

March 11, 2016



s.40(1)

Dear : s.40(1)

**Re: Your request for access to information under Part II of the *Access to Information and Protection of Privacy Act* [Our File #: IGA-02-2016]**

On February 18, 2016, The Intergovernmental Affairs Secretariat received your request for access to the following records/information:

- Correspondence, Reports, or memos between governments regarding abortion from 1988-1998
- Record from First Ministers' Meetings that discuss abortion
- Correspondence, reports and/or memos with or about Dr. Henry Morgentaler and the abortion clinic in St. John's
- Statistics and figures related to the number and costs of abortions in the province

I am pleased to inform you that a decision has been made by the Deputy Minister for the Intergovernmental Affairs Secretariat to provide access to the requested information.

In accordance with your request for a copy of the records, the appropriate copies have been enclosed.

Please be advised that you may ask the Information and Privacy Commissioner to review the processing of your access request, as set out in section 42 of the Access to Information and Protection of Privacy Act (the Act). A request to the Commissioner must be made in writing within 15 business days of the date of this letter or within a longer period that may be allowed by the Commissioner.

The address and contact information of the Information and Privacy Commissioner is as follows:

Office of the Information and Privacy Commissioner  
2 Canada Drive  
P. O. Box 13004, Stn. A  
St. John's, NL. A1B 3V8

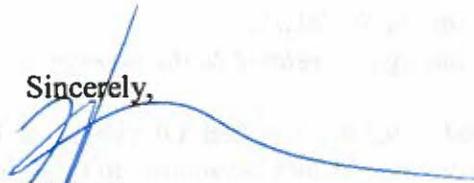
Telephone: (709) 729-6309  
Toll-Free: 1-877-729-6309  
Facsimile: (709) 729-6500

You may also appeal directly to the Supreme Court Trial Division within 15 business days after you receive the decision of the public body, pursuant to section 52 of the Act.

Please be advised that responsive records will be published following a 72 hour period after the response is sent electronically to you or five business days in the case where records are mailed to you. It is the goal to have the responsive records posted to the Office of Public Engagement's website within one business day following the applicable period of time. Please note that requests for personal information will not be posted online.

If you have any further questions, please feel free to contact me, Herb Simms, by telephone at 709 729 2839 or by e-mail at [herbsimms@gov.nl.ca](mailto:herbsimms@gov.nl.ca).

Sincerely,



Herb Simms  
ATIPP Coordinator

Colin has more or less been doing this on his own.

Crucial the when does the fetus become a person and then for rights to security of the person. Implications if any, for the Provincial Health Act

Dissenting Opinion: There is no right to an abortion in the charter... the parliament can do what it wants in terms of legislature

Do nothing. Use of the notwithstanding clause. Return to 1982 standard - life & meaning only.

Did not deal with life. How does life begin? Begins when you are down. Parliament could choose any point.

- Feds can legislate
- Abortion Committee type of procedure not acceptable
- Unclear what would be acceptable.
- Provisions in terms of terms of gestation would be arbitrary. When ~~one~~ the rights of the woman paramount over the rights of the child.
- \* Def. of Health was one of the deficiencies with s.251. Vague concept. Could define more clearly for the purposes of abortion

Federal Gov't Committee procedure was inadequate in that it bore no relation to the balance of the Constitutional Other requests it was supposed to support. \* Balance right of mother versus fetus

Provincial Options

1. Fed legislation only can restrict access.
2. Provinces can not direct hospital boards to perform or not perform abortions
3. ~~Province can not direct hospital boards~~ Province can remove abortions from the list of insured procedures. (c) province can regulate funding without <sup>necessarily</sup> restricting access

Political decision

Would the principles of Universality of Medicare apply to abortion?

### Criminal Code implications:

The Supreme Court decision effectively renders ~~all provisions~~ <sup>governing the public</sup> of The Criminal Code ~~and of the Offences Act~~ <sup>and of the Offences Act</sup> ~~and of no force and effect.~~ <sup>and of no force and effect.</sup> In coming to its decision, however, the court did ~~not~~ <sup>not</sup> directly dispute ~~Parliament's~~ <sup>Parliament's</sup> right to protect the state's interests in the fetus. ~~and its right to~~ <sup>and its right to</sup>

(a) ~~The~~ <sup>The</sup> argument was that the ~~procedural requirements~~ <sup>procedural requirements</sup> of S. 281 are ~~unjustified~~ <sup>unjustified</sup> in that they are ~~unnecessary~~ <sup>unnecessary</sup> in respect of Parliament's objective in establish

(b) Sets stage for new legislation based on fetal development or term of pregnancy.

Queens Printer or  
Legislative Library

### Implications for Provincial legislation:

in administrative structure and in that they would be additional risks to the health of the pregnant women.



## Phone

- ① Could the Federal Gov't Amend the Canada Health Act or some other legislation to regulate Abortion?
- ~~② If the Fed's chose to do nothing in terms of legislation, is there any way the provinces could regulate the procedure other than through funding provisions?~~
- (ie) Would the provinces have the ability to pass legislation governing the 'medical' aspects of the procedure?
- over →

3) ~~Could this <sup>form of</sup> regulation prohibit the performance of the procedure either in its entirety or at a certain stage of the pregnancy?~~

4) ~~Would such legislation contravene either the Supreme Court's decision or the Constitution?~~

## Position of The Federal Government

Feb 4 Hnatyshyn states that he wants a federal/provincial taskforce to study the legal implications of the Supreme Court of Canada's decision on abortion.

The federal cabinet wants the widest possible consultation with the provinces to develop consistent approaches to any future position on abortion.

Court ruling does not necessarily rule out the use of therapeutic abortion committees in the future.

January 28 Hnatyshyn - ruling must be studied and discussed with the provinces who have jurisdiction over <sup>health</sup> medical services.

- clear that the result of the decision has been to declare the abortion prohibitions and constraints under the Criminal Code to be unconstitutional.
- matter is one of shared responsibility with the provincial gov't's.

Abortion (Jamie)

1) Review Abortion letters  
and comment on  
follow up that  
might be required.

2) Review info on  
Provinces stances  
to date in brief  
note.

Health - Supreme Court Decision on Abortion

Note to File:

Federal-Provincial meeting of Deputy Ministers of Justice is scheduled March 7<sup>th</sup> as of now ~~the~~ a discussion of the Supreme Court Decision and its ramifications is expected to be included in the agenda.

March 17<sup>th</sup>, Ministers of Justice are scheduled to meet. Abortion is also expected to be on their agenda as well.

Ren Richards will send copies of the agendas when they become available.

Andrea Dicks  
February '88

Fed/Prov Consultations on Youth Issues.

- bilateral discussions
- primarily aimed at school dropouts  
(amalgamation of Federal & Provincial programs)

Consumer Affairs Ministers are meeting this week.

Native Courtworker Agreements renegotiation

- extend to other than adults
- new definition of a native person
- native policy division will be involved.

VRDP - Social Services

Deputy of Justice Meeting Agenda

- Abortion
- Victims of Crime

C-72 Changes to be incorporated into paper  
3 copies to go to Ron, Peter & Barb.

[P.S.C. - on performance review  
(2 day Seminar)  
this week]

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For Abortion Background Paper.

Criminal Code Implications 1  
Position of Provinces / n.p.w.  
Position of Federal Government  
- letters and recent debates in the house.

Constitutional Options available to the  
Feds

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Justice - has analysis of decision been  
done?

**INFORMATION PAPER**

**ABORTION**

**MARCE, 1988  
IGAS.**

## THE SUPREME COURT DECISION

The January 28, 1988 Supreme Court of Canada decision on the Criminal Code provisions for abortion addresses the following seven constitutional questions:

1. Does section 251 of the Criminal Code of Canada infringe or deny the rights and freedoms guaranteed by ss. 2(a), 7, 12, 15, 27 and 28 of the Canadian Charter of Rights and Freedoms?
2. If section 251 of the Criminal Code of Canada infringes or denies the rights and freedoms guaranteed by ss. 2(a), 7, 12, 15, 27 and 28 of the Canadian Charter of Rights and Freedoms, is s. 251 justified by s. 1 of the Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act, 1982?
3. Is section 251 of the Criminal Code of Canada ultra vires the Parliament of Canada?
4. Does section 251 of the Criminal Code of Canada violate section 96 of the Constitution Act, 1867?
5. Does section 251 of the Criminal Code of Canada unlawfully delegate federal criminal power to provincial Ministers of Health or Therapeutic Abortion Committees, and in doing so, has the Federal Government abdicated its authority in this area?
6. Do sections 605 and 610(3) of the Criminal Code of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(d), 11(e), 11(h) and 24(1) of the Canadian Charter of Rights and Freedoms?
7. If sections 605 and 610(3) of the Criminal Code of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(d), 11(e), 11(h) and 24(1) of the Canadian Charter of Rights and Freedoms, are ss. 605 and 610(3) justified by s. 1 of the Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act, 1982?

In addressing these questions the Court held that section 251 of The Criminal Code constitutes an infringement of the rights and freedoms guaranteed by section 7 of The Charter of Rights and Freedoms. It further found that section 1 of The Charter cannot be used to justify the terms contained in section 251 as these terms do not constitute "reasonable" limits to the security of the person. The court also held that questions three, four and five should be answered in the negative; that question six should be answered in the negative with respect to section 605 of The Criminal Code and should not be answered with regards to section 610(3); and that question seven should not be answered.

Principal Findings of the Court:

The Court found that section 251 of The Criminal Code interferes with a woman's physical and bodily integrity and that such interference by the state constitutes a breach of security of the person. Forcing a woman, by threat of criminal sanction, to carry a fetus to term unless she meets certain criteria, therefore, constitutes a profound interference with the woman's body and is an infringement of her right to security of the person as defined in section 7 of The Charter of Rights.

The Court also found that the statutory requirements set out in section 251 deprive a woman of her rights under section 7 of The Charter by delaying the abortion procedure resulting in higher probability of complications and increased risk. Further, the mandatory procedures act to restrict access to therapeutic abortion facilities.

The following procedural requirements are stipulated, among others, in section 251:

- (i) The requirement that all therapeutic abortions must take place in an accredited hospital;
- (ii) The requirement that at least four physicians be available at that hospital to authorize and perform the abortion; and
- (iii) The requirement that all physicians who practice lawful therapeutic abortions be excluded from serving on the Committee.

In the Court's opinion the requirement that at least four physicians be available at a hospital to authorize and perform an abortion makes the procedure unavailable in many hospitals. As well, the term "accredited" automatically disqualifies many Canadian hospitals from undertaking therapeutic abortions. The provincial approval of a hospital for the purpose of performing abortions further restricts the number of hospitals offering

this procedure. Even if a hospital is eligible to create a therapeutic abortion committee, there is no requirement in s. 251 that the hospital need do so. Provincial regulation can also restrict or even deny the practical availability of the procedure. The administrative system fails, as well, to provide an adequate standard for therapeutic abortion committees which must determine when a therapeutic abortion should, as a matter of law, be granted. The word "health" is vague and no adequate guidelines have been established for therapeutic abortion committees. It is therefore often impossible for women to know in advance what standard of health will be applied by any given committee. The resulting infringement on the right to security of the person is not in accordance with the principles of fundamental justice.<sup>1</sup>

#### IMPACT OF COURT DECISION

##### (a) Criminal Code Implications:

The Supreme Court decision effectively renders all provisions of The Criminal Code governing therapeutic abortions, invalid and of no force and effect. The ruling removes all criminality from the act of procuring or performing an abortion in Canada, and eliminates the statutory rights of Therapeutic Abortion Committees as set up under the C.C. code. The net effect has been to make abortion totally unregulated under federal law.

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<sup>1</sup> One of the basic tenets of the legal system, upon which the principals of fundamental justice are founded, is that the defense to a criminal charge should not be illusory or so difficult to attain as to be illusory. It was the Court's finding that the statutory requirements of section 251 of the Criminal Code make the defense illusory resulting in a failure to comply with the principals of fundamental justice.

(b) Implications for the Provinces' Health or Hospital Acts:

To comply with the Court's ruling, Ontario has had to revoke a regulation in its Public Health Act requiring the establishment of Therapeutic Abortion Committees in all hospitals performing the procedure. No other provinces have been similarly affected to date.

The British Columbia Cabinet's attempt to introduce an Order-in-Council regarding funding of abortions performed in the Province has been declared Ultra Vires by the Province's Supreme Court. The ruling was not made on the basis of the Supreme Court of Canada decision but dealt solely with the question of whether the Cabinet had the authority to make the regulation under the terms of The Medical Services Act 1979. In the Court's view it did not.

It remains to be seen whether the requirement of a second medical opinion for medical insurance coverage will be considered to constitute a committee of one. This may not, by itself, contravene the Supreme Court of Canada's ruling unless the requirement is found to unnecessarily delay the abortion thereby constituting a breach of a woman's right to security of the person. Saskatchewan, New Brunswick, and Alberta have indicated they will require a second medical opinion. British Columbia is also looking at instituting this requirement following the British Columbia Supreme Court's revocation of its Order-in-Council. Prince Edward Island has indicated it will require the approval of a three doctor committee to determine medical necessity before it will fund out-of-province abortions.

POSITION OF THE FEDERAL GOVERNMENT<sup>2</sup>

The Federal Government has accepted the Supreme Court's ruling regarding the Criminal Code provisions governing abortion. It has also indicated on several occasions since the decision was handed down that it feels that it has a leadership role to play in resolving the issue. To date, however, it has refrained from any direct involvement in provinces' responses to the ruling and has also declined to outline its plans for dealing with the future regulation of abortion. Justice Minister Ramon Hnatyshyn has clearly indicated that the delivery of health services is a provincial responsibility. He has also stated that the Federal Government will seek consultation and advice from the provinces regarding the establishment of a uniform approach to the provision of abortion services. The substance and direction of this approach, however, has yet to be determined, although the Government has indicated that it believes a legislative approach at the federal level to be appropriate.

Mr. Hnatyshyn has requested the provinces' views on the appropriate federal action both in a letter to his provincial counterparts, dated January 29, 1988, and at a meeting of Deputy Ministers of Justice, March 7th and of Justice Ministers, March 17-18th. During the Justice Ministers' meeting, the Federal Minister reviewed the Government's analysis of the decision and outlined the options under consideration by the Federal Government. He also indicated that any legislative approach would have to respect the Court's ruling and seek to balance the following competing interests:

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<sup>2</sup> The Federal Government's position was determined from House of Commons Debates, January 29/88, p. 12424-12426; February 1/88, p. 12479-12480; February 8/88, p. 12727-12728; February 9/88, p. 12778-12779.

- (i) the woman's right to make a decision relating to her pregnancy;
- (ii) the woman's right to obtain medical services free from state imposed limits which cause unnecessary delays that adversely affect the woman's physical or mental health;
- (iii) the state interest in protecting the woman's health; and
- (iv) the state interest in protecting the unborn.

#### OPTIONS AVAILABLE TO THE FEDERAL GOVERNMENT

##### Do Nothing:

The Federal Government could choose not to replace section 251 of the Criminal Code with new legislation. This would mean that abortion would be completely unregulated federally and would make it a provincial responsibility to determine the extent to which a province is prepared to fund the procedure under its Health Care Plan.

It is the opinion of Mr. Fosse Faour, Department of Justice, that the decision of the British Columbia Supreme Court clearly indicates that it is entirely within a province's jurisdiction to remove abortion from its list of medically insured services. The question is whether such action would also be vulnerable to a challenge under the Constitution. A second concern would be whether such action would disqualify a province's health care plan from federal funding under The Canada Health Act principles of universality and accessibility. This would require a direct application of the principles to a specific medical procedure and would constitute a use of federal spending power to set policy in an area that would normally be of provincial concern.

Invoke the "Non Obstante" (Notwithstanding) Clause:

Section 33 of the Charter of Rights and Freedoms provides that the Federal Government may declare a piece of legislation to be exempt from the provisions of the Charter. Use of this clause would generally be expected only in extraordinary circumstances as the precedent that would be set could be considered a serious challenge to the Constitution. Justice Minister Ramon Hnatyshyn has indicated that he does not contemplate the use of the clause in resolving the abortion issue.

Develop New Legislation:

The three decisions handed down in the Supreme Court of Canada ruling leave open the question of further legislative action by Parliament. All of the judges appear to concede the existence of a legitimate state interest in protecting the life of the fetus. The judgement does not, however, clarify when the rights of the unborn gain paramountcy over the right of the women's access to abortion, nor does it clearly define what kind of protection Parliament could afford. What has been made clear, however, is that the use of a Committee or any similar approach is not acceptable.

Any replacement legislation almost certainly will have to meet the requirement that any restriction of access to abortion relate directly to the state interest in balancing the protection of the fetus with the woman's right to access to abortion. The Court found that section 251 of the Criminal Code placed restrictions on access to abortion that bore little relevance to the purpose of protection of the fetus. These same restrictions also did not protect the life and health of the mother and therefore were struck down.

The Supreme Court ruling did not deal with the question of when the fetus becomes a person, therefore attaining the right to security of the person under section 7 of the Charter of Rights and Freedoms. Nor did the Court refer to the question of when life begins. Current legislation states that life begins at birth. The Supreme Court ruling also challenged the use of the word "health" stating that the concept is vague. With no adequate guidelines established it was judged to be impossible to have a consistent standard of health applied across the country.

The Federal Government would appear to have four options in drafting replacement legislation:

1. They could return to the 1967 standard which allowed abortions to be performed in life threatening situations only;
2. They could develop a clear definition of health for the purposes of determining eligibility for abortions;
3. They could choose a point other than birth as the point where life begins and the fetus legally becomes a person, thereby attaining the same right to security of the person as the woman; or
4. They could seek to determine the point in the gestation period when the rights of the fetus gain paramountcy over the rights of the woman.

PROVINCIAL REACTION TO DATE:

The provinces have been divided in their approach to the Court's ruling. While all ten have sought to comply with the decision by requesting the termination of existing Therapeutic Abortion Committees, a number have voiced their opposition to what they term, 'abortion on demand'. British Columbia and Saskatchewan have been the leading proponents of the latter group.

The majority of provinces refrained from offering an official position at the March 17-18th meeting of Justice Ministers, however, there was a generally held view that a national standard is required and that the development of that standard is a federal responsibility. Most of the provinces also expect the Federal Government to legislate in this area. An outline of each province's current position follows:

British Columbia:

The Province has disbanded its 51 Therapeutic Abortion Committees in accordance with the Supreme Court of Canada ruling. The Government has taken the position that it will not pay for any abortions unless the mother's life is in danger, however, an Order-in-Council issued February 10, 1988 by the British Columbia Cabinet denying health insurance coverage for abortions unless there was significant threat to the mother's life has been ruled out of order by the British Columbia Supreme Court. As a result, British Columbia's Attorney-General Brian Smith has indicated the Provinces' medical insurance plan will pay for the procedure at least for the time being. Premier Vander Zalm has announced that he will continue to look for ways to regulate abortion, possibly through eliminating the procedure from the medical services schedule or by adopting a policy whereby abortions are only financed when the procedure is declared to be medically necessary by two doctors.

Alberta:

The Province disbanded its 22 Therapeutic Abortion Committees on February 5, 1988. The Government has indicated that women requesting abortions will be required to seek a second medical opinion before the operation is approved. It has

also indicated that the procedure will continue to be performed in approved hospitals only.

Saskatchewan:

The Government has announced that no abortions will be covered by the Province's Medicare Program unless the pregnancy is life threatening or the procedure is considered to be medically necessary. The Government has asked the Saskatchewan College of Physicians and Surgeons to help define the term "medically necessary". The Province has also promised to introduce legislation that will allow hospital staff to refuse to participate in abortions. Premier Grant Devine has indicated that his Government will be taking a leadership role in fighting for new federal legislation to "protect the rights of unborn children".

Manitoba:

The Province's eight Therapeutic Abortion Committees have been ordered to disband to comply with the Supreme Court of Canada ruling. The Government has indicated that it will pay for abortions performed in approved clinics as well as in hospitals. Operations performed outside of hospitals are to be governed by the Manitoba College of Physicians and Surgeons. The Government has indicated that it would prefer the abortion clinics be operated as non-profit community health centers. Manitoba Health Minister Wilson Parasiuk has promised to ensure equitable access to abortion and other reproductive health services.

Ontario:

The Province has revoked a regulation in its Public Hospitals Act that requires the establishment of Therapeutic Abortion Committees in all hospitals performing the procedure and has ordered all of its 81 existing committees to disband. The Government has stated that it will pay for all abortions performed by qualified physicians whether they are done in hospitals or in clinics. It will not, however, reimburse extra-billing by free-standing clinics nor does it intend to allow a proliferation of for-profit abortion clinics. Ontario Health Minister Eleanor Caplan has indicated that her Ministry is working with the College of Physicians and Surgeons of Ontario to develop regulations to ensure that:

- . abortions are performed only by qualified medical practitioners in approved facilities;
- . medical standards are established and quality of care is assured;
- . appropriate financing mechanisms are in place; and
- . counselling, including counselling on alternatives to abortion, is provided.

The Province's Attorney-General has also called on the Federal Government to provide leadership in dealing with the issue by developing new legislation that does not contravene the Constitution.

Quebec:

The Province has disbanded its 30-35 Therapeutic Abortion Committees to comply with the Supreme Court of Canada ruling. Quebec has paid for all abortions performed in clinics and hospitals since 1976. Abortion is not an issue with the Quebec Government.

New Brunswick:

The Province has disbanded all of its Therapeutic Abortion Committees, however, it has invoked a clause in its Public Hospitals Act requiring a second medical opinion to be sought before the abortion qualifies for medical insurance. The Government has also indicated it will pay for only those procedures performed by a doctor in a hospital. The Province has stated that it will use its right to regulate health care to oppose the establishment of abortion clinics.

Nova Scotia:

The Province has disbanded its ten Therapeutic Abortion Committees as required under the Supreme Court ruling. The Government has indicated that it will not condone the establishment of free-standing abortion clinics. It has also stated that the Province's Medicare Plan will pay for only those procedures which a doctor has determined to be medically necessary.

Prince Edward Island:

None of Prince Edward Island's seven hospitals have performed abortions for several years. As a result, the Province had no Therapeutic Abortion Committees in place when the Supreme Court of Canada ruling was issued. The Government has stated that it will pay for all medically necessary abortions performed at a hospital. The Province will also fund out-of-province therapeutic abortions approved by a three doctor committee appointed by the Health Services Commission.

Minister's announced decision to seek consultations with the provinces before deciding whether to replace section 251 of the Criminal Code. In his letter, Dr. Collins outlined the Province's position as follows:

'that the Federal Government should, as soon as possible, indicate that it will be enacting a replacement in the Criminal Code for section 251'

The Province based its position on the fact that the performance and procurement of abortion has always been regulated by federal statute and should continue as such.

FOLLOW UP REQUIRED

There has not been a great deal of interdepartmental consultation and cooperation on this issue given the level of complexity of the Supreme Court decision and the uncertainty of its implications for the Province. This has been primarily due to a decision to deal with the issue at the Ministerial level, in particular the Planning and Priorities Committee of Cabinet. Given the Province's stated position, there would appear to be no significant need for the Intergovernmental Affairs Secretariat to become directly involved at this time, however, monitoring of new developments should continue.

ADD mj

Andrea D. Dicks,  
IGA Technician.

April 11, 1988.

**INFORMATION PAPER**

**ABORTION**

**MARCH, 1988  
IGAS.**

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#### IMPACT OF COURT DECISION

##### (a) Criminal Code Implications:

The Supreme Court decision effectively renders all provisions of The Criminal Code governing therapeutic abortions, invalid and of no force and effect. The ruling removes all criminality from the act of procuring or performing an abortion in Canada, and eliminates the statutory rights of Therapeutic Abortion Committees as set up under the old code. The net effect has been to make abortion totally unregulated under federal law.

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<sup>1</sup> One of the basic tenets of the legal system, upon which the principals of fundamental justice are founded, is that the defense to a criminal charge should not be illusionary or so difficult to attain as to be illusionary. It was the Court's finding that the statutory requirements of section 251 of the Criminal Code make the defense illusionary resulting in a failure to comply with the principals of fundamental justice.

(b) Implications for the Provinces' Health or Hospital Acts:

To comply with the Court's ruling, Ontario has had to revoke a regulation in its Public Health Act requiring the establishment of Therapeutic Abortion Committees in all hospitals performing the procedure. No other provinces have been similarly affected to date.

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POSITION OF THE FEDERAL GOVERNMENT<sup>2</sup>

The Federal Government has accepted the Supreme Court's ruling regarding the Criminal Code provisions governing abortion. It has also indicated on several occasions since the decision was handed down that it feels that it has a leadership role to play in resolving the issue. To date, however, it has refrained from any direct involvement in provinces' responses to the ruling and has also declined to outline its plans for dealing with the future regulation of abortion. Justice Minister Ramon Hnatyshyn has clearly indicated that the delivery of health services is a provincial responsibility. He has also stated that the Federal Government will seek consultation and advice from the provinces regarding the establishment of a uniform approach to the provision of abortion services. The substance and direction of this approach, however, has yet to be determined, although the Government has indicated that it believes a legislative approach at the federal level to be appropriate.

Mr. Hnatyshyn has requested the provinces' views on the appropriate federal action both in a letter to his provincial counterparts, dated January 29, 1988, and at a meeting of Deputy Ministers of Justice, March 7th and of Justice Ministers, March 17-18th. During the Justice Ministers' meeting, the Federal Minister reviewed the Government's analysis of the decision and outlined the options under consideration by the Federal Government. He also indicated that any legislative approach would have to respect the Court's ruling and seek to balance the following competing interests:

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<sup>2</sup> The Federal Government's position was determined from House of Commons Debates, January 29/88, p. 12424-12426; February 1/88, p. 12479-12480; February 8/88, p. 12727-12728; February 9/88, p. 12778-12779.

- (i) the woman's right to make a decision relating to her pregnancy;
- (ii) the woman's right to obtain medical services free from state imposed limits which cause unnecessary delays that adversely affect the woman's physical or mental health;
- (iii) the state interest in protecting the woman's health; and
- (iv) the state interest in protecting the unborn.

**OPTIONS AVAILABLE TO THE FEDERAL GOVERNMENT**

**Do Nothing:**

The Federal Government could choose not to replace section 251 of the Criminal Code with new legislation. This would mean that abortion would be completely unregulated federally and would make it a provincial responsibility to determine the extent to which a province is prepared to fund the procedure under its Health Care Plan.

It is the opinion of Mr. Fouse Faour, Department of Justice, that the decision of the British Columbia Supreme Court clearly indicates that it is entirely within a province's jurisdiction to remove abortion from its list of medically insured services. The question is whether such action would also be vulnerable to a challenge under the Constitution. A second concern would be whether such action would disqualify a province's health care plan from federal funding under The Canada Health Act principles of universality and accessibility. This would require a direct application of the principles to a specific medical procedure and would constitute a use of federal spending power to set policy in an area that would normally be of provincial concern.

Invoke the "Non Obstante" (Notwithstanding) Clause:

Section 33 of the Charter of Rights and Freedoms provides that the Federal Government may declare a piece of legislation to be exempt from the provisions of the Charter. Use of this clause would generally be expected only in extraordinary circumstances as the precedent that would be set could be considered a serious challenge to the Constitution. Justice Minister Ramon Hnatyshyn has indicated that he does not contemplate the use of the clause in resolving the abortion issue.

Develop New Legislation:

The three decisions handed down in the Supreme Court of Canada ruling leave open the question of further legislative action by Parliament. All of the judges appear to concede the existence of a legitimate state interest in protecting the life of the fetus. The judgement does not, however, clarify when the rights of the unborn gain paramountcy over the right of the women's access to abortion, nor does it clearly define what kind of protection Parliament could afford. What has been made clear, however, is that the use of a Committee or any similar approach is not acceptable.

Any replacement legislation almost certainly will have to meet the requirement that any restriction of access to abortion relate directly to the state interest in balancing the protection of the fetus with the woman's right to access to abortion. The Court found that section 251 of the Criminal Code placed restrictions on access to abortion that bore little relevance to the purpose of protection of the fetus. These same restrictions also did not protect the life and health of the mother and therefore were struck down.

The Supreme Court ruling did not deal with the question of when the fetus becomes a person, therefore attaining the right to security of the person under section 7 of the Charter of Rights and Freedoms. Nor did the Court refer to the question of when life begins. Current legislation states that life begins at birth. The Supreme Court ruling also challenged the use of the word "health" stating that the concept is vague. With no adequate guidelines established it was judged to be impossible to have a consistent standard of health applied across the country.

The Federal Government would appear to have four options in drafting replacement legislation:

1. They could return to the 1967 standard which allowed abortions to be performed in life threatening situations only;
2. They could develop a clear definition of health for the purposes of determining eligibility for abortions;
3. They could choose a point other than birth as the point where life begins and the fetus legally becomes a person, thereby attaining the same right to security of the person as the woman; or
4. They could seek to determine the point in the gestation period when the rights of the fetus gain paramountcy over the rights of the woman.

**PROVINCIAL REACTION TO DATE:**

The provinces have been divided in their approach to the Court's ruling. While all ten have sought to comply with the decision by requesting the termination of existing Therapeutic Abortion Committees, a number have voiced their opposition to what they term, 'abortion on demand'. British Columbia and Saskatchewan have been the leading proponents of the latter group.

The majority of provinces refrained from offering an official position at the March 17-18th meeting of Justice Ministers, however, there was a generally held view that a national standard is required and that the development of that standard is a federal responsibility. Most of the provinces also expect the Federal Government to legislate in this area. An outline of each province's current position follows:

British Columbia:

The Province has disbanded its 51 Therapeutic Abortion Committees in accordance with the Supreme Court of Canada ruling. The Government has taken the position that it will not pay for any abortions unless the mother's life is in danger, however, an Order-in-Council issued February 10, 1988 by the British Columbia Cabinet denying health insurance coverage for abortions unless there was significant threat to the mother's life has been ruled out of order by the British Columbia Supreme Court. As a result, British Columbia's Attorney-General Brian Smith has indicated the Provinces' medical insurance plan will pay for the procedure at least for the time being. Premier Vander Zalm has announced that he will continue to look for ways to regulate abortion, possibly through eliminating the procedure from the medical services schedule or by adopting a policy whereby abortions are only financed when the procedure is declared to be medically necessary by two doctors.

Alberta:

The Province disbanded its 22 Therapeutic Abortion Committees on February 5, 1988. The Government has indicated that women requesting abortions will be required to seek a second medical opinion before the operation is approved. It has

also indicated that the procedure will continue to be performed in approved hospitals only.

Saskatchewan:

The Government has announced that no abortions will be covered by the Province's Medicare Program unless the pregnancy is life threatening or the procedure is considered to be medically necessary. The Government has asked the Saskatchewan College of Physicians and Surgeons to help define the term "medically necessary". The Province has also promised to introduce legislation that will allow hospital staff to refuse to participate in abortions. Premier Grant Devine has indicated that his Government will be taking a leadership role in fighting for new federal legislation to "protect the rights of unborn children".

Manitoba:

The Province's eight Therapeutic Abortion Committees have been ordered to disband to comply with the Supreme Court of Canada ruling. The Government has indicated that it will pay for abortions performed in approved clinics as well as in hospitals. Operations performed outside of hospitals are to be governed by the Manitoba College of Physicians and Surgeons. The Government has indicated that it would prefer the abortion clinics be operated as non-profit community health centers. Manitoba Health Minister Wilson Parasiuk has promised to ensure equitable access to abortion and other reproductive health services.

Ontario:

The Province has revoked a regulation in its Public Hospitals Act that requires the establishment of Therapeutic Abortion Committees in all hospitals performing the procedure and has ordered all of its 81 existing committees to disband. The Government has stated that it will pay for all abortions performed by qualified physicians whether they are done in hospitals or in clinics. It will not, however, reimburse extra-billing by free-standing clinics nor does it intend to allow a proliferation of for-profit abortion clinics. Ontario Health Minister Eleanor Caplan has indicated that her Ministry is working with the College of Physicians and Surgeons of Ontario to develop regulations to ensure that:

- . abortions are performed only by qualified medical practitioners in approved facilities;
- . medical standards are established and quality of care is assured;
- . appropriate financing mechanisms are in place; and
- . counselling, including counselling on alternatives to abortion, is provided.

The Province's Attorney-General has also called on the Federal Government to provide leadership in dealing with the issue by developing new legislation that does not contravene the Constitution.

Quebec:

The Province has disbanded its 30-35 Therapeutic Abortion Committees to comply with the Supreme Court of Canada ruling. Quebec has paid for all abortions performed in clinics and hospitals since 1976. Abortion is not an issue with the Quebec Government.

New Brunswick:

The Province has disbanded all of its Therapeutic Abortion Committees, however, it has invoked a clause in its Public Hospitals Act requiring a second medical opinion to be sought before the abortion qualifies for medical insurance. The Government has also indicated it will pay for only those procedures performed by a doctor in a hospital. The Province has stated that it will use its right to regulate health care to oppose the establishment of abortion clinics.

Nova Scotia:

The Province has disbanded its ten Therapeutic Abortion Committees as required under the Supreme Court ruling. The Government has indicated that it will not condone the establishment of free-standing abortion clinics. It has also stated that the Province's Medicare Plan will pay for only those procedures which a doctor has determined to be medically necessary.

Prince Edward Island:

None of Prince Edward Island's seven hospitals have performed abortions for several years. As a result, the Province had no Therapeutic Abortion Committees in place when the Supreme Court of Canada ruling was issued. The Government has stated that it will pay for all medically necessary abortions performed at a hospital. The Province will also fund out-of-province therapeutic abortions approved by a three doctor committee appointed by the Health Services Commission.

Newfoundland:

The Province's three Therapeutic Abortion Committees have been disbanded to comply with the Supreme Court ruling. Provincial Health Minister, Dr. John Collins, has stated that the Government will continue to pay for all procedures performed in an accredited hospital.

Province's Position on the Ruling:

On January 30, 1988, the Minister of Health, Dr. John Collins, in consultation with Justice Minister, Lynn Verge, released a press statement on the implications of the Supreme Court ruling for the Province's Health Care System. In it, Dr. Collins indicated that the decision leaves unchanged the following provincial regulations:

- (i) that the procedure may only be performed legally by a licensed medical practitioner;
- (ii) that the Board of Trustees of Hospitals, or similar competent authorities, retain all rights for the granting of medical privileges, and for the establishment of criteria or guidelines by which privileged medical staff members exercise their responsibilities;
- (iii) that Hospital Boards and medical practitioners have the right to elect whether or not to engage in abortion operations; and
- (iv) that the provisions of the Provincial Medical Care Act and the Hospital Insurance Act, making abortions an insured service only when carried out in an accredited hospital, are unaffected.

Accordingly, it is the Province's position that the Supreme Court's decision will not cause any immediate changes in the manner by which abortion services are provided in Newfoundland.

On February 2, 1988, Dr. Collins wrote the Minister of National Health and Welfare in response to the Federal

Minister's announced decision to seek consultations with the provinces before deciding whether to replace section 251 of the Criminal Code. In his letter, Dr. Collins outlined the Province's position as follows:

'that the Federal Government should, as soon as possible, indicate that it will be enacting a replacement in the Criminal Code for section 251'

The Province based its position on the fact that the performance and procurement of abortion has always been regulated by federal statute and should continue as such.

**FOLLOW UP REQUIRED**

There has not been a great deal of interdepartmental consultation and cooperation on this issue given the level of complexity of the Supreme Court decision and the uncertainty of its implications for the Province. This has been primarily due to a decision to deal with the issue at the Ministerial level, in particular the Planning and Priorities Committee of Cabinet. Given the Province's stated position, there would appear to be no significant need for the Intergovernmental Affairs Secretariat to become directly involved at this time, however, monitoring of new developments should continue.

ADD/mj

Andrea D. Dicks,  
IGA Technician.

April 11, 1988.



File # 540.07.12

MEMO TO FILE:

SUBJECT: March 11, 1988 telephone conversation with Jim  
Thistle regarding the Province's position on  
Abortion.

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- Told that the Province has taken the position that the abortion issue is a federal responsibility and the Province will not be getting involved.
- Issue is being discussed in Cabinet. Jim indicated that the entire issue is extremely sensitive and stressed that prior approval from P.& P. would be required for other than internal consultations or exchanges of information.
- The provincial Justice Minister has been fully apprised of the Provinces position for the Upcoming Federal-Provincial Ministers meeting in Saskatoon. It is expected the Federal Minister will be looking for a clear indication from the Provinces' on whether the Government should proceed with new legislation.

*Andrew D. Dho*

File # 540.07.12

Memo To File:

Subject: March 17, 1988 telephone conversation with Claude Rocan,  
Saskatchewan Intergovernmental Affairs Secretariat

- Provided Mr. Rocan with a outline of Newfoundlands position on the legislative aspect of the abortion issue. Noted that it is our Cabinet's contention that replacement legislation is solely a federal responsibility.
- Agreed to keep him abreast of any changes or developments that may occur in our province's position.

  
Andrea Dicks

March 18, 1988

NOTE TO FILE: 540.07.12

Subject: Department of Justice Cabinet Paper  
34.88 Re: Federal-Provincial Justice  
Ministers Meeting

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- The Federal and Provincial Justice Ministers met March 16-17, 1988. Included on the agenda was a discussion of the Supreme Court of Canada decision on abortion and proposed federal legislative action. A summary of the proceedings is provided below.

FEDERAL POSITION

- Hnatyshyn reviewed the decision with the provinces and outlined the legislative options under consideration by the Federal Government. The Federal analysis is essentially the same as that prepared by Newfoundland Justice officials. (See file 540.07.14.)
- The Federal Government accepts that the decision results in abortion now becoming a matter between a woman and her doctor. New legislation would have to respect the decision and would attempt to balance the following interests:
  - i) the woman's right to make a decision relating to her pregnancy;
  - ii) the woman's right to obtain medical services free from state imposed limits which cause unnecessary delays that adversely affect the woman's physical or mental health;
  - iii) the state interest in protecting the women's health; and
  - iv) the state interest in protecting the unborn.

OPTIONS UNDER CONSIDERATION

- The Federal Government is considering a range of options in response to the Supreme Court ruling.
  1. Least Restrictive - no federal (criminal) restrictions. Provincial health regulations to continue to apply as enacted.
  2. Moderately Restrictive - institution of a statutory fixed period for abortion after which the procedure would only be performed if there was a threat to the woman's life or health. The Government is considering requiring a medical certificate of fetal viability in conjunction with this.
  3. Most Restrictive - all abortions to be prohibited except where the life or health of the woman is endangered. Adoption of this option would require the use of the Chapter 33 override. Hnatyshyn indicated he could not, as Justice Minister, condone this position.

THE PROVINCES

- Most of the provinces refrained from offering an official position at the meeting, however, there was a generally held view that a national standard is required and that development of such a standard is a federal responsibility. Most of the provinces also expect the Federal Government to legislate in this area.
- A discussion was also held on the B.C. Supreme Court decision. British Columbia also took advantage of the meeting to reiterate its views on abortion.

FOLLOW UP

- The Department of Justice indicated that it will maintain its liaison with federal officials regarding the proposed legislation. It will be reporting to Cabinet as new information is acquired.

Andrea D. Dicks,  
IGA Technician.

ADD/mj

DOCUMENT: 830-294/009

**FEDERAL-PROVINCIAL CONFERENCE OF MINISTERS  
RESPONSIBLE FOR CRIMINAL JUSTICE**

**Comparative Abortion Law**

**Federal**

**March 17-18, 1988  
SASKATOON, Saskatchewan**

## COMPARATIVE ABORTION LAW

In all jurisdictions cited abortion is prohibited by criminal law subject to certain legal exceptions.

### COMMONWEALTH:

#### 1. AUSTRALIA

- Grounds are risk to life, physical health or mental health
- In South Australia, socio-economic factors are also grounds
- Foetal defects, rape, incest, and socio-economic reasons may be considered as a risk to health, in the Capital Territory, New South Wales, and Victoria

#### 2. NEW ZEALAND

- Grounds include, risk to life, physical health, mental health, defective foetus or rape and incest

#### 3. NORTHERN IRELAND

- Grounds are risk to life, physical health or mental health

#### 4. UNITED KINGDOM

- Up to 28 weeks, grounds are risk to life, physical health, mental health, foetal defects, and socio-economic reasons
- At 28 weeks, there is a presumption that the foetus is capable of being born alive and an abortion may only be performed for the purpose of preserving the life of the mother
- A private members' bill before Parliament would reduce that limit to 18 weeks
- Bill may be amended to strike a compromise at 20-24 weeks before it is adopted

### EUROPE:

#### 1. AUSTRIA

- On demand up to 12 weeks providing the woman first visits a medical counselling panel
- After 12 weeks if:
  - necessary to avert a grave danger to the woman's life or serious damage to her physical or mental health
  - a grave danger exists that child's mental or physical health will be seriously damaged

- the woman was a minor at the time of conception
- There is no gestational age beyond which all abortions become illegal

2. BULGARIA

- On demand up to 10 weeks for married women with two or more living children, married women over 40 with one living child, unmarried women of any age and in the case of rape or incest
- On medical and eugenic grounds prior to viability

3. DENMARK

- On demand up to 12 weeks
- After 12 weeks on medical, socio-economic and eugenic grounds

4. FRANCE

- On demand up to 10 weeks
- After 10 weeks, if the continuing pregnancy will place the health of the woman in grave danger or there is a strong probability the child will suffer from a particularly serious condition recognized to be incurable

5. GREECE

- Up to 12 weeks in cases of risk to mental health
- Up to 20 weeks for eugenic reasons
- Legislation to allow abortions on demand is pending

6. ITALY

- Up to 90 days on medical and socio-economic grounds
- After 90 days if the continuing pregnancy would endanger the woman's life or her physical or mental health (for example because of the risk of foetal abnormality) unless there is reason to believe the foetus is viable
- After viability only to save the woman's life

7. LUXEMBOURG

- Up to 12 weeks on eugenic, medical and juridical grounds

8. NETHERLANDS

- On demand prior to viability of foetus

9. PORTUGAL

- Up to 12 weeks on eugenic, medical and juridical grounds

10. SPAIN

- Up to 22 weeks if foetus is not of human form
- To save the life of the woman or for her psychological well being, or if pregnancy is due to rape

11. POLAND

- On demand up to 12 weeks
- After 12 weeks only when the mother's health is at risk or when the foetus develops abnormally

12. TURKEY

- On demand up to 10 weeks provided there are no grounds for concern for the mother's health
- After 10 weeks if:
  - pregnancy represents or is expected to represent a threat to the mother's life
  - pregnancy is expected to produce disabilities in the baby to be born or in future generations

13. FINLAND

- Up to 12 weeks if:
  - domestic circumstances are such that caring for the child would be a great strain on the mother
  - conception takes place in certain specified circumstances, such as rape
  - when either or both parents is unfit, through illness or otherwise to look after the child
- Up to 20 weeks when mother under 17 or over 40 at the time of conception or already has four children
- Up to 24 weeks where there are foetal defects

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14. FEDERAL REPUBLIC OF GERMANY

- On social/psychological grounds up to 12 weeks
- On eugenic grounds up to 22 weeks
- On medical grounds irrespective of the duration of the pregnancy

15. HUNGARY

- On demand up to 12 weeks or 18 weeks in the case of a single mother
- After these periods, individual cases considered on their merits by a committee which includes the woman's General Practitioner
- Committee takes account of the mother's health, marital status, number of children, previous abortions etc
- 24 weeks is the latest gestational period normally considered by the committee but in exceptional cases a later abortion might be permitted.

16. NORWAY

- On demand up to 12 weeks
- Up to 18 weeks if:
  - the pregnancy, birth or care of the child may result in unreasonable strain upon the physical or mental health of the woman or place her in a difficult life situation
  - there is a major risk that the child may suffer from a serious disease as a result of its genotype or disease or harmful influence during pregnancy
  - the woman becomes pregnant as a result of rape or incest
  - the woman is severely mentally ill or mentally retarded
- After 18 weeks only if there are particularly important grounds but not if the foetus is viable

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17. SWEDEN

- On demand up to 12 weeks
- Between 12 and 18 weeks on demand if preceded by a special investigation which includes counselling
- After 18 weeks, special grounds must be shown and the permission of the Board of Health and Welfare is required
- No abortions are permitted if there are grounds to suppose that the foetus is capable of surviving

18. YUGOSLAVIA

- On demand up to 10 weeks
- Up to 20 weeks by permission of the Medical Commission
- Exceptionally, if medical indications exist regardless of gestational age

19. SWITZERLAND

- At any gestational age if performed by a qualified doctor who has obtained a second opinion and when no other means are available to remove a risk to the life or health of the mother
- Decisions on whether or when to terminate pregnancies are made by doctors
- Interpretation of the legislation varies considerably from Canton to Canton

UNITED STATES:

- In first trimester abortion is a decision of the woman and her physician
- After first trimester states may regulate the abortion procedure in ways reasonably related to maternal health
- After viability, (i.e. when the foetus is capable of sustaining life outside the uterus), states may regulate and even proscribe abortion, except where necessary in appropriate medical judgment, for the preservation of the life or health of the mother

THE PROVINCES

- Most of the provinces refrained from offering an official position at the meeting, however, there was a generally held view that a national standard is required and that development of such a standard is a federal responsibility. Most of the provinces also expect the Federal Government to legislate in this area.
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Andrea D. Dicks,  
IGA Technician.

ADD/mj

NOTE TO FILE: 540.07.12

Subject: Department of Justice Cabinet Paper  
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MAY - 5 1989

BRIEFING NOTE:

SUPREME COURT DECISION ON ABORTION

ISSUE:

- In January, 1988, the Supreme Court of Canada struck down as unconstitutional, the sections of the Criminal Code which dealt with abortion thus, decriminalized all aspects of abortion and left provinces to determine their own requirements until the Federal Government decided whether or not to proceed with legislation.
- Although the Federal Government has indicated that a legislative approach at the federal level would be appropriate, they have not made any move to introduce legislation and are unlikely to do so quickly.

CURRENT STATUS:

- April, 1989, the federal Throne Speech noted that the Federal Government was considering the implications of the latest jurisprudence of the Supreme Court of Canada on the subject of abortion so as to weigh the appropriate course of action on this matter. In Newfoundland, this issue was dealt with at the Ministerial level through the Planning and Priorities Committee of Cabinet.

PROVINCIAL POSITION:

- To comply with the Supreme Court Ruling, provincial Therapeutic Abortion Committees were disbanded. However, provincial regulations governing abortions are still in place and Government continues to pay for eligible abortion services. In February, 1988 the provincial Minister of Health wrote the federal Minister in response to his request

for consultations before deciding to replace Section 251 of the Criminal Code. The Provincial Minister of Health indicated that the Federal Government should state, as soon as possible, that it will be enacting a replacement in the Criminal Code for Section 251.



For File  
5403 07-45 (new)

GOVERNMENT OF  
NEWFOUNDLAND AND LABRADOR

Executive Council  
Intergovernmental Affairs Secretariat

January 18, 1996

**Mike Samson**  
Director  
Economic and Social Programs

**Subject: Fines Being Imposed on Newfoundland by the Federal Health Department Related to the Morgentaler Clinic**

Health Canada has reevaluated fines imposed on Newfoundland for its failure to pay facility fees at the Morgentaler clinic. The province argued that a \$20,000 per month penalty was excessive. Based on the most recent figures, about 80 women had abortions performed at the facility over a period of five and one-half months, making for a total of upwards of 175 abortions per annum. This translates into an average of about 14 to 15 or so per month.

The province was arguing that the facility costs only amounted to about \$400 per person. This made the \$20,000 monthly penalty excessive.

The federal health department has reevaluated its calculations, but has concluded that the average facility fee per each abortion is about \$570 per person. Based on about 14 to 15 abortions per month, the total fines will now total \$8,000 per month instead of \$20,000. The \$8,000 figure is a rounded off figure.

On this basis, fines for December were reduced to \$8,000 and fines for January will be \$4,000 to compensate for the excessive penalties imposed in November. From February onwards fines will total \$8,000 per month.

On a related matter, several provinces have been cautioned about their failure to pay physician fees at Morgentaler facilities. Both Manitoba and New Brunswick have been cautioned in this regard (as has Quebec which apparently pays part of the facility fees). PEI is also under scrutiny for its failure to cover out-of-province abortions (there are no abortion facilities in the province).

The Federal Health Minister is considering the matter and in my discussion with an official from Health Canada, it was indicated that the penalties on provinces which fail to pay physician fees could ultimately be much more serious than those imposed on Newfoundland and Nova Scotia. He spoke of potentially withholding the entire transfer from such provinces due to the fact that the comprehensive provisions of the Canada Health Act are being undermined.



**Roy Rempel**  
**Analyst**