1988

The Canadian Supreme Court's Abortion Decision

Supreme Court Canada.

THE CANADIAN SUPREME COURT'S ABORTION DECISION

Like the United States, Canada has a written constitution and judicial review, though both the constitutional text and the institution of judicial review differ somewhat from ours. Not surprisingly, the abortion issue, which has proved to be perhaps the most controversial of all constitutional issues in the United States, has also been a subject of constitutional dispute in Canada. Recently, the Canadian Supreme Court declared the current Canadian abortion law unconstitutional. Although the opinions of the judges are too lengthy to reproduce in full, we thought our readers in the United States would be interested in knowing more about the decision.

Luckily, the decision is accompanied by some helpful introductory material, excerpting the relevant statutes and charter provisions, as well as summarizing the written opinions. We are reprinting those materials for your edification and enjoyment. As you will see, some of the majority Justices followed an analysis rather different from that of the majority in Roe v. Wade. *Despite the superficial similarity in outcomes, the Canadian case is much more than a replay of the U.S. litigation. We plan to offer a more extensive discussion of the Canadian decision in a later issue.*

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RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Criminal Code

251.(1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out nis intention is guilty of an indictable offence and is liable to imprisonment for life.

(2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years.

(3) In this section, "means" includes

(*a*) the administration of a drug or other noxious thing,

(*b*) the use of an instrument, and

(*c*) manipulation of any kind.

(4) Subsections (1) and (2) do not apply to

(*a*) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any

means for the purpose of carrying out his intention to procure the miscarriage of a female person, or

(*b*) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means described in paragraph (*a*) for the purpose of carrying out her intention to procure her own miscarriage, if, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of such female person has been reviewed,

(*c*) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and

(*d*) has caused a copy of such certificate to be given to the qualified medical practitioner.

(5) The Minister of Health of a province may by order

(*a*) require a therapeutic abortion committee for any hospital in that province, or any member thereof, to furnish to him a copy of any certificate described in paragraph 4(*c*) issued, by that committee, together with such other information relating to the circumstances surrounding the issue of that certificate as he may require, or

(*b*) require a medical practitioner who, in that province, has procured the miscarriage of any female person named in a certificate described in paragraph (4)(*c*), to furnish to him a copy of that certificate, together with such other information relating to the procuring of the miscarriage as he may require.

(6) For the purposes of subsections (4) and (5) and this subsection

"accredited hospital" means a hospital accredited by the Canadian Council on Hospital Accreditation in which diagnostic services and medical, surgical and obstetrical treatment are provided;

"approved hospital" means a hospital in a province approved for the purposes of this section by the Minister of Health of that province;

"board" means the board of governors, management or directors, or the trustees, commission or other person or group of persons having the control and management of an accredited or approved hospital;

"Minister of Health" means

(*a*) in the Provinces of Ontario, Quebec, New

Brunswick, Manitoba, Newfoundland and Prince Edward Island, the Minister of Health,

(*a*.1) In the Province of Alberta, the Minister of Hospitals and Medical Care,

(*b*) in the Province of British Columbia, the Minister of Health Services and Hospital Insurance,

(*c*) in the Provinces of Nova Scotia and Saskatchewan, the Minister of Public Health, and

(*d*) in the Yukon Territory and the Northwest Territories, the Minister of National Health and Welfare;

"qualified medical practitioner" means a person entitled to engage in the practice of medicine under the laws of the province in which the hospital referred to in subsection (4) is situated;

"therapeutic abortion committee" for any hospital means a committee, comprised of not less than three members each of whom is a qualified medical practitioner, appointed by the board of that hospital for the purpose of considering and determining questions relating to terminations of pregnancy within the hospital.

(7) Nothing in subsection (4) shall be construed as making unnecessary the obtaining of any authorization or consent that is or may be required, otherwise than under this Act, before any means are used for the purpose of carrying out an intention to procure the miscarriage of a female person.

The Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

. . .

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

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r.v. morgentaler

Dr. Henry Morgentaler
Dr. Leslie Frank Smoling
Dr. Robert Scott — *Appellants*

v.

Her Majesty The Queen — *Respondent*

and

The Attorney General of Canada — *Intervener*

indexed as: r.v. morgentaler

File No.: 19556.

1986: October 7, 8, 9, 10; 1988: January 28.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Lamer, Wilson and La Forest JJ.

on appeal from the court of appeal for ontario.

Constitutional law—Charter of Rights—Life, liberty and security of the person—Fundamental justice—Abortion—Criminal Code prohibiting abortion except where life or health of woman endangered—Whether or not abortion provisions infringe right to life, liberty and security of the person—If so, whether or not such infringement in accord with fundamental justice—Whether or not impugned legislation reasonable and demonstrably justified in a free and democratic society—Canadian Charter of Rights and Freedoms, ss. 1, 7—Criminal Code, R.S.C. 1970, c. C-34, s. 251.

Constitutional law—Jurisdiction—Superior court powers and inter-delegation—Whether or not therapeutic abortion committees exercising s. 96 court functions—Whether or not abortion provisions improperly delegate criminal law powers—Constitution Act, 1867, ss. 91(27), 96.

Constitutional law—Charter of Rights—Whether or not Attorney General's right of appeal constitutional—Costs—Whether or not prohibition on costs constitutional—Criminal Code, R.S.C. 1970, c. C-34, ss. 605, s. 610(3).

Criminal law—Abortion—Criminal Code prohibiting abortion and procuring of abortion except where life or health of woman endangered—Whether or not abortion provisions ultra vires Parliament—Whether or not abortion provisions infringe right to life, liberty and security of the person—Whether or not any infringement in accord with fundamental justice—Whether or not impugned legis-

lation reasonable and demonstrably justified in a free and democratic society.

Criminal law—Juries—Address to jury advising them to ignore law as stated by judge—Counsel wrong.

Appellants, all duly qualified medical practitioners, set up a clinic to perform abortions upon women who had not obtained a certificate from a therapeutic abortion committee of an accredited or approved hospital as required by s. 251(4) of the *Criminal Code*. The doctors had made public statements questioning the wisdom of the abortion laws in Canada and asserting that a woman has an unfettered right to choose whether or not an abortion is appropriate in her individual circumstances. Indictments were preferred against the appellants charging that they had conspired with each other with intent to procure abortions contrary to ss. 423(1)(d) and 251(1) of the *Criminal Code*.

Counsel for the appellants moved to quash the indictment or to stay the proceedings before pleas were entered on the grounds that s. 251 of the *Criminal Code* was *ultra vires* the Parliament of Canada, in that it infringed ss. 2(a), 7 and 12 of the *Charter*, and was inconsistent with s. 1(b) of the *Canadian Bill of Rights*. The trial judge dismissed the motion, and the Ontario Court of Appeal dismissed an appeal from that decision. The trial proceeded before a judge sitting with a jury, and the three accused were acquitted. The Crown appealed the acquittal and the appellants filed a cross-appeal. The Court of Appeal allowed the appeal, set aside the acquittal and ordered a new trial. The Court held that the cross-appeal related to issues already raised in the appeal, and the issues, therefore, were examined as part of the appeal. Leave to appeal was granted by this Court.

The Court stated the following 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 s. 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 (*f*), 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(*f*), 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*?

Held (McIntyre and La Forest JJ. dissenting): The appeal should be allowed and the acquittals restored. The first constitutional question should be answered in the affirmative as regards s. 7 only and the second in the negative as regards s. 7 only. The third, fourth and fifth constitutional questions should be answered in the negative. The sixth constitutional question should be answered in the negative with respect to s. 605 of the *Criminal Code* and should not be answered as regards s. 610(3). The seventh constitutional question should not be answered.

Per Dickson C.J. and Lamer J.: Section 7 of the *Charter* requires that the courts review the substance of legislation once the legislation has been determined to infringe an individual's right to "life, liberty and security of the person." Those interests may only be impaired if the principles of fundamental justice are respected. It was sufficient here to investigate whether or not the impugned legislative provisions met the procedural standards of fundamental justice and the Court accordingly did not need to tread the fine line between substantive review and the adjudication of public policy.

State interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitutes a breach of security of the person. Section 251 clearly interferes with a woman's physical and bodily integrity. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus an infringement of security of the person. A second breach of the right to security of the person occurs independently as a result of the delay in obtaining therapeutic abortions caused by the mandatory procedures of s. 251 which results in a higher probability of complications and greater risk. The harm to the psychological integrity of women seeking abortions was also clearly established.

Any infringement of the right to life, liberty and security of the person must comport with the principles of fundamental justice. These principles are to be found in the basic tenets of our legal sys-

tem. One of the basic tenets of our system of criminal justice is that when Parliament creates a defence to a criminal charge, the defence should not be illusory or so difficult to attain as to be practically illusory.

The procedure and restrictions stipulated in s. 251 for access to therapeutic abortions make the defence illusory resulting in a failure to comply with the principles of fundamental justice. A therapeutic abortion may be approved by a "therapeutic abortion committee" of an "accredited or approved hospital". The requirement of s. 251(4) that at least four physicians be available at that hospital to authorize and to perform an abortion in practice makes abortions unavailable in many hospitals. The restriction attaching to the term "accredited" automatically disqualifies many Canadian hospitals from undertaking therapeutic abortions. The provincial approval of a hospital for the purpose of performing therapeutic 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 as well can heavily restrict or even deny the practical availability of the exculpatory provisions of s. 251(4).

The administrative system established in s. 251(4) fails 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 typically impossible for women to know in advance what standard of health will be applied by any given committee.

The argument that women facing difficulties in obtaining abortions at home can simply travel elsewhere would not be especially troubling if those difficulties were not in large measure created by the procedural requirements of s. 251. The evidence established convincingly that it is the law itself which in many ways *prevents* access to local therapeutic abortion facilities.

Section 251 cannot be saved under s. 1 of the *Charter*. The objective of s. 251 as a whole, namely to balance the competing interests identified by Parliament, is sufficiently important to pass the first stage of the s. 1 inquiry. The means chosen to advance its legislative objectives, however, are not reasonable or demonstrably justified in a free and democratic society. None of the three elements for assessing the proportionality of means to ends is met. Firstly, the procedures and administrative structures created by s. 251 are often unfair and arbitrary. Moreover, these procedures im-

pair s. 7 rights far more than is necessary because they hold out an illusory defence to many women who would *prima facie* qualify under the exculpatory provisions of s. 251(4). Finally, the effects of the limitation upon the s. 7 rights of many pregnant women are out of proportion to the objective sought to be achieved and may actually defeat the objective of protecting the life and health of women.

Per Beetz and Estey JJ.: Before the advent of the *Charter*, Parliament recognized, in adopting s. 251(4) of the *Criminal Code*, that the interest in the life or health of the pregnant woman takes precedence over the interest in prohibiting abortions, including the interest of the state in the protection of the foetus, when "the continuation of the pregnancy of such female person would or would be likely to endanger her life or health". This standard in s. 251(4) became entrenched at least as a minimum when the "right to life, liberty and security of the person" was enshrined in the *Canadian Charter of Rights and Freedoms* at s. 7.

"Security of the person" within the meaning of s. 7 of the *Charter* must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an act of Parliament forces a pregnant woman whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate treatment or no treatment at all, her right to security of the person has been violated.

According to the evidence, the procedural requirements of s. 251 of the *Criminal Code* significantly delay pregnant women's access to medical treatment resulting in an additional danger to their health, thereby depriving them of their right to security of the person. This deprivation does not accord with the principles of fundamental justice. While Parliament is justified in requiring a reliable, independent and medically sound opinion as to the "life or health" of the pregnant woman in order to protect the state interest in the foetus, and while any such statutory mechanism will inevitably result in some delay, certain of the procedural requirements of s. 251 of the *Criminal Code* are nevertheless manifestly unfair. These requirements are manifestly unfair in that they are unnecessary in respect to Parliament's objectives in establishing the administrative structure *and* in that they result in additional risks to the health of pregnant women.

The following statutory requirements contribute to the manifest unfairness of the administrative structure imposed by the *Criminal Code*: (1) the requirement that all therapeutic abortions must

take place in an "accredited" or "approved" hospital as defined in s. 251(6); (2) the requirement that the committee come from the accredited or approved hospital in which the abortion is to be performed; (3) the provision that allows hospital boards to increase the number of members of a committee; (4) the requirement that all physicians who practise lawful therapeutic abortions be excluded from the committees.

The primary objective of s. 251 of the *Criminal Code* is the protection of the foetus. The protection of the life and health of the pregnant woman is an ancillary objective. The primary objective does relate to concerns which are pressing and substantial in a free and democratic society and which, pursuant to s. 1 of the *Charter*, justify reasonable limits to be put on a woman's right. However, the means chosen in s. 251 are not reasonable and demonstrably justified. The rules unnecessary in respect of the primary and ancillary objectives which they are designed to serve, such as the abovementioned rules contained in s. 251, cannot be said to be rationally connected to these objectives under s. 1 of the *Charter*. Consequently, s. 251 does not constitute a reasonable limit to the security of the person.

It is not necessary to answer the question concerning the circumstances in which there is a proportionality between the effects of s. 251 which limit the right of pregnant women to security of the person and the objective of the protection of the foetus. In any event, the objective of protecting the foetus would not justify the severity of the breach of pregnant women's right to security of the person which would result if the exculpatory provision of s. 251 was completely removed from the *Criminal Code*. However, it is possible that a future enactment by Parliament that would require a higher degree of danger to health in the latter months of pregnancy, as opposed to the early months, for an abortion to be lawful, could achieve a proportionality which would be acceptable under s. 1 of the *Charter*.

Given the conclusion that s. 251 contains rules unnecessary to the protection of the foetus, the question as to whether a foetus is included in the word "everyone" in s. 7, so as to have a right to "life, liberty and security of the person" under the *Charter*, need not be decided.

Section 251 is not colourable provincial legislation in relation to health but rather a proper exercise of Parliament's criminal law power pursuant to s. 91(27) of the *Constitution Act, 1867*. The section does not offend s. 96 of the *Constitution Act, 1867* because the therapeutic abortion committees are not given judicial powers

which were exercised by county, district and superior courts at the time of Confederation. These committees exercise a medical judgment on a medical question. Finally, s. 251 does not constitute an unlawful delegation of federal legislative power nor does it represent an abdication of the criminal law power by Parliament.

There is no merit in the argument based on s. 605(1)(*a*) of the *Criminal Code*. It is unnecessary to decide whether or not s. 610(3) of the *Criminal Code* violates ss. 7, 11(*d*), 11 (*f*), 11(*h*) and 15 of the *Charter* or whether this Court has the power to award costs on appeals under s. 24(1) of the *Charter*. Whatever this Court's power to award costs in appeals such as this one, costs should not be awarded in this case.

Per Wilson J.: Section 251 of the *Criminal Code*, which limits the pregnant woman's access to abortion, violates her right to life, liberty and security of the person within the meaning of s. 7 of the *Charter* in a way which does not accord with the principles of fundamental justice.

The right to "liberty" contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting his or her private life. Liberty in a free and democratic society does not require the state to approve such decisions but it does require the state to respect them.

A woman's decision to terminate her pregnancy falls within this class of protected decisions. It is one that will have profound psychological, economic and social consequences for her. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well.

Section 251 of the *Criminal Code* takes a personal and private decision away from the woman and gives it to a committee which bases its decision on "criteria entirely unrelated to [the pregnant woman's] priorities and aspirations."

Section 251 also deprives a pregnant woman of her right to security of the person under s. 7 of the *Charter*. This right protects both the physical and psychological integrity of the individual. Section 251 is more deeply flawed than just subjecting women to considerable emotional stress and unnecessary physical risk. It asserts that the woman's capacity to reproduce is to be subject, not to her own control, but to that of the state. This is a direct interference with the woman's physical "person".

This violation of s. 7 does not accord with either procedural fairness or with the fundamental rights and freedoms laid down elsewhere in the *Charter*. A deprivation of the s. 7 right which has

the effect of infringing a right guaranteed elsewhere in the *Charter* cannot be in accordance with the principles of fundamental justice.

The deprivation of the s. 7 right in this case offends freedom of conscience guaranteed in s. 2(*a*) of the *Charter*. The decision whether or not to terminate a pregnancy is essentially a moral decision and in a free and democratic society the conscience of the individual must be paramount to that of the state. Indeed, s. 2(*a*) makes it clear that this freedom belongs to each of us individually. "Freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality and the terms "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning. The state here is endorsing one conscientiously-held view at the expense of another. It is denying freedom of conscience to some, treating them as means to an end, depriving them of their "essential humanity."

The primary objective of the impugned legislation is the protection of the foetus. This is a perfectly valid legislative objective. It has other ancillary objectives, such as the protection of the life and health of the pregnant woman and the maintenance of proper medical standards.

The situation respecting a woman's right to control her own person becomes more complex when she becomes pregnant, and some statutory control may be appropriate. Section 1 of the *Charter* authorizes reasonable limits to be put upon the woman's right having regard to the fact of the developing foetus within her body.

The value to be placed on the foetus as potential life is directly related to the stage of its development during gestation. The undeveloped foetus starts out as a newly fertilized ovum; the fully developed foetus emerges ultimately as an infant. A developmental progression takes place in between these two extremes and it has a direct bearing on the value of the foetus as potential life. Accordingly, the foetus should be viewed in differential and developmental terms. This view of the foetus supports a permissive approach to abortion in the early stages where the woman's autonomy would be absolute and a restrictive approach in the later stages where the state's interest in protecting the foetus would justify its prescribing conditions. The precise point in the development of the foetus at which the state's interest in its protection becomes "compelling" should be left to the informed judgment of the legislature which is in a position to receive submissions on the subject from all the relevant disciplines.

Section 251 of the *Criminal Code* cannot be saved under s. 1 of

the *Charter*. It takes the decision away from the woman at all stages of her pregnancy and completely denies, as opposed to limits, her right under s. 7. Section 251 cannot meet the proportionality test; it is not sufficiently tailored to the objective; it does not impair the woman's right "as little as possible." Accordingly, even if s. 251 were to be amended to remedy the procedural defects in the legislative scheme, it would still not be constitutionally valid.

The question whether a foetus is covered by the word "everyone" in s. 7 so as to have an independent right to life under that section was not dealt with.

Per McIntyre and La Forest JJ. (dissenting): Save for the provisions of the *Criminal Code* permitting abortion where the life or health of the woman is at risk, no right of abortion can be found in Canadian law, custom or tradition and the *Charter*, including s. 7, does not create such a right. Section 251 of the *Criminal Code* accordingly does not violate s. 7 of the *Charter*.

The power of judicial review of legislation, although given greater scope under the *Charter*, is not unlimited. The courts must confine themselves to such democratic values as are clearly expressed in the *Charter* and refrain from imposing or creating rights with no identifiable base in the *Charter*. The Court is not entitled to define a right in a manner unrelated to the interest that the right in question was meant to protect.

The infringement of a right such as the right to security of the person will occur only when legislation goes beyond interfering with priorities and aspirations and abridges rights included in or protected by the concept. The proposition that women enjoy a constitutional right to have an abortion is devoid of support in either the language, structure or history of the constitutional text, in constitutional tradition, or in the history, traditions or underlying philosophies of our society.

Historically, there has always been a clear recognition of a public interest in the protection of the unborn and there is no evidence or indication of general acceptance of the concept of abortion at will in our society. The interpretive approach to the *Charter* adopted by this Court affords no support for the entrenchment of a constitutional right of abortion.

As to the asserted right to be free from state interference with bodily integrity and serious state-imposed psychological stress, an invasion of the s. 7 right of security of the person, there would have to be more than state-imposed stress or strain. A breach of the right would have to be based upon an infringement of some interest which would be of such nature and such importance as to warrant

constitutional protection. This would be limited to cases where the state-action complained of, in addition to imposing stress and strain, also infringed another right, freedom or interest which was deserving of protection under the concept of security of the person. Abortion is not such an interest. Even if a general right to have an abortion could be found under s. 7, the extent to which such right could be said to be infringed by the requirements of s. 251 of the *Code* was not clearly shown.

A defence created by Parliament could only be said to be illusory or practically so when the defence is not available in the circumstances in which it is held out as being available. The very nature of the test assumes that Parliament is to define the defence and, in so doing, designate the terms upon which it may be available. The allegation of procedural unfairness is not supported by the claim that many women wanting abortions have been unable to get them in Canada because the failure of s. 251(4) to respond to this need. This machinery was considered adequate to deal with the type of abortion Parliament had envisaged. Any inefficiency in the administrative scheme is caused principally by forces external to the statute—the general demand for abortion irrespective of the provisions of s. 251. A court cannot strike down a statutory provision on this basis.

Section 605(1)(*a*), which gives the Crown a right of appeal against an acquittal in a trial court on any ground involving a question of law alone, does not offend ss. 11(*d*), 11(*f*) and 11(*h*) of the *Charter*. The words of s. 11(*h*), "if finally acquitted" and "if finally found guilty," must be construed to mean after the appellate procedures have been completed, otherwise there would be no point or meaning in the word "finally."

Section 251 did not infringe the equality rights of women, abridge freedom of religion, or inflict cruel or unusual punishment. The section was not in pith and substance legislation for the protection of health and therefore within provincial competence but rather was validly enacted under the federal criminal law power. There was no merit to the arguments that s. 251 purported to give powers to therapeutic abortion committees exercised by county, district, and superior courts at the time of Confederation or that it delegated powers relating to criminal law to the provinces generally. No evidence supported the defence of necessity.