In 1988 the Supreme Court of Canada ruled that section 251 of the Criminal Code, restricting abortion access, infringed women’s constitutionally protected right to life, liberty and security of the person. In 1988 the British Columbia Court of Appeal determined that the unborn child was not a ‘‘person’’ either at common law or under section 203 of the Criminal Code. In 1989 the Law Reform Commission of Canada recommended that ‘‘there should be a general crime of causing foetal harm or destruction’’. The primary purpose of this article is to examine Canadian judicial and legislative reconciliation of demands for reproductive control, personal autonomy and foetal and community rights, but it also considers the responses to these issues in other jurisdictions. In Canada the cases dealing with the issues are also important in analyzing the post-Charter evolution of the relationship between the courts and the governments in Canada.

La Cour suprême du Canada a décidé en 1988 que l’article 251 du Code criminel qui limitait l’accès à l’avortement portait atteinte au droit à la vie, à la liberté et à la sécurité des femmes, droit que protège la constitution. En 1988 aussi, la Cour d’appel de Colombie-Britannique déclara qu’un enfant avant sa naissance n’était une personne ni en ‘‘common law’’ ni en vertu de l’article 203 du Code criminel. En 1989 la Commission de réforme du droit du Canada recommanda qu’‘‘il y aurait lieu d’instituer un crime de portée générale consistant à détruire un foetus ou à lui causer un préjudice corporel’’. L’auteur de cet article veut avant tout examiner la façon dont les tribunaux et les législatures au Canada réconcilient le pouvoir sur la reproduction, l’autonomie de la personne et le droit du fétus et de la société. Elle considère aussi la position d’autres juridictions. Ces questions sont de plus importantes au Canada pour analyser l’évolution des relations entre les tribunaux et les gouvernements après la Charte.

Introduction

Part of the uncertainty, however, about the status of the foetus results from lack of consensus as to the principles necessary to underpin a coherent legal approach. . . Such principles cannot easily be determined by market research, religious doctrine or even by common sense morality.1

"Human being" is left undefined. For one thing everyone knows what it means. For another all definitions must end somewhere.²

On January 28, 1988, in Morgentaler, Smoling and Scott v. The Queen,³ the Supreme Court of Canada, by a majority of five to two, "struck down" section 251, the abortion provision of the Criminal Code,⁴ because it infringed a woman's constitutionally protected right to life, liberty and security of the person.⁵ On 9 March 1989, in Borowski v. Attorney-General of Canada,⁶ the Supreme Court concluded that a challenge to section 251 on the basis that it infringed the constitutionally protected right of a child en ventre sa mère to life was, in the absence of the provision, moot and that the appellant lacked standing to bring the case. On 28 July 1988 the British Columbia Court of Appeal, in R. v. Sullivan,⁷ concluded that an unborn child was not a "person" either at common law or under section 203 of the Criminal Code.⁸ In 1989 the Law Reform Commission of Canada released its Working Paper 58, Crimes Against the Foetus,⁹ in which it recommended that, "[t]here should be a general crime of causing foetal harm or destruction".

The appropriateness of state regulation of what is essentially a moral decision is a question which has provoked widespread, often acrimonious, public and political debate, particularly in the last two decades. Since government policy is most frequently given expression in its laws, the debate has carried over to the courtroom where, when policy and life collide, the judiciary has been forced to adjudicate.

This article will outline the various reasons given by the Supreme Court of Canada in Morgentaler for concluding that the way in which abortion was regulated in Canada infringed a woman's right to life, liberty and security of the person to the extent that the law was declared of no force and effect. It will also outline the court's decision (or non-decision as it is generally perceived) in Borowski on the question of

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² Ibid., p. 50. This passage is from the discussion regarding the legislation setting out the proposed crime against the foetus.
⁷ (1988), 43 C.C.C. (3d) 65 (B.C.C.A.). Sullivan involved a foetal death during delivery by midwives who were charged with criminal negligence causing death of the baby. Leave to appeal was given by the Supreme Court of Canada in March 1989.
⁸ Supra, footnote 4.
The protection of the foetus. While not the central focus of this article, the recent proposal of the Law Reform Commission of Canada suggesting that a crime against the foetus be created and the legal implications of new developments in reproductive technology will also be considered in light of these decisions. Aside from their importance to the abortion issue, both Borowski and Morgentaler are also important for analyzing the post-Charter evolution of the relationship between the courts and the governments in Canada.

Provisions similar to section 251 of the Criminal Code regulating the availability of abortion exist in many countries. Abortion is generally treated as a crime and forbidden, subject to statutory or judicially defined exceptions which focus for the most part either on the health of the pregnant woman or on her lack of consent to the intercourse which caused the pregnancy. An example of a judicially defined exception is found in the treatment of abortion in Australia. Abortion in Australia is controlled by State criminal law and follows a format similar to that found in the Crimes Act 1900 (N.S.W.), sections 82-84, which makes it an offence to have or provide an "unlawful" miscarriage. It has been held that an abortion was "lawful" where it was performed by a physician who honestly and on reasonable grounds believed that it was necessary for the life or health of the woman, and the circumstances were not out of proportion to the danger to be averted. Susan Bulfinch comments in her survey of abortion regulation in common and civil law jurisdictions that:

The result of a more realistic and flexible attitude towards abortion legislation and the decriminalization of previously held rigid statutes has had a profound effect in

10 M. Glendon, Abortion and Divorce in Western Law (1987), p. 36, points out that there is a differing notion of privacy expressed in the judgments in that in the United States it is largely a negative right to be left alone by the state while in Germany it is viewed more as an affirmative right to develop. She also examines abortion regulation in twenty countries and concludes that of those surveyed only two had blanket prohibitions against abortion (Belgium and Ireland), while twelve disapproved in principle, but had exceptions for either "hard" (medical or the circumstances in which pregnancy occurred) or "soft" (social or economic hardship) reasons at various stages in the pregnancy, and six permitted elective abortion in early stages.

11 R. v. Davidson, [1969] V.R. 667 (Sc. Ct.). In England and Wales the law on abortion is found in the combination of three Acts: the Offences Against the Person Act, 1861, the Infant Life (Preservation) Act, 1929, and the Abortion Act, 1967. In Scotland the first two are not relevant and the position according to Kenneth McK. Norrie, Abortion in Great Britain: One Act, Two Laws, [1985] Crim. L. Rev. 475, is much simpler. According to the "Call to Australia Group", the moving force behind the New South Wales Senate motion for a law restricting abortions, in the 1986-87 financial year more than 80,000 women had abortions in Australia, over half of which were performed in New South Wales.

many Western countries. The developing trend in the law regarding the termination of pregnancy is to balance the social, economic, and family interests of the woman with the political and legal interests of the fetus.

Although the main purpose of this article is to highlight the *Morgentaler* and *Borowski* decisions, analogous decisions in other jurisdictions will be referred to. This will be done with a view to discerning the place of the Canadian decision in overall trends in judicial reconciliation of increased demands for reproductive control and personal autonomy and the, apparently incompatible, notions of foetal and community rights.

I. The Decisions

A. Legal Background

Section 251, the main Criminal Code provision challenged in *Morgentaler* and *Borowski*, stated that procuring, or acting upon an intention to procure a miscarriage on a female person "whether or not she is pregnant" was an indictable offence punishable by life imprisonment. A pregnant woman intending to procure, or permitting someone else to act to procure, her own miscarriage was similarly guilty of an indictable offence punishable by two years imprisonment. An exception was made in the case of miscarriages authorized by a hospital "therapeutic abortion committee" and carried out in an "approved hospital" in "good

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13 The decision of the courts and abortion laws in jurisdictions such as: France (French Constitutional Council Decision, January 15, 1975, [1975] D.S. Jur. 529); Italy (Carminosa et al., Const. Cortz., 18 Feb. 1975, No. 27, [1975] 20 Giur Const. 117); Austria (Decision of Constitutional Court, October 11, 1974, G8/74 Slg. 7400, [1974] Erklärungen des Verfassungsgerichtshofs 221); Ireland (A.G. (S.P.U.C.) v. Open Door Counselling, [1987] ILRM 477 (Ir. H. Ct.)); England (C. v. S., [1988] Q.B. 135, [1987] 1 All E.R. 1230 (Q.B.D., C.A.)), have been discussed in numerous articles and diverse theoretical frameworks advanced for rationalizing the judgments and the dilemma posed by abortion. For the most part the theories themselves are equally incompatible because the very subject raises concerns which extend beyond abortion into more institutional dilemmas such as the role of the court and the financial responsibility of the state for supporting the position taken by the court. Donald Kommers, Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective, [1985] Brigham Young U.L. Rev. 371, argues that abortion more clearly than any other category of constitutional adjudication illustrates the creative tension experienced by judges in endeavouring to reconcile values of liberty and community. Others, such as Brenda Cossman, The Precarious Unity of Feminist Theory and Practice: The Praxis of Abortion (1986), 44 U.T.L. Rev. 85, and Catherine Mackinnon, Privacy v. Equality: Beyond Roe v. Wade, in Feminism Unmodified (1987), p. 93, suggest that the debate is more accurately understood in terms of feminist analysis of the gender-based division of power and control in society. These and other ideas, perhaps because of the contentious nature of the subject matter, are useful only to the extent that the entire "package" of assumptions is accepted. Perhaps the most curious aspect of the judicial and academic commentary in western countries is that often the conflicting interpretations are based on essentially the same legal terminology in the context of similar cultures.

14 *Supra*, footnote 4, s. 251(1), (2).
"Even by Commonsense Morality"

faith" by a qualified medical practitioner. Abortions were permitted only in cases where the committee had issued a certificate to a medical practitioner stating that,

... in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health...

A further control on the availability of abortions existed in that an "authorized" abortion could only be carried out in a hospital that had been accredited by the Canadian Council on Hospital Accreditation and had been approved by the Minister of Health (a Provincial Government Department) for that purpose.

Not surprisingly the extent to which lawful abortions, or more specifically abortions which were not subject to criminal sanction, were available in Canada was variable and dependent for the most part on the "morality" of the local community and, ultimately, on the Department of Health of each province. This unevenness in availability of abortion was part of the underlying situation which the majority of the Supreme Court of Canada found offensive in Morgentaler. The fact that abortion was available and that the health related exception was loosely applied in some places was the central complaint of Mr. Borowski.

The Morgentaler case came before the Supreme Court of Canada in October 1986 as an appeal by Doctors Morgentaler, Smoling and Scott from a decision of the Ontario Court of Appeal setting aside a jury acquittal of the three on charges of conspiring to procure and procuring an abortion. The various proceedings leading up to the hearing before the Supreme Court of Canada are complicated and of little relevance to the present discussion. Although the three appealed on thirteen grounds, the main thrust of their case was that section 251 of the Criminal Code

15 Ibid., s. 251(4)(c).
16 Ibid., s. 251(4) and the definitions in s. 251(6). The circumstances of an authorized abortion were also subject to examination by the Minister of Health.
17 It is acknowledged that this is the situation in almost any case, and in particular, offences which are tried by jury. Ultimately it is the offensiveness of the behaviour in question as perceived by the local community which provides the exact parameters of the offence, e.g. the extent to which the police will enforce, judges will penalize, juries will convict, etc. The court did not consider the proposition that this situation may in itself be a valid or useful approach to dealing with matters such as abortion. If one accepts that abortion is an issue of social morality, such local variations are supportable in that it is the local community itself which is determining the acceptability of abortion. In a federal state, recognition of differing perspectives is not necessarily invalid or insupportable. The crux of the problem remains, however, that the issue is placed in the criminal law context which, being uniform in Canada, does not necessarily reflect the local community response to the issue.
18 Other Criminal Code provisions which have an impact on the foetus have also been criticized for incoherence in their characterization of the foetus and events relating to its survival. See R. v. Sullivan, supra, footnote 7, and Law Reform Commission, op. cit., footnote 1, pp. 15-27.
was *ultra vires* the Parliament of Canada because it infringed sections 2(a), 7 and 15 of the Canadian Charter of Rights and Freedoms. Mr. Borowski’s case was equally complex in terms of procedure. However, his constitutional challenge, while not finally dealt with on the merits by the court, made essentially the same point: section 251(4), (5) and (6) of the Code offended section 7 and section 15 of the Charter. The main difference between the two cases was that Dr. Morgentaler’s real complaint was against the prohibition while Mr. Borowski’s was against the exception. Similarly the two, while based on the same sections of the Charter, differed in their conclusions as to the interests at stake.

In the end, *Morgentaler* turned primarily on whether there was a violation of section 7 of the Charter, and if so could the provisions of the Criminal Code be saved under section 1 of the Charter. Section 7 provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.\(^{20}\)

It has been one of the most problematic sections of the Charter to interpret, chiefly because of the potentially unlimited scope of its application. One of the more difficult issues that the court has had to decide is whether section 7 protection is confined to procedural questions—that is whether an individual can be deprived of life, liberty or security of the person as long as the means by which it is done accord with the *procedural* principles of fundamental justice, or whether the protection extends to *substantive* review of legislation. This point is of particular importance for understanding the differences between the majority decisions in *Morgentaler*. Earlier Charter cases established that the “principles of fundamental justice” could relate to both procedure and substance depending on the facts before the court, that the rights enumerated in the provision were to be given independent significance, and that it was sufficient if there was a threat to one of the guaranteed rights.\(^{21}\)

Once it has been decided that a protected right has been infringed, the court must consider whether this limitation is justified under section

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\(^{19}\) *Supra*, footnote 5.

\(^{20}\) Section 7 is the first in a series of provisions grouped under the heading “‘Legal Rights’. The extent to which the headings are to influence interpretation is also a subject of debate. Beetz J., in *Morgentaler, supra*, footnote 3, at pp. 89 (S.C.R.), 427 (D.L.R.), states that he agrees with Estey J., in *Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357*, at p. 377 (1984), 9 D.L.R. (4th) 161, at p. 176, that the heading of the section is “‘at best one step in the constitutional interpretation process and is not necessarily of controlling importance’”.

1 of the Charter. The Supreme Court of Canada has decided that infringing legislation can be salvaged if the party seeking to uphold the impugned legislation is able to demonstrate first, that the objective of the legislation is of sufficient importance to warrant overriding a protected right, and secondly, that the means chosen to do so are reasonable and demonstrably justified in a free and democratic society. The latter test requires that the means chosen are "proportional" to the valid objective. A tripartite test for measuring the proportionality of "means to ends" has been adopted as the relevant measure.

B. Factual Background

The factual backgrounds of the two cases are similarly complex and, again, a detailed discussion is unnecessary. Suffice to say that Dr. Morgentaler has been a public advocate and practitioner of the view that a woman should have an unfettered right to choose whether or not to have an abortion. He and like-minded colleagues set up and operated for over a decade "abortion" clinics contrary to the provisions of the Criminal Code and had been brought to court on numerous occasions in several provinces. Mr. Borowski has been an equally tenacious advocate for recognition of a foetal right to life.

C. The Judgments—Morgentaler

Morgentaler generated four sets of reasons from the Supreme Court of Canada, three concurring in the result and one in dissent. The reasons of Dickson C.J.C., for finding section 251 of the Criminal Code unconstitutional were concurred in by Lamer J., and were sufficiently ambiguous as to appear in agreement with both Wilson J. and Beetz J. It is suggested, however, that the Chief Justice's overall approach was not dissimilar from that advanced by Beetz J., concurred in by Estey J. These two decisions, representing four out of five of the majority result, will be discussed as the "majority of the majority". Wilson J., "the
minority of the majority’’, while concurring in the result, differed radically in her approach to the issue from the other four. Dissenting reasons were provided by McIntyre J., and concurred in by La Forest J.

1. The Majority of the Majority

(a) Chief Justice Dickson

Dickson C.J.C. was frequently quoted by the media for his ruling that the factual submissions in Morgentaler ‘‘establish beyond any doubt’’ that section 251 of the Criminal Code was prima facie a violation of the security of the person:

Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with the woman’s body and thus a violation of security of the person.

In spite of this expansive interpretation of security of the person, which would seem to argue against the existence of any state regulation of abortion, his judgment is worded narrowly in terms of precedent: there is little judicial interference with the basic thrust of the law or the policy. Essentially he accepted the underlying assumption that abortion was behaviour suitable for regulation by the state, so long as the appropriate mechanism for such regulation was employed. The implication of his emphasis on physical and emotional security of the person as the infringing factors rather than decision-making as an inherent right in itself is unclear given the comments quoted above.

Although he referred to section 7 as containing three rights, Dickson C.J.C. based his judgment on the right to security of the person, a right which, as he noted earlier, case law had defined to include both physical and psychological harm. He concluded that it was a ‘‘. . . basic right, the deprivation of which has severe consequences for an individual’’. He was, however, careful to emphasize that Parliament could infringe the security of the person if it did so in a manner consistent with principles of fundamental justice.

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26 Supra, footnote 3, at pp. 56 (S.C.R.), 401 (D.L.R.). It is unclear whether this is a new standard or intended to be a standard applied to proof of facts under s. 7.

27 Ibid., at pp. 56-57 (S.C.R.), 402 (D.L.R.). At pp. 63 (S.C.R.), 407 (D.L.R.), a similar statement was made which included the additional point that s. 251 ‘‘. . . imposes serious delay causing increased physical and psychological trauma to those women who meet its criteria’’.

28 Perhaps the most curious aspect then of his decision is that in the final result he removed the entire provision, not just the regulatory sections.

29 Supra, footnote 3, at pp. 54 (S.C.R.), 400 (D.L.R.).

30 Dickson C.J.C., also commented: ‘‘With the advent of the Charter, security of the person has been elevated to the status of a constitutional norm’’; ibid., at pp. 53 (S.C.R), 399 (D.L.R.).
Having decided that section 251 infringed the right to security of the person (by reason of the physical and mental stress arising from the operation of the administrative process) the next inquiry was whether it did so according to the principles of fundamental justice. Section 7 of the Charter did, in his opinion, confer on the courts a power of substantive review.\(^{31}\)

I have no doubt that s. 7 does impose upon courts the duty to review the substance of legislation once it has been determined that the legislation infringes an individual’s right to “life, liberty and security of the person”. He concluded, however, that it was not necessary on this occasion to “tread the fine line between substantive review and adjudication of public policy”,\(^{32}\) and that it would be sufficient to investigate whether section 251 met procedural standards of fundamental justice. In the Chief Justice’s view, while the purpose of legislation might be unobjectionable “the administrative procedures created by law to bring that purpose into operation may produce unconstitutional effects”.\(^{33}\) After a detailed examination of the procedural requirements, he concluded that section 251(4) was essentially an exculpatory provision, but that it was not constitutionally supportable:\(^{34}\)

... the structure—the system regulating access to therapeutic abortions—is manifestly unfair. It contains so many potential barriers to its own operation that the defence it creates will in many circumstances be practically unavailable...

Consequently it did not comply with the principles of fundamental justice which were “to be found in the basic tenets of our legal system”, and which include the principle that “when Parliament creates a defence to a criminal charge, the defence should not be illusory or so difficult to obtain as to be practically illusory”.\(^{35}\)

\(^{31}\) Ibid., at pp. 53 (S.C.R.), 399 (D.L.R.). (Emphasis added). It is difficult to discern what sort of review he is envisaging in that, although he appears to support substantive review of legislation, equally he appears to suggest that he would not consider the substance of legislation in actually determining if it infringed a protected right.

\(^{32}\) Ibid.

\(^{33}\) Ibid., at pp. 62 (S.C.R.), 406 (D.L.R.). The fact that the unconstitutional effects were not directed at the litigants did not result in a denial of standing to the appellants nor was it argued to do so by the respondents. The fact that the appellants were charged under the section was apparently sufficient even though the part found to be offensive did not actually operate with respect to them.

\(^{34}\) Ibid., at pp. 72 (S.C.R.), 414 (D.L.R.). He also emphasized, ibid., at pp. 65, 72 (S.C.R.), 408, 413 (D.L.R.), the point, as did Beetz J., that it was the law itself which created the difficulties rather than being “caused by external forces which do not relate to the law itself”.

\(^{35}\) Ibid., at pp. 70 (S.C.R.), 42 (D.L.R.). He expanded on the point, at pp. 72-73 (S.C.R.), 414 (D.L.R.):

Similarly, Parliament must be given room to design an appropriate administrative and procedural structure for bringing into operation a particular defence to criminal liability. But if that structure is “so manifestly unfair, having regard to the deci-
The Chief Justice considered whether the provision could be "saved" by section 1 of the Charter. He identified two competing purposes in the abortion provisions: the "life and health of the pregnant woman" and the "protection of the foetus". In his view Parliament had clearly provided in section 251 that the balance between the two "rights" (he expressly refused to decide whether foetal rights were an independent constitutional value) was tipped in favour of the life and health of the pregnant woman. Thus he found the objective of section 251 to be balancing the two rights. Although this was held to be sufficiently important to meet the first aspect of the section 1 test, the means chosen to advance this interest were not "proportional". He found that the administrative procedure created by the legislation operated in a way that was unfair, arbitrary and impaired more of the protected right than necessary: the limitation was out of proportion to the valid "balancing" objective in that it actually defeated the objective of protecting the health of the woman. Consequently section 251 could not be "saved" by section 1 of the Charter and, under the authority of section 52(1) of the Constitution Act, 1982, was "struck" down as inconsistent with the "supreme law of Canada". In so doing he accepted the proposition that the "machinery" sections of section 251 were not severable from the provision, that is the defence was intrinsic to the definition of the crime.

While not expressly suggesting an alternative legislative scheme for regulating abortions Dickson C.J.C. appeared to suggest that he may not reach the same conclusion should a similar question be raised outside the criminal law context. The following comments suggest that section 7 protection may be of limited availability.

It may well be that constitutional protection of the above interests [covered in sections 7-11 of the Charter] is specific to, and triggered by, the invocation of our system of criminal justice. It must not be forgotten, however, that s. 251 of the Code, subject to subs. (4), makes it an indictable offence for a person to procure the miscarriage and provides a maximum sentence of two years in the case of the

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36 Beetz J. argued that if the pith and substance of s. 251 was to be found in s. 251(4), then as health legislation it would not in and of itself stand up as a valid Federal criminal law legislation as it would have been in relation to a provincial head of power. This may be less certain than Beetz J. suggests.

37 Ibid., at pp. 75-76, 80 (S.C.R.), 416-417, 420 (D.L.R.).

38 Ibid., at pp. 79-80 (S.C.R.), 419-420 (D.L.R.). This was based on his conclusion in Morgentaler v. The Queen, [1976] 1 S.C.R. 616, at p. 676, (1975), 53 D.L.R. (3d) 161, at pp. 207-208, that "s. 251 contains a comprehensive code on the subject of abortions". This comment was made in response to the suggestion that a defence to the crime of abortion on the part of the medical practitioner could be raised on the basis of another section of the Criminal Code.

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

(b) Beetz J.

Beetz J., more clearly than Dickson C.J.C., accepted the fact of reproductive regulation and adopted the view that in section 251(4), (5) and (6) Parliament had given precedence to protection of the life and health of the pregnant woman over protection of the foetus. He also agreed that the structure provided under section 251(4), rather than advancing this purpose, operated so as to endanger the health of the woman and consequently infringe her right to security of the person. He restricted his analysis of section 7 rights to the danger this posed to her life and health as a violation of the security of the pregnant woman’s person in the criminal law context. To the extent that the operation of section 251(4) impeded a pregnant woman’s right of access to a legislatively endorsed abortion, it was an infringement which violated the constitutionally guaranteed right of security of the person. Beetz J. did not comment on removal of decision-making control as a violation of section 7. He found that the physical and emotional dilemma experienced by a pregnant woman whose life or health was endangered by continuation of the pregnancy constituted a violation of section 7, and that this violation resulted from the operation of the legislated administrative structure.

While Beetz J. concluded that, overall, the operation of section 251(4) to the extent that it was the source of unnecessary and dangerous delay, did not accord with the principles of fundamental justice, he was careful to point out that certain elements of the procedure did accord with the principles of fundamental justice. For example, he was of the view that the operational standard, “likely to endanger her life or health”

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40 Ibid., at pp. 89 (S.C.R.), 427 (D.L.R.).
41 Although of the majority judges he was the least questioning of policy choices of Parliament, his decision is the one which places the most obligation on the State and provides the basis for developing a right to service: i.e., a constitutional right of access implies that there must exist services to have access to.
42 He stated, supra, footnote 3, at pp. 91 (S.C.R.), 428 (D.L.R.):
Where the continued pregnancy does constitute a danger to life or health, the pregnant woman faces a choice: (1) she can endeavour to follow the s. 251(4) procedure, which as we shall see, creates an additional medical risk given its inherent delays and the possibility that the danger will not be recognized by the state-imposed therapeutic abortion committee; or (2) she can secure medical treatment without respecting s. 251(4) and subject herself to criminal sanction under s. 251(2). (Emphasis added).
was substantively certain enough to accord with the notion of fundamental justice, as was the requirement that the determination be made on the basis of an independent medical opinion.\(^4^4\) In his opinion these administrative provisions reflected the state interest in the protection of the foetus subject only to danger to the woman’s health and life. The existing procedure was, however, ultimately offensive in that it included numerous unnecessary delays or obstacles unrelated to the objective of protecting the foetus and constituted a further state-caused danger to a pregnant woman’s person.

He considered whether the legislation could be saved by section 1. In his view, contrary to the opinion of Dickson C.J.C., the primary objective of the Criminal Code provision was protection of the foetus: section 251(4) could not be understood to create a right to therapeutic abortion, rather it was a decriminalization of abortion in certain narrowly defined circumstances.\(^4^5\) He concluded that, while the protection of the foetus was a sufficiently important objective, some of the means chosen by Parliament to achieve it did not constitute a reasonable limit: many of them were administratively unnecessary and, therefore, were not “carefully designed to achieve the objective in question” and “rationally connected” thereto.\(^4^6\) He did suggest, however, that Parliament might legislate in future in such a way as to meet the proportionality test of section 1 while protecting the right of the foetus.\(^4^7\) In one respect Beetz

\(^{4^4}\) He suggested, \textit{ibid.}, at pp. 109 (S.C.R.), 442 (D.L.R.):

The presence of the exculpatory provision in the Criminal Code and the wording of the standard itself point to the parameters of s. 251(4). The required standard of threat to life or health must necessarily be lesser than that required under the common law defence of necessity, otherwise s. 251(4) would be superfluous.

He also argued, at pp. 107 (S.C.R.), 441 (D.L.R.):

In section 251(4) Parliament has only given the committee the authority to make a medical determination regarding the pregnant woman’s life or health. The committee is not called upon to evaluate the sufficiency of the state interest in the foetus as against the woman’s health. The evaluation of the state interest is a question of law already decided by Parliament in its formulation of s. 251(4).

\(^{4^5}\) \textit{Ibid.}, at pp. 86-87 (S.C.R.), 425 (D.L.R.). This is in response to the statement of the Ontario Court of Appeal, quoted by Beetz J., that “a woman’s only right to an abortion at the time the Charter came into force would accordingly appear to be that given to ss. (4) of s. 251”.


\(^{4^7}\) For example, he referred to various reports suggesting alternative modes of delivering abortion services as well as noting, \textit{ibid.}, at pp. 114 (S.C.R.), 446 (D.L.R.):

Some delay is inevitable in connection with any system which purports to limit to therapeutic reasons the grounds upon which an abortion can be performed lawfully. Any statutory mechanism for ensuring an independent confirmation as to the state of the woman’s life or health, adopted pursuant to the objective of assuring the protection of the foetus, will inevitably result in a delay which would exceed whatever delay would be encountered if an independent opinion was not required. Fur-
J. came closer to expressing an opinion as to the appropriate parliamentary policy regarding abortion than did Dickson C.J.C. when he stated that, in his view, section 251 could not be severed, removing the offending machinery.\textsuperscript{48} 

The current rule expressed in s. 251, which articulates both Parliament’s principal and ancillary objectives [protection of foetus and protection of woman’s health] cannot stand without the exception in s. 251(4). The violation of pregnant women’s security of the person would be greater, not lesser, if s. 251(4) was severed leaving the remaining subsections of s. 251 as they are in the \textit{Criminal Code} . . . The objective of protecting the foetus would not justify, in my view, the severity of the breach of pregnant women’s right to security which would result if the exculpatory provision was completely removed from the \textit{Criminal Code}. 

Although Beetz J. expressly confined his decision to interpreting the right to security of the person he felt compelled to respond to Wilson J.’s decision which was founded upon the right to “liberty”. He commented that even if the right to access to abortion was founded upon “liberty” the requirement that independent medical opinion be given was not necessarily offensive. He said:\textsuperscript{49} 

I am of the view that there would still be circumstances in which the state interest in the protection of the foetus would require an independent medical opinion as to the danger to the life or health of the pregnant woman . . . there would be a point in time at which the state interest in the foetus would become compelling. From this point in time, Parliament would be entitled to limit abortions to those required by therapeutic reasons . . .

Without explicitly stating his views as to the appropriate timing of such intervention he cited a paragraph from Wilson J.’s decision in which she referred to the difficulty of this determination and offered, by way of example, “somewhere in the second trimester”.\textsuperscript{50} He contrasted this with an excerpt from the dissenting opinion of O’Connor J., of the United States Supreme Court, in \textit{City of Akron v. Akron Center for Reproductive Health Inc.}\textsuperscript{51} in which she stated that:

The choice of viability as the point at which state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward. Accordingly I believe that the State’s interest in protecting potential human life exists throughout pregnancy.

He concluded, however, that it was not necessary for him to decide the case on the basis of “liberty”.

\textsuperscript{48} Ibid., at pp. 125-126 (S.C.R.), 455 (D.L.R.).

\textsuperscript{49} Ibid., at pp. 112-113 (S.C.R.), 445 (D.L.R.).

\textsuperscript{50} Ibid., at pp. 113 (S.C.R.), 445 (D.L.R.).

\textsuperscript{51} 462 U.S. 416, at p. 461, 103 S. Ct. 2481, at p. 2509 (1983). Implicit in this reference then is a critique of the United States Supreme Court approach as set out in
Beetz J. was also careful to stress that he was not deciding, nor had he been asked to decide, whether the word "everyone" in the Charter applied to the foetus.52

2. The Minority of the Majority

Wilson J.'s decisions have gained her a reputation for confronting difficult issues head on. Not surprisingly then she differed from the other two majority decisions in her characterization of the issue to be decided. In her opinion the heart of the matter was "... whether a pregnant woman can, as a constitutional matter, be compelled by law to carry the foetus to term".53 Accordingly, she was of the view that a discussion of procedural requirements regulating abortion was "pointless" if the actual fact of regulation, regardless of the means, was itself offensive. The main thrust of her decision was whether the legislation in substance infringed a protected right:54

... it would, in my view, be an exercise in futility for the legislature to expend its time and energy in attempting to remedy the defects in the procedural requirements unless it has some assurance that this process will, at the end of the day, result in the creation of a valid criminal offence.

While she agreed with her colleagues' conclusions regarding a violation of security of the person, she suggested that this approach "begr the central issue in the case"55 because the real question was whether either

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Roe v. Wade, 410 U.S. 113, 193 S. Ct. 705 (1973). Kommers, loc. cit., footnote 13, at p. 390, describes O'Connor J.'s critique of Roe v. Wade as a case "on a collision course with itself" because of advances in medical technology, as "compelling" because "[c]onstitutional law is too important to rest on the state of medical technology...". The notion that potential life is not divisible into trimesters was also expressed in the decision of the West German Federal Constitutional Court. 25 February 1975, BVerfG, W. Ger., 39 BVerfG 1, although the court did so on the basis of express recognition of the constitutional protection of the unborn life. For an interesting discussion of both the historical development of modern German abortion law and this case, see H. Gerstein and D. Lowry, Abortion, Abstract Norms, and Social Control: The Decision of the West German Federal Constitutional Court (1976), 25 Emory Law J. 849. J. Gorby and R. Jonas, West German Abortion Decision: A Contrast to Roe v. Wade (1975-76), 9 John Marshall J. of Practice and Procedure 551, preface their translation of the decision with a useful note on the various German legal concepts in the judgment and the difficulty in finding equivalent expression in Anglo-American jurisprudence, as for example the concept of "Zumutbarkeit" which they finally translated as "exactable" to connote the notion of simultaneously demanding and enforcing performance. The relationship between the German decision of 1975 and the 1985 Spanish Court decision, 1985-89 Boletin de Jurisprudencia Constitucional 515, which adopted a similar approach is discussed at length in R. Stith, New Constitutional and Penal Theory in Spanish Abortion Law (1987), 35 Am. J. Comp. Law 513. Although Beetz J. refers to the various abortion laws in Europe, Australia and the United Kingdom he does not expressly consider their interpretation.52 Supra, footnote 3, at pp. 128 (S.C.R.), 457 (D.L.R.).
53 Ibid., at pp. 161 (S.C.R.), 482 (D.L.R.).
54 Ibid., at pp. 162 (S.C.R.), 483 (D.L.R.).
55 Ibid., at pp. 163 (S.C.R.), 484 (D.L.R.).
the right to liberty or the right to security of the person conferred on the pregnant woman the right to decide for herself whether or not to have an abortion. As pointed out above, Dickson C.J.C., at least on one reading of his reasons, also appeared to adopt this approach. However, this was qualified to such a large extent in the remainder of his decision that it is hard to argue with any confidence that he and Wilson J. were actually of the same view.

Wilson J. preferred instead to base her decision on the potentially broader right to liberty and the content of this right in the context of abortion. She proceeded from the proposition that the Charter was concerned with the individual in society:56

The Charter and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity.

A discussion of this proposition leads her to conclude:57

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

Unlike the other judges, Wilson J. expressly considered, and to a large extent, adopted the approach that until very recently had been taken by the United States Supreme Court to the questions of abortion, while acknowledging that care must be taken to avoid the ‘‘mechanical application of concepts developed in different cultural and constitutional contexts’’.58 American jurisprudence had approached the issue of reproductive control as falling within the right to privacy which is part of the

57 Ibid., at pp. 166 (S.C.R.), 486-487 (D.L.R.). This juxtaposition of liberty and society and the implicit suggestion that the two are not in conflict contrast with Kommers, loc. cit., footnote 13, at pp. 376, 403-405, who argues that in the context of the abortion decisions in the United States:

. . . in the aftermath of Griswold stretching from Eisenstadt v. Baird to the abortion cases of 1983, the Court’s emphasis slowly began to change, with the tension between liberty and sociality dissolving into a new principle that exalted liberty at the expense of sociality or community.

. . . liberty under the aegis of the Supreme Court has evolved into an ideology of free choice, one that seriously undermines community and sociality in American constitutional thought. In matters of abortion and contraception at least, choice cannot be lawfully limited in the absence of compelling state reasons. [New constitutional rights theory means we may experience] . . . in the new constitutional republic of the late twentieth century, a newfound human dignity supported and reinforced by the moral neutrality of rationalistic jurisprudence. . . Liberty takes priority over duty, over fraternity, over community.
58 Ibid., at pp. 167 (S.C.R.), 487 (D.L.R.).
guaranteed sphere of individual liberty found in the Fourteenth Amendment. Wilson J. cited the commentary of Tribe, L. Tribe. American Constitutional Law (1978), pp. 924-925. Cases of importance are Roe v. Wade, supra, footnote 51; Thornburgh v. American College of Obstetricians and Gynecologists, 106 S. Ct. 2169 (1986). For example, Blackmun J., in Roe v. Wade explained the allocation of rights in terms of trimesters. During the first trimester an abortion may be safer than childbirth; during the second trimester the woman's health may require that the state regulate abortions only to the extent necessary to protect the mother's health or life: once the foetus becomes viable (approximately at the end of the second trimester) the state may prohibit abortions altogether unless necessary to protect the woman's health or life.

She appears to be using the word “purpose” in a looser sense here than in the s. 1 sense of the ultimate purpose or objective of the legislation.

In this she went further than Dickson C.J.C. and Beetz J., and accepted the appellants' argument that security of the person also included a right of control over one's body.

She concluded that the right of a woman to terminate her pregnancy fell within the class of protected rights because of the profound physical, emotional, economic and social implications of the choice for the woman. Consequently section 251, the purpose of which was to place this private and fundamental decision in the hands of a committee, violated the right to liberty.

Not only was section 251(4) a direct interference with the pregnant woman's right to liberty in the form of control over her body, it was also found to constitute a threat to the protected right of security of the person. According to Wilson J., the provisions of the Criminal Code resulted in the woman "... being treated as a means—a means to an end she does...

59 Privacy as the constitutional basis for protecting the right to decide to have an abortion has been criticized by feminist analysts such as Mackinnon, op. cit., footnote 13, p. 93, who comments that:

... privacy doctrine reaffirms and reinforces what the feminist critique of sexuality criticizes: the public/private split. The political and ideological meaning of privacy as a legal doctrine is connected with the concrete consequences of the public/private split for the lives of women. It is a very material division that keeps the private beyond public redress and depoliticizes women's subjection within it. It keeps some men out of the bedrooms of other men.

Cossman, loc. cit., footnote 13, at p. 88, suggests an analysis concerned with the process and relations of reproduction in terms of male alienation and resistance to alienation from the reproductive process. She concludes, ibid., at p. 103, with respect to privacy:

... it is apparent that gaining the right to abortion in terms of privacy rights has not addressed, but has actually reinforced, the underlying problems of the subordination of women in the relations of reproduction and sexuality. A right to abortion couched in terms of privacy contradicts the ultimate feminist objective of transcending oppression.

60 L. Tribe. American Constitutional Law (1978), pp. 924-925. Cases of importance are Roe v. Wade, supra, footnote 51; Thornburgh v. American College of Obstetricians and Gynecologists, 106 S. Ct. 2169 (1986). For example, Blackmun J., in Roe v. Wade explained the allocation of rights in terms of trimesters. During the first trimester an abortion may be safer than childbirth; during the second trimester the woman's health may require that the state regulate abortions only to the extent necessary to protect the mother's health or life: once the foetus becomes viable (approximately at the end of the second trimester) the state may prohibit abortions altogether unless necessary to protect the woman's health or life.

61 She appears to be using the word "purpose" in a looser sense here than in the s. 1 sense of the ultimate purpose or objective of the legislation.

62 In this she went further than Dickson C.J.C. and Beetz J., and accepted the appellants' argument that security of the person also included a right of control over one's body.
not desire but over which she has no control. She is the passive recipient of a decision made by others . . .’’. 63

Having reached this conclusion with regard to the content of the rights to liberty and security of the person, Wilson J. considered the extent to which a legislature could either deprive an individual of rights under section 7, or limit them under section 1. While Wilson J. agreed with Dickson C.J.C. and Beetz J. that the administrative structure set out in section 251(4) did not accord with procedural principles of fundamental justice, she argued that recourse could be had to other rights and freedoms guaranteed in the Charter to give substantive content to the phrase ‘‘principles of fundamental justice’’. This approach, based on an earlier decision of the court, led her to the view ‘‘. . . that a deprivation of the s. 7 right which has the effect of infringing a right guaranteed elsewhere in the Charter cannot be in accordance with the principles of fundamental justice’’. 64 The other right infringed by section 251 was section 2(a) of the Charter which provides, in part:

2. Everyone has the following fundamental freedoms:
(a) freedom of conscience and religion.

Wilson J. argued that freedom of conscience must be understood to include both religious and secular morality and that the decision to terminate a pregnancy was essentially moral: it was a matter of individual rather than state conscience. By enforcing a particular morality the state had violated the section 2(a) guarantee of freedom of conscience and, consequently, the legislation and the procedures which it created could not be in accordance with principles of fundamental justice. 65

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63 Supra, footnote 3, at pp. 173 (S.C.R.), 492 (D.L.R.). Wilson J., ibid., at pp. 172 (S.C.R.), 491 (D.L.R.), openly adopted a feminist analysis of the issue of control over reproductive rights as ‘‘properly perceived as an integral part of the modern woman’s struggle to assert her dignity and worth as a human being’’, and commented, ibid., at pp. 171 (S.C.R.), 490-491 (D.L.R.):

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience . . . but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma.

She did not, however, utilize the analysis based on equality as distinct from equal access, although to a certain extent her point about assertion of control could be taken to include that approach. The Canadian Law Reform Commission, op. cit., footnote 2, p. 41, used this analysis, yet remained firmly of the view that abortion is a medical matter.

64 Ibid., at pp. 175 (S.C.R.), 494 (D.L.R.).

65 Ibid., at pp. 176-178 (S.C.R.), 494-495 (D.L.R.). Wilson J., in concluding that s. 2(a) was not confined to religious beliefs, referred to the opening affirmation of the Charter, that ‘‘Canada is founded upon principles that recognize the supremacy of God . . .’’ and pointed out that this was to be understood in the context of a ‘‘free and democratic society’’. An argument against the availability of abortion on the basis of the Preamble to the Irish Constitution which refers to Jesus Christ and Christian principles is discussed
Legislation which violated substantive principles of fundamental justice could, however, still be saved under section 1 of the Charter if it constituted a reasonable limit and was justified in a free and democratic society. Like Beetz J., Wilson J. concluded that the primary purpose of section 251 was protection of the foetus and that this constituted a "perfectly valid legislative objective". Consequently she found that section 1 of the Charter did authorize a reasonable limit on the woman's right to make the decision having regard to the developing foetus.

Wilson J. preferred to leave the difficult question of determining at which point this would be to legislators and experts. She did, however, suggest that such a determination would necessarily have to evaluate the potential life of the foetus directly in relation to its stage of development during gestation. In Wilson J.'s opinion this approach did not deny the validity of the view expressed by O'Connor J. in City of Akron v. Akron Center for Reproductive Health Inc. and cited by Beetz J., that the foetus is potential life from the moment of conception; rather it meant balancing the state's interest in protection of the foetus against the woman's rights under section 7, with greater weight being given to the state's interest later in the pregnancy. She found, however, that section 251(4) was unacceptable in that it took the decision away from the woman at all stages of the pregnancy and resulted in a complete denial rather than a limitation of the woman's section 7 right: it could not meet the proportionality test.

Wilson J. noted that she had not been asked nor had she considered the question of whether the foetus was covered by the word "everyone" in section 7.
3. The Dissenting Judgment

As a preliminary matter, McIntyre J. expressed considerable doubt about the appellants' standing to argue the matter as a constitutional question. Although the case had been argued and judgment given on the basis of the Charter issues, in his view the question was whether the appellants had conspired to breach section 251 of the Criminal Code (a fact which was admitted) and it was "... difficult to see where any infringement of their rights, under section 7 of the Charter, could have occurred". McIntyre J.'s opinion was that section 251 did not confer any general right to abortion: the provision was aimed at protecting the interests of the unborn child and the only exception to the criminal sanction existed where abortion was necessary to protect the life or health of the mother. He pointed out that Parliament's policy as expressed in section 251 reflected the general view of society "... that abortion is, in its nature, 'socially undesirable conduct'...".

While he accepted the general approach to Charter interpretation employed by the majority, McIntyre J. emphasized the importance of the court confining itself to measuring legislative provisions against democratic values which "are clearly found and expressed in the Charter". The court could be seen as seeking an answer to the "right or wrong" of abortion and deciding on the best resolution rather than simply measuring the constitutional validity of legislation. In short, he was worried about explicitly value-based judgments:

The Court must not resolve an issue such as that of abortion on the basis of how many judges may favour "pro-choice" or "pro-life". To do so would be contrary to sound principle and the rule of law affirmed in the preamble to the Charter which must mean that no discretion, including a judicial discretion, can be unlimited. But there is a problem, for the Court must clothe the general expression of rights and freedoms contained in the Charter with real substance and vitality. How can the courts go about this task without imposing at least some of their views and predilections upon the law?... In my view, this Court has offered guidance in this matter... it has enjoined what has been termed a "purposive approach" in applying the Charter and its provisions. I take this to mean that the Courts should interpret the Charter in a manner calculated to give effect to its provisions, not to the idiosyncratic view of the judge who is writing.

McIntyre J. clearly felt that, irrespective of refutation, the decisions of the majority were all founded upon a constitutional right to abortion. Thus his response that all legislation to some extent interferes with pri-

74 Ibid., at pp. 136 (S.C.R.), 463 (D.L.R.).
75 Ibid., at pp. 138 (S.C.R.), 465 (D.L.R.). A point of evidentiary interest is McIntyre J.'s reliance, in part, on opinion poll evidence to support this proposition; ibid., at pp. 135 (S.C.R.), 463 (D.L.R.).
76 Ibid., at pp. 139-140 (S.C.R.), 466 (D.L.R.).
orities and aspirations, and that the proposition that women enjoy a constitutional right to have an abortion was "... devoid of support in the language of s. 7 of the Charter or any other section". 77

McIntyre J. seemed to adopt the approach used by Wilson J. in relation to interpreting "principles of fundamental justice" for determining whether state-action infringed the security of the person. He held that in order to infringe the security of the person governmental action must go beyond the imposition of stress and anxiety since nearly every governmental policy would, to some degree, result in stress for some members of the community. 78 In addition to stress and anxiety the state action would also need to infringe another right or freedom deserving of protection under the concept of security of the person before it would be offensive under section 7. In his view abortion was not such an interest. He concluded that section 251(4) of the Criminal Code constituted the only circumstance in Canadian law, custom or tradition in which abortion was permissible.

Having decided that no right under section 7 was infringed McIntyre J. still considered whether the structure set out in section 251(4) regulating the availability of therapeutic abortion was procedurally fair. Dr. Morgentaler had argued that the section 251(4) defence was "illusory" by reason of administrative and practical impediments to the availability of the authorized abortions, a point accepted by Dickson C.J.C. McIntyre J. concluded that it was for Parliament to decide and describe the breadth—that is the availability—of a defence to criminal action. Although in practice the administrative structure may have broken down by reason of the unforseeably large number of demands for abortions, this was a matter external to the validity or procedural fairness of the statute, and did not constitute a proper basis for striking down the provision. 79 The other grounds of appeal including an alleged infringement of section 2(a) of the Charter were, likewise, not supportable.

77 Ibid., at pp. 143 (S.C.R.), 469 (D.L.R.). In putting forward this position McIntyre J. took into account the legislative history of abortion in Canada and parliamentary debates regarding the Charter in relation to such an issue. He referred to American human rights documentation (and in fact relied on American case law in support of his argument on the appropriate role of the court) and current debate, as well as employing an inclusio unis exclusio alteris approach to the Charter: viz. other rights are explicitly mentioned why not abortion? He concluded that there was no support for the view that the Charter entrenched a right to abortion.

78 Anti-smoking legislation and drug regulation are listed as examples. He comments that in any event the mere fact of pregnancy itself gives rise to stress and that the "anguish associated with abortion is inherent and unavoidable and that there is really no psychologically painless way to cope with an unwanted pregnancy": ibid., at pp. 148 (S.C.R.), 473 (D.L.R.).

McIntyre J. was careful to note that he had expressed no opinion on whether or not there should be a right for a pregnant woman to have an abortion free from legal sanction. 80

Questions of public policy touching on this controversial and divisive matter must be resolved by an elected Parliament. It does not fall within the proper jurisdiction of the courts.

D. Borowski

The judgment of the Supreme Court of Canada in Borowski represented the unanimous conclusion of seven judges with reasons given by Sopinka J. As pointed out above the procedural background to the case is complex and it is unnecessary to do more than note that in 1981 the Supreme Court of Canada had held that Mr. Borowski had standing to bring the case on the basis of that he had "a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court". 81 Subsequently his complaint had been reframed to take account of the existence of the Charter. The Supreme Court of Canada agreed to hear the case on appeal from a decision of the Saskatchewan Court of Appeal. The Saskatchewan Court of Appeal had held, on the basis of historical treatment of the foetus as well as the language and history of section 7 and section 15 of the Charter, that the foetus was not included in "everyone" under section 7 or "every individual" under section 15. 82 At the time of hearing in October 1988 the challenged provisions of the Criminal Code were, as a result of the Supreme Court decision in Morgentaler, no longer in existence. The two remaining constitutional questions were whether a child en ventre sa mère was protected by section 7 and section 15 of the Charter. Despite the fact, as pointed out by Sopinka J., that by 1988 the case clearly raised questions of mootness, standing and justiciability, the Supreme Court of Canada decided to hear argument on these matters and on the merits. The main justification for this would seem to be that a determination on these preliminary points did not necessarily preclude the court from exercising its discretion to decide the merits.

After hearing argument on the issues, the Supreme Court decided that Mr. Borowski's case had been rendered moot and, since in its opinion, the two remaining constitutional questions were inseverable from the two which had been rendered moot he had also lost the basis of his standing to bring the case.

80 Ibid., at pp. 158 (S.C.R.), 480 (D.L.R.).
Sopinka J., in discussing the doctrine of mootness, noted that the relevant law for evaluation was the law as it existed at the time of hearing. In general if the decision would have no practical effect on the rights of any party to the action then, in his opinion, the court could decline to decide the case. He was, however, careful to point out that the determination of mootness involved two steps. First, there must no longer be a live controversy, and secondly, the court must exercise its discretion not to decide the case. Several bases for exercising this discretion were suggested. These were: a need for an adversarial context, a need for "judicial economy", conservation of judicial resources and a need for the court to "demonstrate a measure of awareness of its proper law-making function". In Borowski the central problem was that no practical effect other than confusion would stem from a decision in the absence of legislative guidance. In addition the Supreme Court concluded that the issue of foetal rights was likely to arise again in the context of an existing controversy. On the "economics" of the matter the Supreme Court essentially adopted the position that its decisions are a scarce resource to be allocated sparingly. Sopinka J. concluded that Mr. Borowski was asking for what amounted to a private reference absent legislation or other government action which would bring the Charter into play.

To accede to this request would intrude on the right of the executive to order a reference and pre-empt a possible decision of Parliament by dictating the form of legislation it should enact. To do so would be a marked departure from the traditional role of the Court.

Since the issue was moot there was no real need to address the issue of standing. Nonetheless, Sopinka J. dealt with it as well and found that the original decision to give standing had been on the basis that specific legislation was being challenged on constitutional grounds and that this was no longer the case. In his opinion Mr. Borowski had no other basis for standing under the Charter since the challenge was no longer based on either a "law" or a government action and he was not directly affected.

The decision, while taking what might seem to be a restrained and politically responsible stance, has been criticized for several reasons.

84 Sopinka J., ibid., at pp. 365 (S.C.R.), 248 (D.L.R.), 114 (W.W.R.), noted: ... doctors and legislators would have to stay up at night to decide how to deal with the situation. This state of uncertainty would clearly not be in the public interest. Instead of rendering the law certain, a decision favourable to the appellant would have the opposite effect.
85 It is notable that leave to appeal was given in the case of R. v. Sullivan, supra, footnote 7, shortly after. Sullivan is thought by many to raise the issue of foetal rights. It does this, but the issue is not necessarily the same as the issue of decision-making control over abortions.
Chief amongst these is that the court did not use the opportunity to address the issue of governmental non-action as action warranting Charter review. Further, the fact that the governments are funding abortion services could be construed as "government activity" sufficient to bring it within the Charter. Finally, at a more theoretical level, the case assumes the correctness of an earlier decision which in effect exempted court or judicial action from the class of "government action" which fell within the Charter.

II. Analysis

It is apparent from the Morgentaler decision, and even more so from Borowski, that the Supreme Court is increasingly concerned about achieving a politically acceptable balance between the various interests involved in one of the most publicized issues to come before it. Concern about the potential implications of any detailed discussion of section 7 rights is evident in the tendency towards limitation, qualification and ambiguity. The court's desire to live up to the grand mandate of the Charter whilst avoiding criticism for "re-creating" laws in accordance with personal morality and values adds a further institutional complication to the decision-making process. This is partly because of the tendency of precedent to narrow and define application of law. Thus, what in one circumstance appears a just resolution or interpretation of a Charter provision may, because of the broad language of the Constitution and the very fact of being a constitutional provision, have an unacceptable result in another case.

The Supreme Court is not alone in its struggle to determine the content of constitutional rights and the nature of the relationship between the state and the individual in the context of reproductive control. These questions have been confronted by courts in other jurisdictions. The

88 Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, (1986), 33 D.L.R. (4th) 174. For example, it could be argued that the infringing actor, from Mr. Borowski's point of view, was the judicial branch of government in striking down the prohibition against abortion. Similarly, the recent spate of Provincial court injunctions preventing women from obtaining abortions could be seen, on this analysis, as directly infringing the women's right to equality, liberty and security of the person.
89 In the last few years, the court has been confronted by a number of issues which implicitly pose questions about the appropriate role of the judiciary. Among the more contentious have been those in Operation Dismantle v. The Queen, [1985] 1 S.C.R. 441, (1985), 18 D.L.R. (4th) 481 (a case which potentially raised the issue of whether the testing of American nuclear missiles on Canadian territory infringed Charter rights), and Singh v. Minister of Employment and Immigration, supra, footnote 21 (regarding the rights of illegal immigrants and refugees in Canada).
results have varied both in the approach adopted and in the courts’ conclusions on the issue of state regulation of reproduction. One of the more striking examples of differing judicial approaches to essentially the same constitutional language is found in the two mid-1970s decisions of the United States Supreme Court and the West German Constitutional Court and in the subsequent cases in other jurisdictions these decisions have influenced. In these two cases:

... despite appeal to values of personhood and human dignity, two courts resolved the abortion issue in different ways. The United States Supreme Court invoked these values to vindicate the constitutional right of a woman to procure an abortion. The Federal Constitutional Court appealed to the same values to vindicate the right to life of the unborn.

The United States Supreme Court decision was, as discussed already, based on a right to privacy found to exist as part of the protection of liberty and due process under Amendment XIV of the Constitution which provides: ‘No State shall . . . deprive any person of life, liberty or property, without due process of law.’ The court concluded that a foetus was not a ‘person’ within the meaning of the Amendment and, in the absence of countervailing interests, the right to privacy protected the woman from state interference in her decision regarding termination of pregnancy. However, in the second trimester of the pregnancy, hazards to the life or health of the woman were considered justification for some restriction on the availability of abortion. In the third trimester the foetus was considered viable as independent life and given constitutional recognition. Accordingly state action to protect it was justified. In effect, the regulation of reproductive decisions was envisaged as a balancing process throughout the entire nine month period with the scales ‘weighted’ at either end by a presumption in favour of the woman’s privacy rights in the first three months and by the unborn child’s right to life in the last three months.

One year later, in stark contrast with the opinion of the United States Supreme Court, a majority of the West German Federal Constitu-

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90 Kommers, loc. cit., footnote 13, at p. 372, noted that between 1974 and 1978 cases dealing with the constitutionality of abortion legislation were decided in Canada, Austria, France, Italy, West Germany and the European Commission on Human Rights. Subsequently there have been cases in Spain, Ireland and the United Kingdom. P. Glenn, The Constitutional Validity of Abortion Legislation: A Comparative Note (1975), 21 McGill L.J. 673, found that the decisions in Germany, Canada, France and the United States cast an.

91 Roe v. Wade, supra, footnote 51; Decision of the West German Constitutional Court, 25 Feb. 1975, supra, footnote 51; and cases listed at footnote 13.

92 Kommers, loc. cit., footnote 13, at p. 379.

93 See discussion, op. cit., footnote 51.
tional Court reached an opposite conclusion under an analogous constitutional provision of the German Basic Law which stated, in part:

Art. 1 The dignity of man is inviolable.

Art. 2 Everyone has the right to life and to inviolability of his person.

"Everyone" was interpreted as including an unborn human being from the date of potential life (which was decided to be fourteen days after conception), and the right recognized under Article 2 was not divisible. The majority judgment declared a statute according recognition to the woman's right to decide on whether to continue the pregnancy during the first trimester unconstitutional, and found that the state had a positive duty both to act to protect the right to life of the unborn person from this point on, and to express moral disapproval of abortion. In effect each court declared as "unconstitutional" laws which were implicitly accepted by the other as the appropriate way of reconciling the various interests in the decision to terminate pregnancy. Ernst Binda, refering to this division of opinion which is not confined to the United States and West German jurisdictions, commented:

An interesting point is the differing view of the development of human life. . . One may wonder at this disparate legal treatment of the same biological phenomenon. It is well imaginable that law considers a biologically continuous process as legally non-continuous since the biological facts are not the primary concern. The various views on the development of human life do not mirror a scientific opinion on which the legal result is dependent, but rather reflect the constitutional evaluation of unborn life, independent of any biological research. It is worthwhile to stress that all solutions discussed are found in countries where there is no doubt of the close attachment to the concept of a free and democratic society governed by the rule of law. The disparity in solutions points out the relativity of our own judgment on this controversial subject.

Not surprisingly the two judgments have been the subject of extensive academic and judicial discourse.95 One of the more influential analyses is that advanced by Donald Kommers.96 Essentially he argues that the West German Constitutional Court approached the law in terms of its educative role and was unembarrassedly concerned with the expression and protection of social or communitarian rights as well as individual protections. The United States Supreme Court, in his view, instead emphasized personal autonomy, liberty and isolation. Its decision exhibit-

95 See articles cited, supra, footnotes 13 and 51; and also more generally Glendon, op. cit., footnote 10.
96 Loc. cit., footnote 13. Stith, loc. cit., footnote 51, at pp. 513-514, adopts Kommers' framework in his analysis of a recent Spanish case on abortion. He suggests:

The Spanish Constitutional Court decision of 11 April 1985 which was strongly influenced by the German one, is in many (but not all) ways even more communitarian than that prior opinion.
ited an essentially individualistic view of the world in which law "must remain morally neutral if free choice is to be given reign". Kommers sides enthusiastically with the West German Court's approach:  

... the German jurisprudence gives us... a richer concept of the human personality. The moral rationality underlying American cases "abstracts persons from the meaningful contexts in which they live their lives and define themselves". In fact obsessive concern with freedom of choice may damage personality and character, actually inhibiting people from resolving their problems in accordance with their identities.

... the Supreme Court seems determined to strike down any and every law crafted to enhance the quality of moral rationality or to encourage exercise of moral choice within a framework of familial, communal, or social relationships.

Our current constitutional policy, so different from that of Germany, arguably drives some women into isolation, leaving them to their own devices.

This view is not, however, accepted by all commentators. Gerstein and Lowry posit a "realist" analysis, taking account of political pressures on the West German Court and the legislative history of the abortion provisions. They adopt an analytical framework which characterizes the majority decision in the West German case as paternalistic, doctrinal, concerned with objective values and abstract norms, and as an illustration of Durkheim's mechanical solidarity model of the function of criminal law in society. This is compared unfavourably with the approach of the United States Supreme Court which is described as "unhampered by abstract norms" and concerned with a "broad social perspective". They conclude with an enthusiasm equal to that of Kommers:  

In striking down stringent statutory restrictions, the United States Supreme Court provided other jurisdictions, including Germany, with a salutary lesson in balancing conflicting fundamental rights in the light of social reality. This "law in action" approach produced a decision markedly different from that resulting from an abstract doctrinal analysis...  

The Federal Constitutional Court, however, blinded itself to the needs of society at large and especially to those of women...
This [West German] decision demonstrates that abstract analysis makes "bad law," whereas a judicial balancing of conflicting rights and interests can best respond to the needs of contemporary society.

The two decisions represent judicial responses to approaches to regulation which have been described as "the periodic model" and the "indication model".102 The "periodic model" like the one accepted in the United States, Austria and France, accords primacy to the woman's right to self determination during the first trimester. The "indication model", which was adopted in Germany following the court's decision that the "periodic model" was inconsistent with the German basic law, still connects the legitimacy of abortion to particular stages during the period of gestation. For example, the central prohibition on abortion does not apply during the first four weeks after the last menses—that is "acts whose effect occurs before the completion of nidation do not constitute abortion".103 After nidation abortion is permissible only where specific circumstances or defined "indications", primarily related to medical grounds, exist.104 It is notable, however, that there is an underlying similarity in the approach adopted by both courts because on either decision no value is supreme and allowance is made for other competing interests—in particular the physical health of the woman.

The point of interest for present purposes is determining where the decision in Morgentaler "fits" in terms of these other decisions and analytical frameworks. The Canadian Criminal Code provision declared unconstitutional in Morgentaler was essentially an "indications model" form of regulation in that abortion was not permissible during pregnancy except in the indicated circumstances—that is where the relevant authorities had determined that termination of her pregnancy was necessary for the life or health of the mother.

The two "majority of the majority" decisions in Morgentaler found the statute to be inconsistent with the Charter, not because the underlying policy or the balance of rights within the provision was offensive, but because the means of determining the "indication" were flawed. The majority, under the aegis of the Charter, did strike down the law, but in terms of its analytical approach, and the institutional role of law, they adopted what was essentially a "Parliament has spoken" approach. Thus, even while de facto (and perhaps inadvertently) reversing Parliament's policy on abortion, it did so without acknowledging this aspect

103 German Penal Code # 218 StGB; #219d StGB, as cited in Eser, ibid., at pp. 374, 375.
104 Eser, ibid., at p. 377, notes that there is an additional personal exculpatory ground which applies only to the mother and has the effect of encouraging "abortion tourism".
of the decision, and while accepting the legitimacy of the view that abortion was an activity appropriate for some form of state regulation. In this sense then the two decisions do not differ greatly from the 1975 pre-Charter decision in Morgentaler v. The Queen\(^{104a}\) although the result is clearly different.

The most striking aspect of the majority decisions are in their result-oriented interpretations of the Charter provisions. This is particularly the case with the judgment of Beetz J., who clearly envisages and to a degree suggests the way in which Parliament might mend the procedural practices relating to reproductive regulation. The position taken by Dickson C.J.C. is less clear because of his comment regarding control over the woman’s right to make the decision. While not directly confronting the issue of whether abortion should or should not be regulated, both judgments in fact unquestioningly accept the proposition that abortion should be regulated by the state. Paradoxically, while expressly refraining from deciding whether the rights of the foetus, if any, should be recognized, both judgments have the final result that, until Parliament enacts further legislation, abortion in any circumstance is no longer a statutory criminal offence.\(^{105}\) In effect this totally negates, at least in the interim, foetal interests and is, perhaps unintentionally, a “win” for the pro-choice faction. The central problem with this result is the apparent failure on the part of the majority to address or even recognize this point. This would seem to be the basis for McIntyre J.’s comment that the conceptual underpinning of the majority decision assumes a right to abortion. One might question, given the obvious attempt by Dickson C.J.C. and Beetz J. to avoid abortion on demand, the failure to sever the offending provision.\(^{106}\) While it is not strictly analogous, the situation could be compared to a situation involving a murder provision in which the exculpatory provision for self defence was unworkable. It is hard to believe that in that context the court would strike down the entire offence of murder.

The heart of the difficulty with regulating reproductive decisions is that they are not appropriate subjects for criminal legislation or any other form of state control.\(^{107}\) The real issue, as identified by Wilson J., remains

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\(^{104a}\) *Supra*, footnote 38.

\(^{105}\) Under the Criminal Code, *supra*, footnote 4, s. 8, there are no longer common-law criminal offences.

\(^{106}\) It is recognized that complete severance of any exculpatory provision would then shift the balance of interests, subject to any common law exception, in the other direction and effectively result in a return to the statutory situation that prevailed in Canada before the enactment of the “defence” in 1969.

\(^{107}\) Eser, *loc. cit.*, footnote 102, at p. 383, argues:

> Without this socio-economic assistance, criminal prohibition of abortion ultimately amounts to a half-hearted, if not deceptive, lip-service to protecting unborn life.
one of control over decision-making and the subjugation of the individual to an historically male-defined community. While there are foreseeable problems arising from the scope of Wilson J.’s decision, it is commendable for directly (albeit with some hesitancy and evident awareness of future cases dealing with foetal rights), confronting the difficult issue of a woman’s right to make decisions about her body. Unfortunately her ultimate acceptance of a foetal versus woman’s rights paradigm undermines her initial position regarding the importance of control over one’s body. There has been a great deal of concern, particularly in relation to the new reproductive technologies, about employing a legal framework which pits women’s rights against foetal rights rather than characterizing the issue as a question of personal autonomy and equality. 108

Wilson J.’s comments in relation to section 1 can be characterized as adopting the “periodic model” approved by the Supreme Court of the United States and approaching the issue as one of expressly balancing individual rights. Her decision suffers from a shortcoming, attributable perhaps to her concern to limit the scope of the judgment and a reluctance to comment on facts not immediately before the court, in that she did not consider and provide comment on the implications of her conclusion that a right to liberty and security in the context of abortion includes the right to make fundamental decisions about one’s body. 109 In the context of abortion, this right could be characterized as the right of a pregnant woman to demand medical treatment—in effect the converse to the right to refuse consent to treatment. Certain limitations on the right to refuse treatment exist at present such as, in the context of mental health treatment, harm to self and others.

The Borowski decision, other than its foreclosure of arguments premised on the notion of action by omission as well as commission, has

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108 See comments, supra, footnote 67.

109 The case of Re Eve, [1986] 2 S.C.R. 388, (1986), 31 D.L.R. (4th) 1, is an example of a fact situation which might provide difficulty in future cases. Eve dealt with the question of whether a court should exercise its parens patriae jurisdiction to authorize the sterilization of a mentally handicapped adult woman. Although s.7 of the Charter arguments were advanced, the court chose to decide on an alternative basis. La Forest J., writing for the court, commented on the “grave intrusion on a person’s rights and the certain physical damage that ensues from non-therapeutic sterilization without consent...”; ibid., at pp. 431 (S.C.R.), 32 (D.L.R.). He dismissed the s. 7 arguments as inapplicable (ibid., at pp. 436 (S.C.R.), 35 (D.L.R.)):

But assuming for the moment that liberty as used in s. 7 protects rights of this kind [procreation and choice of contraception] (a matter I refrain from entering into), counsel’s contention seems to me to go beyond the kind of protection s. 7 was intended to afford. All s. 7 does is to give a remedy to protect individuals against laws or other state action that deprive them of liberty.

Although La Forest J. noted counsel’s argument that court-ordered sterilization infringed a right to security of the person he did not respond to it other than to comment that it was not necessary to decide on the basis of the Charter arguments.
little impact on the abortion question. The main basis on which the Supreme Court of Canada can be faulted is its failure to hear the case with Morgentaler, thereby more completely considering all aspects of the issue of abortion.

One of the most interesting aspects of these two cases is the public response to the court’s decision and the extent to which its conclusions are accepted. It is apparent that the situation that prevailed in the United States following their Supreme Court’s decision in Roe v. Wade\(^{110}\) is also occurring in Canada. The problem has become the highly practical issue of funding and regulation of access to abortion clinics by provincial governments. It was pointed out in the introduction that health in Canada is generally considered a matter for provincial governments. Whether the local funding bodies will abide by the decision by providing funding or better administrative structures, or even providing an administrative structure at all remains to be seen.\(^{111}\) Events in British Columbia and the Maritime provinces, where the provincial governments have passed health regulations preventing abortions in “free-standing clinics”, suggest that another legal battle involving the indomitable Dr. Morgentaler may be in the offing.\(^{112}\) The provincial legislation has the effect of restricting access to abortion services but, in terms of a challenge by anti-regulation groups, it is more problematic because of the ostensible purpose of the legislation to protect the security and health of women seeking abortions by setting services standards.

As the court foresaw the issue will arise again and not only in the form of other cases.\(^{113}\) The majority of the court refused to give com-

\(^{110}\) Supra, footnote 51. Recent events in the United States indicate that the debate has once again re-opened.

\(^{111}\) Maher v. Roe, 432 U.S. 464, 97 S. Ct. 2376 (1977); Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671 (1980), decided that the state was not obliged to support financially abortion on demand.

\(^{112}\) See, for example, Anti-Abortion Protest Draws 2,000, Globe and Mail, 25 March 1989, St. John’s, Nfld (CP); L. Legge, Abortion Clinics Outlawed, The Chronicle Herald, Halifax, 17 March 1989. A case challenging these provisions brought by a pro-choice group has run into procedural hurdles on its standing to challenge the laws. On October 27, 1989 Dr. Morgentaler was charged in Halifax with breach of provincial legislation after he announced that he had performed seven abortions in his clinic contrary to the regulations.

\(^{113}\) The government-ordered release and sale of “abortion” pills in France raises some interesting questions. Glendon, op. cit., footnote 10, p. 19, argues in favour of the French approach to abortion which,

\[...\] names the underlying problem as one involving human life, not as a conflict involving a woman’s individual liberty or privacy and a non-person.

Similarly, it is suggested that the case of R. v. Sullivan, supra, footnote 7, although thought to replace the case of Borowski, does not in fact replicate the exact issue. While the question of foetal status is indeed raised in the context of the death of a foetus while in the process of birth, it does not deal with the fundamental question posed by abortion: who has control over the decision as to whether to continue a pregnancy.
plete consideration to the real issue before it—the meaning of control over one's physical person in the context of abortion and guaranteed rights such as life, liberty, security of the person and equality. A recent Working Paper of the Law Reform Commission of Canada is illustrative of the problem caused by lack of clear direction from the Supreme Court on the meaning of these rights. The Working Paper, Crimes Against the Foetus, is a melange of philosophizing which pays lip service to the issue of personal autonomy and equality, before enthusiastically proposing what appears to be more restrictive legislation than existed pre-\textit{Morgentaler}. Indeed, it seems almost directly counter to the general thrust of the \textit{Morgentaler} decision with respect to the issue of a woman's control over fundamental personal decision-making, a constitutionally important value clearly supported by Wilson J., and arguably by Dickson C.J.C. and Lamer J. The proposed "crime against the foetus" would remove decision making from women at all stages and once again do so in the context of a criminal law prohibition. The Commission posed a four question test for deciding whether foetal harm should be a crime. It concluded that it was not necessary to decide that a foetus was a person in order to decide that it was an entity worth protecting:\footnote{Ibid., p. 45.}

\... to decide whether to give the foetus criminal law protection we don't need to decide if it is a person. Instead we can directly ask how far we should protect it.\...

Once we go straight to the question of how to treat the foetus, our ordinary intuitions can point the way. This exercise of "ordinary intuition" resulted in a proposal which permits abortion only where the woman's physical and psychological health is at stake. A public interest in the unborn is extant at all stages of pregnancy. This is determined to be necessary to ensure that women do not decide to abort on the basis of caprice and pure whim.\footnote{Ibid., p. 44.} The proposed crime of foetal destruction would, consequently, not apply to acts done before the twenty-second week of pregnancy to protect the woman's physical or psychological health.\footnote{Ibid., p. 47.} Criminal law is deemed the appropriate form of regulation because of its symbolic importance in "upholding respect for human life, stressing the value of the unborn human life and emphasizing that pregnancy termination has to be—not least for the sake of the mother's own health—a medical matter".\footnote{Ibid., p. 47.}

\footnote{Op. cit., footnote 1.}

\footnote{Ibid., p. 34.}

\footnote{Ibid., p. 44.}

\footnote{Ibid., p. 45.}

\footnote{Ibid., p. 47. Given the tenor of the Working Paper it should have come as no surprise to find that it was unacceptable to many interested groups: See V. Gogolek, Media's Abortion Coverage Hit, The National (March 1989), at p. 17, which reported the response of Mr. Justice Allen Linden, President of the Law Reform Commission of Canada, to criticism of the Paper.}
Parliament, the legislatures, the Law Reform Commission of Canada and the courts have all roles to play in attempting to determine how the law should treat abortions. In Morgentaler the Supreme Court of Canada made it clear that it will at least subject the procedures of abortion legislation to rigorous constitutional scrutiny. It, perhaps prudently but equally it may be thought unfortunately, left for another day a full consideration of the substantive issue of whether a woman should be free to decide to have an abortion or whether there is a sufficient state interest in that decision to justify some form of regulation. It also avoided dealing with the substantive issue in Borowski, but on appeal in R. v. Sullivan it may not be able to do so again. Moreover, in so far as abortion is legal, the court may eventually have to face equally difficult questions on whether provinces may prohibit abortions outside of accredited hospitals, limit abortions taking place in these hospitals or refuse to pay from provincial medical schemes the medical costs associated with abortions. It is inevitable that any decision of the court on these or similar matters will, like the proposals from the Law Reform Commission of Canada, fail to satisfy major sections of the community. On such an issue as abortion, the courts were before the advent of the Charter on the fringes of the storm; in the post-Charter era they are in its eye. The success with which the courts, and in particular the Supreme Court of Canada, deal with issues like abortion will be a major test of how far the public accepts their role in the changed constitutional structure of Canada.

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119 Supra, footnote 7.

120 The recent flurry of judicial activism in Ontario and Quebec provides striking evidence to the community that the judiciary are in the forefront of policy and law making: precedent and parliamentary supremacy are fast achieving the status of myth. See, for example, K. Makin, Ruling on Fetus seen as priority for top Court, Globe and Mail, 15, July 1989, 1.

In addition to raising related issues, the recent granting of injunctions in Quebec and more particularly Ontario pose other difficult issues for the judiciary.

It is hard to avoid questioning the role of the courts in cases of essentially "private" litigants such as fathers and mothers seeking injunctive relief. Where is the government action or actor, if not the judge? The questions about the role of the judiciary and the state and law making was not completely resolved in Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery, [1986] 2 S.C.R. 572, and it may well come to the surface again.