

Implementation of Abortion Policy in Canada as a Women's Issue

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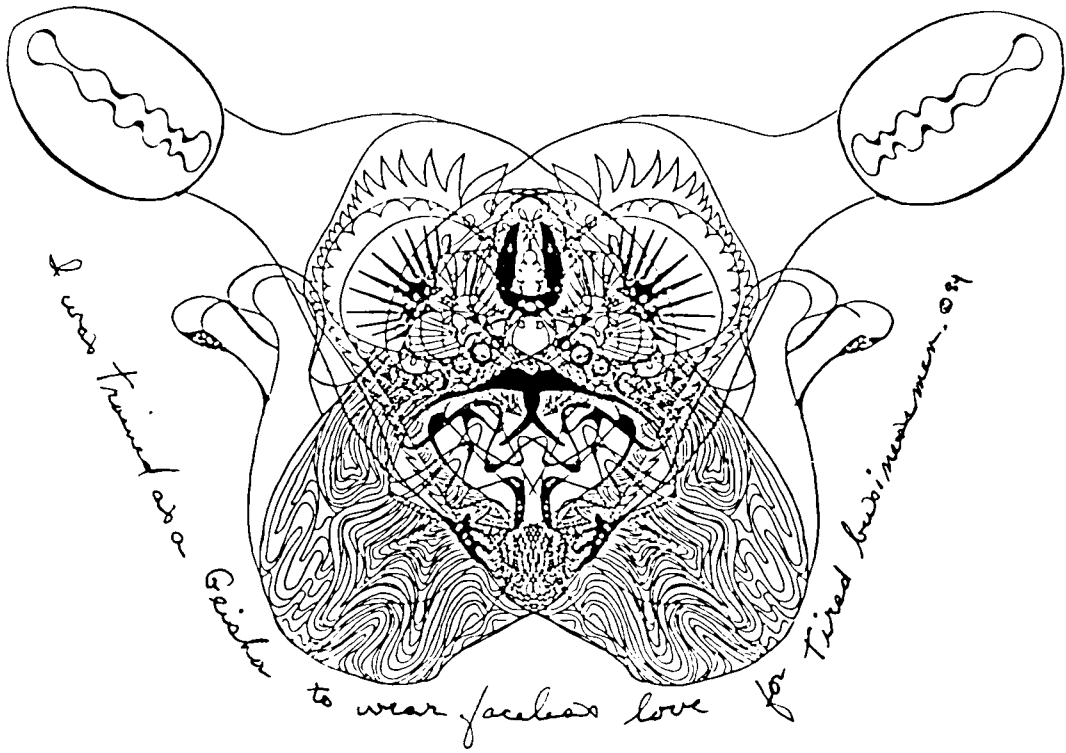
ABSTRACT

Abortion policy as it is implemented in Canada has fundamental implications for women. The existing policy, which grew out of political compromise, is found to be biased, inequitable and subject to crippling problems. Local hospital boards, comprised largely of medical doctors, ultimately serve as arbiters of public opinion. Without acting either as policy makers or as medical practitioners, these boards decide the proper social roles for women. Legal issues involve shifting responsibility among the courts, federal and provincial governments and Parliament. Evidence shows that in battling issues created by abortion policy, access to abortion by women in Canada is being diminished.

The debate over abortion in Canada continues to be spirited and often heated. During the federal election campaign of 1984, anti-abortion groups dogged political candidates and a national Catholic newspaper suggested that Roman Catholics not vote at all rather than vote for a candidate who took a pro-choice position on abortion.¹ Leaders of all major parties were asked to specify their views on abortion, with some responding by carefully separating their political position from their personal views, thereby underlining the sensitivity of the issues involved.

The abortion question raises a number of complex legal and moral issues. Among these are the sanctity of life and the rights of women. In the strongly polarized debate between anti-abortion forces and pro-choice forces, this is the central point of contention. Anti-abortion sup-

porters claim to be protecting the lives of the unborn while pro-choice advocates claim to be promoting reproductive rights for women. Beyond the immediate concerns with rights of the fetus and rights of women, lie world-views defining what is sacred and moral but also what is socially preferable. Each side has a clear vision of the place of the child in society, the place of the family and crucially, the appropriate role of women within the family and society. These world views include more subtle, but equally strongly held views, on the appropriate roles of the state and of the church in maintenance or promotion of what is socially preferable for women. Each side has the clear sense that its position is not only the correct one but the view which best serves the interests of society in defining women's roles. Abortion, for these reasons as



well as others which will be discussed subsequently, is quintessentially a women's issue.

The central purpose of this paper is to examine the implementation of abortion policy in Canada as it relates to women's lives and roles. A second purpose is to assess the social forces that are impinging on the implementation of abortion policy as evidenced in recent court cases, changes in or by hospital therapeutic abortion committees or within local communities and public campaigns. A third intent is to explore the degree to which anti-abortion forces or pro-choice forces have actually affected access to abortion by Canadian women. In order to better analyze the ways in which Canadian abortion policy is implemented, it is useful to compare the Canadian and American experience

Abortion Law and Policy in the U.S.

In the United States, at present, abortion is being hotly debated in a very public manner, although the issues involved are substantially different than they are in Canada. To illustrate the public importance of the issue, one American Congressman, an avowed opponent of legalized abortion, commented recently, "...abortion is the single most divisive issue facing Congress, the courts and the public. Nothing like it has separated our society since the days of slavery."² A new political party, Right to Life, ran a slate of candidates in both the 1980 and 1984 elections and added its voice to the elections by rating candidates on their abortion attitudes and political performance. An amendment to the United States Constitution, known as the Human Life Amendment, has been proposed which would prohibit abortion on all grounds and make anyone involved in or seeking to obtain an abortion liable to criminal prosecution.³ Articles, both scholarly and journalistic, are assessing the impact of the abortion issue on Congressional elections.⁴ Public opinion polls are being analyzed and reanalyzed in an attempt to ascertain the real attitudes of the American people on abor-

tion.⁵ Blake and Del Pinal puzzle over the recent political victories of the supporters of "pro-life" (anti-abortion) in the U.S. in light of expressed support for availability of abortion among most American people. They conclude that most people are between the two extreme views on abortion but tend to be closer in terms of background to the "pro-lifers" than to the "pro-choicers."⁶ This may account for the public's seemingly equivocal support of the "pro-life" side. And attempts are being made to measure the consequences of recent cut-backs of public funds for abortion in the U.S.⁷

Both Canada and the United States implemented laws against abortion in the second half of the nineteenth century. In the United States, unlike in Canada, the twentieth century movement to reform abortion law was public and widely supported.⁸ By 1972, the impetus to repeal restrictive abortion laws was sufficiently strong that nearly two-fifths of the states had changed their laws.⁹ The victory for legalized abortion in the United States was not an actual change in the law but a 1973 United States Supreme Court decision (*Roe vs. Wade*) which stated that restrictive abortion laws were unconstitutional in that they violated a woman's basic right to privacy. "Specifically, the Court ruled that in the early phase of pregnancy (roughly the first three months, or trimester), states could not prohibit or interfere with a woman's right to abortion, except to require that it be done by a licensed physician."¹⁰ Since that landmark decision, the Supreme Court has ruled in several other cases involving abortion thereby further clarifying the circumstances under which abortion is legally allowable.

Although without unanimity on the issue, the United States in its precedent-setting Supreme Court decision and the earlier decisions made by the state governments, decided in favour of choice on abortion. Luker, in her recent book on the politics of abortion, argues convincingly that the 1973 court decision was "much more in line

with the traditional treatment of abortion than Americans appreciate."¹¹ Luker quotes impressive data to support her contention that "the lack of public discussion about abortion should not make us believe that abortion did not exist."¹² She goes on to say "therapeutic abortion, performed for a wide variety of reasons and with a stunning range of frequencies, was common."¹³ The establishment of therapeutic abortion boards in hospitals in the United States in the 1950's was, according to Luker, a delaying tactic in the face of growing pressures for change in the grounds on which abortion was medically available. Luker's analysis of this period concludes that therapeutic abortion boards in hospitals had the effect of restricting access to abortion and even that this might have been an intended goal in the establishment of such boards. Once "therapeutic abortion boards became perceived as more and more unfair and unworkable, physicians began to cast about for other resolutions of the dilemma."¹⁴ It was at this point that state governments and courts including the United States Supreme Court decided in favour of abortion as a right of women.

Abortion Law and Policy in Canada

In vivid contrast to the situation in the United States, abortion policy in Canada has not been publicly debated until rather recently. "Federal governments in Canada have always refused to pay the political price of a directly applied state abortion policy."¹⁵ Instead of taking direct legislative action to change the extremely restrictive pre-1969 abortion law to actually legalize abortion, the Canadian government quietly compromised. To satisfy the medical establishments which wanted to maintain its monopoly over the delivery of abortion services, to give public support to the reformers but also to reassure the "pro-life" movement, the 1969 change in the criminal code to permit abortion essentially "enshrined the rhetoric of reform while basically just legalizing established medical practices."¹⁶ Pelrine suggests that "... the 1969 amendments to

the Criminal Code of Canada did little more than to bring the law almost up to what was then standard practice in a handful of metropolitan hospitals."¹⁷ It should be noted that not all groups were appeased by the compromise law, which adopted the Canadian Medical Association's resolution of 1966 almost verbatim. De Valk, an anti-abortionist, complains in a 1981 article:

We know the law was finally changed in May 1969. We also know that the change was worded in such a way as to permit virtual abortion on demand. From the parliamentary debates in 1969 it is clear this development was contrary to the expressly stated purpose of the government which intended to permit abortion only under fairly restricted circumstances.¹⁸

The 1969 abortion law, heralded by many as the law which liberalized abortion access in Canada, insulated elite groups, most notably doctors and federal government officials, from political and legal liability by permitting abortions to take place only in provincially accredited or approved hospitals and sanctioning doctors with making decisions about the advisability of abortion. The responsibility for implementing the law rested with individual doctors and their hospital committees who were given the authority to define health risks independently for each case presented to them. This supported the doctrine long prevalent in the United States that the decision on abortion is a technical medical one. Luker suggests that in the United States during the period from 1926 to the 1960's, "the doctrine of medical judgement permitted physicians to use an almost unimaginably wide range of criteria for deciding upon an abortion and neither the public nor individual physicians appear to have been very troubled by the discrepancies."¹⁹

All hospitals in Canada were not required by the 1969 law to set up therapeutic abortion committees, thereby limiting access to abortion

for women who live in areas remote from participating hospitals. The onus for implementing abortion policy, in being given to therapeutic abortion committees in accredited hospitals, removed responsibility from the courts, the legislators and the federal government. On paper, the 1969 law might have seemed reasonable but its implementation clearly reflects the political compromise out of which it grew.

As Collins argues, the 1969 law may have exacerbated the real social problem by giving women a false sense of freedom of choice.²⁰ It further creates the illusion that abortion is available in Canada virtually on demand and that numbers of abortions have dramatically increased, when in fact they may have only seemed to be increasing because they were being recorded and reported for the first time, as required by the 1969 law. Armed with statistics anti-abortion forces can easily attack the 1969 law as too liberal. Furthermore the 1969 law and the political bargaining on which it is premised, exaggerates already extant social and geographic inequities while seeming to be equitable. It allows, for example, the overwhelmingly male physicians on abortion committees to reign supreme as they decide, presumably on medical grounds, the fates of female "patients" they generally never see. Gifford-Jones, the pseudonym for a widely syndicated Canadian medical columnist, cites some examples of this:

Some members of therapeutic abortion committees have admitted their reasons for rejecting an application for abortion. For instance, a 40 year old woman who became careless in middle age about contraception should be made to suffer and bear a child. The irresponsible teenager must be taught a lesson and assume the responsibility of motherhood, whether able or not. And the women with five children can learn to cope with yet another.²¹

Women, under abortion policy in Canada as it is presently implemented, run a kind of roulette with the system. Gifford-Jones again cites examples:

Some patients are turned down one week, but would have been passed the following week. The T.A.C. felt obligated that week to reject a few applications. It makes the committee look less like a rubber stamp. And no one can then accuse them of being too liberal. Other women are forced to carry a pregnancy because of hard luck. The committee member who would have voted on her behalf was unable to attend the meeting on the day her application was passed.²²

Few committees see the woman about whom they are making a presumably medical decision. Since there are no guidelines from the courts or the federal government, committees can act totally arbitrarily. The fact of making a medical decision without ever seeing the "patient" would, in most circumstances, be seen to be in direct violation of the medical community's cherished doctor-patient relationship, if not constitute out-and-out malpractice. Most committees read a short medical history and quickly decide whether they deem abortion warranted. Some committees require the husband's signature for the abortion application to be considered; others require a psychiatric evaluation. Former Solicitor-General Francis Fox was caught by the requirement of a husband's signature when he signed for a mistress in 1978 and was forced to resign from office. If even a Solicitor-General, who certainly should know the ropes and be able to use them, gets stung by Canada's peculiarly and inequitably implemented abortion policy, then what happens to poor women with several children in the rural prairies or immigrant women in major cities?

Another kind of duplicity underlines the implementation of abortion policy in accord-

ance with Canada's 1969 law. This is the consequence of a class-sex bias. Abortion committees are comprised largely of men who personally never will face the despair and desperation of an unwanted pregnancy. Furthermore these are men who live in big houses, take winter holidays in the Caribbean and have few economic woes. It is not surprising that they lack empathy with women who out of desperation, either physical, emotional or economic, seek abortions. Claude-Armand Sheppard, Dr. Morgentaler's Quebec attorney, commented on this situation while listening to the testimony of doctors in Morgentaler's 1973 trial in Montreal:

From a personal point of view, what happened to me when I listened to the Crown witnesses was that I became a convert to women's lib. Because until then I had never faced completely the inhumanity, the selfishness and the lack of comprehension toward women. At no time in the last 10 to 15 years, since I left university, did I feel such waves of personal indignation well in me as when I heard these arrogant, incomprehensible doctors decide the fate of others, the comforts of others, and the liberty of others as though it were a purely theoretical problem. And then it suddenly dawned on me that the only reason I was not subject to this kind of authoritarian control was that I was a man.²³

Neither are legislators immune to this class-sex bias which enables them to take public stands on issues when in their private lives they may act differently. Stuart Legatt, a member of Parliament from British Columbia remarked, "Section 251 of the Criminal Code (the abortion law) would be immediately repealed if we could magically turn on the lights in the House of Commons to see how many MP's, in one way or another, have been personally connected with abortion - for their wives, daughters or mistresses."²⁴

Regional inequities create situations where women, particularly poor women who cannot afford to travel elsewhere, are forced to bear an unwanted pregnancy for lack of a hospital with a therapeutic abortion committee in their vicinity. "...[In] July 1975, fewer than one-fourth of Canadian general hospitals, all publicly financed, have established therapeutic abortion committees."²⁵ Paul MacKenzie suggests that, "Hospitals have been reluctant to establish model therapeutic abortion facilities, partly out of fear of being known as 'abortion mills.'"²⁶ An examination of recent data, shows that the number of hospitals with T.A.C.'s has actually shrunk somewhat since 1975. A recent report notes that in 1982 in Canada, 17 hospitals were performing 75 percent of all abortions.²⁷ Pelrine points out that "Women in the more affluent provinces - British Columbia, Ontario and Alberta - have much freer access to abortion than do those in other provinces."²⁸ Although Section 251 of the Criminal Code is a federal law it is differently applied across provinces: while a licensed physician, Henry Morgentaler, was arrested in Manitoba and Ontario in 1983 for performing abortions in free-standing clinics, five such clinics operate with impunity in Quebec.²⁹

Morgentaler emphasizes another inequity of the existing abortion policy in a letter he wrote to Health Minister Marc Lalonde in 1973: "...one of the most pernicious effects of the existing Canadian abortion laws—presumably designed to protect women against incompetent operators—is that the few institutions providing these services are swamped with requests, have long waiting lists and many women waiting for legal abortions thus reach 12 weeks of pregnancy or more before their operation may take place."³⁰ This situation often leads resourceless women to give up in despair or to seek dangerous and expensive illegal abortions. Morgentaler reiterated this concern following his most recent arrests in Winnipeg (June 1983) and Toronto (July 1983).

The establishment of hospital abortion boards in the United States in the 1950's (similar to the hospital therapeutic abortion committees created by the 1969 Canadian law) had the effect according to Luker, of obscuring the issues involved in abortion under the veil of medical judgement and making examples of individual women. For example, "In an effort to choose cases that would be most defensible, only those cases acceptable to all doctors on the board were approved."³¹ Operating within the ambiguous guidelines of abortion being appropriate when a pregnancy threatened a women's health, the condition was often imposed that sterilization accompany the abortion. This was based on the assumption that if this pregnancy is a threat to a woman's health, all subsequent pregnancies would represent a similar threat. In times when threats to women's lives were only physical, this assumption may have had some merit but when threats are expanded to include social, psycholological, economic factors, the requirement of sterilization as a condition for abortion seems punitive and extreme.

When consensus is lacking about the appropriate conditions under which abortions should be granted, as it was in the United States in the 1950's and has been in Canada since 1969, abortion boards become the arbiters of public opinion. At times, they are market systems "in which women with wealth, information and medical advocates were [are] far more likely to be granted abortions than their poorer, less well-informed and less well-connected peers."³² At other times, they become door keepers to protect public mortality in granting only a certain number of abortions proportionate to numbers of live births. It was suggested earlier that this was what is happening in Canada. The lack of clear criteria on the grounds upon which abortion should be granted and the growing public debate on the issue has made the U.S. hospital boards in the 1950s and the Canadian abortion committees of the 1970s and 1980s highly susceptible to public opinion and influence.

Demand for Abortion in Canada as a Women's Issue

As long as women lack control over their own sexuality and methods of contraception are less than perfect, unwanted pregnancy will continue to be a reality and abortion an unfortunate necessity. Few people would argue that abortion is an appropriate form of birth control. Indeed, virtually everyone who supports abortion on demand see it as a contraceptive back-up of last resort rather than an alternative to contraception. Unfortunately, this obvious point easily becomes obscured in the highly charged discussion of the issue.

The abortion debate in Canada has a distinctly masculine bias. As has been seen, in implementation of abortion policy men, either legislators or doctors, are largely making decisions for women who seek abortion. This, however, is only the most obvious masculine bias in the abortion issue discussion. Abortion is closely tied to the social roles women are expected to play and to patriarchy. Women still tend to be seen as pre-eminently childbearers or childcarers and this perception influences their participation in society in almost every way. To the extent that women are defined essentially as reproducers, they come to be seen as vessels for carrying out other people's wishes, those of their family, husbands and society. Women become subordinate to the family, the society and patriarchy.³³ In fact, a substantial part of the "pro-family" movement, primarily in the United States, takes the view that abortion frees women from patriarchal control and reproductive responsibility and is therefore to be prevented. The family that is envisioned by these people is not dissimilar to the male-dominated, hierarchial, patriarchal family favoured by Hitler, a point lucidly argued by Gloria Steinem, as well as by Berger and Berger.³⁴ Steinem concludes her discussion by linking politics at the personal and at the larger level with the apt fictional, but not out of character quote from Reagan, "A gun in every holster, a

pregnant women in every kitchen. Make America a man again.”³⁵ Clearly, abortion politics has a macho ring to it in Canada as well as in the United States, if for no other reason than that men are defining the proper roles women must play in male-dominated society.

Paradoxically, the social and cultural image well internalized by women, that women are vessels of reproduction, tends to result in more unplanned and unwanted pregnancies and a greater demand for abortion. An American study of abortion experiences among women found that “Most women in the sample were faced with unwanted pregnancy because they had not seen themselves as instrumental in planning pregnancies. They were trained to be receptive, to value themselves in terms of others’ responses.”³⁶ Translated into real terms, this means that women who are most lacking in psychological resources and senses of self-worth, often those also experiencing economic and social disadvantages, are those who are most likely to face unwanted pregnancy. “Abortion’s role in controlling reproduction is greater for vulnerable groups - the unmarried, teenagers, nonwhite women and the poor.”³⁷ It is also these women who least often have the option of abortion. And so the cycle continues - being forced to bear an unwanted pregnancy further underlines the woman’s sense of powerlessness and lack of autonomy.

In both the United States and Canada, although in different ways, the workings of abortion policy and the circumstances under which abortion is available consistently underlines the view that women’s central purpose in life is having babies. “The assumption that women are for having babies appears to override considerations of rape, incest, health risks, or even the woman’s life for some legislators.”³⁸ In Canada, this view manifests itself on every level of the abortion policy: arbitrary decisions by T.A.C.’s who see pregnancy and mandatory motherhood as punishment for sin or as a means of teaching of

responsibility to women; legislators who pontificate on the virtues of motherhood while denying the harsh realities; Canadian courts which refuse to take precedent-setting decisions on abortion policy; the federal government which not only drafted the 1969 abortion law as an unworkable compromise but set up its own agency, the Family Planning division of Health and Welfare Canada without power, in order to contain the abortion issue. On every level, the implicit or explicit assertion rings loud and clear - women should be mothers and impediments of every kind are put in the way of those seeking to end unwanted pregnancies.

In spite of the concern, expressed by some, that the rate of induced abortions in Canada is “disturbingly high,”³⁹ comparative data from other countries reveals unequivocally that Canadian rates of abortion are substantially lower than those in the United States where a less restrictive law exists and in fact are lower than in many other countries with fully legalized abortion.⁴⁰

During the period from 1973 to 1981, at a time when the proportion of women of reproductive age in Canada increased substantially due to the baby boom, the rates of therapeutic abortions performed did not increase appreciably. (See Table 1) More recently, when concern about “skyrocketing” rates of abortion seemed strongest, the numbers of abortions performed and the abortion rates in Canada actually remained almost stable.

The relatively low rates of therapeutic abortion in Canada, however, do not reflect the demand for abortion. Evidence suggests that illegal abortion remains a thriving industry in Canada.⁴¹ Women when denied access to legal abortions manage in one way or another, in fairly large numbers, to terminate unwanted pregnancies anyway.⁴² As well, substantial numbers of Canadian women obtain abortions outside their own country, most notably in the United States. Tietze estimates that “Around 10,000

Table 1
Number of Legal Abortions, Abortion Rates
and Abortion Ratios
Canada 1970-1981

	Number of Abortions	Abortion Rate per 1,000		Abortion Ratio per 1,000	
		Total Pop.	Women 15-44	Live Births	Known Pregnancies ¹
1970	11,200	0.5	2.6	30	29
1971	30,900	1.4	6.6	83	77
1972	38,900	1.8	8.2	112	101
1973	43,200	2.0	8.8	127	113
1974	48,100	2.1	9.5	136	120
1975	49,300	2.2	9.5	133	118
1976	54,500	2.4	10.3	152	132
1977	57,600	2.5	10.6	159	137
1978	62,300	2.7	11.3	174	148
1979 ²	65,000	2.7	11.6	178	149
1980	65,751	2.8	11.5	177	150
1981	65,053	2.8	11.1	175	149

Sources: 1970-1979 data (excluding abortion ratios per 1,000 known pregnancies) from Christopher Tietze, *Induced Abortion: A World Review* (4th edition). New York: A Population Council Fact Book, 1981 Table 2, p. 26;

1979-1981 data from Canada, Statistics Canada. *Therapeutic Abortions*, 1981 (Ottawa, 1983) Table II, p. 17.

¹ Live births plus legal abortions.

² Tietze rounded off numbers of abortions to the nearest hundred. 1970-79 data are rounded.

Canadian women are known to have obtained legal abortions in the United States in 1975; the actual total may have been substantially higher.⁴³ In 1981, 2651 legal abortions were obtained in the United States by Canadian residents, up from 1,644 obtained the year before.⁴⁴ According to Statistics Canada some abortions continue to be done by doctors in their offices or by women themselves. Badgley *et al.* found in their national survey that women admitted trying self-abortion at a rate of 8.5 per 1,000 women and sought abortion by others at a rate of 6.6 per 1,000 women (4.3 per 1,000 in doctor's offices and 2.3 per 1,000 by lay persons).⁴⁵ In addition to these sources of abortion, women regularly seek out Morgentaler's free-standing clinics in Montreal

and for a short time in Winnipeg and in Toronto before these clinics were closed in 1983.

Biases in the adjudication process for abortion in Canada mean, as they do in other places in the world in which a system of adjudication is operative, that older women with more children (5+) are more likely to be approved for abortion and single women between 15 and 30 least likely.⁴⁶ This means, of course, that it is women who are most sexually active and at risk for unwanted pregnancy in Canada who face the greatest impediments to having abortions. Luker, reporting on an American study, states that it is lower income women who most often wish to end a pregnancy with an abortion in a ratio of almost 5 to 1.⁴⁷ Add this to the other biases in the adjudication system, and it would seem that poor women who are young and single and possibly could benefit most from a chance to upgrade their education or continue working, are those who experience the most difficulties in obtaining therapeutic abortions under the existing Canadian system.

The administrative difficulties created by the 1969 Abortion law in Canada not only force many women to bear an unwanted child to term or seek an extra-legal abortion. Administrative delays also cause women in Canada to have abortions later in gestation than in other countries. This, of course, increases the risk to the woman but also, paradoxically, increases the outrage felt by anti-abortion forces. All available evidence points to the conclusion that women in Canada obtain abortions later than in the United States. Cates states that "in 1977, 24 percent of Canadian women obtained abortions at eight weeks or less, and 16 percent at 13 weeks or more. This compares to 51 percent and 9 percent respectively, in the United States."⁴⁸ MacKenzie suggests that a reasonable goal for legal abortions, in order to minimize the health risk to women, would be to maximize the proportions of abortions done up to and including the tenth week of gestation. He points out that in Canada in 1978 this propor-

tion was only 61 percent, compared to 75 percent in the United States. He quotes from the National Patient Survey conducted by the Badgley Committee in 1977 in Canada in which "women reported a delay of 2.8 weeks after they suspected they were pregnant until they visited a physician. After this contact, they reported an average of 8 weeks until the operation was done."⁴⁹

The demand for abortion by women in Canada seems to be in clear excess of the system's ability to meet it. Masculine bias, idiosyncratic decisions by abortion committees, a patriarchal system which defines women as essentially child-bearers, the hedging of responsibility by governments and courts and an unworkable bureaucratic system of approving abortion all work against women seeking an end to unwanted pregnancy. It is known that a solid proportion of these women, most notably the mobile, the better educated and the moneyed, seek abortion outside the system. It can only be speculated, in the absence of Canadian research on this subject, that Canadian women who are denied access to abortion react in ways similar to their counterparts in other countries by becoming mothers of poorly adjusted children, by committing suicide, by engaging in anti-social behaviour of various sorts, by living in abject poverty and deprivation, by increasing their dependence on drugs, alcohol and tobacco, or by engaging in child abuse.⁵⁰ It is telling to notice that so much research has been done on the psychological consequences of abortion and so very little on the consequences of mandatory childbearing in cases where abortion has been denied.

Impediments to Access to Abortion in Canada

Abortion has become a major social issue in Canada, as evidenced by the publication of some 1100 articles in major Canadian newspapers and news magazines, from January 1980 through April 1984.⁵¹ During the three months of May, June and July 1983 alone, a peak period occurred in which a total of 400 articles appeared. Al-

though a systematic content analysis of these popular articles has yet to be done, glancing through the titles suggests that the topics range from the political, legal and religious through to positions taken by the "pro-life" and pro-choice forces, human interest stories and descriptions of recent developments occurring in community hospitals. Reading a selective sample of these articles reveals a number of cross-cutting currents in the abortion debate. The confusion surrounding jurisdiction over abortion in Canada also emerges as an important theme.

Four significant legal challenges to abortion law and policy provide the possibility for analysis of the forces impinging on access to abortion as well as recent trends in abortion policy. A former Manitoba Cabinet Minister, Joe Borowski, began a lawsuit against the federal government in the early 1970's when he claimed that Section 251 of the Criminal Code (the 1969 law on abortion) and the use of public funds for abortion was illegal.⁵² His intent was to prove that the 1969 law is in violation of the unborn child's "right to life." The federal response to this challenge was that the unborn are protected under the criminal code but that the law does not recognize the fetus as a person under the Charter of Rights.⁵³ Although this would seem to be a victory for the pro-choice forces, Mr. Borowski received considerable public support for his suit and his campaign to declare the abortion law in violation of the rights of the fetus may not be over. As part of Borowski's attempt to challenge the federal law, an important jurisdictional decision resulted. It was decided at the federal level that the legal issues raised by Borowski could be heard in Provincial Supreme Court in Saskatchewan. Thus, although the abortion law is a federal statute, the issue of abortion falls under provincial jurisdiction.

In 1983, the Federal Supreme Court again ruled in favour of the provinces hearing abortion cases. This time the case was one brought against the Lion's Gate Hospital in Vancouver by

two hospital board members challenging the power of a therapeutic abortion committee to allow abortions for social and economic reasons.⁵⁴ This was the first case to challenge the decision-making power of a therapeutic abortion committee. The Supreme Court of Canada decided that abortion committees fall under provincial rather than federal law. The case is still pending and its outcome could have serious implications for access to abortion by Canadian women.

A husband in Ontario in 1984 challenged a hospital therapeutic abortion committee's approval of an abortion for his wife. In this case, the Supreme Court of Ontario ruled that the father of an unborn child has no legal status to prevent it from being aborted.⁵⁵ The abortion had been approved, argued the court, on the basis that a continuation of the pregnancy would endanger the life or health of the woman. The wife's health would be endangered by delays, according to the court, while the husband's risks were fewer. This decision broadens the issue of rights in abortion to involve consideration of the rights of the father. Nevertheless some analysts of this decision have argued that women's rights are being given priority over men's rights in abortion decisions:

A mother's mental trauma at the prospect of carrying a child for nine months is considered grounds for an abortion. A man's profound mental trauma at the idea of supporting a child for 18 years is not. At the very least if we take the constitutional guarantees of equality between men and women seriously, society is going to have to face up to the consequences of allowing men to opt out of their support obligations for a child they do not want.⁵⁶

The scope of whose rights are potentially infringed upon by abortion is widening to include the fetus, the woman, society-at-large and the man whose child it would be.

Among the most serious legal challenges to the existing abortion law in Canada comes from Dr. Henry Morgentaler. For many years Morgentaler has contended that the existing law is unjust and unfair. He has been arrested several times for performing "illegal" abortions. Dr. Morgentaler's legal cases underline the many ambiguities present in the law on abortion. He is a legitimately licensed practicing physician who performs abortions under safe and decent conditions. Presumably the decision to perform an abortion, if made by a licensed medical doctor, is a medical decision, consistent with the law. The problem is that Morgentaler does not perform abortions through a therapeutic abortion committee in an accredited hospital. It is for this reason that he has been repeatedly arrested and his free-standing clinics in Quebec, Ontario and Manitoba have been raided.

Following his arrest in Toronto in the summer of 1983, Morgentaler and his lawyers took the case to the Supreme Court of Ontario, challenging the constitutionality of the existing abortion law. The argument presented by Morgentaler's lawyer, Maurice Manning, was that "the law was vague, was unequally applied across Canada and violated guarantees of religious freedom and the right to life and liberty."⁵⁷ On 20 July 1984, Associate Chief Justice Williams Parker declared the law constitutional: "No unfettered legal right to an abortion can be found in our law, nor can it be said that a right to an abortion is deeply rooted in the traditions or conscience of this court."⁵⁸ In essence, Judge Parker decided that the Charter of Rights and Freedoms only protected freedoms that are seen as truly fundamental by the majority of Canadians. He cited the right to marry and the right to bear children as examples of such deeply rooted freedoms. Interestingly, Parker "did not deny evidence that access to legal abortion in Canada is left up to chance - where the woman happens to live, whether she has sufficient funds to travel - or that the availability of hospitals willing to provide abortions declines steadily every year under the

pressure of anti-abortion groups. He did not find this inequity to be within his jurisdiction - instead it was the responsibility of Parliament."⁵⁹

This Supreme Court of Ontario decision, although not based on the rights of the fetus, was claimed as a victory by the "pro-life" anti-abortion forces.⁶⁰ Women's groups and pro-choice forces expressed concern that women's rights were being neglected by the decision in granting recognition that inequities exist in implementation of the existing law but denying that the inequities are in violation of women's rights. One aspect of Judge Parker's decision revealed the vagueness and ambiguity existant in the 1969 law which permits courts and governments alike to avoid decisive action:

Judge Parker stated that if discrimination isn't obvious on the 'face of the legislation' then there is no denial of equality. Although there might in reality be unequal access to abortion, this only proves that there is unevenness in the 'administration' of the law and this is for Parliament, not the courts, to correct.⁶¹

It is this vagueness which permits local gynecologists, hospital abortion committees and hospital boards, all highly susceptible to influence within their communities, to implement abortion policy on a day-to-day basis and to interpret and re-interpret the law as they see fit or are pressured to do. When plans were made for a free vote in the House of Commons on abortion in 1978, the government retreated and cancelled the vote.⁶² No attempt at a free vote on the fifteen year old law on abortion has been made since that time.

In the midst of jurisdictional disputes legal challenges to the abortion law, increasing activism of both anti-abortion and pro-choice forces and a proliferation of newspaper articles on abortion, a recent public opinion poll reveals that the majority of Canadians (72%) favour abor-

tion decisions being made by the patient in consultation with her doctor and should be performed by a licensed physician in conformance with good medical practice.⁶³

Is Restriction of Access Occurring?

In Canada, responsibility for implementation of abortion policy has been for all intents and purposes passed down to the level of the local hospital committee composed of three doctors. It further requires the availability of local doctors willing to perform abortions in those accredited hospitals which have abortion committees. Not all hospitals are required to have therapeutic abortion committees under the 1969 law, thereby providing inequitable access to abortion. All that is necessary to restrict access to legal abortion in Canada is for anti-abortion forces to exert sufficient pressure on hospital abortion boards (or boards of directors) or on doctors who perform abortions in the community. This, of course, is precisely what has happened and is continuing to happen in Canada at present. In a hospital in Moncton, New Brunswick, the therapeutic abortion Committee was disbanded after it succumbed to the pressure of anti-abortion forces but subsequently was re-instated as a result of community opinion.⁶⁴

In one medium-sized community in Ontario in the early 1980's, there were six local gynecologists who performed abortions. Over time, most of them became known in the community. The anti-abortion movement, at the grass roots level, eventually succeeded in pressuring and embarrassing four of these six doctors to withdraw their abortion services. The doctors are reported to have had "personal and moral" changes of heart in the matter of abortion. This leaves only two gynecologists in a sizeable community who continue to do abortions and now one of them is considering withdrawing his abortion services. With little fuss and a relatively small investment of time and resources, anti-abortion forces have

succeeded in denying access to abortion to most women in this community.

In other places, pressures have been brought to bear on the abortion committee themselves. All that is required is for one or two of the members of the committee to succumb to the threat of public embarrassment to cause the committee to disband and with it, access to legal abortion in that community or region. In Surrey, British Columbia, a "pro-life" majority was elected to the therapeutic abortion committee.⁶⁵ Given this ease of access at the local level, it is not surprising that abortions performed over the past few years (since 1978) have become stable and recently declined somewhat, as shown in Table 1. It is also not surprising that abortions are being increasingly concentrated in central metropolitan hospitals which are less susceptible to political influence than hospitals in smaller communities. Table 2 shows some fluctuation in the numbers of hospitals in Canada with therapeutic abortion committees from 1980 to 1983 with an overall decline of four hospitals from 1982-1983. These data, however, obscure what is actually happening. As Tietze suggests, in 1978 in Canada, 15 per cent of hospitals with abortion committees reported no abortions.⁶⁶ By 1983, this percentage had risen to 18 percent of hospitals *with* therapeutic abortion committees which performed *no* abortions at all.⁶⁷

Anti-abortion forces often express greatest concern about abortions among teenagers, suggesting that their rates are exorbitantly high. Table 3 compares rates for women aged 15-19 with those for women aged 15-44 in Canada from 1974-1981. The rates for teenagers are consistently higher than for all women of reproductive age but given the already noted bias against granting abortions to teens by therapeutic abortion committees, these rates no doubt fail to reflect the actual demand among this age group. As in the total population of women of reproductive age, abortion rates among teenagers have remained stable since 1978 or so and have recently

Table 2
Numbers of Canadian Hospitals
Therapeutic Abortion Committees
by Province 1980-1983

	1980	1981	1982	1983
Newfoundland	5	5	5	5
Prince Edward Island	2	2	1	1
Nova Scotia	13	13	12	12
New Brunswick	8	9	9	9
Quebec	29	30	32	30
Ontario	190	101	99	98
Manitoba	8	7	8	8
Saskatchewan	9	9	10	10
Alberta	25	24	24	23
British Columbia	52	54	58	58
Yukon	1	1	1	0
Northwest Territories	2	2	2	2
Total	258	257	261	257

Sources: Canada. Statistics Canada, Therapeutic Abortions Unit, Institutional Care Statistics Section, 1983.

List of Hospitals with Therapeutic Abortion Committees as Reported by Provinces in Canada;

Canada, Statistics Canada, Therapeutic Abortions Unit, Institutional Care Statistics Section, 1982.

List of Hospitals with Therapeutic Abortion Committees as Reported by Provinces in Canada;

Canada, Statistics Canada *Therapeutic Abortions 1981* Table 7, p. 50.

declined. This decline, it could be suggested, is accountable in ways similar to the overall decline in abortion. Statistics Canada, not a political body by any means, said in 1983 that the large jump in numbers of Canadian women seeking abortions in the United States from 1980 to 1981 "may reflect 'strong lobbying' by groups in Canada opposed to abortion and the impact of that lobby on the work of hospital abortion committees."⁶⁸

Further evidence that restriction of access is occurring in spite of some recent, if ambiguous, legal gains by the pro-choice forces is found in the stepped up lobbying of candidates in the 1984 election campaign by anti-abortion forces. This, coupled with the overtly political plea to Catholics by a national Catholic newspaper to stay home rather than vote for a pro-choice can-

Table 3
Therapeutic Abortion Rates per 1,000 females
aged 15-44 and 15-19
Canada 1974-1981

	15-44	15-19
1974	9.6	13.6
1975	9.6	13.7
1976	10.3	14.6
1977	10.6	15.3
1978	11.3	16.3
1979	11.6	17.0
1980	11.5	16.9
1981	11.1	16.2

Source: Canada. Statistics Canada, *Therapeutic Abortions 1981* Historical Table 56, p. 112; Historical Table 61, p. 115.

didate suggests that “pro-life” groups are becoming more determined on every front to restrict abortion. The Ontario Supreme Court decision has been claimed as a victory for anti-abortion forces as well.

From this analysis, it seems justifiable to conclude that anti-abortion forces in Canada have had a significant impact on access to abortion without ever having to organize to change the law or lobby legislative bodies. It is the peculiar operation of abortion policy in Canada which enables this ease of influence. A group of people with strong views can, without recourse to democratic process, deny another group access to a service they see as appropriate, necessary and even a right. The question to pose in concluding this paper is what might happen if the anti-abortion forces succeed in repealing the existing abortion law in Canada?

In spite of wide public support in Canada for access to legal abortion at least under certain specified circumstances,⁶⁹ there is some apprehension that, with their successes so far at the grass roots level, an attempt might be made in the near future by anti-abortion groups to either repeal the existing abortion law or to further restrict access to abortion by continued efforts at local levels. The effects of both of these ap-

proaches, if successful, would be the same—diminishing availability of legal abortion to Canadian women. In this section, we speculate on the basis of known consequences from other parts of the world and from parallel situations elsewhere what the effects might be in Canada of such changes.

Anti-abortion forces and policy-makers in either repealing legal abortion laws or in denying access through ad hoc policy changes, typically intend to elevate the birth rate. They naively take the view that denial of access to legal abortion will have the consequence of producing live births. Experiences from other countries that have moved from liberal abortion laws to more restrictive laws—notably Czechoslovakia, Rumania and Bulgaria—shows that this hope is not likely to be realized in Canada. After a very short period of elevated birth rates following the restrictive abortion legislation, the levels of illegal abortion increased substantially in all three of these countries.⁷⁰ Although Canada’s situation differs substantially from these countries, there is little reason to expect that in Canada previously legal abortions would result in anything but illegal abortions if access to legal abortion were further restricted.

McDaniel and Krotki apply estimates of ratios of legal to illegal abortions from a New York study by Tietze to Alberta survey data on abortion in an effort to more realistically ascertain the possible effects of a change in the abortion law in Canada on levels of illegal abortion and fertility rates.⁷¹ Tietze concludes in his study of the impact of abortion laws on birth rates in New York that 32-35 per cent of the actual increment in legal abortion due to liberalization of the laws would have resulted in births, had the law remained unchanged. The remainder, according to Tietze, would have resulted in illegal abortions.⁷² Applying Tietze’s “rule of thumb” estimates to Alberta data, McDaniel and Krotki find that restriction of therapeutic abortion for that province would have a negligible effect on

birth rates (increasing the crude birth rate by only 1 point per 1,000 population) but would result in a rather substantial increase in the rates of illegal abortion. Their estimates indicate that illegal abortions per 100 conceptions would increase from a level of 19.7 (estimated levels for 1973) to 22.8 or 22.9 after the law was changed. To the extent that this analysis is correct and the estimates credible, it can be concluded that restricting availability of legal abortion, either through legislative fiat or through policy shifts, would not result in a reduction in the rates of abortion at all but in a substantially elevated level of illegal abortion. It should be noted that Morgentaler, a doctor with first-hand experience with women's needs for abortion, has predicted the same consequences.⁷³

Polenberg in a recent article, suggests that in the United States adoption of a constitutional amendment outlawing abortion would create a situation analogous to Prohibition in three senses. The first is that both access to abortion and access to alcoholic beverages would be prohibited through constitutional amendment. The second is that in both situations, legislation is attempting to control people's moral behavior. The third is that in both instances, no consensus exists among the members of society on whether the behavior involved is immoral—in fact, the majority seem to be in favour of choice on abortion and during Prohibition, were in favour of choice on alcohol consumption.⁷⁴

Prohibition, which became the law in the United States by amendment of the 18th amendment in 1919, made it a crime to sell, manufacture or transport intoxicating liquors. This law succeeded in reducing consumption of alcohol but by far less than its proponents had hoped. What is of relevance in the discussion of prohibition of abortion is the other consequences of the Prohibition amendment. Prohibition meant that regulation of the liquor industry was no longer possible in order to protect the health and safety of the public. People died from drinking con-

taminated liquor. Regular citizens became criminals, thereby congesting the judicial system, which led to contempt for the law in general. A massive growth in federal police powers was seen in the Prohibition years including all manner of intrusions on civil liberties, even to the extent of modernistic (in the 1920's) use of wiretaps. It is not difficult to envisage similar developments in the United States if abortion were to be prohibited through a constitutional amendment or in Canada if a more restrictive law were introduced.

One last speculation on the possible consequences of repealing the existing abortion law in Canada seems appropriate. Medical opportunists and lay people would have a field-day performing abortions illegally and, without doubt, for high fees. This means, of course, that women with resources, as prior to 1969 and now, would continue to have the choice to end an unwanted pregnancy but under less safe circumstances than at present, while poor women would become mothers against their wills. A third alternative to dirty back-room abortion or safe, medical abortion is presented in an article by Bart.⁷⁵ She describes an illegal abortion collective run by laywomen who have trained themselves to perform safe abortions in a supportive atmosphere. This collective, in Chicago, acquired the technology for looking after women in need of abortion in a non-alienating, but necessarily furtive, way. The experience of the women in the collective, as reported by Bart, shows that the possibility exists for women to succeed in performing abortions outside the law if conditions require this sort of action by women.

From this brief examination of the possible consequences of a more restrictive law or policy on abortion in Canada, it is clear that the intended consequences of the anti-abortion movement are not likely. Instead of producing more live births and saving fetuses, what would occur is an exaggeration of already rampant inequities, the suffering and the forbearance women ex-

perience with abortion policy as it is presently implemented in Canada. Abortions would continue but in a far less safe and more discriminatory environment. Policy-makers would be well advised to carefully consider these consequences if they are tempted to accede to the seemingly "humane" demands of anti-abortion forces.

Summary and Conclusion

Abortion policy as it is presently implemented in Canada has enormous implications for women's lives. The structure of abortion policy permits medical doctors on therapeutic abortion committees to serve as gate-keepers. They can define their role as serving society's moral interests, as a market or quota system, as a political forum to be influenced by local pressure groups or as a determining force of women's best interests. It has been seen that all these are occurring now in Canada. The biases and inequities apparent in Canada's abortion policy are rampant and widely acknowledged.

An examination of recent developments in the abortion debate reveals some ambiguous legal decisions which could be argued to favour at the same time both the pro-choice and anti-abortion forces. The legal issues involved in abortion law and policy are such that responsibility is shifted from federal to province jurisdiction and from Parliament to courts and back. The result appears to be no decisive action or precedent-setting cases, but cases which further obscure the issues involved.

The discussion of the evidence on whether access to abortion in Canada is being diminished concludes that it is. With the possibilities for influencing therapeutic abortion committees, local gynecologists and hospital boards looming so large, it would be difficult for anti-abortion forces to resist these opportunities. Their successes, so far without recourse to Parliamentary processes, have been impressive. It is fairly clear with their stepped up attention to political can-

didates in the election of 1984, that the pressure they have used at local levels is being applied to attempting to change the 1969 law.

With this in mind, but with no clear analytical assessment of the probability of success of anti-abortion forces in repealing the 1969 law, it was speculated from research conducted elsewhere what would happen if the existing law were to be made more restrictive. The conclusion is that abortions would continue but would be illegal, therefore, more life-threatening and even more inequitably available than at present. Further, it would produce a situation similar to what occurred in the United States during prohibition in which respect for all laws would diminish as the courts become bogged down with cases of illegal abortion.

In Canada today, abortion policy implementation is a random system in which the well-to-do can benefit but the poor, particularly the single, young and deprived suffer from severe, crippling biases in the abortion adjudication process. It is an idiosyncratic, locally controlled system for which no one seems willing to take responsibility. It is a male-dominated system in which women's appropriate roles are defined by men for their own purposes. The establishment of local hospital-based therapeutic abortion committees in Canada, in accordance with the 1969 law, may not be a delaying tactic but an effective hedge against decisive and courageous action on a politically contentious women's issue. This fifteen year old law enables, indeed demands, that responsibility be relinquished by governments, courts and Parliament.

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