Cabinet Meetings, Ottawa, 1988-1990: Discussions of Abortion

Note: These are all the Canadian cabinet discussions held on the topic of abortion in the years 1988 to 1990, released under my *Access to Information Act* requests. Below is a record I have compiled from the cabinet minutes (and background papers), which I have scanned and re-formatted for easier readability. I have added several explanatory notes in square brackets. The cabinet papers in their original formatting are available upon request from the Privy Council Office in Ottawa.

The *ATI Act* allows the public to view cabinet minutes only after 20 years have passed. Yet many lines of the minutes are still being withheld, mostly under *ATI Act* section 23 (solicitor-client privilege, which is an exemption with no time limit).

– Journalist Stanley Tromp, 2013.

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SECRET

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Serial # 1-88 CBM

Cabinet Minutes

A meeting of the Cabinet was held in Room 323-S, House of Commons, on Thursday, January 28, 1988 at 9:30 a.m.

Abortion

(R - 901.2 - 88D1)

1. there has been a ruling [Jan. 28, 1988] by the Supreme Court on the constitutionality of Section 251 of the *Criminal Code*;

2. the Prime Minister [Rt. Honourable Brian Mulroney] read aloud the Supreme Court decision which stated that Section 251 of the *Criminal Code* interferes with women's rights;

3. the Minister of Justice [Hon. Ray Hnatyshyn] explained that the Court has ruled that Section 251 is non-constitutional. When questioned, the Minister will refer to the decision as an important one which will need to be considered carefully;

4. Ministers noted the implications for the *Charter of Rights* and the movement of Canadian jurisprudence towards the U.S. style of legislating through the judiciary; and

5. Ministers noted the importance of not pronouncing on the issue, of avoiding promises or of publicly discussing options.

Serial #3-88 CMPP

The Cabinet Committee on Priorities and Planning

Minutes

A meeting of the Cabinet Committee on Priorities and Planning was held in Room 323-S, House of Commons, on Tuesday, February 2, 1988 at 9:30 a.m.

Abortion

(2-9190-88D1)

The Prime Minister sought the views of Ministers on options for dealing with the Supreme Court decision that struck down the abortion law. He indicated that he had limited his own public comments to the fact that the Supreme Court was the ultimate arbiter of law in Canada, that its decisions would be respected by the Government, and that he would read the judgment and reflect on it.

The Minister of Justice [Hon. Ray Hnatyshyn] stated that the direct consequence of the judgment was that there was no law governing abortion. Pro-life groups were the most offended by the judgment, and were looking to the Government for a new law. Women's groups viewed the judgment as a victory. Should the Government decide to legislate, very careful drafting would be required to take account of the views presented in the judgment.

The Minister indicated that, following the judgment, he had written his provincial counterparts proposing a meeting of Deputy Ministers of Justice on February 10 to 12 to consider the situation. In the interim, he had reviewed the legal implications with the Minister Responsible for Women, the Minister of National Health and Welfare and the Minister of State (Federal-provincial Relations). Five options were discussed: take no action; new *Criminal Code* legislation; use of the *Canada Health Act*; use of the override provision of the *Charter of Rights and Freedoms*; and review of the issue by a Royal Commission or a Parliamentary Committee. The last two options were rejected; work on the others would continue with emphasis on legislative options. In the interim it was important that Ministers and members of Caucus not place themselves in positions that would compromise the Government's options.

The Minister Responsible for the Status of Women [Hon. Barbara McDougall] noted that the issue was a decisive one for women. They did not, on balance, view the judgment as a victory. Rather, there was a sense of relief that the most restrictive elements of the law had been struck down. The practical concern was that there was no legal definition of the time frame in which an abortion could be performed.

The Minister of National Health and Welfare [Hon. Jake Epp] said that the status of the fetus was an open question even in the case of medical negligence. He noted that although the judgment was silent on the *Canada Health Act*, it was being interpreted in light of the Act's comprehensiveness and accessibility provisions as a requirement to fund abortion on demand. The Act required the Minister to take certain steps if its provisions were violated, such as notification of the provincial government and ultimately withholding of funding.

The Prime Minister directed that the group of Ministers reviewing the issue be formalized, and extended to include Mme Vezina [Hon. Monique Vezina, Minister of State for Transport] and Mr. Bouchard [Hon. Lucien Bouchard, Minister of State for the Environment]. Other Ministers were free to participate if they so desired. He said that the group should give immediate consideration to the question of what the Government should say to women who were pregnant and seeking access to services. The group should then undertake a review of abortion laws in other jurisdictions to determine whether they provide a model for a new Canadian law, recognizing that the Supreme Court signaled that the rights of the fetus should be examined.

The Deputy Minister of Justice stated that the Supreme Court would hear the *Borowski* case on the rights of the fetus in the course of the year. Given the *Morgentaler* judgment, however, they might determine that the case no longer needed to be decided.

The Prime Minister concluded the discussion by indicating that a free vote would ultimately be required on the issue. He was personally impressed with the sanctity of life arguments, but would not attempt to impose his views on other Members.

Serial #4-88 CMPP

<u>The Cabinet Committee on Priorities and Planning</u>

<u>Minutes</u>

A meeting of the Cabinet Committee on Priorities and Planning was held in Room 323-S, House of Commons, on Tuesday, February 9, 1988 at 9:30 a.m.

General Discussion:

<u>Supreme Court Ruling - Abortion</u>

(7-0070-88RD (01) (NSD))

The Government Leader in the Senate [Sen. Lowell Murray] reported on the results of deliberations undertaken by the Ad Hoc Committee examining responses to the recent Supreme Court decision on abortion. He made the following points:

1) public opinion was not at either extreme; the majority of people could support abortion under some circumstances but there was no consensus on what the conditions should be;

2) the Ad Hoc Committee was not in favour of establishing a Royal Commission to consider both abortion issues as well as issues respecting reproductive technology; and

3) the Committee did support a public statement which would indicate the Government's intention to legislate, recognizing that Canada currently was alone among the industrialized countries in having no law dealing with abortion.

During the ensuing discussion, the following points were made:

1) the Government should resist using the notwithstanding clause in the constitution, despite pressure to do so from certain caucus members;

2) the *Canada Health Act* did not provide the Government with the power to tell the provinces that they had to pay for abortions;

3)

< 5 lines withheld under ATI Act sec. 14, federal-provincial affairs >

4) the matter would likely require a free vote; and

5) the Government needed to act with some urgency.

The Prime Minister concluded that there was a consensus in favour of making a public statement on the intention of the Government to introduce legislation. He added that the Government should move sooner rather than later and that he was not offended by the notion of a free vote on the issue.

The Committee agreed that:

1. legislative options be drafted by the Department of Justice for consideration by the Cabinet Committee on Priorities and Planning at an early date;

2. the government's intention to legislate be announced at an appropriate time; and

3. the Ministers of Health and Welfare and Justice continue to consult with the provinces on their response to the Supreme Court decision in the *Morgentaler* case.

Serial #5-88 CMPP

The Cabinet Committee on Priorities and Planning

Minutes

A meeting of the Cabinet Committee on Priorities and Planning was held in Room 323-S, House of Commons, on Tuesday, February 23, 1988 at 9:30 a.m.

Abortion

(4-9107-88RD)

The Prime Minister noted that, following the Supreme Court ruling, abortion was a difficult but important issue on which legislation should be introduced prior to an election. He asked the Secretary to the Cabinet to ensure that the Government's options would not be reduced by positions which the Department of Justice was taking in other cases.

Serial #6-88 CMPP (Annex II)

The Cabinet Committee on Priorities and Planning

Minutes

A meeting of the Cabinet Committee on Priorities and Planning was held at Willson House, Meech Lake, on Saturday, March 5, 1988 at 9:30 a.m.

Abortion

Decisions will be required on legal, house strategy and health issues, including:

- model on which to base the legislation (e.g., trimester approach where accessibility to abortion would become more difficult as unborn child develops; two-stage approach providing a cut-off date after which abortion would only be available to save a woman's life);

- manner in which issue would be addressed in House (i.e., Government bill or resolution);

- position the federal Government will take with the provinces with respect to application and enforcement of the *Canada Health Act*.

Roundtable Discussion

(1-9150-88DI)

The Chairman of the Cabinet Committee on Economic and Regional Development indicated that the key sectoral priorities included:

< Lines withheld – not relevant >

The Minister stated that abortion should be the top priority for the Government. People in all walks of life wanted the issue settled; the debate was too wrenching and divisive to be allowed to continue much longer.

The Prime Minister agreed that it was important to resolve the issue, and options would be considered later in the meeting. *[See March 4, 1988, box of options placed below in this file.]*

Abortion

(4-9152-88RD)

The Minister of State (Federal-Provincial Relations) [Sen. Lowell Murray] reviewed the background to this issue, the discussions of the Ad Hoc Committee on Abortion and his meetings with provincial and regional caucus Chairmen. He explained that, as a result of the Supreme Court decision, there was no law in Canada regulating abortions, although the *Criminal Code* and provincial health statutes provided basic controls. The Minister of Justice had stated publicly that the Government would introduce legislation consistent with the *Charter of Rights* and with the Supreme Court decision, and would not make use of the override provision in the *Charter of Rights*. The Ad Hoc Committee of Ministers was committed to finding a real and lasting solution; it had rejected a process approach which would have put off the difficult questions to a later date. Nevertheless, the Government needed to be ready with a back-up position which might involve deferring definitive action, in the event that consensus could not be reached. He had reassured caucus members that there would be a free vote on this issue, as the Prime Minister had promised in 1984.

The Minister of State (Federal-Provincial Relations) reported that the Ad Hoc Committee favoured a middle ground approach, involving regulating abortions with some time limits. For example, under a two-stage approach abortions would be readily available to a statutorily fixed period of gestation, but only performed after that point in life threatening situations. The major question under such an approach, was where to draw the line. Arguments could be made for the imposition of restrictions as early as 12 weeks or as late as 24 or 28 weeks. Legislation based on gestational development would probably be acceptable to a substantial portion of the public. However, it would be repugnant to those who took a traditional “right to life” view and who held that restrictions should be placed on all abortions except where the mother’s life was threatened and perhaps in cases of rape and incest.

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Regarding process, the Minister of State (Federal-Provincial Relations reported that the Ad Hoc Committee of Ministers favoured a free vote on a government resolution proposing a legislative approach (e.g., trimester or two-stage), and then introducing government legislation based on the outcome of the vote. Alternatively, the drafting of the legislation could be referred to a House Committee, on which a free vote could ultimately be held.

On the health issue, he noted that, under the *Canada Health Act* (CFIA), provinces must satisfy certain criteria before receiving the full federal transfer payment for health. Provinces could not be forced to comply; however, penalties could be imposed. Provincial positions on the abortion issue were shifting. He recommended against convening a Health Ministers' meeting until there was a clear Government position; however, the Minister of Health and Welfare should make a factual statement outlining his responsibilities and options under the *CHA*.

Finally, the Minister of State (Federal-Provincial Relations) outlined the following key questions for discussion:

- What was the Government's objective on this issue?

- How should the issue be handled?

- What approach should be taken with Caucus?

- Was a back-up option required (e.g., legislation prohibiting abortion, but with minimal restrictions)?

The Minister of Justice highlighted constitutional considerations deriving from the reasons for judgment in the recent Supreme Court decision and outlined the legislative options for dealing with this issue. A copy of his notes is attached.

< 7 lines withheld under ATI Act sec. 23, solicitor-client privilege >

The Minister of National Health and Welfare [Hon. Jake Epp] reported on options open to him under the *CHA*. In cases of extra billing (e.g., if a doctor in an abortion clinic charged more for performing an abortion than a doctor in a hospital), he could impose a non-discretionary financial penalty. If other criteria were not met (e.g., comprehensiveness, accessibility, portability), discretionary financial penalties could also be imposed.

The Minister of National Health and Welfare

< 5 lines withheld, under ATI Act section 19(1) – personal information >

The Minister of National Health and Welfare outlined the following arguments against the gestational development approach. First, it was arbitrary, and did not provide fundamental

justice. It was also inadequate, as it failed to take account of abortions which should be performed after, or those which should not be performed before the cut-off date. It was aimed at convenience; yet the implications of such an approach were frightening, should a similar approach be taken for the elderly or the disabled. It was ignorant of scientific facts - there was no difference between one side of the line and the other except growth; the components had not changed.

The Minister of National Health and Welfare argued that his alternative was preferable because it offered a standard but was not arbitrary, was objective as regards life, and recognized that foetal viability was a moving target. For example, both the very young and the very old required care to be viable.

He disagreed fundamentally with the gestational approach being taken by the Department of Justice and said that he had consulted lawyers who supported his view. With his approach, he noted that there would be more flexibility than he personally would like to see, but he recognized that leaders had to take decisions based on the greater good.

He advocated working with the provinces in developing a package of initiatives aimed at supporting life, and including, for example, measures to facilitate adoption, assist teenage mothers and provide child care.

Finally, the Minister of National Health and Welfare argued that the issue at stake was the preservation and dignity of life - thus it could not be treated simply as a legal question requiring a legal solution.

In view of the limited time remaining, Prime Minister suggested that further discussion be deferred. He noted that this was one of the most difficult and important issues facing the Government and one on which there were deeply held personal views. However, there was not yet a Government position on it. Options would be discussed with caucus the next day, and their views sought. Subsequently, Ministers would discuss how best to proceed. He expressed confidence that a solution could be found which would stand up in court and win public acceptance.

SUMMARY OF CONSTITUTIONAL CONSIDERATIONS

The following summary presents a number of basic propositions derived from the reasons for judgment in *Morgentaler v. The Queen*, but it does not address all of the many subtleties of that judgment and all of the pertinent *Charter* considerations.

- The *Charter* protects a woman's decision to terminate her pregnancy, and protects the exercise of that decision from state - interference that would threaten the physical or psychological aspects of her security.

• The judgment of the Supreme Court leaves little room for the imposition of limits in the early stages of a pregnancy.

• However, the judgment recognized that the constitutional rights of the woman, especially during the later stages of pregnancy, can be subject to reasonable limits imposed by the state in the interests of protecting the unborn or protecting the life or health of the woman.

• Any such limits must be rationally and proportionally connected to these interests.

• Especially in the early and middle stages of pregnancy, any limits or procedures cannot deny or significantly delay a pregnant woman's access to a therapeutic abortion, such that she would be put into a position of greater risk or danger to her physical or mental health.

• In assessing the weight of the state's interest in protecting the unborn, two of the reasons for judgment refer to the development of the unborn child and its viability.

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• Even when the state is justified in adopting measures to protect the unborn, the right of the pregnant woman to security of her person includes a right of protection from threats to life or serious risk of harm to health arising from the pregnancy.

Legislative Options. March 4, 1988

OPTIONS	**PROS**	**CONS**
1. **Maintain Status Quo** - no *Criminal Code* legislation - rely on provincial regulations governing health care and medical practice - use existing *Criminal Code* provisions to prosecute in case of death or harm as a result of abortion	• 28% of Canadians believe abortion should be legal under any circumstances	• 55% of Canadians believe abortions should be legal "only under certain circumstances." • inconsistent with government commitment to introduce legislation
2. **Introduce Legislation Prohibiting Abortion, but with Minimal Restrictions**	• satisfies commitment to legislate	• provides no protection to unborn

- abortions prohibited except those carried out by qualified medical practitioner according to current medical practice	• addresses hypothetical problem of "back alley" abortions • supported by those who oppose limits on rights of woman to choose	• does not respond to Supreme Court invitation to draft legislation based on foetal development
3. <u>Introduce Legislation Permitting Abortion</u> - based on suitable therapeutic or social reasons - performed by qualified medical practitioner - performed in an approved medical facility	• satisfies commitment to legislate • liberalized approach to abortion without administrative problems in S. 251	< 13 lines withheld, under ATI Act section 23, solicitor-client privilege >
B. <u>Moderately Restrictive Options</u> **4. <u>Introduce Legislation Based on Trimester System</u>** - <u>first trimester (0-12 weeks)</u>: abortion is left to decision of woman in consultation with her doctor - <u>second trimester (12-24 weeks)</u>: abortion restricted (suitable therapeutic or social reasons, performed by qualified medical practitioner in an appropriate medical facility) - <u>third trimester (24-36)</u>: abortion only permitted where there is a threat to life or health of woman	• consistent with US model • supported by 55% who believe abortion should be legal "only under certain circumstances" • most abortions performed in first 12 weeks • pro-choice supporters would support the lack of restrictions in first trimester and some may support limits in the second and third trimesters	• would be opposed by pro-life supporters as "abortion on demand" in first and even in second trimester • increasingly earlier viability point due to medical advances means unborn in second trimester may soon be able to survive separated from its mother – if justification for the third trimester is based on principle of viability, a fixed timeframe could be seen to be arbitrary • some pro-choice supporters may oppose grounds in second trimester

• Definition of health could range from physical health to social and economic well-being **5. <u>Introduce Legislation Based on Three Stage System</u>** - <u>in the first 16 weeks</u>: abortion is left to decision of woman in consultation with her doctor - <u>from 17 weeks to the point of viability</u>: abortions only performed where the continuation of pregnancy would or would be likely to endanger the life or health of the woman - <u>after viability</u> (as determined according to current medical practice), abortions only permitted where continuation threatens life or is a serious health risk to woman	• timeframes easier to justify because they are based on objective criteria • definition of viability is flexible and would allow for adjusting to reflect changes in medical technology • scheme addresses and balances the two legitimate objectives of legislative intervention (i.e. protection of rights of woman and unborn) recognized by Supreme Court in *Morgentaler* decision	• no protection for unborn in first stage • pro choice supporters may oppose need for grounds for abortion prior to viability
6. <u>Introduce Legislation Based on Two-Stage System</u> Options **a)** abortion legal (based on suitable therapeutic or social reasons, performed by qualified medical practitioner in approved medical facility) to statu-torily fixed period of gestation (e.g. 28 weeks in	• eliminates administrative impediments criticized by Supreme Court • provides protection for the unborn at a certain fixed point in gestation	• little protection for unborn before limitation point • regulates all abortions, < 2 lines withheld, under ATI Act section 23, solicitor-client privilege >

Britain) and only performed after that when there is a threat to the woman's life or health		
b) abortion legal based on woman's decision in consultation with doctor to a statutorily fixed period of gestation and only performed after that when there is a threat to the woman's life or health	• pro choice groups support the freedom of choice in the first stage • easier to administer	• same as above • same as for a) and b)
c) abortion legal based on woman's decision in consultation with her doctor up to the point of foetal viability as determined by a qualified medical practitioner in accordance with current medical practice. Only performed after that when there is a threat to woman's life or health	• same as for b) but not rigid in dealing with point of viability	
C. <u>Most Restrictive Options</u> **7. <u>Use Section 33 (*Charter* Override) to</u>:** **a)** introduce legislation reinstating S. 251 - abortions prohibited subject to exceptions for therapeutic reasons and subject to procedures, e.g. therapeutic abortion committee **b)** introduce legislation - prohibiting abortion from conception to birth; or	• would be supported by pro-life groups • satisfies government commitment to legislation	• would be opposed by pro-choice groups, those who support Supreme Court decision, and those who do not believe *Charter* should be overriden • would be seen as precedent for further use of S. 33 to override other *Charter* rights of individual • would reject Supreme Court decision although Minister of Justice and Prime Minister have already said the government will respect decision

- permitting abortions only when the woman's life is threatened (pre 1969 situation); or - imposing onerous administrative procedures not related to protection of the woman or the unborn **c)** apply to a part or parts of earlier legislative options, e.g. restricting abortions to a hospital		• < 2 lines withheld, under ATI Act section 23, solicitor-client privilege >

House Strategy on Abortion. March 1, 1988

OPTION	**HOUSE PROCESS**	**VOTING PROCEDURE**	**TIMING**
1. Government Bill (Government policy on abortion)	Government introduces legislation	Free vote at all stages - but not for Ministers, as Bill would be government policy	Bill introduced once government policy approved, e.g., Spring '88
2. Reference to House Committee (no policy content in motion), e.g., that House supports establishment of special committee to recommend policy on abortion	House committee asked to recommend policy to House. If House adopts committee report, either government (preferably), or House committee, to prepare legislation	Party discipline for vote on committee reference; Free vote, including ministers, held on motion to concur in committee's report; Free vote on any legislation - not for ministers if government bill - including ministers	Short debate on terms of reference – April '88; Committee study could be short – June '88, or long – Fall '88 or early '89 Legislation – Fall '88 or early '89

		if committee's bill	
3. Government Resolution (some policy content in motion), E.g., that House supports legislation regulating abortion on trimester system – with or without request to House committee to prepare and report legislation	If resolution without committee reference adopted, government prepares legislation If committee prepares legislation, it would stand in House in chairman's name	Free vote, including ministers, on resolution (e.g., death penalty); Free vote on any legislation - not for ministers if government bill; - including ministers if committee's bill	Long debate in resolution (death penalty debate was 40 hours) – free vote by June '88 Report from committee – Fall '88; Winter '89 Legislation '89
4. Private member's bill or motion	Private member introduces bill or motion, with or without government support	Free vote, including ministers, after 5 hour intermittent debate	Free vote – Late Fall '89

Serial #7-88 CMPP

The Cabinet Committee on Priorities and Planning

Minutes

A meeting of the Cabinet Committee on Priorities and Planning was held in Room 323-S, House of Commons, on Tuesday, March 15, 1988 at 9:30 a.m.

Abortion

(5-9031-88DI)

The Minister of State (Federal-Provincial Relations) reported on discussions in the ad hoc committee reviewing the abortion issue. He said that the *Canada Health Act* aspects of the issue had become less urgent as a result of the British Columbia Supreme Court decision that the provincial government must provide funding. The Minister of National Health and Welfare would not need to take action before the broad legal issues had been resolved.

Work was underway in National Health and Welfare to develop a family support package that could complement legislative action on abortion. Ministerial reaction was mixed, however, with some Ministers supporting the initiative as a means of balancing the debate, and others suggesting that it would be overshadowed by the legislative debate.

The ad hoc committee had also considered the advisability of establishing a Royal Commission to consider the broad issues of reproductive technology. Although Ministers agreed that the issues warranted review, they recommended that it not be undertaken until the main legal issue had been settled.

On that issue, small but vocal minorities of Canadians favoured pure pro-choice or pure pro-life options. The challenge, however, was to develop legislation that would enjoy the widest public acceptance and support. The majority of Canadians favoured an approach that would place greater restrictions on abortion during later stages of pregnancy.

The Minister [Sen. Lowell Murray] said that the ad hoc committee favoured a two-stage legislative process where the first stage would be a resolution seeking the views of Members of Parliament on the broad approach to legislation, and the second stage would incorporate the results of the resolution in a bill.

On the resolution, the Government had two options. -

1. To impose the same restrictions on abortion at all stages of pregnancy. This approach would be more restrictive than the provisions of the *Criminal Code* that were struck down by the Supreme Court,

< 3 lines withheld under ATI Act sec. 23, solicitor-client privilege >

Pro-life lawyers disagreed.

2. To impose restrictions based upon fetal development, with fewer restrictions in the early stages of pregnancy, and greater restrictions during later stages.

A free vote would be allowed on the resolution, but the Government would have to decide whether to allow a free vote on the subsequent legislation. Most members of the ad hoc committee favoured a Government bill, but recognized it could conflict with Cabinet solidarity. If a free vote was to be allowed, the bill would have to be drafted by a Parliamentary Committee.

The Minister of National Health and Welfare said that the gestational approach was most likely to be favoured by Caucus. He questioned whether similar support would be forthcoming from the Opposition parties. They would likely object to the process that had been proposed, criticizing the Government for not bringing in legislation directly or the use of a Parliamentary Committee with a majority of Conservative members to draft the bill.

In the course of discussion, the following main points emerged.

1. In the absence of new legislation, abortion was available on demand. Even a moderate resolution might be defeated by a coalition of pro-choice supporters who favoured the status quo, and pro-life supporters who would argue that the resolution did not go far enough in restricting access to abortion.

2. To protect against this outcome, Caucus would need to be convinced

< 2 lines withheld under ATI Act sec. 23, solicitor-client privilege >

The only realistic alternative to the status quo was a bill based upon gestational development.

3. Caucus was familiar with the proposed substance, as it paralleled that used in the capital punishment debate.

The Committee agreed to review the two resolutions with Caucus to seek their views on which was most appropriate.

Serial # 5-88 CBM

Cabinet Minutes

A meeting of the Cabinet was held in Room 323-S, House of Commons, on Thursday, March 17, 1988 at 9:30 a.m.

In introducing this issue, the Leader of the Government in the Senate and the Minister of State (Federal-Provincial Relations) [Sen. Lowell Murray] noted that he had been put in charge of an Ad Hoc Committee of Ministers consisting of himself, the Minister of Justice [Hon. Ray Hnatyshyn], the Minister responsible for the Status of Women [Hon. Barbara McDougall], the Minister of Employment and Immigration [Hon. Benoit Bouchard] and the Minister of Transport [Hon. John Crosbie] to review this issue and make recommendations to the Cabinet. The attached report [see above] based on several committee meetings reflected the substance of what had been placed before Caucus yesterday. He noted there were two issues at stake:

1. which of the two resolutions before the Cabinet would Ministers be inclined to support for introduction into the House and if passed, the subsequent drafting of legislation;

2. which of the House strategy options would Ministers prefer, noting that the difference between the two referred to in the report was that the first would permit a free vote on the government resolution but then Cabinet solidarity on votes for the subsequent bill while the second option provided for two free votes, both at the resolution stage and at the legislation stage;

3. the preamble to resolution two was added in order to provide a context for the resolution and indicate that the government was forced to act by a Supreme Court decision. Some members of caucus had taken offence to the preamble;

4. in the caucus discussion, several members had indicated that they have and would prefer variations on resolution one or two. It was important to note though that any changes were essentially a variation of either resolution one or two. Resolution two was based on time limits, while resolution one indicated that the same criteria were to apply throughout the term of the pregnancy. Resolution one was more restrictive than section 251 of the Criminal

< 4 lines withheld under ATI Act sec. 23, solicitor-client privilege >

5. several members of caucus had suggested that the government find a way to put both resolutions in front of the House. This would be procedurally dubious and politically foolish as the government would be accused of a lack of leadership. Some members of caucus, however, were insistent on getting their opportunity to vote on resolution one and if it were defeated then they would consider whether or not they would vote on resolution two. If this procedure was followed it would guarantee maximum political embarrassment for the government. For those who preferred resolution two, they would be forced to vote against resolution one. The time that would be necessary to handle two more resolutions would also create a real problem; and

6. Ministers would have to determine which resolution has the best chance of passing the House, enjoying public support and which House strategy would be best to pursue the government's intentions.

In the subsequent lengthy discussion, the following Ministers participated: the Minister of International Trade [Hon. Pat Carney], the Minister of Employment and Immigration [Hon. Benoit Bouchard], the Minister of Science and Technology, the Minister of Fisheries [Hon. Tom Siddon], the Minister of Communications [Hon. Flora MacDonald], the Minister of State (Small Business) [Hon. Bernard Valcourt]; the Minister of Veterans Affairs [Hon. George Hees], the Minister of Energy, Mines and Resources [Hon. Marcel Masse], the Associate Minister of National Defence [Hon. Paul Dick], the Minister of Indian Affairs and Northern Development [Hon. Bill McKnight], the Secretary of State for External Affairs [Hon. Joe Clark], the Minister of National Health and Welfare [Hon. Jake Epp], the Minister of Finance [Hon. Michael Wilson], the Minister of Environment [Hon. Tom McMillan], the Minister of Transport [Hon. John Crosbie], and the Leader of the Government in the Senate and Minister of State (Federal-Provincial Relations). The key points in the discussion were as follows:

1. There was a spirited discussion on if it would be wise for the government to introduce a resolution (resolution one)

< 20 lines withheld under ATI Act sec. 23, solicitor-client privilege >

2. Some Ministers noted that they would support resolution number two, albeit reluctantly, as it was their view that the decision on whether or not an abortion should be performed was really one only for a women and her doctor. It was noted that the great religions of the world did not agree on when life began and so it would be unwise for the government to try and answer this question. Many women had felt a sense of relief from the Supreme Court decision, that a burden had been lifted and that women were out of a bind. If the government introduced restrictive legislation they had to anticipate politically that women would not support the government and that the Conservative Party would be judged for generations on its attitude toward women in terms of how it dealt with this issue. It had to be recognized that reintroducing legislation would be a step backward as it would put restrictions on women which they felt had finally disappeared on January 28th. Women were responsible and would not all rush out to get abortions. Obviously women wanted children but in an atmosphere where they are in control. It was noted that morality was not all on one side of the issue. Ministers should have in front of them the additional options of a women and doctor being left to make this decision as well as the status quo.

3. While a number of Ministers supported resolution two, some felt the subsequent legislation should be drafted by a Committee of House while others felt it should be left to the Government.

4. It was noted that one of the difficulties in resolution two would be the definition of the early and later stages of the pregnancy. If it were a narrow definition of say twelve weeks, a number of Ministers indicated they could not support such legislation, as too narrow a definition would be too hard on the young. It was noted that teenage cycles were very hard to define, not regular, and a great many teenagers were ignorant and frightened and would delay going to parents and their doctors.

5. Some Ministers noted they would prefer an approach building on modifying section 251 to deal with the Supreme Court concerns to make it palatable under the *Charter*, perhaps using a better definition of health. In this regard, the Leader of the Government in the Senate and Minister of State (Federal-Provincial Relations) explained that resolution two was designed to liberalize section 251 so it would pass Supreme Court review. He noted that if one was opposed in principle to the gestational approach, then the choices were either to go with resolution one as drafted or an even more liberalized resolution one. He noted you could not define health in a narrow fashion and expect to pass the Supreme Court test. If Ministers wanted a resolution that was not based on time limits and wanted criteria which would pass the Supreme Court test, then the government would have a very permissive resolution in' front of them.

6. A number of Ministers indicated they could not support any approach based on the concept of gestational periods while others suggested that they could support such an approach with a time limit of about sixteen weeks.

7. A suggestion was made that the government consider dealing by means of a Royal Commission with the larger questions of health and euthanasia and surrogate motherhood so that the government could put some parameters around the things that were going on.

8. While recognizing that there are sociological (cases of violence and rape) and economic reasons to justify an abortion, a few Ministers felt that the majority of caucus wanted to uphold the rights of the unborn and they certainly did not want free standing abortion clinics.

9. A Minister suggested with respect to resolution two that they consider adding a request for consultation with a third party prior to the abortion being done with the third party chosen to consider the rights of the unborn.

10. Some Ministers noted that lobbying pressures should not be overestimated. It was important that all Ministers say where they stood. However, for some neither of the two resolutions permitted that opportunity. It was recognized by those who favored a pro-choice position that they would be expected to go along with resolution two without the comfort that other Ministers would have of voting for resolution one before resolution two.

11. A Minister noted that the government could not reconcile pro-life and pro-choice views and that it had a duty to act and could not use its position to impose certain moral values over everyone.

12. On the issue of the management of the issue in the House, a few Ministers suggested that government show leadership by bringing in a Bill immediately. Others (the majority) felt that it was necessary to have a free vote at the resolution stage. Opinion was divided though a majority favored Cabinet solidarity on any Bill subsequently flowing from a resolution. It was noted that the Conservative Party had a commitment to a free vote.

13. A Minister noted that the government had to take account of the evolution of society which was more liberal and open and insistent on individual freedoms. If the government passed a law not reflecting this reality it had to anticipate evasion. This would be all right for the rich who could go to the United States while the poor would be forced underground. This was an extremely important women's issue on which the government should not be seen to be using powers to refuse women what they need and want.

14. A Minister suggested that the government should perhaps look further ahead in terms of the *Borowski* Appeal which he understood was to be heard by the Supreme Court in June. Given that he would have difficulty with both resolutions, he would prefer to know what the implications are of the *Borowski* decision and what the government could anticipate.

15. The importance of the Government reflecting the thinking of the whole country on this issue and not simply the thinking of Caucus was stressed. It was noted that the Conservative

Party had been successful nationally because it had moved away from Caucus and its views and reached out to the country.

16. ***< 8 lines withheld under ATI Act sec. 23, solicitor-client privilege >***

17. It was recognized that if the government introduces resolution two, there was a possibility that a coalition of forces, who favored section 251, could be built to defeat it.

18. It was suggested the government could introduce a Bill specifying a time limit of sixteen weeks saying that it was forced to act because of the Supreme Court decision, but indicating that it would examine more closely appropriate time period by establishing a Royal Commission. The government would respond to the Royal Commission within six months. This would show the government was acting but leave open the opportunity of saying it was seeking more advice.

19. Those Ministers who favored a pro-life approach, made the following points:

- governments inevitably, when they legislate, touch on issues of morality and so it was inappropriate to argue that you cannot look at an issue like this from a moral point of view;

- with respect to women's positions you will find as many women on one side of this issue as another;

- they could not accept the argument that life was staged, that it has more value at one point than another;

- Ministers need to look carefully at the views of the Department of Justice on this as the *Charter* was not the Holy Grail;

- resolution one was not pro-life and it was not more restrictive than section 251. It was suggested that a resolution should be based on what the Prime Minister had said in his Capital Punishment speech in which he had noted and emphasized some very fundamental principles. In particular, the Prime Minister had emphasized the inherent dignity of a human being and the inherent worth of human life;

- Ministers must recognize that the government's first responsibility was the protection of life;

- the government would have to ensure that any resolution it had would carry Caucus, otherwise it would be better to stay with the status quo and wait for the Supreme Court's pronouncements on the *Borowski* case.

20. A Minister made the following comments:

- he was looking for middle ground of a fair law which would gain support and had a problem with both resolutions. He found resolution one too restrictive and resolution two too troubling because it was not sufficiently precise on when the time limits would be imposed;

- he felt that Canadians wanted some restrictions but the options Ministers had before them put the issue in extreme ways;

- he felt a declaratory statement as part of the resolutions was important and ought to emphasize the importance of life. He wondered if there could be some guiding principles instead of time limits and wondered if those could be developed.

21. A Minister suggested that the government seriously consider ducking the issue. He felt there were no points to be gained as there was no consensus in the country, Cabinet or in the Caucus.

22. Other Ministers suggested the government could not duck this issue as the longer it went on the more fanatical it would become, with every nomination contested and the campaign dominated entirely by this issue with Ministers and Caucus Members finding themselves caught in the middle of extremists. The only way the government could handle this issue was to take the Supreme Court decision and hug it to its breast, quoting the decision at length. The Supreme Court had decided the issue of whether or not you could have an abortion and had said yes you could. That issue had now been settled by the Supreme Court and the country's Constitution. The government would not override the Constitution.

In reacting to the discussion, the Leader of the Government in the Senate and Minister of State (Federal-Provincial Relations) made the following comments:

1. for all the reasons that had been pointed out the government must draft a Bill and not refer the matter to Committee;

2. the government dare not start on an initiative without knowing where it will end up and it could not rely on the opposition for the necessary votes to pass the legislation or the resolution;

3. if it was not possible to come to a consensus in Cabinet or Caucus then the government would have to consider ducking the issue and say that there was no consensus and that the government would put in place a consensus-building mechanism like a Royal Commission. If this was done, then every member was going to be under extreme pressure at nominating-meetings. Ministers must decide which was the more politically palatable, acting or not acting:

4. with respect to the Constitution and the *Charter of Rights*, the Government would look like fools if it passed a law that was subsequently thrown out by the Supreme Court. It would also be unwise to bring in a vaguer resolution as there was a necessity to give some precise instructions to drafters;

5. with respect to the House process and the desire on the part of a number of people to be able to vote on principle, the only way that would be permitted without introducing a variety of resolutions would be to permit amendments to be moved to the initial resolution;

6. with respect to suggestions that had been made for a law which was based on restrictions but not on time limits, he noted that in order to be consistent with the Supreme Court there would have to be minimal restrictions because the Court has said that there is very little room for the imposition of limits in the early stages. Therefore if you are going to use the criteria approach throughout, you have to have minimal criteria;

7. he did indicate that his Committee would seek to try and draft a different resolution one that would withstand a *Charter* test but he noted that this would in practice mean a resolution that was more liberal than the existing resolution one;

8. he noted the possibility of toughening up resolution two by saying that 2 doctors must agree to the abortion. That may get by the Supreme Court but his advice was anything more elaborate would not be seen as respecting the *Charter* and the previous decision;

9. Ministers must recognize that if the Government does not legislate, then the status quo exists. The status quo is that it is strictly a woman and her doctor's decision;

10. the final possibility was to bring in some interim legislation perhaps saying only a doctor can decide and only in an approved facility as a holding step for a longer term review of this whole issue;

11. he noted the importance of ensuring that the government had a head count and would know how many votes either resolution would receive;

12. finally that it was unanimous that following the vote on the resolutions it should be the government's responsibility to draft the legislation and not a Committee's.

The Deputy Prime Minister [Hon. Don Mazankowski] finished the discussion by noting that the further work indicated by the Chairman of the Special Committee would be undertaken and the issue wou1d be reviewed in Caucus the following Wednesday.

INFORMATION PACKAGE ON ABORTION

March 17, 1988

[Presented to Cabinet meeting that day.]

RESOLUTION 1

That this House supports, in principle, the introduction of legislation that would:

(1) prohibit the performance of an abortion;

(2) provide for an exception to this prohibition where two qualified medical practitioners have, in good faith and on reasonable grounds, by certificate in writing, stated that in their opinion the continuation of the pregnancy would or would be likely to endanger the life of the pregnant woman or seriously and substantially endanger her health, and that there is no other commonly accepted medical procedure for effectively treating this health risk. (The medical standard of "seriously and substantially endanger her health" does not include the stress or anxiety which may accompany an unexpected or unwanted pregnancy, nor social or economic considerations;) and

(3) exclude physical or mental abnormalities of the unborn child as a reason for obtaining an abortion.

RESOLUTION 2

That, whereas the Supreme Court of Canada in the case of *Morgentaler et al. v. the Queen* has held that section 251 of the *Criminal Code* violates the Canadian *Charter of Rights and Freedoms* and is, thereby, of no force or effect;

And, whereas this House is desirous of enacting new legislation to replace section 251 in a form that is consistent with the provisions of the Canadian *Charter of Rights and Freedoms* and the principles enunciated by the Supreme Court of Canada in the case of *Morgentaler et al. v. the Queen*;

And whereas new legislation should attempt to achieve an equitable balance between the interests of the woman with respect to the liberty and security of her person and the public interest in protecting the unborn, as recognized within the reasons for judgement of the Supreme Court of Canada in the case of *Morgentaler et al. v. the Queen*

Be it therefore adopted:

That this House supports, in principle, the introduction of legislation that would prohibit the performance of an abortion subject to the following exceptions:

(a) during the earlier stages of pregnancy, a woman in consultation with her physician decides to terminate her pregnancy and the termination is performed by a qualified medical practitioner, and

(b) during the subsequent stages of pregnancy, the termination of the pregnancy satisfies not only the conditions described in paragraph (a) but also further conditions, including a condition that after a certain point in time the termination would only be permitted where the continuation of the pregnancy would or would be likely to endanger the woman's life or to seriously endanger her health.

HOUSE STRATEGY OPTIONS

1. Introduce a government resolution seeking the House's support for abortion legislation, following which the government would draft and introduce legislation based on the outcome of the vote.

2. Introduce a government resolution seeking the House's support for abortion legislation, and the establishment of a special committee to draft and recommend legislation to the House.

ISSUES FOR DECISION

Legislative Options

• Do Ministers support legislation which applies the same criteria at all stages of pregnancy and only permits abortion when continuation of the pregnancy would endanger the life of the woman or substantially endanger her health? (Resolution 1)

OR

• Do Ministers support moderately restrictive legislation based on foetal development which, in the first stages of pregnancy, permits abortion performed by a doctor based on a woman's decision, and, in the later stages, permits abortion only when the life or health of the woman is threatened? (Resolution 2)

HOUSE STRATEGY

• Should the government introduce a resolution in the House on abortion legislation and then introduce government legislation based on the outcome of the vote?

OR

• Should the government introduce a resolution in the House on abortion legislation and establish a special committee to draft and recommend legislation to the House?

Serial #8-88 CMPP

The Cabinet Committee on Priorities and Planning

Minutes

A meeting of the Cabinet Committee on Priorities and Planning was held in Room 323-S, House of Commons, on Tuesday, March 22, 1988 at 9:30 a.m.

Abortion

(6-9039-88DI)

The Minister of State (Federal-Provincial Relations) [Sen. Lowell Murray] reviewed the previous week's Cabinet and caucus discussions on abortion and outlined the process ahead. He reported that there had been a good discussion at caucus, although no progress had been made towards a consensus on questions of substance. However, there had been consensus on process: a free vote on a resolution with policy content, to be followed by a Government bill. He noted that there could not be a free vote on a Government bill.

The Minister of State (Federal-Provincial Relations) explained that there were only two basic substantive options: an approach based on gestational development or a non-gestational approach. A draft resolution covering each approach had been discussed at Cabinet on March 17. Concerns had been expressed with both. Following the Cabinet meeting, he had asked that revised resolutions be prepared; specifically, a *Charter*-proof resolution based on the non-gestational approach and a more restrictive resolution based on the gestational approach. He pointed out, however, that the former would be a permissive resolution while the latter would run the risk of being defeated by a combination of extremists on both sides of the question.

He explained that abortion would be discussed at a meeting of Ministers chaired by the Deputy Prime Minister [Hon. Don Mazankowski] immediately following Priorities and Planning and subsequently at caucus and Cabinet on March 23 and 24 respectively. Finally, he noted that the Government would be able to resolve the matter only if consensus could be achieved.

The Prime Minister expressed his hope that final decisions could be taken at Cabinet on March 24.

Serial #6-88 CBM

Cabinet Minutes

A meeting of the Cabinet was held in Room 323-S, House of Commons, on Thursday, March 24, 1988 at 9:30 a.m.

Abortion

(I-9043- 88D1)

The Prime Minister noted that he was hearing, as a result of yesterday's Caucus discussion of abortion, that some Members felt that the government should be providing more direction to Caucus and that they were expecting something better designed from the government. It was clear that consensus would be difficult to achieve. In responding, the Deputy

Prime Minister [Hon. Don Mazankowski] noted that the discussions yesterday in Caucus had not gone as well as hoped and that in some respects the government was sliding back in terms of managing the issue. Some Members of Caucus were afraid that options were being shoved down their throats and that there had not been sufficient time devoted to discussion of this issue in Caucus.

The Leader of the Government in the Senate and Minister of State (Federal-Provincial Relations) [Sen. Lowell Murray], as Chairman of the Ad Hoc Committee on Abortion, made the following points:

1. since discussing this issue in Cabinet last week, a group of Ministers had met and added two new resolutions to the two previously discussed by Cabinet (copy of preamble and resolutions attached). They had provided a variation of resolution two and toughened it up a little bit in the hope that it would sell better, and they had produced a new resolution one which they now believed would be *Charter* proof. As well, they had reshaped the preamble;

2. unfortunately, there had not been sufficient time to explain to Caucus the development of the various resolutions since they had discussed this issue a couple of weeks earlier.

In the subsequent discussion, the following points were made:

1. a number of Caucus Members were very interested in ensuring that they would have a resolution that was staunchly pro-life on which they would have an opportunity to vote, but this might mean the necessity of a number of resolutions being introduced on the floor of the House;

2. it was suggested that if this procedure were to be followed, it would be a formula for maximum embarrassment as it would mean that middle-of-the-roaders would be forced to vote against the classic right-to-life position. It was also noted that voting on a classic right-to-life position was not possible because it was outlawed by the Supreme Court;

3. in response to a question as to whether or not there was a better procedure than a resolution in the House followed by legislation, it was noted that the Government could proceed with a Bill but that would have made it very difficult to give Ministers the freedom to vote their conscience on this issue;

4. it was suggested that if the pro-lifers were going to have an opportunity to vote on their resolution, other Ministers would wish the right to vote on a pure pro-choice resolution which was not resolution two. That meant that there may be a need for at least three resolutions in the House.

5. some Ministers suggested that it would be desirable prior to the next discussion in Caucus that outside legal opinion be sought to verify the constitutional acceptability of the various resolutions.

In summarizing the discussion, the Prime Minister made the following comments:

1. before this was finalized, the government needed to ensure that it knew how many votes it would have for its preferred approach;

2. the government could not afford to make a mistake once it went down the road of resolution and legislation;

3. whatever time was necessary to get it right should be taken;

4. he agreed that Ministers must vote freely on the resolution but noted that the last thing the government wanted to do was to pass something which the Supreme Court would throw out;

5. the government must be seen to have a reasonable approach and that Caucus supported it, noting that the Opposition would do all they could to scuttle the government approach;

6. he noted that the Consensus of Cabinet seemed to be on resolution two (B).

PREAMBLE

That, whereas the Supreme Court of Canada has declared that the provisions of the *Criminal Code* relating to abortion are inconsistent with the provisions of the Canadian *Charter of Rights and Freedoms* and are therefore of no force or effect;

And, whereas a new enactment to take the place of the said provisions must be consistent with the Constitution of Canada including the *Charter of Rights and Freedoms* therein;

And, whereas this House desires to enact new provisions which reflect the fundamental value and inherent dignity of each human being and the inherent worth of human life;

And, whereas such new provisions must achieve an equitable balance between the right of a woman to liberty and security of her person and the right of society to protect the unborn;

Be it therefore, adopted:

Resolution 1A (Non-gestational Approach)

That this House supports, in principle, the introduction of legislation that would:

(1) prohibit the performance of an abortion;

(2) provide for an exception to this prohibition where two qualified medical practitioners have, in good faith and on reasonable grounds, by certificate in writing, stated that in their opinion the continuation of the pregnancy would or would be likely to endanger the life of the pregnant woman or seriously and substantially endanger her health, and that there is no other commonly accepted medical procedure for effectively treating this health risk. (These grounds do not include the stress or anxiety which may accompany an unexpected or unwanted pregnancy, or social or economic considerations;) and

(3) exclude physical or mental abnormalities of the unborn child as a reason for obtaining an abortion.

Resolution 1B (Non-gestational, Minimal *Charter* Risk Approach)

That this House supports, in principle, the enactment of legislation that would prohibit the performance of an abortion subject to the following exception;

(i) a qualified medical practitioner is of the opinion that the continuation of the pregnancy of a woman would or would be likely to threaten her physical or mental well-being;

(ii) the woman in consultation with a qualified medical practitioner decides to terminate her pregnancy; and,

(iii) the termination of the pregnancy is performed by a qualified medical practitioner.

Resolution 2 (Gestational Approach)

That this House supports, in principle, the introduction of legislation that would prohibit the performance of an abortion subject to the following exceptions:

(a) during the earlier stages of pregnancy, a woman in consultation with her physician decides to terminate her pregnancy and the termination is performed by a qualified medical practitioner, and

(b) during the subsequent' stages of pregnancy, the termination of the pregnancy satisfies not only the conditions described in paragraph (a) but also further conditions, including a condition that after a certain joint in time the termination would only be permitted where the continuation of the pregnancy would or would be likely to endanger the woman's life or to seriously endanger her health.

Resolution 2B (More Restrictive Gestational Approach)

That this House supports, in principle, the enactment of legislation that would prohibit the performance of an abortion subject to the following exceptions:

(a) during the earlier stages of pregnancy, a qualified medical practitioner is of the opinion that the continuation of the pregnancy of a woman would or would be likely to threaten her physical or mental well being; the woman in consultation with a qualified medical practitioner decides to terminate her pregnancy; and, the termination is performed by a qualified medical practitioner, and

(b) during the subsequent stages of pregnancy, the termination of the pregnancy satisfies further conditions, including a condition that after a certain point in time (at which the unborn child is viable) the termination would only be permitted where, in the opinion of two qualified medical practitioners, the continuation of the pregnancy would or would be likely to endanger the woman's life or to seriously endanger her health.

Serial #11-88 CMPP

The Cabinet Committee on Priorities and Planning

Minutes

A meeting of the Cabinet Committee on Priorities and Planning was held in Room 323-S, House of Commons, on Tuesday, April 19, 1988 at 9:30 a.m.

Abortion

(8-9061-88DI)

The Prime Minister discussed his impressions that public feelings against abortion may be hardening in the country. He expected that abortion would remain the number one issue on constituents' agendas. He urged Ministers not to commit themselves publicly on the issue until Cabinet decides on a course of action.

Serial #12-88 CMPP

The Cabinet Committee on Priorities and Planning

Minutes

A meeting of the Cabinet Committee on Priorities and Planning was held in Room 323-S, House of Commons, on Tuesday, April 26, 1988 at 9:30 a.m.

Abortion

(6-9162-88DI)

The Minister of Justice reported that lawyers for Mr. Borowski had made application to the Supreme Court for an early hearing of his case of whether the unborn are persons under the *Charter of Rights and Freedoms*. Arguments were heard in chambers by Mr Justice McIntyre,

< 1 line withheld under ATI Act sec. 23, solicitor-client privilege >

Justice McIntyre set the hearing date for October 3 and 4, 1988. Mr. Borowski's Factum must be revised by June 15, 1988 in light of the *Morgentaler* decision, and the federal government's response must be filed by August 1, 1988. Some eight to fifteen months would typically be required to hear the case.

The Minister stated that in his view the *Borowski* decision would not add to understanding of the abortion issue, and should not influence the Government's decisions on whether to proceed with a resolution. Regardless of the outcome of the *Borowski* case, Parliament would be faced with the decision of how to balance the interests of the fetus and the pregnant women, as suggested by the *Morgentaler* decision.

The Deputy Prime Minister [Hon. Don Mazankowski] indicated that there was a sense in caucus that the Cabinet was imposing a position, rather than being involved in its formulation. As a consequence, the Committee might consider that a series of resolutions be put forward. The Government would be criticized as being indecisive on the issue, but a multiple resolution process would allow caucus to express its differing views. As an alternative, a general resolution could be introduced, and Members of Parliament would be able to move amendments. Regardless of the approach chosen, however, it was important that the House consider the abortion issue before the election.

The Minister also stressed the need for continuing caucus involvement in the process. In his view, caucus members would accept a moderate approach if they were first able to have their views placed on the record.

In the course of discussion, the following main points emerged.

1. A delay in the introduction of legislation implied acceptance of the abortion on demand regime that was a consequence of the *Morgentaler* decision. Delay would also make the achievement of a consensus more difficult, as more people moved to extreme positions on either side of the issue.

2. The right to life movement would present candidates in the next election, and would gain strength from the absence of abortion legislation.

3. The position of women's groups - that no abortion legislation was required - was gaining acceptance among women generally. A pro-choice resolution should be one of the options for the multi-resolution vote.

4. Discussions were underway with the Opposition parties to seek consensus on how the issue should proceed in Parliament, Opposition representatives had indicated that they were prepared to cooperate with the Government, and recognized that it was not a partisan issue.

< 4 lines withheld under ATI Act sec. 23, solicitor-client privilege >

Although the fetus was not a person in a *Charter of Rights* sense, Parliament had an interest in protecting the fetus.

Serial #7-88 CBM

Cabinet Minutes

A meeting of the Cabinet was held in Room 323-S, House of Commons, on Thursday, April 28, 1988 at 9:30 a.m.

Abortion

(3-9082- 88D1)

Noting the issue had last been reviewed on March 24, the Deputy Prime Minister [Hon. Don Mazankowski] turned to the Minister of Justice [Hon. Ray Hnatyshyn] who then discussed the *Borowski* case. The case amounts to seeking clarification from the Supreme Court on whether an unborn child is a person under Section 7 of the *Charter of Human Rights*. The Minister reviewed the anticipated timing of the Court's consideration. He felt the Court may either decide the case should not be heard as Section 251 of the *Criminal Code* had been judged to be *ultra vires* or, alternatively, may agree to hear the case. The case, he felt, did not help the government much in deciding on a suitable course of action on the abortion issue. He noted the current void in law and that something must be done. Delays will hurt the government. A middle of the road approach, between the pro-life and pro-choice options, would be desirable.

Two issues need to be addressed by the government:

1.) how to manage the abortion file, given the strong pro-life feeling in Caucus? ; and

2) should the Deputy Prime Minister and House Leader discuss this with Opposition parties?

The Deputy Prime Minister noted that some of the options are consistent with the *Charter*, others could require an override. He called for early action. He went on to say the government is looking for a mechanism to have a free vote, leading up to a consensus on a moderate approach. An Order of the House is required to provide for a debate on a resolution with three possible amendments: a pro-life amendment; a pro-choice amendment and a moderate amendment. The support of Caucus and of the Opposition is needed. The matter is to be put to Caucus.

A minister expressed a preference for a government bill. Ministers discussed the relative merits of introducing a resolution, as opposed to a bill and the need to provide for a free vote on a resolution.

Some ministers supported debating a resolution to get the sense of the House although others felt the resolution needed to be specific.

There was further discussion on the resolution vs. government bill routes. No final disposition of the item was agreed to, although the need to consult Caucus was generally supported.

Serial #14-88 CMPP

The Cabinet Committee on Priorities and Planning

Minutes

A meeting of the Cabinet Committee on Priorities and Planning was held in Room 323-S, House of Commons, on Thursday, May 5, 1988 at 9:30 a.m.

Abortion

(8-9136-88DI)

The Prime Minister noted that the Government needed to decide whether to proceed with a resolution on abortion, to introduce legislation, or to attempt to roll over the issue into the next mandate.

The Deputy Prime Minister [Hon. Don Mazankowski] indicated there were five options:

1) a single resolution open to unstructured amendments;

2) a single resolution with structured amendments;

3) a multiple resolution;

4) a Government Bill; and

5) do nothing.

He suggested that the ad hoc committee chaired by the Government Leader in the Senate meet to these options and report to Priorities and Planning the next week. The Committee accepted this suggestion.

Conclusions

The Prime Minister summed up the conclusions of the meeting as follows:

1) Priorities and Planning would consider recommendations from the Ad Hoc Committee on abortion on Tuesday, May 10;

< Lines withheld – not relevant >

Serial #15-88 CMPP

The Cabinet Committee on Priorities and Planning

Minutes

A meeting of the Cabinet Committee on Priorities and Planning was held in Room 323-S, House of Commons, on Tuesday, May 10, 1988 at 9:30 a.m.

Abortion

(4-9073-88DI)

The Government Leader in the Senate reported on the deliberations of the Ad Hoc Committee reviewing the abortion issue. He indicated the Committee was recommending that the attached "limited pro-choice" resolution be put forward as the main resolution, and that an attempt be made to negotiate two amendments with the Opposition - one pro-life amendment (Annex A) and one pro-choice amendment (Annex B). During the ensuing discussion of this approach, the following points were made:

1) there was a 75 percent chance that the Opposition would not agree to the approach and the debate could then unfold in an unstructured way, with considerably more amendments;

2) some caucus members would be concerned that the main resolution was not a pure pro-life resolution, and that the opportunity to move such an amendment would first go to the Opposition parties;

3) a resolution without a Bill might not be sufficient before the election, since candidates would still be asked how they would vote on a Bill;

4) the first clause of the pro-choice amendment should be eliminated (agreed);

5) several caucus members would express serious concern if the preamble did not refer to the "right" of society to protect the unborn; and

6) perhaps no resolution had a chance of passing.

The Prime Minister said that the Government would not be able to proceed to the House without support in caucus. He noted his personal difficulties of justifying a position of saying where life begins, indicating he was not sure how he himself would vote on these options.

The Deputy Prime Minister concluded the discussion by noting that some more work would be done on the wording to reflect the views expressed before presenting the resolutions to caucus.

DRAFT RESOLUTION

That, in the opinion of this House, the Supreme Court of Canada having declared that the provisions of the *Criminal Code* relating to abortion are inconsistent with the provisions of the Canadian *Charter of Rights and Freedoms* and are therefore of no force or effect, the government should prepare and introduce legislation consistent with the Constitution of Canada, including the *Charter of Rights and Freedoms,* which reflects the fundamental value and inherent worth of human life, and which achieves a balance between the right of a woman to liberty and security of her person and the right (interest) of society to protect the unborn, such legislation should prohibit the performance of an abortion, subject to the following exceptions:

When, during the earlier stages of pregnancy: A qualified medical practitioner is of the opinion that the continuation of the pregnancy of a woman would, or would likely to, threaten her physical or mental well-being; when the woman in consultation with a qualified medical practitioner decides to terminate her pregnancy; and when the termination is performed by a qualified medical practitioner; and

When, during the subsequent stages of pregnancy: the termination of the pregnancy satisfies further conditions, including a condition that after a certain point in time, the termination would only be permitted where, in the opinion of two qualified medical practitioners, the continuation of the pregnancy would, or would be likely to, endanger the woman's life or to seriously endanger her health.

ANNEX A

That, in the opinion of this House, the Supreme Court of Canada having declared that the provisions of the *Criminal Code* relating to abortion are inconsistent with the provisions of the Canadian *Charter of Rights and Freedoms* and are therefore of no force or effect, the government should prepare and introduce legislation consistent with the Constitution of Canada, including the *Charter of Rights and Freedoms,* which reflects the fundamental value and inherent worth of human life, and which achieves a balance between the right of a woman to liberty and security of her person and the right (interest) of society to protect the unborn, and

Plus amendment substituting the following for the remaining text of the resolution:

Such legislation, giving pre-eminence to the protection of the foetus, should prohibit the performance of an abortion except when:

-- Two independent qualified medical practitioners have, in good faith and on reasonable grounds, stated that in their opinion the continuation of the pregnancy would, or would be likely to, endanger the life of the pregnant woman or seriously and substantially endanger her health and there is no other commonly accepted procedure for effectively treating the health risk; but grounds for such opinion are not to include:

> (1) The effects of stress or anxiety which may accompany an unexpected or unwanted pregnancy, or

(2) Social or economic considerations.

ANNEX B

That, in the opinion of this House, the Supreme Court of Canada having declared that the provisions of the *Criminal Code* relating to abortion are inconsistent with the provisions of the Canadian *Charter of Rights and Freedoms* and are therefore of no force or effect, the government should prepare and introduce legislation consistent with the Constitution of Canada, including the *Charter of Rights and Freedoms,* which reflects the fundamental value and inherent worth of human life, and which achieves a balance between the right of a woman to liberty and security of her person and the right (interest) of society to protect the unborn, and

Plus amendment substituting the following for the remaining text of the resolution:

Such legislation, giving pre-eminence to a woman's freedom to choose, should permit the performance of an abortion under the following conditions:

(1) When a qualified medical practitioner is of the opinion that the continuation of the pregnancy of a woman would, or would be likely to, threaten her physical or mental well-being; and

(2) When the woman in consultation with a qualified medical practitioner decides to terminate her pregnancy; and

(3) When the termination of the pregnancy is performed by a qualified medical practitioner.

Serial #8-88 CBM

Cabinet Minutes

A meeting of the Cabinet was held in Room 323-S, House of Commons, on Thursday, May 19, 1988 at 9:30 a.m.

Abortion Update

(7-9087- 88D1)

The Deputy Prime Minister [Hon. Don Mazankowski] reported that the opposition rejected the government's proposal on the procedure to be followed. The government was essentially left with two options:

- it could use closure to force through a motion directing the House to consider the preferred abortion Resolution, including the two amendments

or

- it could introduce the Resolution with no amendments and allow the debate to unfold according to normal House rules.

The Deputy House Leader [Hon. Doug Lewis] regretted that the opposition had politicized this sensitive debate. 99% of House Orders go on consent. He was prepared however to put the process question on, to debate it and to vote it.

The Prime Minister sought assurance on the feasibility of the proposal. Would the Speaker allow the Resolution back in? Would it be voted through? The Deputy House Leader stated that caucus would be supportive and the process would work.

There was a brief discussion on whether a "classic pro-life" amendment should be considered. The points made included:

- debate on a "classic pro-life" amendment would be good for the country in terms of emotional release,

- no such amendment should be added since caucus had agreed already to a balanced package, and the middle-of-the-road option would be the one that would pass.

The Prime Minister concluded that the matter should proceed quickly. He felt very comfortable with a free vote on such a sensitive moral issue. The government was committed to free votes of this type and would live up to its commitment.

Serial #25-88 CMPP

The Cabinet Committee on Priorities and Planning

Minutes

A meeting of the Cabinet Committee on Priorities and Planning was held in Room 323-S, House of Commons, on Thursday, August 11, 1988 at 9:30 a.m.

Abortion

(7-9095- 88D1)

The Minister of Justice outlined the position he was taking as Attorney-General in presenting a factum on the *Borowski* case. He noted that the case centered on whether the fetus was a person within the meaning of the *Charter of Rights*, and that the Court had rejected the Government's arguments to postpone a ruling on this decision.

< 10 lines withheld under ATI Act sec. 23, solicitor-client privilege >

During the ensuing discussion, Ministers reviewed the question of whether a decision on the policy could be postponed until after the election. The Prime Minister concluded that he wanted the question to be put aside until after the election, and that the possibility of appointing a Royal Commission on this matter should be reviewed at the next Cabinet meeting.

[***Historical note:*** *The government's main resolution was defeated in the House of Commons on July 28 by a vote of 147 to 76. August 11 marked cabinet's final discussion of the abortion topic that year. Soon afterwards, parliament was dissolved, a general election was held on November 21, 1988, and the Conservative Party was re-elected with its second majority mandate. The topic would next be raised with a new cabinet on March 21, 1989.]*

SECRET

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The Ad Hoc Committee on Abortion

A meeting of the Ad Hoc Committee on Abortion held in Room 323-S, House of Commons, on Tuesday, March 21, 1989 at 12:30 p.m.

General Discussion

The Minister of State (Federal/Provincial Relations) [Sen. Lowell Murray, Leader of the Government in the Senate] in introducing the abortion issue made the following points:

1 . Given the background, the government should proceed fairly quickly to resolve the issue;

2. Careful consideration should be given to the proposed government position and

3. The proposed position should be carefully managed to gain as much support for it as possible.

A discussion paper identifying the substantive options was circulated to committee members and introduced briefly by the Minister of Justice [Hon. Doug Lewis]. Members agreed that the options would be reviewed at the next meeting. *[Note: This discussion paper is attached as an appendix to the end of this PDF file.]*

The Committee discussed timing and process concerns associated with the management of the abortion issue. The Minister of National Health and Welfare [Hon. Perrin Beatty] advised that those on both sides of the abortion debate could challenge the government's use of the *Canada Health Act*.

The Committee agreed that:

1. The issue should be resolved before June 30, 1989.

2. The Leader of the Government in the House of Commons [Hon. Doug Lewis] would provide an analysis of the procedural alternatives for the management of the issue for the next meeting.

3. The Leader of the Government in the House of Commons would also offer advice on how the issue should be presented to caucus.

4. The Minister of Justice would lead a discussion of the substantive options at the next meeting.

5. The Minister of Employment and Immigration [Hon. Barbara McDougall] would provide for the next meeting information on the known positions of Members of parliament on the issue.

Serial # 13-89CBM

Cabinet Minutes

A meeting of the Cabinet was held in Room 323-S, House of Commons, on Tuesday, July 25, 1989, at 2:00 p.m.

Item - Abortion

General Discussion

The Prime Minister [Rt. Hon. Brian Mulroney] opened the meeting by referring to the various agenda items. He also raised a number of issues pertaining to the business of the Conservative Party.

(8-9044-89D1)

The Prime Minister introduced the abortion issue by requesting the Minister of Federal-Provincial Relations [Sen. Lowell Murray] to summarize the deliberations and conclusions which the Ad Hoc Minister's Committee on Abortion (which he had chaired) had come to in April. The Prime Minister noted that the issue was not merely one of abortion but one of leadership. There was a sense of unease in the country about the legislative vacuum. Government was expected to provide an appropriate legislative framework for resolving the issue.

The Minister of State (Federal-Provincial Relations) made the following report:

- the procedural options of a Reference to the Supreme Court, a national referendum, and a Royal Commission were eliminated because of the delay they would cause;

- the option of putting a resolution to the House was rejected because it would simply repeat last year's experience;

- two remaining alternatives are to criminalize abortion under the *Criminal Code*, or to pass separate legislation; and

- there were strong views against criminalizing abortions, and a consensus that no legislation could win majority support in the House; and it was therefore the conclusion of the Ad Hoc Committee in April that the Government not legislate with respect to abortion at that time.

The Minister noted that circumstances have changed as a result of the recent Provincial Court challenges and that Canadians will be looking to government to provide leadership. He noted that public opinion in general favours availability of abortion but regulated by medical opinion. The broad population does not share either of the pro-life or pro-choice positions but rather prefers a middle ground compromise.

The Prime Minister indicated that extreme positions are not going to lead to a solution. A middle ground must be found which will reflect the views of the majority of Canadians and which can be reflected in appropriate compromises in caucus and parliament. The Prime Minister requested the Minster responsible for Federal-Provincial Relations to reconvene the Ad Hoc Committee of Ministers on Abortion and develop a moderate legislative framework to deal with the abortion issue. The Prime Minister indicated further that he would take responsibility for navigating the issue through parliament. He referred to the possible need for meetings with leaders of the other two major parties.

Responding to views of some Ministers, the Prime Minister asked Ministers to temper their public comments and to try to be consistent with his statements, i.e. that legislation will be developed for introduction in the fall and in the interim the issue is being reviewed.

The Prime Minister emphasized that there is a need for the government to provide leadership on this issue and it is essential that they try for a legislative solution. He noted that other countries had been able to resolve the issue with suitable legislation. In fact, there was a certain commonality to their legislative approaches. It was extremely important for Canada to settle the issue with an appropriate legislative framework.

< 4 lines withheld under ATI Act sec. 23, solicitor-client privilege >

Serial # 14-89CBM

Cabinet Minutes

A meeting of the Cabinet was held in Room 323-S, House of Commons, on Wednesday, August 23, 1989, at 10:00 a.m.

Items – Abortion

(7-9185-89D1)

The Minister responsible for Federal-Provincial Relations and Senate Leader [Sen. Lowell Murray] noted that the Ad Hoc Committee on Abortion met recently and that a compromise was near, and further noted that members of the Committee agreed that any gestational approach that went beyond 22 weeks should have restrictions and that a 3 stage approach, rather than 2 [….]

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Serial # 17-89CBPP

The Cabinet Committee on Priorities and Planning

Minutes

A meeting of the Cabinet Committee on Priorities and Planning was held at Willson House, Meech Lake, on Wednesday, September 13, 1989 from 10:00 a.m. to 5 p.m., and reconvened on Thursday, September 14, 1989 from 10:00 a.m. to 5 p.m.

Items – Abortion

(5-9055-89D1)

The Prime Minister introduced the discussion by noting that he had asked the Ad Hoc Committee chaired by Senator Murray to develop a policy which recognized realities and the existence of a pluralistic society. He knew that his own views would not be fully reflected in the legislation. It was important, however, to act now. The nation had to be spared a repetition of the legal "circus" that had been witnessed over the past summer [i.e., the case of *Tremblay v. Daigle* (1989) 2 SCR 530]. He concluded that he was looking for a position that could be supported by the government as a whole. The legislation would have to pass and a free vote might be problematic.

The Government Leader in the Senate then outlined the conclusions of the Committee (a copy of the Minister's presentation and speaking notes is attached).

The Prime Minister then asked for views on both the substance of the proposal as well as on the procedure to be followed and the implications for the government as a whole. He stressed the importance of coming up with a solution which would clear the Supreme Court.

During the ensuing discussion, Ministers expressed a broad range of views, including the following points:

1. there should be some recognition of the rights of the unborn child;

2. the proposed Bill did not address the issue of paternity rights, which was at the heart of the controversies experienced over the summer;

3. imposing a ten year penalty after a certain date was not saleable;

4. a three stage approach was not consistent with the government's previously stated intention to strike a balance between the rights of the woman and the responsibility of society;

5. the entire Cabinet would need to support the Bill but the government could not impose closure.

The Minister of Energy, Mines and Resources [Hon. Jake Epp] then outlined his views. He indicated that the presentation by Senator Murray was an accurate reflection of the views of the majority of the members of the Ad Hoc Committee. He himself, however, could not accept the gestational approach. His responsibility as a Minister was to protect people who required protection under the law and he believed that life began at conception. As such, his view was that the government should accept protection of human life as its fundamental obligation and consider moving from this - i.e. permitting abortions - only in exceptional circumstances given factors such as rape or incest.

The Minister added that the largest single block of votes in the House was pro-life and that it would be very difficult to get legislation passed if it was based on the gestational approach. He did not believe the opposition could be counted on to cooperate. He concluded that he as a Cabinet Minister could not support the proposed legislation.

The Prime Minister indicated that he agreed that the approach outlined by the Minister might indeed receive sufficient support for a free vote.

< 2 lines withheld under ATI Act sec. 23, solicitor-client privilege >

He then suggested that Ministers return to this issue after breaking for lunch.

When they resumed the discussion, Ministers brought up the following points:

- Several Ministers stressed that this was no longer an issue of private morality, but one of public morality: Ministers of the Crown now had a duty to reflect the moral consensus of the majority of Canadians.

- Some Ministers wondered whether the proposed legislation should not be accompanied by a package of family assistance to help low-income mothers keep their child.

- Concern was expressed about the criminal sanctions envisaged in the legislation and the fact that these might be applied differently depending on the province.

- One Minister felt that the Bill as drafted left too much discretion to doctors in interpreting the language of the law.

- There was also some discussion about whether the proposed legislation amounted to a stricter or a more permissive regime than the status quo. Ministers reached the view that, on paper at least, the proposed regime would likely be more restrictive than the status quo. One Minister regretted the fact that the proposal did nothing to reduce the number of abortions performed in Canada.

- Ministers noted that the three-stage approach being proposed was not the preferred option of any Minister, but was a compromise reached with some difficulty and reluctance. It was thought that the three-stage approach might also prove more resistant to *Charter* challenges.

The Minister responsible for the Status of Women [Hon. Barbara McDougall] explained that the three-stage approach represented a significant compromise for women of the pro-choice persuasion: the proposed legislation because it re-criminalizes abortion and does away with unrestricted freedom of choice, would be perceived as "taking away" rights which had been "granted" following the Supreme Court decision on *Morgentaler*. She indicated that she did not think she could move any further. Moreover, she was concerned about whether Cabinet solidarity would apply in the event of amendments to the Government's legislation.

The Prime Minister concluded, by noting that the composition of the Priorities and Planning Committee (19 men, 1 woman) was not representative of the general population on this issue, and that the views of the Minister responsible for the Status of Women were therefore not to be taken lightly. He indicated that the following consensus was emerging:

1) Abortion had become now an issue of Government leadership and competence.

2) Therefore, there is need for legislation.

3) The three-stage gestational approach appears generally acceptable.

4) The legislation will likely have to be a Government Bill.

5) Ministers appear to be reaching the view that Cabinet solidarity will have to prevail when voting on the Bill and its amendments.

The Prime Minister concluded by indicating that he would meet privately with the chairman of the Ad Hoc Committee on Abortion [Sen. Lowell Murray] and the Minister of

Justice [Hon. Doug Lewis] before reporting back to P&P Ministers and Cabinet during the week of September 18.

SECRET DRAFT

INTRODUCTION

TALKING POINTS

o As you know, the Prime Minister has indicated his intention to show federal leadership of the abortion issue by introducing legislation this fall

o He asked the ad hoc cabinet committee on abortion to come up with a legislative model based on the Law Reform Commission's proposals

o As you might imagine, it is difficult to arrive at an acceptable legislative compromise on an issue such as this where deeply held convictions must be expected

o Already, those of either side of the issue are making a compromise in beginning with legislation:

< 7 lines withheld under ATI Act sec. 23, solicitor-client privilege >

o Pro-choice groups, which favour the status quo, will perceive that any legislation limiting entitlements to abortions will infringe a woman's right to security of the person

o I would like briefly to take you through the deliberations and recommendations of the ad hoc committee, and I have a few slides for that purpose

SLIDE ONE – Background Statistical Information

o The country has been without a federal abortion law since the Supreme Court of Canada struck down the *Criminal Code* provision in the *Morgentaler* case in January, 1988

o This slide will give you some sense of the number of abortions occurring in Canada

SLIDE TWO – Underlying Principles and the Abortion Policy

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o Events over the summer have pointed to a perceived need for federal leadership on the abortion issue

o The ad hoc committee sought to develop legislation which would:

A. Respect the Charter and judicial precedents in Canada (includes decision not to use the Notwithstanding Clause);

B. Reflect the values of the majority of Canadians;

C. Reconcile the rights of women to the security of the person with society's interest in protecting the foetus; and,

D. Have the best chance of passing a free vote in the House

<u>The following policy elements underlie the proposed legislation:</u>

- Abortions are medical acts: Doctors must be involved but the provinces and medical professions can determine the details of the involvement

- During the early stages of pregnancy, a woman should be free to exercise her right to the security of the person and obtain abortions without state interference: it is a decision between her and her doctor

- During the later stages of pregnancy, society's interest in protecting the foetus increases justifying the imposition of increasingly strict conditions for obtaining abortions

'CRIMINALIZATION'

o Some of the most controversial aspects of any bill in this area will relate to its criminalization

< 3 lines withheld under ATI Act sec. 23, solicitor-client privilege >

o The provisions could be included in an amendment to the *Criminal Code* or be set out in a separate statute

o Since with a separate statute, the responsibility for enforcement would rest with the federal government rather than with the provinces, an amended *Criminal Code* was thought to be the appropriate vehicle

o Criminal liability would expressly apply to those performing abortions

o No express criminal liability would attach to the woman having the abortion; nor would there be an express exemption from criminal liability

o The offense would be an indictable one carrying a maximum penalty of ten years, which is the same penalty as for criminal negligence

SLIDE THREE – <u>Legislative Models: Reaching a Compromise</u>

o The ad hoc committee considered three legislative models prepared by the Department of Justice

o Consistent with the Prime Minister's wishes, the models were fashioned after the Law Reform Commission's proposals

o They are all based on a gestational development approach which accords increasing protections to the foetus over two or three stages as the pregnancy progresses

o As you can see, on all three models, viability – the stage where the foetus is capable of living and developing outside the womb – was selected as the point where society's interest in protecting the foetus justified imposing strict conditions for obtaining abortions

o The models are quite different before the point of viability:

- Model A is a two-stage model with no conditions for obtaining abortions prior to viability
- Model B is a two-stage model with conditions prior to viability
- Model C is a three-stage model with two stages prior to viability; in the early stage no conditions no stages are imposed but conditions relating to a threat to the woman's life or health apply in the second stage.

Committee members initially preferred the two stage models but for very different reasons:

- Some felt that there should be no conditions in the first stage of pregnancy
- Others believed that society's interest in protecting the unborn should extend to the earliest stage of pregnancy and require at least some conditions throughout

o The three-stage model became an acceptable compromise between the two different two-stage models and included elements from each approach:

- During the first stage, virtually no conditions are imposed;
- Moderate conditions are imposed at the second stage; and,
- In the third stage, after viability, strict conditions are imposed

SLIDE FOUR – <u>The Three Stage Model</u> -

o This slide sets out the three stage model and the conditions that apply at each stage

o For the purposes of clarity in the criminal law, the duration of pregnancy is being measured from conception and not from the time of the last menstrual period, which usually precedes conception by about two weeks (the differing measures are a bit confusing and I can come back to it and explain it more fully later)

o Explaining the time frames so that they are understandable for doctors and women who have traditionally used a calculation based on the time of the last menstrual period will be an important part of the communication strategy

o Stage One covers the first fourteen weeks of pregnancy

- The only condition applying during the first stage and throughout the pregnancy is that the abortion must be performed by a doctor

- Over 90% of abortions occur within this time frame

o The second stage applies to the period between the fourteenth week and the viability of the foetus

- Abortions are available if a doctor is of the opinion that the continuation of the pregnancy threatens the woman's health

- "Health" would not be defined in the statute but courts have defined it broadly to include mental health

- An estimated 3 - 5% of abortions have typically occurred during this period

o The third stage last from viability to birth

- Abortions are only permitted if the woman's life or health is seriously threatened

- Less than 0.4% of abortions would occur at this stage

The demarcation between Stage One and Two is tied to the increased risk of the abortion to the health of the woman at this point in the gestational development of the foetus

SLIDE FIVE – <u>The Proposed Bill</u>

o This is essentially what the amendment to the *Criminal Code* would look like

o It resembles the three-stage model proposed by the Law Reform Commission

o The Canadian Medical Association has given us advice on the medical terms and issues in the Bill

o I would just like to explain some of the key phrases used in the Bill:

• "Every person": The offense is targeted at anyone inducing an abortion outside the scheme of this section. A woman, simply by having an abortion, would not be directly caught. However, if she self-aborted, the provisions would apply;

• "Induces an abortion" is used to ensure that all methods of causing abortions are included in the provision. Methods that are used as birth control measures, such as intrauterine devices and "morning after" pills, are not, as a practical matter, included;

• "Not exceeding ten years": The maximum sentence for this offense is equivalent to the one for criminal negligence. Pro-life faction may argue that this is lenient for an offense which wrongfully takes a human life: while pro-choice groups may argue that it is too harsh; and,

• "By or under the directions of a medical practitioner"; another health care professional, such as a nurse, can induce an abortion under the direction of a doctor. However, it is the doctor who must form the opinions required for the exemptions to apply. In remote areas, doctors can form the opinions based on information conveyed to them by health care professional over the phone

SLIDE SIX – <u>*Charter* Implications</u>

o There is little doubt that any proposed legislation on this topic will be subjected to a *Charter* challenge

< 3 lines withheld under ATI Act sec. 23, solicitor-client privilege >

Accessibility to abortions and the *Canada Health Act*

o Advocates on both sides of the abortion debate may attempt to use federal funding under the *Canada Health Act* to either encourage or discourage access to abortion in the provinces

SLIDE 7 – <u>Province-by-province access to abortions</u>

o This slide gives some indication of the current regimes in the provinces

o There is considerable variations from province to province

o Once federal legislation is enacted, provinces may alter their conditions for obtaining abortions to conform to the federal lead

o It should be noted, however, that even with the federal legislation, each province makes the determination of whether abortions are "medically necessary" and thereby insured services; different regimes could still occur

SLIDE 8 – Background on the accessibility issue

o As a couple of cases have already indicated, the federal government will become implicated in access to abortion questions insofar as they relate to federal funding

o A criterion of federal funding under the Canada Health Act is that the minister of health be of the opinion that access to "medically necessary services" as designated by the provinces is reasonably available

o Non-compliance with the criterion could have financial consequences for the province

SLIDE 9 – Recommendation on accessibility

o The Committee recommends that the funding provisions of the *Canada Health Act* not be used to advance the position of either side of the abortion debate

o It is also our view that the *Canada Health Act* should not be amended to specifically reference abortions

o The proposed federal legislation will provide guidance to the provinces and we have every expectation that provinces will comply with the new legal framework

SLIDE 10 – House Strategy

o This slide sets out some of the considerations for a House strategy

o Would point out that the Committee believes early action is appropriate. We should not allow this issue to drag on for too long

SLIDE 11 – Decisions Required

o Decisions are needed on the following:

- Agreement to the proposed legislation
- Agreement to a House strategy
- Agreement to not use the *Canada Health Act* to deal specifically with abortion

Finally, I should point out that the scope of the federal abortion initiative could be expanded to include a policy statement, the *Canada Health Act*, and federal programs which could reduce the need for abortions. If we have time, we may want to get to these broader questions today, or return to them at a late date

CONCLUDING COMMENTS FOR THE PRIME MINISTER

On abortion, we have had a useful and in-depth discussion. Lowell, Doug and I will be meeting as I mentioned, hopefully in time for review at the next cabinet on September 21.

Serial # 18-89CBPP

The Cabinet Committee on Priorities and Planning

Minutes

A meeting of the Cabinet Committee on Priorities and Planning was held in Room 323-S, House of Commons, on Tuesday, September 19, 1989 at 10:00 a.m.

Abortion - Discussion

The Prime Minister indicated he had been reflecting on the discussion of this issue at Priorities and Planning on September 14. He noted that he was coming to the conclusion that there could not be a free vote on the issue but would wait to hear from Cabinet before taking a final decision. He also indicated that he had been reviewing the substance of the Bill with the Government Leader in the Senate. He then asked Senator Murray to summarize the results of the discussion at Meech Lake.

Senator Murray indicated that a review of his notes taken at Meech Lake led him to the following conclusions:

1. The three-stage approach created problems for Ministers on the pro-life side of the issue.

2. A majority of ministers would prefer a two-stage approach and some wanted a more restrictive regime to apply before 20 weeks. This latter suggestion would, however, create real problems politically and with the Supreme Court.

3. The majority of Ministers would find a two-stage approach which imposed a general health condition requirement from conception and a more restrictive regime after 20 weeks preferable to the three-stage approach.

4. This would create real difficulties for those on the pro-choice side of the question.

5. Such a compromise would enable the government to say to the pro-choice people that abortion was available, while saying to the pro-life movement that there would be some protection for the foetus from conception.

The Prime Minister then invited his colleagues to indicate their views noting that a decision would not be taken that day.

The Minister of Energy, Mines and Resources [Hon. Jake Epp] indicated that such a position would have possibilities for people holding pro-life views, since it would send a signal

that life has value and must be protected at all stages. At the same time it would recognize that laws can only set parameters and penalties and that people must make their own decisions.

The Minister of Employment and Immigration [Hon. Barbara McDougall] indicated that she was disappointed with this position since it would not provide for a period in which there was free choice. She indicated that such a law would lead to more injunctions over the question of what was a threat to health. It would also lead to the building of a new coalition of women on the pro-choice side with leadership that was unsympathetic to the Conservative Party. The Minister concluded that she was nervous about this position both from her own perspective and because of what she could foresee happening.

The Prime Minister indicated that he would need help from his colleagues on this question. He also indicated that he was looking at the possibility of having the Minister of National Health and Welfare [Hon. Perrin Beatty] announce a package of initiatives to assist mothers to have children rather than abort. This would, however, not be part of the Bill but rather a kind of social policy statement.

The Prime Minister concluded that this matter should he reviewed in Cabinet on Thursday, September 21, and indicated that he felt the government was on the right track. He reiterated the importance of having Cabinet work together on this Issue.

Serial # 15-89CBM

Cabinet Minutes

A meeting of the Cabinet was held in Room 323-S, House of Commons, on Thursday, September 21, 1989 at 10:00 a.m.

General Discussion – Abortion

The Minister responsible for Federal-Provincial Relations [Sen. Lowell Murray] reported on the work of the Ad Hoc Committee on Abortion and the subsequent discussion held by Priorities and Planning. In this regard, the Minister observed on the 2 stage versus 3 stage proposals under consideration and that after all consideration made the 2 stage approach is more preferable as it stood the highest chance of passage in the House.

The Prime Minister remarked that the worst thing is to introduce legislation only to find it struck down by the Courts and therefore as we move towards a Bill,

< 2 lines withheld under ATI Act sec. 23, solicitor-client privilege >

In the ensuing discussion, several Ministers concluded on their preferred positions.

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The Minister of Employment and Immigration [Hon. Barbara McDougall] remarked that there existed three significant stages to manage the file: leadership in getting the Bill through the House; ensuring success against any challenge to the Bill in the Supreme Court; and response towards respective constituents. She concluded that the two-stage approach would be a significant disappointment to the pro-choice groups and others who found themselves in the middle of the spectrum on the abortion debate, and that the approach suggested would result in injunctions and challenges. The Minister went on to suggest that the two-stage approach would result in a loss of young females to the Party's base and other segments drawn to the Party in recent years. Accordingly the Minister of Employment and Immigration stated as her preferred position the three-stage proposal.

The Minister responsible for Supply and Services [Hon. Paul Dick] suggested the three-stage approach more acceptable although he had hoped for a formula of 0-22 weeks with no restrictions and minimal restrictions thereafter. On responding to a question as to whether there existed a need to define health in the 3 stage approach, the Deputy Attorney General observed that the Supreme Court had already provided guidance in that any interference on the liberty and security of the woman would have to be justified and therefore the need to consider carefully what elements of interference would apply rather than a definition of health.

The Minister responsible for Fisheries and Oceans [Hon. Tom Siddon] remarked emphatically his disappointment that no proposals to date speak to the right of the fetus.

The Minister of State for External Affairs noted her preference for 3 stage approach in order that women be given the opportunity to make a choice in the first 14 weeks.

The Minister of State for Elders [Hon. Monique Vezina] concluded her support to the 3 stage approach noting it was a compromise position, and one that was coherent and logical and further acknowledges the right of a women to decide with the first 14 weeks.

The Minister responsible for Communications [Hon. Marcel Masse] noted his dislike to any notion of criminalizing abortion and strongly endorsed the 3 stage approach.

The Minister responsible for Energy, Mines and Resources [Hon, Jake Epp] advocated a conscious-clause in the bill for any worker who does not want to partake in the abortion operation, and further remarked that the 3 stage approach would have no chance of support by the caucus and that the 2 stage approach would have a better chance if a definition of health were not included. He concluded by noting his strong preference for the two-stage approach and would want to see a declaratory statement in the Bill that speaks to the value of life at all stages of pregnancy.

The Minister of State for Indian Affairs [Hon. Kim Campbell] expressed her preference for the two-stage approach as it codifies what currently exists and the only issue that remains is who is best placed to make the decision.

In concluding, the Prime Minister stated the issue was not one of abortion but leadership and accordingly legislation is required. He further noted that any legislation must be capable of passage through the House, and it must be consistent with the *Charter*. Finally, on whether there will be a free vote will apply but that Cabinet solidarity is required and therefore there will be no free vote for Ministers.

Serial # 19-89CBPP

The Cabinet Committee on Priorities and Planning

Minutes

A meeting of the Cabinet Committee on Priorities and Planning was held in Room 323-S, House of Commons, on Tuesday, September 26, 1989 at 10:00 a.m.

Items - Abortion

The Chairman of the Ad Hoc Committee of Ministers on Abortion (Senator Murray) summarized the deliberations of the recent weeks. Ministers had at first settled on a three-stage gestational approach (no conditions in stage 1, general health conditions in stage 2, and serious health conditions in stage 3) as the preferred legislative strategy. They felt this was the most "*Charter*-proof" approach, as well as being the one most likely to meet some of the expectations of the pro-choice lobby. Finally, it was thought to be the closest to the public mood.

Because some Ministers felt that more should be done to placate the pro-life lobby, Ministers had then focused on a two-stage gestational approach, where general health conditions would obtain from the moment of conception. The Senator noted that this approach, in order to withstand *Charter* challenges, would require two further changes (relative to the three-stage approach):

1) The definition of "health" would need to be significantly widened to include "psychological" as well as physical and mental health.

2) The criminal penalty for contraventions would need to be reduced from 10 to 5 years of imprisonment.

(There was some concern about inconsistencies between the English and French versions of the Bill, which the Senator undertook to correct).

< 4 lines withheld under ATI Act sec. 23, solicitor-client privilege >

The senator concluded that the Ad Hoc Committee, at its September 25 meeting, had reached a consensus on this approach, even if a reluctant one. The Minister responsible for the Status of

Women [Hon. Barbara McDougall] and the Minister of State for Employment and Immigration [Hon. Monique Vezina] would not have chosen the two-stage approach as their first preference, but were willing to support it.

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but faced with the need for a decision, was willing to support the two-stage approach as well.

In the ensuing discussion, the following main points were made:

1) Ministers wondered why the same broadened definition of health obtained under both stages, given that the intent of the draft Bill was to give effect to an increasing interest of society in the foetus, as the pregnancy advances.

2) Ministers noted that the only difference in the conditions obtaining during stage 1 and 2 was one of degree of severity of the health risk to the mother. There were questions about how the courts would interpret the word "severe".

3) Several Ministers were thus led to wonder whether the new two-stage proposal was not squarely a pro-choice approach: wouldn't the broader definition of health allow any doctor to circumvent effectively the intent of the law? Could such an approach really be reconciled with the Supreme Courts' instructions to search for a balance between the rights of women and society's interest in protecting the foetus?

4) Other Ministers were of the view that there was little discernable difference between the two approaches under discussion, as far as their impact on the number of abortions being performed: neither one would lower the number of abortions performed in Canada below what it would otherwise be. Any differences between them were largely symbolic or presentational.

After the Minister of Energy [Hon. Jake Epp] indicated that, in his view, the two-stage approach would never be acceptable to the majority of Caucus, the discussion shifted to the strategy for securing the support of Caucus. Ministers noted that some pro-life Caucus members would prefer to see a Government Bill fail, rather than support an imperfect Bill.

Several Ministers agreed that Caucus could not simply be presented with one preferred approach; it would need time to think its way through the various options and, through a process of elimination, discover for itself that the Ad Hoc Committee's recommendation is probably the best workable compromise.

The Prime Minister summed up the deliberations as follows:

1) He felt it imperative that the Caucus be persuaded to support the Government's Bill: every other western country had been able to legislate on the matter of abortion.

2) The support of Caucus cannot be secured by rushing the issue; adequate time will be required for Caucus members to acquire some "pride of authorship" over the preferred legislative approach.

3) He reminded Ministers that this was not an issue of private morality or religion, but one of political leadership and stewardship in a pluralistic society. Ministers, as responsible legislators, had a duty to legislate on abortion. In so doing, they had to observe the fine line between the exercise of leadership and authority, and the imposition of personal moral views on the population. He was concerned that the Government's approach be in tune with a modern society, and avoid steering too far to the right.

4) He ended by inviting Ministers to submit their suggestions on how to manage the issue in Caucus (when to launch the discussion, whether to form a Caucus Committee, etc.).

Serial # 21-89CBPP

The Cabinet Committee on Priorities and Planning

Minutes

A meeting of the Cabinet Committee on Priorities and Planning was held in Room 323-S, House of Commons, on Monday, October 10, 1989 at 10:00 a.m.

Items - Abortion

The Government Leader in the Senate [Sen. Lowell Murray] reported that the caucus Committee on abortion was having its final meeting today. He indicated that the Committee had looked at 2-stage and 3-stage approaches but that the pro-life people would prefer a non-gestational approach. Committee members understood that this meant an absolute minimum of restrictions.

The Minister went on to indicate that the consensus developing was close to the old regime but with no Abortion Committees. Health would be defined broadly to include physical, mental and psychological health.

The Prime Minister indicated that this was the first time he had heard of this. He concluded that the Committee should review this with the Government Leader in the Senate when their deliberations were complete. Senator Murray would then bring the matter before P&P.

Serial # 24-89CBPP

The Cabinet Committee on Priorities and Planning
Minutes

A meeting of the Cabinet Committee on Priorities and Planning was held in Room 323-S, House of Commons, on Tuesday, October 31, 1989 at 10:00 a.m.

Items – Abortion. (7-9152-89D1)

General Discussion:

The Government Leader in the Senate [Sen. Lowell Murray] reported on the deliberations of the caucus committee examining the abortion issue. He indicated that the Committee had come up with a one-stage approach which would permit abortion in cases where the psychological, mental or health conditions of the woman were at risk. He noted that the principle of making no distinction between various stages of life for the pro-life group was so important that they were able to accept minimal conditions throughout. He noted that the Committee co-chairmen had said that there was a large consensus but not unanimity, He suggested that the government should treat this as a caucus matter now and discuss it at national caucus that week. The government could then serve notice later in the week.

The Prime Minister said he had concluded that this would find wide favour in caucus and would pass. This was very important. He suggested that Ministers review timing.

< 3 lines withheld under ATI Act sec. 23, solicitor-client privilege >

He suggested that the government give formal notice the next evening, noting the danger of leaks once the matter was discussed in full caucus.

The Minister of Energy, Mines and Resources [Hon. Jake Epp] indicated that he thought the proposal would be acceptable to caucus and that the members of the Cabinet would have to put water in their wine.

The Minister of Employment and Immigration [Hon. Barbara McDougall] said that the pro-choice side was smaller in number than the pro-life side. She said that the women in Cabinet would be bitterly disappointed but would do what had to be done.

The Prime Minister contrasted the proposal with the recent actions of President Bush, who had proposed to refuse funds for abortions required because of rape and incest, and who had met with a storm of protest. He said that the Committee's proposal struck him as a generous Canadian compromise. He indicated that he agreed with the Minister of Justice's [Hon. Doug Lewis] observations on timing, and concluded that the Committee should be invited to present its recommendations to caucus the next day.

PRIVY COUNCIL OFFICE

An Act Respecting Abortion

The Act would amend the *Criminal Code* in order to prohibit abortion unless, in the opinion of a medical practitioner, based on the generally accepted standards of the medical profession, the health or life of the female person would be likely to be threatened if the abortion was not, induced.

The Act defines "health" to include physical, mental and psychological health.

[TEXT OF THE DRAFT BILL FOLLOWS – TO BE LATER NAMED BILL C-43]

Serial # 25-89CBPP

The Cabinet Committee on Priorities and Planning

Minutes

A meeting of the Cabinet Committee on Priorities and Planning was held in Room 323-S, House of Commons, on Tuesday, November 7, 1989 at 10:45 a.m.

Items - Abortion (7-9037-89D1)

The Prime Minister urged all Ministers to be very careful about making any statements which might unleash the divisive potential of this issue.

The Minister of Energy, Mines and Resources [Hon. Jake Epp] expressed some concern that support for the Government's legislation on abortion (C-43, An Act Respecting Abortion) might be wavering among Government Members.

The Chief of Staff [Stanley Hartt] to the Prime Minister explained that some Members were conducting a discreet "head count" to gauge the extent of support for the legislation.

The chairman of the Ad Hoc Committee on Abortion [Sen. Lowell Murray] noted the importance of passing the legislation as quickly as possible to minimize its divisive potential among House Members. He also had indications that the Opposition Leader in the Senate [Liberal Senator Hon. Allan MacEachen] would support the legislation.

2. Abortion Update

Issue

- Review of reaction to abortion legislation and plans for managing this issue in the House.

Outcome

- Need to build on this with five or six good speeches in the House this week - something on the record for our MPs this weekend.

- The key is to get the Bill approved as quickly as possible, before it has time to divide Members of Parliament again.

Serial # 16-90CBPP

The Cabinet Committee on Priorities and Planning

Minutes

A meeting of the Cabinet Committee on Priorities and Planning was held in Room 323-S, House of Commons, on Tuesday, May 15, 1990 at 10:00 a.m.

Items – Abortion. (4-9062-90D1)

General Discussion:

The Government House Leader [Hon. Harvie Andre] outlined the arrangements that had been proposed for managing the debate and vote on the abortion legislation. He said that seven amendments had been allowed by the Speaker. The plan was to permit 10-minute speeches commencing on Wednesday of the following week and to continue the debate as long as people wished to speak. The vote would then be held on May 29, 1990 at 3:00 p.m.

The Minister of Justice and Attorney General of Canada [Hon. Kim Campbell] reported on the numbers likely to vote for and against the proposed legislation. Ms. Campbell said there was a risk that some of the pro-life amendments would pass if the New Democratic Party elected to boycott the proceedings. The majority in favour of the legislation was very small, assuming all Cabinet members supported the legislation.

After some discussion, the Prime Minister outlined his conclusions. He indicated that he would speak to the caucus on the importance of this legislation passing. He reminded his colleagues that they had agreed that all members of Cabinet would vote against any amendment and directed all Ministers to be in attendance for the vote. He tasked the Government House Leader with the responsibility of managing the issue in the House. He said that while the Government could not use a three-line whip to enforce its will, it must spare no effort in ensuring that the legislation passed.

Serial # 9-90CBM

Cabinet Minutes

A meeting of the Cabinet Committee on Priorities and Planning was held in Room 323-S, House of Commons, on Thursday, May 31, 1990 at 10:30 a.m.

General Discussion:

Abortion Legislation (8-9018-90D1)

The Prime Minister thanked and congratulated members of the Cabinet for the successful debate in the House of Commons on the abortion legislation.

[END OF CABINET MINUTES ON ABORTION. 1988-1990]

[***Historical postscript:*** *Bill C-43 was referred to a Legislative Committee on 28 November 1989. On 6 April 1990, the Committee reported C-43 back to the House of Commons without amendment. Third reading debate began on 22 May 1990.*

On 23 May 1990, the House rejected all proposed amendments to Bill C-43 by a significant majority. Most of the proposed amendments would have limited the conditions under which an abortion could be obtained. On 29 May 1990, the House of Commons passed Bill C-43 on third reading by a vote of 140 to 131. Although Cabinet Ministers were required to support the bill, it was a free vote for all other Members.

On 31 January 1991, the Senate voted on Bill C-43. As with the House of Commons, it was a free vote except for members of the Cabinet (Senator Murray). Of 86 senators present, 43 voted for the bill and 43 voted against it. Under the Rules of the Senate, a tied vote is deemed to be a negative vote; therefore Bill C-43 was defeated.

With this result, abortion in Canada is not limited by criminal law but by the Canada Health Act. While some non-legal obstacles exist, Canada is one of only a few nations with no legal restrictions on abortion.

See: Karine Richer, Abortion in Canada: Twenty years after R. v. Morgentaler. *Parliament of Canada, Law and Government Div. PRB-08-22E.* http://www.parl.gc.ca/content/LOP/ResearchPublications/prb0822-e.htm

Mollie Dunsmuir, Abortion: Constitutional and Legal Developments. *Government of Canada. 89-10E.* http://publications.gc.ca/collections/Collection-R/LoPBdP/CIR/8910-e.htm]

[APPENDIX – TWO BACKGROUND PAPERS OF 1989]

ABORTION DISCUSSION PAPER

March 21, 1989

SECRET

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ISSUE

Response to the January 28, 1988 decision of the Supreme Court of Canada in the *Morgentaler* case, in which section 251 of the *Criminal Code* was struck down.

BACKGROUND

Part A - Legal

Morgentaler Decision

- There were three majority reasons for judgment and one minority reasons for judgment.
- The majority reasons for judgment agreed that section 251 of the *Criminal Code*:

  - violated the guarantee of security of the person and the principles of fundamental justice in section 7 of the *Charter*

  - was not saved by section 1 of the *Charter*

- The majority reasons for judgment agreed that "security of the person" in s. 7 of the *Charter of Rights* includes both physical and psychological security and health.

- Many of the complex procedures of section 251 were not related to the protection of the life or health of the woman, nor to the protection of the unborn.

- These complex procedures resulted in unnecessary delays which increased the risks to the health of, and caused psychological injury to the woman; thereby breaching her right to "security of the person."

With respect to the issue of entitlement to an abortion, both the decisions of Chief Justice Dickson and Madame Justice Wilson held that the *Charter*, under the section 7 guarantee of "security of the person", protects a woman's decision to terminate her pregnancy from state interference that would threaten the physical or psychological aspects of her security. Madame Justice Wilson goes even further and holds that during the early months of pregnancy, this right to make a decision is absolute on the part of the woman, and is also protected by the *Charter* guarantee of the right to "liberty." She does, however, acknowledge that reasonable limitations can be imposed later in the pregnancy. Mr. Justice Beetz suggests that a requirement for an independent medical opinion second to that of the woman and her physician might be constitutionally justifiable, but perhaps only during the later stages of pregnancy if the right to "liberty" is considered instead of the right to "security of the person".

The Court did not say that there could be no controls on abortion; indeed some of the judges suggested that legislation could be drafted that would meet *Charter* requirements. The judgment recognizes that the constitutional rights of the woman, especially during the later stages of pregnancy, can be subject to reasonable limits imposed by the state in the interest of protecting the foetus. But, these limits, procedures or conditions cannot significantly delay a pregnant woman's access to a therapeutic abortion, such that she would be put into a position of greater risk or danger to her physical or psychological integrity. Further, any limits must also be rationally connected to the objectives of protecting the foetus and to the protection of the life and health of the pregnant woman.

Legal Effects of the *Morgentaler* Decision

According to the Supreme Court of Canada, the purpose of section 251 of the *Criminal Code* was to protect and balance both the state's interest in protecting the foetus and the protection of the life and health of the pregnant woman.

As a result of the unconstitutionality of section 251, direct legal protection of these interests, at least by the criminal law, has been eliminated.

The effect in law is that there is no federal statutory restriction on the ability of the woman to decide whether to terminate her pregnancy. The decision rests with her and her doctor. Of course other non-legal restrictions, such as medical reasons or lack of access to facilities, would continue to exist.

Furthermore, there is no longer any direct criminal sanction against the performance of abortions by unqualified persons. Nevertheless, the *Criminal Code* provisions regarding criminal negligence causing bodily harm or death would apply to any person who was criminally negligent in the performance of an abortion, and thereby caused bodily harm or death to the woman. Recently, in the case of *R. v Sullivan and Lemay*, the British Columbia Court of Appeal found two midwives guilty of criminal negligence causing bodily harm to the mother, following the death of a foetus that died in the birth canal after complications arose during the birth which the midwives did not have the medical skill to handle. However, they were found not guilty of the charge of criminal negligence causing death to the foetus on the basis that the foetus could not be considered a "person" for the purposes of section 220 of the *Criminal Code*. Leave to appeal to the Supreme Court of Canada was granted on January 23, 1989.

Other *Criminal Code* provisions may apply as well, and provincial laws continue to govern the practice of medicine and the provision of medical services.

Charter **Considerations**

The following summary presents a number of basic propositions derived from the reasons for judgment in *Morgentaler v. The Queen*, but it does not address all of the many subtleties of that judgment and all of the pertinent *Charter* considerations.

- The *Charter* protects a woman's decision to terminate her pregnancy from state-interference that would threaten the physical or psychological aspects of her security.

- The judgment of the Supreme Court leaves little room for the imposition of limits in the early stages of a pregnancy.

- However, the judgment recognizes that the constitutional rights of the woman, especially during the later stages of pregnancy, can be subject to reasonable limits imposed by the state in the interests of protecting the unborn or protecting the life or health of the woman.

- Any such limits must be rationally and proportionally connected to these interests.

- Especially in the early and middle stages of pregnancy, any limits or procedures cannot deny or significantly delay a pregnant woman's access to a therapeutic abortion, such that she would be put into a position of greater risk or danger to her physical or mental health.

- In assessing the weight of the state's interest in protecting the unborn, two of the reasons for judgment refer to the development of the unborn child and its viability. (It would seem, therefore, that steps to protect the unborn could be linked to its development, and that greater limits could be imposed at the stage of viability).

- Even when the state is justified in adopting measures to protect the unborn, the right of the pregnant woman to security of her person includes a right of protection from threats to life or serious risk of harm to health arising from the pregnancy.

Legislative Balance

In developing a legislative option one must attempt to create a balance among the following factors.

1. the right of a woman to make a decision relating to her pregnancy

2. the right of a woman to obtain medical services free from state imposed limits that would cause any unnecessary delay which adversely affects her physical or psychological health

3. the state interest in protecting the health of the woman.

4. the state interest in protecting the unborn. (As compared with the rights of the woman, this is not likely to be predominant until the later stages of pregnancy.)

Part B — Medical and Sociological Health Consequences of Abortion

Health Consequences of Abortion

The Surgeon General of the United States, Dr. C. Everett Koop, has stated that "scientific studies do not provide conclusive data about the health effects of abortion on women". In referring to 250 studies in the scientific literature dealing with the psychological aspects of abortion, Dr. Koop advised that "the data do not support the premise that abortion does or does not cause or contribute to psychological problems".

The American Psychological Association reviewed more than 100 studies conducted on the mental consequences of abortion and agreed with Dr. Koop that no scientific conclusions could be drawn from them.

Factors Relevant to the Timing of an Abortion

The length of pregnancy varies considerably in humans. The usual duration is considered to be between 259 and 293 days. For descriptive purposes, pregnancy is divided into three trimesters of equal length. The former abortion law did not specify any stages of pregnancy or gestation during which therapeutic abortions could be performed, although medical practice discourages late abortions. Current options for a new abortion law include proposals specifying stages of pregnancy or gestation which do not necessarily coincide with the formal trimester limits.

Statistics Canada reports that in 1986, at the time of therapeutic abortion, the gestation period was under 13 weeks for 87.8% of the women, between 13 and 16 weeks for 8.7% of the women and 17 weeks or more for the remaining 3.4% of the women. The latter figure was made up of 3% at 17-20 weeks and only 0.4% at over 20 weeks. Abortions under 13 weeks of gestation increased, in relation to total therapeutic abortions, from 81.3% in 1975 to 86% in 1980 and to 87.8% in 1986, thereby indicating a trend toward earlier abortions. However, it has been reported from other sources that during this first trimester, the percentage of women in Canada who have abortions before 8 weeks tends to be significantly lower than the percentage of women in the United States who have abortions before 8 weeks. Most of the Canadian first trimester abortions were occurring between 8-12 weeks, thereby possibly signifying some delay under the s. 251 procedure.

An analysis based on trends in Statistics Canada data and basic Medical Care data (collected by National Health and Welfare) over the 1982-1988 period indicates that the number of therapeutic abortions performed in Canada has remained fairly stable, declining from about 70,000 in 1982 to a plateau of approximately 65,000 over the 1983-1986 period with a slight rebound to about 68,000 in 1987. Preliminary estimates for 1988 suggest a likely increase to as many as 73,000 - 74,000, largely as a result of increases in Ontario. Whether these increases reflect the decision by the Supreme Court of Canada in *Morgentaler* is not yet clear given that they appear to have

started somewhat prior to the decision, i.e., in 1987. In relative terms, rates actually declined somewhat over the 1982-1987 period, given the general increases in population.

a) Abortions in the First Trimester

The first 12-14 weeks have long been considered the most appropriate time, from a medical perspective, to perform an abortion. The procedure is relatively simple to perform and is of little risk to the woman. During the first trimester an abortion can be performed by vacuum suction or curettage. The immediate risk to the woman is low, and the procedure can be performed in a clinic or day surgery unit.

b) Abortions in the Second Trimester

During the second trimester (up to 24 weeks) the difficulty in performing an abortion increases, and there is consequent increased risk to the mother. At some point prior to the end of the second trimester the foetus is potentially viable outside the uterus.

In Canada, abortions from 13-16 weeks are usually carried out in a hospital on an in-patient basis; but 20% of abortion clinics in the United States accept patients up to 16 weeks. In *Morgantaler*, Chief Justice Dickson found that the more dangerous dilation and evacuation procedure is performed, although much less often in Canada than in the United States.

As described by Chief Justice Dickson: “From the 16th week of pregnancy, the instillation method is commonly employed in Canada. The method requires the intra-amniotic introduction of prostoglandin, urea, or a saline solution, which causes a woman to go into labour, giving birth to a foetus which is usually dead, but not invariably so”.

Statistics Canada reports that the therapeutic abortion complication rate decreased to 2.2 in 1986 from 2.6 in 1979 and 3.2 in 1975. Risk, however, increases with delay and is greatest between 17 - 22 weeks. In addition, Chief Justice Dickson pointed out that “each method of abortion progressively increases risk to the woman.”

c) Late Presenters

In 1986 (the most recent year for which information is available), Statistics Canada reported that 54.7% of the 63,508 therapeutic abortions performed on Canadian women related to women between 20 and 29 years of age. Women under 20 years accounted for 22.3% of the abortions and women 30 years of age and over for 23%. This represents a decrease for teenagers (women under 20), from 31.3% in 1975 to 22.3% in 1986. It also represents a decrease for women over 39 years of age, from 3.1% in 1975 to 2.0% in 1986. However, women under 20 have the lowest percentage of abortions for any age group performed under nine weeks, when it is safest, and the highest percentage for any age group between 13-16 weeks (13.1%) and over 16 weeks (4.9%), when there is greater risk of complications. The next highest percentage for any age group over 16 weeks is for those 40 years and over, who may have mistaken pregnancy for menopause. The

existence of late presenters (primarily young and older women) points to the need for flexible gestational limits for abortion, apart from any limits prescribed by medical practice. Late presenters may also require prenatal screening and diagnosis to detect congenital anomalies in the foetus, and this could further extend the timing for an abortion.

d) Safety

In *Morgentaler*, Chief Justice Dickson found that even within the periods appropriate to each method of abortion, the evidence indicated that the earlier the abortion was performed, the fewer the complications and the lower the risk of mortality. For example, a study emanating from the Centre for Disease Control in Atlanta confirmed that dilatation and evacuation procedures performed at 13 to 15 weeks' gestation were nearly 3 times safer than those performed at 16 weeks or later. Statistics Canada reports that in 1986 procedures performed at 13-16 weeks gestation had less than one-quarter the complication rate per 100 therapeutic abortions than procedures performed at 17 - 20 weeks or 21 - 22 weeks. (There are few abortions after 22 weeks, and this may account for the decrease in the complication rate at this point). Chief Justice Dickson also stated that "the Court was advised that because of their perceptions of risk, Canadian doctors often refuse to use the dilation and evacuation procedure from the thirteenth to sixteenth weeks and instead wait until they consider it appropriate to use the instillation technique".

It has already been pointed out that there is a higher proportion of abortions after 16 weeks' gestation among women who are under 20 or 40 years or over, than as compared to other age groups. While the numbers are low, they are high in relation to any of the age categories of women from 20 - 39 years of age. Because of the late abortions, women under 20 or over 39 have a higher abortion - related complication rate in relation to any of the age categories of women from 20 - 29 years of age. Thus, even though the percentage of abortions of women at all ages at 17 weeks and over is very small - 3.6% in 1986 (it is 8.7% from 13 to 16 weeks) a certain number of late abortions, with the attendant risks, will remain.

e) Fetal Viability

The exact point at which a foetus has reached an appropriate level of maturity to be viable outside the uterus cannot be determined in an individual foetus at this time. A few instances have been recorded in which foetuses of less than 23 weeks have lived after being delivered from the mother. Most foetuses of this age would not live outside the uterus, nevertheless, it is not unreasonable to accept 22 weeks, generally, as the point of potential viability outside the uterus. It must be remembered that the smaller the foetus the more likely it is, if it lives, to be affected by retinal, neurological and pulmonary sequelae.

A pregnancy is usually calculated from the first day of the last menstrual period. In women who have irregular menses it is then very difficult to estimate when the ovulation and fertilization occurred. We thus have problems in calculating the age directly and in relation to the weight.

There is no objective standard test to determine whether a foetus is viable. A plurality of factors, some requiring the subjective judgment of doctors, combine to ultimately determine viability.

For example, individual factors involved in the survival of a foetus include the degree of maturity of the baby; its genetic stamina; racial factors; the quality of intrauterine environment prior to birth, the available equipment; and the skilled staff on hand to use it. As well, there are physiological factors involved in survival: maintenance of the natural environment; nutritional; excretory; and genetic.

Moreover, since there is no agreed upon definition of "viability", establishing a fixed gestational age of viability is bound to be somewhat arbitrary. Definitions of viability of the foetus can vary from being "born alive" to "being capable of indefinite, independent survival". These definitions have direct relevance to the stage of gestation when a foetus is considered viable. The gestational age of a foetus capable of live birth may be lower than the age required for indefinite and independent survival.

In *Roe v. Wade*, the United States Supreme Court stated: "With respect to the State's important and legitimate interest in potential life, the compelling point is viability. This is so because the foetus then presumably has the capability of meaningful life outside the mother's womb, albeit with artificial aid". The Court defined viability as "potentiality of meaningful life... and not merely momentary survival". The phrase "meaningful life" was not explained in *Roe*. Since *Roe*, the Court has ruled on two cases that have dealt with the definition of viability - *Planned Parenthood of Central Missouri v. Danforth* (1976) and *Colautti v. Franklin* (1979).

In *Danforth*, the Court upheld a Missouri criminal abortion statute that defined viability as "that stage of foetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems". In this definition, viability occurs when the foetus is developed to a stage where its life outside the womb may be indefinitely sustained.

In *Colautti* the Court stated, "viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is reasonable likelihood of the foetus' sustained survival outside the womb, with or without artificial support". In this case, the Court moved away from "indefinite survival" of the foetus and adopted a definition of viability that involved more than momentary survival but less than continued survival. The Court did not indicate any criteria of survival time (e.g. hours, days, or weeks required to constitute "sustained survival"). The *Colautti* decision also confirmed the role of the physician as arbiter of when a foetus is viable. In *Danforth*, the Court ruled that viability is "a matter of medical judgment, skill and technical ability; and rejected the assertion that "a specified number of weeks of pregnancy must be fixed by statute as the point of viability".

A Select Committee of the House of Lords of the United Kingdom Parliament was appointed in 1987 to consider a proposed *Infant Life (Preservation) Bill* introduced in the House of Lords by

the Lord Bishop of Birmingham. The Bill died on the Order Paper when the session of Parliament ended. In the new session of Parliament another Select Committee was established to consider an identical Bill. The intent of the Bill was to amend the *Infant Life (Preservation Act 1929)* which makes it the offence of child destruction to kill a child "capable of being born alive", and creates a presumption that a child of 28 weeks gestation is capable of being born alive. The amendment would have substituted 24 weeks for 28 weeks. At the same time, an unsuccessful House of Commons Private Member's Bill sponsored by David Alton sought to amend the *Abortion Act 1967* by setting an 18-week limit on abortions. The Select Committee found the 1929 Act unsuitable for regulating abortions because of, among other things, doubt as to the meaning of the expression "capable of being born alive", and recommended that the House of Lords Bill should not proceed.

The Select Committee thought that the expression in the 1929 Act meant "capable of being brought into the world alive independently of the mother, for a period however short, even a matter of minutes". They noted, on the other hand, that current medical opinion was of the view that "capable of being born alive" means "viable" in the sense of the capacity to survive for an appreciable period. More specific conceptions of viability suggested by medical professionals included: "sustained independent existence", "being able to breathe at the time of birth so that long term survival is possible", "not only the capability of being born alive but also viability (i.e. the capability of sustaining life)", and "capable of sustained survival". With regard to the gestational age of a viable foetus, the Department of Health and Social security (DHSS) accepted the recommendation of the *Royal College of Obstetrics and Gynecologists Report on Foetal Viability and Clinical Practice* that the gestational age after which a foetus is considered as viable should be changed from 28 to 24 weeks.

f) Prenatal Screening and Diagnosis

Tests to detect congenital anomalies in the foetus may be divided into:

a) Screening tests which are performed routinely on all pregnant women in certain at-risk age groups, populations, or areas. For example, in Canada, there is some screening of populations with moderate risk for neural tube defects. Pregnant women over the age of 35 are screened for the possibility of Downs Syndrome in the foetus.

b) Diagnostic tests which are performed on individuals on the basis of an assessment of the risk factors for congenital anomalies present in the pregnancy under consideration. They are performed after the family history and history of previous pregnancies has been evaluated. There may be inherited disease of extreme severity or an unusual syndrome, known to recur, in a previous child. The number of conditions which can be diagnosed antenatally is large and increasing due to the ability to analyze DNA structure.

Chorionic villus sampling (a diagnostic test) can be done when a woman is 8 weeks pregnant, but can only detect about 25% of Down's Syndrome cases at that time. Confirmation testing

(such as amniocentesis) is done at a much later stage. Some serum screening cannot be done earlier than 18 weeks. Amniocentesis is usually offered in high risk pregnancies at 16-18 weeks in order to confirm Down's Syndrome, neural tube defects, and other chromosomal or metabolic anomalies. It can take 7 days to get the results of the screening tests, and as much as 21 days to get the amniocentesis results. If one wished to permit pregnant women to take full advantage of prenatal screening and diagnosis to detect congenital anomalies in the foetus, any gestational limit for the performance of an abortion would have to be at not less than 22 weeks.

Grounds for Abortion

In the United Kingdom *Abortion Act 1967*, grounds for abortion are stated in terms of risk to the woman or to her existing children (the woman's actual or reasonably foreseeable environment can be taken into account), or to the child if it were born. The grounds do not include acts such as rape or incest which result in pregnancy. In Canada, the only grounds in the former abortion law were danger or likely danger to the woman's life or health. However, in assessing the standard of "health", many factors were considered by doctors which might adversely affect the woman's health. These included:

a) Physical Health

In their 1977 report, the federally-appointed Committee on the Operation of the Abortion Law (the Badgley Committee) found that "physical health considerations in the context of therapeutic abortion were endorsed by virtually all physicians" they had surveyed. About three out of four physicians also endorsed mental health, eugenic, and ethical considerations (which could include pregnancy resulting from rape or incest).

b) Mental Health

Most physicians surveyed by the Badgley Committee said that "mental health was a valid part of the definition of health (79.8%) in the context of therapeutic abortion". From 1972-1974 the abortion reporting form of Statistics Canada asked whether the grounds were medical, psychiatric or social, or a combination of these. After 1974 the grounds were dropped from the reporting forms because 72% of all abortions were being reported on psychiatric grounds, or on psychiatric grounds in combination with other grounds. In its 1977 report, the Badgley Committee commented on these statistics as follows:

"A majority of the diagnoses associated with therapeutic abortion reported by Statistics Canada were for reasons of mental health, mostly listed as reactive depression. Few physical indications were reported in these national statistics. What these findings may indicate is that in terms of their physical health, most women who had abortions in Canadian hospitals were considered by their physicians to be in good physical health, but as a result of their unwanted pregnancy, some aspect of their mental health had been affected. The extensive diagnostic classification involving the mental health status of women obtaining therapeutic abortions masks to a considerable extent

what their actual state of mental health may be. The reason why this information must be considered to be unreliable is that many physicians gave their abortion patients these diagnostic labels to facilitate their applications for therapeutic abortion. Many physicians whom the Committee met on its visits to hospitals across Canada openly acknowledged that their diagnoses for mental health were given for purposes of expediency and they could not be considered as a valid assessment of an abortion patient's state of mental health."

c) Eugenic Health

This term refers to the possibility of congenital anomalies, inherited or otherwise, in the foetus. Three-quarters of the physicians (72.7%) surveyed by the Badgley Committee included this consideration in their definition of health in the context of therapeutic abortion with a trend toward younger physicians emphasizing this component somewhat more than older physicians. Ever since the former law was struck down by the Supreme Court of Canada, interest groups supporting the rights of the mentally and physically disabled have expressed their opposition to the inclusion of eugenic grounds in any new abortion law. If eugenic health was not expressly referred to as grounds for an abortion, physicians would probably take this consideration into account in assessing all the relevant factors in an attempt to determine whether there is a threat of injury to the pregnant woman's health (mental and physical). Nevertheless, it should be noted that if the degree of threat which is required is increased (e.g. "serious" threat to health) the ability to include eugenics in assessing the woman's health is lessened. The Law Reform Commission of Canada, on the other hand, has recommended that "lethal defect in the foetus" should be a separate ground for abortion. However, the creation of this separate ground might have the interpretative effect that a serious defect in the foetus could not be taken into account in determining threat of injury to the health of the pregnant woman, particularly her mental health. This is further complicated by the Law Reform Commission's exclusion of mental health from the second ground for lawful abortion, i.e., termination of the pregnancy to save the woman's life or to protect her against serious physical injury.

d) Ethical Health

This category includes juridical acts such as rape or incest resulting in pregnancy, but could also include immoral acts which may not necessarily be illegal, such as knowingly exposing a woman (and her child) to sexually transmitted diseases. The Badgley Committee found that "three out of four physicians (74.4%) believed that ethical considerations should be included in the concept of health when it involved therapeutic abortion. In the Committee's National Population Survey, two-thirds of the women and men surveyed gave priority to an induced abortion being performed when a pregnancy had resulted from rape or incest.

Abortion Facilities

Under the former abortion law, therapeutic abortions could only be performed in "accredited" or "approved" hospitals. An "accredited hospital" meant "a hospital accredited by the Canadian

Council on Hospital Accreditation in which diagnostic services and medical, surgical and obstetrical treatment are provided". An "approved hospital" meant "a hospital in a province approved for the purposes of (the abortion law) by the Minister of Health of that province". The word "hospital" was not defined. In *Morgentaler*, both Chief Justice Dickson and Beetz J. referred to the finding of the Badgley Report regarding the definitions of hospitals where therapeutic abortions can be performed: "Of the total of 1,348 non-military hospitals in Canada in 1976, 789, or 58.5%, were ineligible in terms of their major treatment functions, the size of their medical staff, or their type of facility to establish therapeutic abortion committees". The result was to restrict access to therapeutic abortions.

In *Morgentaler*, Beetz J. had problems with the requirement that abortions could only be performed in hospitals. He noted that experts had testified that many first trimester abortions could safely be performed in clinics, and that the hospital requirement was not rationally connected to the legislative interests of protecting the unborn or the life or health of the woman. He found that there was no medical or constitutional justification that <u>all</u> abortions need take place in a hospital. Chief Justice Dickson found that from the evidence presented as to the actual functioning of the abortion law, the "approved hospital" requirement therein resulted in a denial of access to a therapeutic abortion. Provincial regulation through the approval process had heavily restricted, and even denied, access. Madame Justice Wilson agreed with the finding of both the other two decisions on the issues of procedural requirements.

Prior to the *Morgentaler* case, only the province of Quebec granted approval to clinics to perform abortions. These clinics, the "Centre Locaux de Services Communautaires" (CLSCs), are not affiliated with hospitals and perform abortions in the first 12 weeks only. Quebec would expect these facilities to be covered by any new law. There are also private clinics in Quebec, and Quebec hospital insurance pays for abortions done in these facilities. Beetz, J., in his reasons for judgment made specific mention of the accessibility which the clinics provided in contrast to the inadequate access that exists in other parts of the country.

Since the *Morgentaler* decision, Ontario has announced that Ontario hospital insurance will pay for abortions done in approved private facilities.

In England, termination of pregnancies of under 12 weeks' duration in private day-care abortion centres has been authorized. Licences have also been granted to certain private charity organizations for this purpose. In the United States, 82% of abortions performed in 1982 were done outside of hospitals. In a number of European countries, including the Netherlands, Poland, West Germany and France, approximately half of the abortions are performed in non-hospital facilities.

Therefore, both in Canada and elsewhere, non-hospital abortions have been permitted in either hospital-affiliated, but separate, clinics or in private or charitable clinics. Some provincial governments, however, have expressed concern about the possibility of U.S. style commercial

abortion clinics operating in their jurisdictions. It is understood that proposed Ontario legislation will address this problem.

Second Medical Opinion

Beetz J. (joined by Estey J.) held in *Morgentaler* that Parliament is justified in requiring an independent verification of the practicing physician's opinion that the life or health of the pregnant woman is in danger. This opinion has served as the basis for the argument that a second medical opinion requirement could be justified wherever a medical judgment was necessary to terminate a pregnancy. Neither Chief Justice Dickson nor Wilson J. specifically addressed the question of whether such a condition would be permissible, although Wilson J. did accept that there may be an inquiry into the reason for an abortion and conditions could be prescribed in the later stage of the pregnancy. It should also be remembered that both of these reasons for judgment held that section 7 of the *Charter* protects a woman's decision to terminate her pregnancy from state interference that would threaten the physical or psychological aspects of her security. Madame Justice Wilson held that this right to make a decision is absolute on the part of the women during the early stages of pregnancy.

The United Kingdom abortion legislation requires a second opinion. On the other hand, the United States Supreme Court has struck down committee and second opinion requirements as being unconstitutional. In *Doe v. Bolton*, 410 U.S.179 (1973), the United States Supreme Court held that required acquiescence by co-practitioners, i.e. a second independent medical opinion, has no rational connection with a patient's needs and unduly infringes on the physician's right to practice.

In a meeting between Justice officials and representatives of the Canadian Medical Association (CMA), the CMA representatives gave it as their personal opinions that while a second opinion might be sought for medical reasons in particular cases, it should not be undertaken for legal reasons only.

While there is no absolute bar in the judgments of the *Morgentaler* decision (other than in respect of Dickson C.J.C.'s and Wilson J.'s discussion of the issue of a woman's entitlement to make a decision) to Parliament passing legislation requiring a second medical opinion, such a requirement increases the risk of a successful *Charter* challenge to the legislation. Given the Supreme Court's intense scrutiny of the procedures in the abortion law in *Morgentaler*, it can be expected that the court will give very careful scrutiny to the relevance of taking this extra precaution and the possibilities for causing unnecessary delay and restricting access. The outcome of a court challenge will depend on the Government's ability to demonstrate that the requirement does serve its intended purposes (protection of the foetus) while taking into account the legitimate and protected interests of the pregnant woman (life and health).

Perhaps even more important will be the necessity to establish that the requirement of a second medical opinion will not cause unnecessary delay or restrict access to abortions for women who

would otherwise qualify; e.g. if the second medical practitioner must be a specialist, strong arguments could be made that the procedure would cause unnecessary delay and restricted access. The CMA representatives thought that consultation by an obstetrician/gynecologist would not always be easily accessible. Lastly, the requirement of a second medical opinion, particularly during the early stages of pregnancy, may conflict with the dicta of Dickson C.J.C. and Wilson J. concerning the entitlement issue, unless it could be argued that such was in accord with fundamental principles of justice or justifiable under section 1 of the *Charter*.

CURRENT STATUS

Shortly after the decision of the Supreme Court of Canada, the Minister of Justice indicated that the Government intended to introduce legislation in the House of Commons that would attempt to balance the state's interest in the protection of the foetus and the woman's constitutional right to security of her person.

On May 24, 1988, the Government tabled in the House of Commons a draft resolution respecting abortion. The draft resolution, and its two alternative amendments, outlined three possible legislative schemes for restricting abortion. Subsequently, the Government and Opposition Parties discussed various procedural issues relating to the format of the resolution and its restrictions respecting the making of any amendments thereto.

On July 22, 1988, the Government tabled in the House of Commons a new draft resolution that outlined a scheme for regulating abortion during the early months of pregnancy and prohibiting its occurrence (subject to exceptions) after a particular point in the pregnancy.

On July 26, 1988, debate on the Government motion commenced in the House of Commons and a number of amendments to the draft resolution were proposed. These proposed amendments ranged from proposals to severely restrict the obtaining of an abortion to proposals that would have placed little restrictions on such.

On July 28, 1988, the House of Commons voted on the Government motion and the various proposed amendments. All of the proposed amendments were defeated, as was the Government motion.

The Supreme Court of Canada heard argument on appeal in *Borowski v. R.* on October 3 and 4, 1988 concerning the issue of whether a child *en ventre sa mere* is to be considered as a "person" for the purposes of section 7 and 15 of the *Charter* (protection of life, liberty, security of the person and equality rights). The Court reserved its decision.

On March 9, 1989, in a unanimous decision of the Court delivered by Mr. Justice Sopinka, the appeal was dismissed on two grounds:

(1) Mr. Borowski's case had been rendered moot when section 251 of the *Criminal Code* was struck down and the Court would not exercise its discretion to hear it; and

(2) the appellant had lost his standing to pursue the appeal as the circumstances upon which such standing was premised had disappeared.

In dismissing the appeal, the Court has declined to rule on the substantive merits of the appellant's contention that the foetus is guaranteed the right to life and right to the equal protection and equal benefit of the law without discrimination because of age or mental or physical disability under sections 7 and 15 of the *Charter*.

In so doing, the Court has provided no guidance to the government as to how it might exercise the state's interest in protection of the foetus or how that interest might be balanced with the rights of women, as recognized in *Morgentaler*. In the result, the government is no further ahead than it was immediately following the *Morgentaler* decision in terms of guidance from the Court, other than that the question of whether the Court would answer these issues in a legislative vacuum has been answered.

During the 1988 election campaign, the Prime Minister indicated that he would consult the other political parties to depoliticize the issue and to seek a compromise that would achieve a balance of interest between a woman's right to liberty and security and society's interest in the protection of the unborn. He invited the reactions of Canadian women before proceeding with changes and indicated that the Government would await the Supreme court decision in the *Borowski* case before taking further action in Parliament. The Prime Minister further suggested that legislation might be introduced within a year, whereupon he would allow Members of Parliament a free vote, guided only by their conscience.

The Minister of State for the Status of Women, the Honourable Barbara McDougall, indicated, during the debate in the House of Commons and during the election campaign, that she firmly believes Canadian women will make responsible choices when dealing with the abortion issue.

On February 23, 1989, the Law Reform Commission released its Working Paper, "Crimes Against the Foetus". In this Report, the majority of the Commissioners are proposing a regulated two-stage gestational approach. The Commission is recommending the enactment of a new offence of intentionally, recklessly or negligently causing foetal harm or destruction.

The term "foetus" would be defined to mean "the product of a union in the womb of human sperm cells and egg cells at all stages of its life prior to becoming a person". A "person" would be defined to refer, inter alia, to "a human being which has proceeded completely and permanently from its mother's body in a living state and capable of independent survival." The offence would apply even though the destruction or harm results after the foetus becomes a person.

Lawful abortions would be an exception to this offence. In the first 22 weeks, a woman would be able to decide to terminate her pregnancy (on the basis of her informed consent) in consultation and with the authorization of a medical practitioner in order to protect her physical or

psychological health. Additionally, at any time during the pregnancy, the pregnancy may be terminated in order to "save the woman's life or to protect her against serious physical harm," or "because the foetus is suffering from a malformation or disability of such severity that medical treatment could be legally withheld upon its birth" (i.e., lethal defect). After 22 weeks, termination would be permitted for the latter two grounds only where authorized by two qualified medical practitioners.

There is also a minority alternative three-stage approach which differs from the above only by the addition of a first stage which would be "at any time before the foetus is twelve weeks old", during which time the abortion would be a private matter between the pregnant woman and her doctor. The subsequent stages are identical to those proposed in the two- stage approach.

Although agreeing that there should be a general foetus crime, one of the Commissioners dissented on the basis that abortion should be available only where necessary to save the mother's life or to protect her against serious and substantial danger to her health where there is no other commonly accepted medical procedure for effectively treating this health risk.

The Canadian Medical Association's new policy on abortion adopted at their annual meeting in August states that in the first 20 weeks, the decision to terminate a pregnancy rests with the patient and her doctor. After 20 weeks, abortions would be allowed under exceptional circumstances. A second medical opinion is not required. Abortions should be performed in a facility meeting provincial standards but need not be done in a hospital.

The Canadian Medical Association is presently conducting a study to determine the extent to which the medical profession can regulate abortion and will be sharing its information with Department of Justice officials. The medical profession is able to regulate medical procedures where empowered to do so by provincial legislation.

< Pages 000037 to 000073 are withheld under ATI Act sec. 23, solicitor-client privilege >

OUR FILE — N/ REFERENCE

ADMO-PCI-0787

April 10, 1989

MEMORANDUM

Members of the Ad Hoc Committee on Abortion

From Perrin Beatty, Minister of National Health and Welfare

SUBJECT

Meeting of the Ad Hoc Committee on Abortion on April 11, 1989

Attached for your review is a copy of a discussion paper on Abortion and the *Canada Health Act* which will be discussed at tomorrow's meeting of the Ad Hoc Committee on Abortion.

SECRET

Ministers' Eyes Only

DISCUSSION PAPER ON ABORTION

AND THE *CANADA HEALTH ACT*

National Health and Welfare

April 10, 1989

INTRODUCTION

The Government has formed an Ad Hoc Committee of Ministers to study and make recommendations on the abortion issue. As part of its work, the Committee asked the Minister of National Health and Welfare to bring forward a paper which reviews the health implications of the abortion issue, and particularly the administration of the *Canada Health Act*.

This paper has five parts. Part one sets out the key elements of the *CHA*, including a discussion of how the Act's criteria and conditions work in relation to its compliance provisions. Part two reviews the administration of the Act since it came into law on April 1, 1984. Part three provides a status report on current provincial abortion protocols and regulations as well as a synopsis of current court actions against some provinces. Part four assesses the various possible legal actions in relation to the provisions of the Act and past NHW administrative practices. Part five provides a summary of the key conclusions to emerge from this review of abortion and the *CHA*.

1. HOW THE *CHA* WORKS

The provinces have primary responsibility under the Constitution for matters relating to the organization and delivery of personal health care services. Accordingly, federal legislation in the area of health care financing and health insurance has always been framed carefully, in order to respect the division of powers under the Constitution.

The method for determining the amount of federal health funding to which each province is entitled is set out in the Established Programs Financing (EPF) arrangements. These

arrangements came into effect in 1977 and provide for an equal per capita annual block payment to be paid to each province. They replaced a system of cost shared health grants. Increases in federal health contributions are no longer tied to provincial spending but to average increases in G.N.P.

The *Canada Health Act (CHA)* repealed and replaced the existing federal Acts governing the conditions under which the federal government agreed to help finance provincial hospital (*Hospital and Diagnostic Services Act, 1957*) and medical (*Medical Care Act, 1968*) insurance programs. Any description or evaluation of how the current law works must therefore be seen against an historical backdrop of some thirty years, especially in terms of the extent to which the federal government's spending power has been exercised.

Simply put, the *CHA* does three things. First, it provides a statement of the primary objective of Canadian health care policy in terms of protecting, promoting and restoring the health of Canadians and facilitating " . . . reasonable access to health services without financial or other barriers." Second, it sets out the criteria and conditions that provincial health insurance plans must satisfy in order for the province to receive full federal cash payments under the EPF arrangement. Third, it provides for payments to the provinces in accordance with the EPF formula and methods of withholding federal payments if the criteria or conditions in the Act are not satisfied by a province(s).

National Policy Statement: As a statement of federal policy, the *CHA* reflects the long-standing consensus across Canada that medically necessary hospital and medical services should be available to Canadian residents without financial impediment.

Neither the *CHA* nor the previous federal health legislation dictate to the provinces the manner in which "medical necessity" should be determined. The *CHA* does not include a definition or interpretation of medical necessity.

At the most general level, a determination of medical necessity can only be made by a qualified medical practitioner. The provincial Colleges of Physicians and Surgeons license doctors to practice medicine in a particular province. Based on consultations and negotiations with provincial medical associations, provinces establish the services which are to be insured and the circumstances under which certain services will not be insured, i.e., where they are not strictly medically necessary (e.g., physical examinations for life insurance purposes) or are paid for on the basis of third party liability (e.g., workers' compensation claims) . Once the set of insured services has been defined by a province, individual doctors decide on a case-by-case basis the medical needs of particular patients.

Criteria: The *CHA* sets out five criteria which the provincial plans must satisfy in order to qualify for full cash payments under EPF. The five criteria are briefly summarized as follows:

(1) Universality - all bona fide residents are entitled to health insurance benefits on "uniform terms and conditions".

(2) Comprehensiveness - all "medically necessary" hospital, physician, and certain surgical-dental procedures must be insured under provincial plans.

(3) Portability - Canadians are entitled to benefits while temporarily in another province and to reasonable reimbursement for expenses incurred while outside Canada. Prior consent for elective services may be required for services available on a "substantially similar" basis in their home province.

(4) Accessibility - Canadians are entitled to "reasonable access to insured services on uniform terms and conditions, unimpeded directly or indirectly by financial or other barriers.

(5) Public Administration - provincial plans must be administered and operated on a non-profit basis.

These basic concepts were contained in the original federal hospital and medical insurance legislation, although they were cast in terms of "conditions" which meant that the Government was obliged to withhold *all* federal health care funding if a province failed to comply with federal legislation.

Withholding and Deduction Provisions: Under the *CHA*, cash contributions to a province can be triggered in two ways.

The first is provided for under Section 20 of the Act. It requires the Minister to levy a dollar-for-dollar penalty on those provinces permitting user charges to be collected by hospitals or provinces allowing physicians to bill patients over and above provincial plan payments. The amount of extra billing or user charges deductions in a province is determined based on provincial estimates. The penalties are automatic and the Minister is required to report such non-compliance in his Annual Report to Parliament.

The second provision is provided for under Sections 14 and 15 of the Act. They provide for a three-stage consultative process for resolving federal-provincial disputes about compliance. The three stages are: (1) letter of concern from the Minister to the Province(s); (2) joint federal-provincial fact-finding; and (3) a meeting between the Minister and the provincial Minister concerned. The dispute resolution process is essentially a formalization of a similar process that had in fact existed for some time prior to 1984. If this process fails to resolve the dispute, the Minister must refer the matter to the Governor-in-Council. The Governor-in-Council may levy a penalty from 0 to 100% of the federal cash transfer, depending on the "gravity of the default".

In summary, the *CHA* allows the federal government to require that broad conditions be satisfied in return for federal funding of provincial programs (i.e., the exercise of the federal spending power) . At the same time, the constitutional prerogatives of the provinces are preserved. They

have responsibility for interpreting which health services are insured and for organizing their health care systems. This is a long standing arrangement which has afforded Canada one of the most accessible and cost effective health systems in the world.

2. ADMINISTRATION OF THE *CANADA HEALTH ACT*

(a) General Approach

Since 1984, the Government has adopted a flexible, non- confrontational approach to interpreting and applying the criteria set out in the *CHA*.

With respect to extra billing and user charges, the Minister had no option but to initiate dollar - for-dollar reductions on July 1, 1984. While some provinces continued to question the federal policy and court action was initiated by the medical profession (currently finalizing the agreed statement of facts in the Ontario Supreme Court , the fact remains that by July 1, 1987 the Minister was able to report to Parliament that all user charges and extra billing had been eliminated. This meant that all the federal withholdings over this three year period were in fact returned to the provinces in accordance with the Act. While this was the objective of the legislation, the Act does not proscribe or ban such charges. Rather, it provides a financial disincentive for provinces electing to finance their health plans in this way.

Former Health Minister Epp wrote to the provinces in June, 1985 to confirm his intentions with respect to the provisions of the Act. In his letter, Mr. Epp stressed the need to develop " . . . flexible, reasonable and clear ground rules to facilitate provincial, as much as federal, administration of the *Canada Health Act*". He also indicated his " . . . preference that the provincial/territorial Ministers be given an opportunity to interpret and apply the criteria of the Act to their respective health care insurance plans" while at the same time understanding his own accountability to Parliament for the Act.

Within this broad framework, administration of the Act was predicated in an appreciation of and respect for provincial commitments to the basic health insurance principles as well as ". . . provincial prerogatives regarding the organization, licensing, supply, distribution of health manpower, as well as the resource allocation and priorities for health services".

It was also predicated on the fact that, historically, when provinces strayed very far from the basic principles of national health insurance, the media, public, health interest groups and/or the courts took up the issue. Invariably, this action has resulted in provinces reconsidering their original decisions or being required by the courts to change existing practices or polices. There are numerous examples of this, including a successful legal challenge in Alberta to stop doctors from charging a fee for abortion referral letters required by therapeutic abortion committees (pre *Morgentaler* decision).

(b) *CHA* and Section 251 of the *Criminal Code*

The *CHA* requires that all "medically necessary" services be insured by a provincial plan. Before section 251 of the *Criminal Code* was found to be inconsistent with the *Charter*, only those abortions performed in accordance with the Code and at hospitals with the approval of a therapeutic abortion committee were accepted as "medically necessary" and therefore insured. Any applicable extra billing or user charges levied for such procedures would have been included in amounts estimated or reported to the federal government and would have been deducted from EFF cash payments.

Prior to the *Morgentaler* decision, therapeutic abortions were treated differently from most medical services by provincial plans because the *Criminal Code* imposed particular conditions or legal eligibility criteria. From the standpoint of the *CHA*, as long as these were insured on a "where and as available" basis in hospitals and in accordance with the law, provinces were in compliance. For example, although there was no therapeutic abortion committee in any PEI hospital and no physician was reportedly prepared to perform the procedure, the plan nevertheless covered out-of-province abortions on a "prior approval" basis when provided in accordance with the Code.

Only abortions in hospitals approved by provinces for the purposes of s.251 of the *Criminal Code* were regarded as lawful prior to January 1988, and therefore, as medically necessary services which a provincial plan was required to insure. In Quebec, clinics were also approved for the purposes of s. 251.

Post *Morgentaler* decision, the principle of medical necessity in the *CHA* requires that abortion services be considered on the same basis as any other plan benefits or other "medically required" procedure.

3. PROVINCIAL RESPONSES TO THE *MORGENTALER* DECISION AND RESULTING COURT ACTIONS

Subsequent to the *Morgentaler* decision, provinces have adopted varying policies and practices for the provision, delivery and payment of abortion services. These actions have served to either restrict or improve availability and access to abortion services. The extent to which a province may use administrative practices or rely on controls over licensure to restrict access to abortions may lead to court challenges in view of the findings on *Morgentaler* that the therapeutic abortion process restricted access and posed safety problems to women which interfered with their rights under the *Charter*.

(a) Provincial Actions

Today, the extent of the availability of abortion services is very much a function of these differing provincial policies and practices. Table I summarizes, in chart form, some of the

requirements, determined by provincial actions, which govern the availability and/or access to abortion services. However, given that many of the entries in the table would require detailed footnotes to explain the specific policy of each province in these areas, the table should be regarded as illustrative only and should not be used publicly to describe the range of abortion services available in provinces.

[TABLE I]

The following brief description of provincial requirements concerning abortion services will serve to illustrate the diversity across the provinces. Specifically, there are variations in provincial requirements with respect to:

o The approval process for an abortion: Although abortion committees have been disbanded in almost every province, in Prince Edward Island, "medical necessity" is determined by a three physician committee (appointed by the Hospital and Health Services Commission) using the CMA policy. P.E.I. insists that it would make such services available in an emergency situation.

There are hospitals in Saskatchewan, Alberta and the North West Territories which have retained their therapeutic abortion committees.

In New Brunswick, The Medical Society Act and the Public Hospitals Act Regulations continue to require that a second medical opinion be obtained. The Provincial Hospitals Act in Alberta requires a second opinion, preferably that of a specialist.

o Where the procedure is performed: In Quebec, Ontario and British Columbia, abortions performed in hospitals and elsewhere are covered by the provincial plan. In other provinces (see note above on P.E.I.) abortion services are insured when performed in an approved and accredited hospital (not all hospitals in provinces are approved for this purpose). It is only in these three provinces that abortions performed in clinics or doctors' offices will be covered by the provincial insurance plan.

In most cases, abortion services will be insured by the provincial health insurance plan if it is deemed medically necessary by a qualified MD, and if provincial requirements concerning location of the procedure and personnel are met. This applies even if the procedure is performed out-of-province. Other provinces, such as New Brunswick, refuse to reimburse for out-of-province abortions performed in clinics.

o Personnel authorized to perform the procedure: In New Brunswick, the abortion must be performed by a specialist in gynecology or obstetrics. No doctors in P.E.I. will provide abortion services.

In Newfoundland one doctor provides abortion services. In Saskatchewan,

< 3 lines withheld under ATI Act sec. 14, Federal-provincial affairs >

only a limited number of physicians provide abortion services.

o Grounds for abortion: In general, abortions are performed only if a medical practitioner has deemed the procedure medically necessary, although there may be some cases where doctors perform abortions because they believe they should be available to all women. However, hospitals may restrict abortions by establishing guidelines or protocols governing the procedure.

In Newfoundland, the hospital in which most abortions are performed has guidelines restricting services to life-threatening or health risk cases. In April 1988, the P.E.I. legislature passed a motion opposing abortions except in situations in which the mother's life is in danger.

o To whom the service is available: In Alberta, one hospital limits abortion services to local women only and in B.C., one hospital has capped the number of abortions to be performed at the facility. These appear to be other examples of hospital restrictions rather than provincial actions.

(b) Free Standing Clinics, Extra-billing and User Charges

Another issue which may arise in relation to provincial actions following the *Morgentaler* decision is the application of extra billing or user charges for abortions performed in clinics. The question of extra-billing involves mandatory penalties, as discussed in Section 1. Questions have been raised by some as to whether operating or overhead charges at free-standing clinics could constitute extra-billing or user charges under the *CHA*.

In British Columbia, for example, charges for clinic operating/overhead costs are regarded as extra-billing by the provincial government.

In Quebec, where abortions performed by qualified practitioners, whether in hospitals or clinics, are insured, the province is studying financial arrangements and is currently exploring the issue of whether or not an extra-billing problem exists in its free-standing clinics.

In Ontario, it is our understanding that, at this time, the provincial insurance plan will reimburse only the physician fee portion of the cost of abortions performed in clinics. Ontario's Independent Health Facilities Act, which is at the second reading stage, is designed to license, regulate and finance independent clinics, including abortion clinics.

(c) Court Actions Resulting from Provincial Decisions

Finally, the provincial actions following the *Morgentaler* decision have resulted in three court actions to date and others are anticipated. These include;

o New Brunswick: In February 1988, Dr. Morgentaler filed a case against the provincial government's refusal to pay for out-of-province abortions performed in clinics, claiming that the

province's position contravenes its own regulations for payment of out-of-province medical services. The case was heard in February, 1989 and the Court reserved its decision.

o Manitoba: Dr. Morgentaler filed a motion in the Court of Queen's Bench challenging, on constitutional grounds, the Manitoba government's policy of not paying for abortions performed at his Winnipeg clinic.

o British Columbia: In March 1988, the provincial Supreme Court ruled in favour of the B.C. Civil Liberties Association challenge that the province's attempt to deinsure abortion services was illegal because there was no statutory authority for the Cabinet to enact such regulations. In the decision, it was noted that there might be a question of the province not satisfying provisions of the *CHA*. However this question was not addressed by the court.

o Nova Scotia: In an attempt to prevent Dr. Morgentaler from opening a clinic in Halifax, the government enacted regulations in March 1989, restricting abortions to approved hospitals and funding them accordingly.

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(d) Actions of Provincial Colleges of Physicians and Surgeons

In the absence of abortion legislation, some of the provincial Colleges of Physicians and Surgeons as well as the Canadian Medical Association have developed positions or policies on abortion. These could serve to either restrict or improve the availability and access to abortion services.

In Saskatchewan, the provincial College of Physicians and Surgeons has decided that members shall only perform abortions in accredited hospitals, following consultation.

In Manitoba, the provincial College of Physicians and Surgeons approves all surgical procedures which are performed outside of a hospital setting. Dr. Morgentaler's clinic in Manitoba was authorized to perform abortions up to 14 weeks. Provincial regulations limit payment to abortions performed in hospitals, thus women who attend the clinic must pay the full cost of abortions.

The CMA's position on induced abortions states that the decision to perform an induced abortion, in the early stages of pregnancy, is a medical one, made confidentially between the patient and her physician, within the confines of existing Canadian law. Fetal viability is understood to be the ability of the fetus to survive independently of the maternal environment which would be over 20 weeks of gestation or over 500 g. in weight.

< Pages 000014 to 00015 withheld under ATI Act sec. 19[1] and 23 >

CONCLUSIONS

Six general conclusions appear to emerge from the foregoing analysis:

1. Before the *Morgentaler* decision, the determination of what constituted a medically necessary abortion was confined by the restrictions of section 251 of the *Criminal Code*. Therapeutic abortions were accepted as being medically necessary and therefore were insured. Post *Morgentaler*, the legal criteria are gone and the provinces have been forced to treat abortion, like other medical procedures, from the perspective of medical necessity. This has resulted in wide variations in administrative arrangements for abortions across the provinces.

2. The fact is that the *Morgentaler* decision has clarified what may constitute an impediment to access to abortions. The effect of the judgment is to require that, as a minimum, abortion services should be treated the same as other insured services. If, for example, a second medical opinion would be required in a particular case for medical reasons, this would not likely offend the principles set out by the Supreme Court in *Mortgentaler*. However, if administrative procedures, such as abortion committees and second opinions, are routinely required, these might be seen to be an impediment to access, as suggested in the *Morgentaler* decision.

< Many more next lines withheld under ATI Act sec. 23, solicitor-client privilege >

[END]