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## Why Canada Needs an Abortion Policy

On June 30<sup>th</sup> a young Quebec woman was sentenced to 18 months in jail for leaving her baby to die in a wooded area north of Montreal, shortly after giving birth to the infant in 2006. Crown attorneys had originally wanted to charge her with first-degree murder, but they accepted a guilty plea on the lesser charge of manslaughter when they realized that they could not prove she had actually intended to kill her newborn child.

Ironically, if the accused mother had aborted her baby in a hospital just a few hours earlier – essentially the same act, but with unquestioned intent and premeditation – no charges whatsoever would have been laid. That’s because in Canada, there is no law regulating abortion.

Canada remains the only country in the developed world where this is so. In Canada, a mother can legally abort her baby at any time during the pregnancy, including up to the delivery itself. As long as the child has not yet been born, no crime is committed if the doctor – on instructions from the mother – kills the baby. And if the doctor were to take the life of the child under the same circumstances, but *without* the mother’s consent, he might lose his license to practice medicine, but he would certainly not be charged with a crime. Not in Canada.

It’s unfair to blame the courts for this situation. Contrary to popular belief, the Supreme Court of Canada did not “legalize” abortion in 1988. Therapeutic abortion had already been made legal in Canada – albeit with restrictions – with the passage of the *Criminal Law Amendment Act* in 1969. The Court struck down these restrictions in its 1988 decision, but that was mainly because the regime they established was so dysfunctional that, in some areas, they often had the practical effect of denying women access to therapeutic abortions that they were otherwise legally qualified to have.

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The idea that a woman should have to “qualify” to have an abortion will not sit well with some people, but there is no question that the Court accepted it as a legitimate practice. Rather than ruling that abortion was a constitutional right, the Court invited Parliament to rewrite the law in a way that would address the deficiencies it had identified in the system.

In 1989 the federal government did just that, introducing legislation that not only revamped the process, but significantly reduced the penalty imposed on anyone convicted of performing an illegal abortion as well. This new law was approved by the House of Commons 1990, but it died in the Senate after receiving a tie vote. Since then no government has attempted to address the issue, leading to the policy vacuum we have today.

But is this lack of a policy governing abortion really such a bad thing?

If the example of other developed nations means anything, the answer to that question would seem to be an overwhelming yes.

Consider that France permits abortion on demand only until the 10<sup>th</sup> week of pregnancy. After 10 weeks a multidisciplinary team must certify that the mother’s health is in danger or that the fetus is badly deformed in order for an abortion to be legally performed. Sweden allows abortion on demand only until the 18<sup>th</sup> week, after which it is severely restricted. In The Netherlands – where euthanasia is legal – a woman seeking an abortion in her first trimester must first wait five days and undergo counseling before proceeding. After the first trimester she can only obtain an abortion in a hospital, not an abortion clinic, and then only with the approval of a two-doctor panel, neither of whom can be involved in the procedure itself.

Even in liberal Spain, where a parliamentary committee recently ruled that apes have some rights equal to humans, abortion is permitted only in cases where the mother’s health is confirmed to be at risk by an independent physician, or if a two-doctor independent panel certifies that the fetus is badly deformed. As with all of the above countries, a woman can also obtain an abortion in Spain if she was raped, but only if the rape was reported to police and even then, only until the 12<sup>th</sup> week of pregnancy.

All this goes to show just how out of touch Canada is with mainstream thinking and practice on this issue. Without exception, every other progressive, liberal democracy on the planet protects unborn children. Only Canada does not. The law may vary from country to country as to when these protections commence and to what degree, but not the principle that society has the right – and even the duty – to provide such protection, even if the fetus is not considered a full human being. On that, everyone agrees.

This is an essential point to grasp. The debate in Canada has tended to revolve around the rights of the fetus, specifically whether or not a fetus is a living human being with intrinsic rights of its own, but this misses the point entirely. The issue is not whether a fetus has an intrinsic right to

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protection, but whether or not society, i.e. Parliament, has the right to provide such protection, under the auspices of the Criminal Code, *notwithstanding* the status – and therefore the rights – of the fetus, if a compelling enough case can be made that it is in the public interest to do so. According to the Supreme Court in *Morgentaler*, the answer to this question is yes, which is one reason why it refused to declare abortion a constitutional right *per se*, and although the Court did rule in *R. v. Sullivan* in 1991 that a fetus is not a “person” until it has fully exited its mother’s body, nothing in that or subsequent decisions diminishes this right of Parliament.

What important public interest would be served in protecting the fetus? There are a number of answers to this question.

To begin with, although the Supreme Court ruled that a fetus does not have the legal status of “person” and therefore does not possess intrinsic rights, it did not declare that a fetus is not a human being with intrinsic *value*, nor could it have. Such a declaration would have been more than just counterintuitive, but scientifically unsound as well. No biological or cognitive change occurs in a baby in the few hours immediately before and after its birth that even remotely would have justified such a conclusion.

From a biological point of view, individual human life begins at conception. This is not a moral argument, but a scientific fact. There may be those who argue that a microscopic cluster of cells cannot reasonably be called human, and that therefore “human life” cannot be said to begin until sometime later in fetal development, but this objection has more to do with the philosophical question of *what is* human life, rather than the empirical question when does human life commence. Even then, all agree that “human life” begins at the latest when a fetus becomes viable, i.e. capable of survival outside of its mother’s womb. The point is that there is virtually no dispute regarding the *value* (in contrast to rights) of a fetus as an individual human being, albeit in the early stages of growth and development.

Society regularly enacts laws to protect things of value when it is deemed in the public interest to do so. To cite a few crude examples, we protect localized wetlands from development even when there is no danger to the survival of any species of wildlife or threat of significant damage to the environment. We protect privately owned buildings to preserve the heritage of our cities. We even protect trees on private property to preserve the character of individual neighbourhoods – all in the name of public interest. Why not unborn children? Surely an unborn child is at least as valuable to society as a frog in a local swamp or a brick façade on an old building?

This is no mere abstract question either. Although the vast majority of abortions in Canada are performed in the first trimester of pregnancy, according to a paper published by the Abortion Rights Coalition of Canada in July of 2005, approximately 0.4% of all abortions occur after 20 weeks. At first glance this may seem like a small number, but given that there are around 100,000 abortions in Canada each year, that would mean that about 400 are being carried out on

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potentially viable babies. To put this into perspective, the total number of homicides committed in Canada in 2006 was 605. Many of these late-term abortions undoubtedly involved cases where the fetus was so badly deformed that there was no possibility that it would live if the pregnancy had reached full term, but how many were not such cases?

Another statistic that Canadians are largely unaware of is the number of woman who actually died as a result of so-called “back alley” abortions prior to the procedure’s legalization. In the decade preceding the passage of the aforementioned *Act* in 1969, the average number of deaths each year attributable to illegal abortions was 16, and of these, all were performed in doctors’ offices under medical supervision.

Were “back alley” abortions ever performed? Probably – but their number was always extremely small and, in any event, the removal of restrictions did not end the practice. Consider that the two most widely publicized cases of mothers trying to abort their fetuses in the last half century in Canada – one involving a university student who bled to death after trying to use a coat hanger, the other a young woman who inserted a pellet gun in her vagina, shooting the fetus – occurred *after* the Morgentaler ruling.

In addition to the obvious ethical implications of being permitted to end a viable life with impunity, there are potential legal implications as well. Since there is no scientific basis for differentiating between a child one hour before birth and the same child one hour after, how can the law logically differentiate between the two? What is the theoretical justification for charging our young Quebec mother with any crime, let alone murder, if she could have killed the same child legally a few hours earlier anyway? How long will it be before an intrepid lawyer offers – and an activist judge accepts – this defence on behalf of a mother who leaves her baby in a trash container at the local bus stop to die?

If all this sounds implausible, consider that some prominent ethicists are already saying exactly that. Princeton University professor of bioethics Peter Singer argues that since infants lack what he believes to be the essential characteristics of personhood, specifically rationality, autonomy and self-consciousness, killing them is not the same as killing a “person” and therefore, not murder. Singer is by no means alone in this view.

Another compelling argument in favour of a sensible abortion policy is scientific progress itself.

In the last two decades, advances in medical science have made it possible to detect, not just obvious physical abnormalities in a fetus, but its genetic predisposition to certain diseases and other incapacities as well. This has led to the rise of a new generation of eugenicists whose goal it is, not to perfect the species, but to reduce suffering by preventing flawed human beings from being born in the first place. Although the distinction is somewhat dubious, among those who accept that there is a clear difference between these two goals, many consider the latter to be a positive thing. But what does that say about the value our society places on the lives of people

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who struggle every day with inherited disabilities? Would they – and society – have been better off if they had never been born?

And if heredity *is* a legitimate criterion for determining whether a fetus lives or dies, why limit the scope of genetic investigation to only those defects that may manifest themselves as disabilities or diseases later in life? Why not also include characteristics that are innocuous to most of us, but that may be undesirable to others, characteristics like the baby's gender for instance? Once again, the practice may seem far fetched, but in 1993, some Canadian ethnic newspapers were carrying advertisements on behalf of clinics promising to reveal the gender of the fetus to parents.

Does anyone really doubt what these parents did with that information once they had it?

The controversy stirred up by these newspaper ads may have deterred any further public promotion of gender-selection abortions, but recent statistics seem to indicate that the practice remains widespread in some communities nonetheless. In an article published in *Western Standard* in June 2006, Andrea Mrozek, Director of Research at the Institute for Marriage and Family in Ottawa, points out that there were 11 percent more male children born in Surrey BC than female in the year 2000, and 9 percent more in 2003, almost twice the national average. Surrey's population is nearly one third immigrant, with about one third of these new Canadians originating in India, where illegal gender-selection abortions are an acknowledged problem.

There's more.

In Coquitlam BC, where Chinese immigrants make up 12 per cent of the population, there were 16 percent more boys born in 2000 than girls. In 2001 the number was 9 percent and in 2003 it was 12 percent. In Richmond BC the difference was 11 percent in 2000 and 12 percent in 2003. In the Greater Toronto Area (GTA), north Etobicoke, where a large part of the population is made up of Indian immigrants, the male-to-female ratio for children under the age of 4 was 1.1:1 in 2001 while in Sikh areas of Brampton the ratio was 1.09:1 and in Toronto's eastern Chinatown it was 1.08:1. There is no credible explanation for these differences other than the ongoing practice of gender-selection abortions in certain communities.

The response of Canadian policy-makers to gender-selection abortions has been to restrict gender-testing and limit the availability of information derived from such testing. In 2001 the Society of Obstetricians and Gynecologists of Canada (SOGC) warned doctors that determining the gender of a fetus "for the purpose of gender-selection" was "inappropriate". The College of Physicians and Surgeons of Ontario reminded its members in 2004 that using ultrasound to discover the gender of a fetus "without a medical indication" – a euphemistic way of saying "for gender-selection" – was "contrary to good medical practice". And in British Columbia, where the 1993 newspaper ads originally ran, the College of Physicians and Surgeons actually barred doctors from divulging to parents the gender of a fetus younger than 24 weeks except where

there was a medical reason to do so, the theory being that the parents would be less likely to have an abortion so late in the pregnancy.

Finally, when Parliament passed the *Assisted Human Reproduction Act* in 2004 it included a provision outlawing the performance of all tests to determine the gender of a fetus “except to prevent, diagnose or treat a gender-linked disorder or disease.”

The strategy of regulating access to information as a means of stopping gender-selection abortions is seriously flawed though.

In the first place, it simply makes no sense to restrict the acquisition and/or transmission of information without also restricting the acts that might be performed as a result of either, especially if the only reason for the former is to limit the latter. Put another way, how can it be illegal to reveal the gender of a fetus if it remains perfectly legal to arrange an abortion for that or any other reason? The prohibition of gender-testing included in the *Assisted Human Reproduction Act* is a legal challenge waiting to happen.

Furthermore, by refusing to deal with the elephant in the room – the abortion itself – policy-makers unwittingly ensured that that the controls they were putting in place could be easily circumvented if it ever became possible for parents to establish the gender of their unborn child themselves.

And that, in the end, is precisely what happened. A test became available that allowed parents to determine the gender of their unborn child fetus without ever having to visit their doctor or a clinic.

Except to arrange the abortion that is...

Reacting to this development, the SOGC re-iterated its 2001 policy that testing for the purpose of identifying a fetus’ gender “should not be used to accommodate societal preferences”, a breathtaking demonstration of impertinence given that its members were no longer needed to perform such testing. Meanwhile, the BC College of Physicians and Surgeons described the practice as “repugnant”.

It seems not to have occurred to anyone in these organizations that aborting a fetus because its parents do not want a disabled child – or *any* child for that matter – is just as much an accommodation of a “societal preference” as aborting a fetus because its parents do not want a female child. What makes the latter “repugnant” if the former is acceptable? And if a fetus really is a non-entity without intrinsic value or rights of its own, what difference does it make if it is aborted to “accommodate societal preferences”, irrespective of how “repugnant” those preferences are?

These troubling questions expose just how intellectually weak Canada's practice *vis-a-vis* abortion is by laying bare the inherent illogic that is at the heart of that practice. What is telling – and more than a little disturbing – is that the questions are being raised, not by opponents of abortion, *but by its defenders*, who believe that they are advancing a progressive agenda when, in fact, the agenda they are advancing is profoundly nihilistic.

Whatever side of the abortion divide one is on, one thing is clear: the absence of a coherent national policy is leading to consequences that were hard to predict two decades ago and that few Canadians, including many passionate defenders of abortion rights themselves, desire.

Other countries have managed to navigate the anti-intellectualism that has come to dominate the debate and have enacted laws that address, however imperfectly, the challenges Canadians lawmakers seem so determined to flee from in spite of overwhelming public support for government action. In doing so, these countries have succeeded in striking some semblance of balance between the interests and rights of all stakeholders – including unborn children – without tearing their societies apart. If they can do it, surely so can we.

After all, we do it for frogs and bricks, don't we?

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