)	57	171
Regina v. Schwartz and Schwartz (1973), 13 C.C.C. (2d) 161 (N.S.C.A.)	56	159
Regina v. Stevens (1983), 3 C.C.C. (3d) 198 (Ont. C.A.)	32	90
Regina v. Taylor (1979), 46 C.C.C. (2d) 105	58	175
Regina v. Webb (1914), 22 C.C.C. 424 (Man. C.A.)	58	174
Regina v. Young (1984), 46 O.R. (2d) 520 (C.A.),	32	90
Richman v. McMurtry (1983), 41 O.R. (2d) 559 (Ont. S.C.)	50	147
Roe v. Wade, 93 S. Ct. 705 (1973)	28 29 30 30 31 41 43	77 80 81 83 85 112 118
Sparf and Hansen v. United States, 15 S.Ct. 273	57 57 58	171 172 173
Smith, Kline & French Laboratories Ltd. et al v. Attorney General of Canada (1985), 24 D.L.R. (4th) 321 (F.C.T.D.)	38	105
State v. Champa 494 A. 2d 102 (R.I.S.C., 1985)	57	172
State v. Dorsey, 395 A. 2d 855 (N.H. Sup. Ct. 1978)	52	155
State v. Warshow, 410 A. 2d 1000 (Vt. Sup. Ct. 1979)	52	155

RESPONDENT'S FACTUM — PART V — TABLE OF AUTHORITIES

State v. Walton, 311 N.W. 2d 113 (Iowa Sup. Ct., 1981)	53	158
Stirland v. D.P.P., [1944] 2 All E.R. 13 (P.C.)	55 58	167 176
The King v. Shipley (1794), 9 Dougl 73; 99 E.R. 774	57 57 58	171 172 173
The Queen v. Big M Drug Mart, [1985] 1 S.C.R. 295	29 36 37 38 43 44	78 99 102 105 119 125
The Queen v. Osborn, [1971] S.C.R. 184	48	142
Thomas v. Review Board of the Indiana Employment Security Division et al., 450 U.S. 707 (1981)	36	100
United States v. Anderson, 716 F. 2d 446 (7th Cir., 1983)	57	172
United States v. Boardman, 419 F. 2d 110 (1st Cir., 1969)	57	171
United States v. Dougherty, 473 F. 2d 1113 (D.C. Cir. Ct. App., 1972)	57 58	172 173
United States v. Moylan, 417 F. 2d 1002 (4th Cir., 1969)	57 57	172 173
United States v. Raines, 80 S.Ct. 519 (1960)	34	95
United States v. Simpson, 460 F. 2d 515 (9th Cir. U.S.A., 1972)	57	172
United States v. Trujillo, 714 F. 2d 102 at 106 (11th Cir., 1983)	57 57	171 172
United States v. Vuitch, 91 S.Ct. 1294 (1971)	35	98
United States v. Washington, 705 F. 2d 489 (D.C. App., Ct., 1983)	58	173
Vezeau v. the Queen, [1977] 2 S.C.R. 277	59	177
Village of Hoffman Estate v. Flipside, 102 S.Ct. 1186 (1982)	34	95
Welch v. the King, [1950] S.C.R. 412	47	140
Williamson v. Lee Optical, 348 U.S. 483 (1955)		
Wisconsin v. Yoder, 406 U.S. 205 (1972)	36	100

Wyley v. Warden, 372 F. 2d 742 (4th Cir., 1967)	58	173
Zwickler v. Koota, 88 S.Ct. 391 (1967)	33	93
TEXTS		
Abel, Laskin's Canadian Constitutional Law, (Toronto: Carswell Compnay Ltd.: 1975) 4th ed., at 825	44	124
Blackstone, Commentaries on the Laws of England (1765-1769) Vol. 1, p. 125	27 28	76 77
Del Buono, V.M., "The Right to Appeal in Indictable Cases: A Legislative History" (1979), 16 Alta. L. Rev. 446	48	142
Devlin, The Judge, (Oxford Univ. Press, 1979)	57 57	171 172
Driedger, "The Interaction of Federal and Provincial Laws" (1976), 54 Can. Bar Rev. 695	45 45	127 129
Fletcher,G., Re-Thinking the Criminal Law (Little Brown and Co., (1978, Ch. 9, 10	52 52 52	154 155 156
Friedland, M.L., Double Jeopardy (Clarendon Press, Oxford: 1969)	48	142
Friedland, M.L., "Legal Rights Under the Charter" (1982), 24 Crim. L.Q. 430	47	140
Garant, P., "Fundamental Freedoms and Natural Justice", Canadian Charter of Rights and Freedoms, Tarnopolsky and Beaudoin, ed (Carswell, Toronto: 1982) at 270	28 28	76 77
Gold, "A Principled Approach to Equality Rights" (1983), 4 Sup. Ct. L.R. 131 a	38	105
Gordon, The Criminal Law of Scotland, (W. Green & Son, 1978)	53	161
Gunther, Constitutional Law, 10th ed., p. 1189 n.9	31 33	85 93
Hogg,P.W., Canada Act 1982 Annotated (Carswell, Toronto: 1982)	47	140
Lefave and Scott, Criminal Law, West, (1972) p. 386	52 52	154 155
Martin's 1955 Annotated Criminal Code, at 445	29	80
The Honourable D.C. McDonald, Legal Rights in the Canadian Charter of Rights and Freedoms (Carswell, Toronto: 1982)	47	140

	Nedjati, Human Rights Under the European Convention (North-Holland Publishing, New York: 1978) 85-87	28	76
	Noonan,J.T., "An Absolute Value in History", in The Morality of Abortion 4th printing (Harvard University Press, Cambridge: 1977)	30 41	83 112
10	Reid, Administrative Law and Practice 2d ed. (Butterworths, Toronto: 1976)	35	98
	Reid and Burns, "Costs in Criminal Proceedings" Criminal Procedure; Canadian Law and Practice (Butterworths: 1981)	49	146
	Simpson, G.J., "Jury Nullification in the American System: A Skeptical View" (1976), 54 Texas L.R. 488	58	173
20	de Smith, S.A., Judicial Review of Administrative Action 4th ed. (Stevens, London: 1980) at 346	35	98
	Spencer, "Criminal Law and Criminal Appeals - The Tail that Wags the Dog", [1982] Crim. L.R. 260	48	142
	Spencer, Bower and Turner, Res Judicata 2nd ed. (Butterworths, London: 1969)	48	141
	Stenning, P.C., Appearing for the Crown, (Brown Legal Publications Inc: Cowansville, 1986)	48	142
30	Stephen's Digest of Criminal Law, Carswell's 1980, p. 36	53	158
	Tarnopolsky, W.S., "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983), 61 Can. Bar. Rev. 241	38	105
	Tietze, C.,Induced Abortion, A World Review (New York: The Population Council, 1983)	41	113
	Trechsel, S."The Right to Liberty and Security of the Person" (1980), 1 Human Rts. L.J. 88	28	76
40	Tribe, L., American Constitutional Law, (New York: Foundation Press Inc., 1978) a	30 31 36 43	83 84 101 118
	Tussman and tenBroek "The Equal Protection of the Laws", (1949), 37 Calif. L. Rev. 341	38	105
	Brett Waller, Criminal Law: Text and Cases 4th ed (Butterworths, Melbourne: 1978)	48	142
	Williams, G. Textbook of Criminal Law (Stevens, London: 1978) at 252 et. seq.	29	80

OTHER AUTHORITIES

"Appeals by the State in Criminal Cases", 36 Yale L.J. 486 (1927)	48	142
"Bis Vexari: New Trials and Successive Prosecutions", 74 Harv. L. Rev. 1-15 (1960)	48	142
Court Room Procedure Handbook (1979) Oath of a Juror in Criminal Proceedings	57	171
European Commission on Human Rights, Decisions and Report, #5573/72 and 5670/72, Decision 7, Oct. 1977; #7050/75 Decision 19, Oct. 1980	28	76
House of Commons Debates, Canada, January 23, 1969, p. 4717-18, 4722, April 28, 1969, p. 8058, May 6, 1969, p. 8385 et. seq.	30 43	83 118
International Covenant on Civil and Political Rights, Article 18	43	119
Law Society of Upper Canada, Professional Conduct Handbook, Rule 8	58	173
Minutes of Special Joint Committee, Proceedings re: Abortion 22:36-49; 24:99-102, 108-10; 29:9-10, 13-14, 37-49, 86; 34:119-21, 124-7; 43:49-51; 49: 17-20	43	118
"The Necessity Plea in English Criminal Law" (1972), Cambridge Law Journal 87 at 90-1	52 54	155 163
Australia: Northern Territory: Criminal Law Consolidations Act and Ordinance, s. 79A; South Australia: Criminal Law Consolidation Act, s. 82a	42	114
173.20 C.J.S. Costs s. 439 (1940)		
Constitution Act, Article 7, section57	26	73
Criminal Code	50 51	147 151
England: The Abortion Act	42	114
English Legislation: The Abortion Act (1967), The Infant Life Preservation Act (1929)	30	83
French text of Section 251	34	95
Germany: Criminal Code, Art. 218a and 218b	42	114
Israel: Penal Law 5737-1977, sections 312 to 321	42	114

Legal Aid Act, R.S.O. 1980, ch. 234, s. 12, 13, 14	50	147
Lord Ellenborough's Act, 1803, 43 Geo. 3, c. 58	29	80
New Zealand: Crimes Act, sections 182 to 187A	42	114
Switzerland: Code Pénal Suisse, Art. 120	42	114