Constitutional Law and Abortion in Saskatchewan: *The Freedom of Informed Choice (Abortions) Act*

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Abstract

This paper reviews the history of Bill 53, the *Freedom of Informed Choice (Abortions) Act*. A private member's bill introduced in the Saskatchewan Legislative Assembly in 1985, Bill 53 would have imposed additional consent requirements on women seeking abortions. After concerns about its constitutionality were raised, the Bill was referred to the Saskatchewan Court of Appeal, which found it fell outside provincial jurisdiction. This paper explores the connection between Bill 53 and its more well-known cousins, Morgentaler and Borowski, and examines judicial and political decision-making in the early Charter era.

Keywords: legal history, abortion, constitutional law, Saskatchewan, political process.

Résumé

Ce document passe en revue l'historique du projet de loi 53 – *Freedom of Informed Choice Act (Avortements)*. Le projet de loi 53, un projet de loi d'initiative parlementaire présenté à l'Assemblée législative de la Saskatchewan en 1985, aurait imposé des exigences supplémentaires en matière de consentement aux femmes qui demandent un avortement. Après que des préoccupations aient été soulevées au sujet de sa constitutionnalité, le projet de loi a été renvoyé à la Cour d'appel de la Saskatchewan, qui a conclu que celui-ci ne relevait pas de la compétence provinciale. Cet article explore les liens entre le projet de loi 53 et d'autres affaires plus connues, Morgentaler et Borowski, et examine le processus décisionnel sur le plan judiciaire et politique au début de l'ère de la Charte.

Mots clés: histoire juridique, avortement, loi constitutionnelle, Saskatchewan, processus politique.

I. Introduction

The week before Christmas, in 1985, a panel of the Saskatchewan Court of Appeal sat for arguments in two cases involving the intersection of abortion regulation and

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the Constitution. For the first three days, the Court heard from Joe Borowski's lawyer who claimed that s. 7 of the *Charter*[1] protected a fetal right to life. On Thursday, the Court heard arguments on the constitutionality of Bill 53, *The Freedom of Informed Choice (Abortions) Act*,[2] a private member's bill which had been referred from second reading in the Legislative Assembly to the Court for an advisory opinion[3] as to potential *Charter* and federalism defects. Government-appointed counsel Tom Gauley argued that Bill 53 violated women's *Charter* rights and also exceeded provincial jurisdiction over health under s. 92 of the *Constitution Act, 1867*.[4] The next day, the Court released its decision finding the province lacked authority under s. 92 to enact such legislation. Borowski's arguments were also rejected by the Court eighteen months later.[5] For most appellate justices, their entire tenure will pass without a single case on abortion rights, so it is exceptional the panel heard two such cases in one week. The paths of these cases diverged, however, in the months that followed. *Borowski* was appealed to the Supreme Court, while the advisory opinion was not; *Borowski* has received popular and scholarly attention, whereas the reference has largely disappeared from popular memory, garnering only a handful of academic and legal citations. As an early *Charter* case on a contentious issue, the reference had the ingredients to be publicly and legally impactful, like its brethren *Borowski* and *Morgentaler*. The Court's opinion, finding the Bill invalid on federalism rather than *Charter* grounds, likely muted its impact, as did the fact that the government did not appeal the ruling to the Supreme Court.

This paper brings Bill 53 out from the shadows of its well-known cousins, tracing the Bill's journey from drafting at an American law firm to debate in the Legislative Assembly to eventual demise at the Court of Appeal. Not only is Bill 53 an overlooked piece of Saskatchewan legal history, it is unique in Canada, one of a handful of provincial-level legislative attempts to restrict access to abortion challenged in court and the only one blocked by a reference proceeding.[6]

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2 Bill 53, *An Act Respecting Freedom of Informed Choice Concerning Abortions in Saskatchewan*, 4th Sess, 20th Leg, Saskatchewan, 1984-85 [*Bill 53*].

3 As Carissima Mathen highlights in her recent book, an advisory opinion or reference is a unique type of proceeding. Typically, cases involve disputes between parties, whereas references are requests by the government for advice from the judiciary and are technically not binding (though in practice, they are treated as authoritative precedent): Carissima Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinion* (New York: Hart Publishing, 2019), 180–81. References are controversial in that they challenge the traditional separation of powers, by subjecting the judiciary, which does not typically operate in response to the will of the executive, to the government's requests for advice: Ibid., 62–63, 180.

4 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92.

5 *Borowski v Canada (AG)* (1987), 39 DLR (4th) 731, 33 CCC (3d) 402 (Sask CA).

6 Bill 53 uniquely focused on consent, but other provinces have sought to limit access to abortion. Many provinces restricted public funding for abortion following the 1988 *Morgentaler* case: see Sarah Burningham, "Provincial jurisdiction over abortion," *Queen's Law Journal* (forthcoming). In 1985, New Brunswick enacted a law attaching professional sanction to physicians who provided abortions in private clinics: *Medical Act*, SNB 1985, c 76, ss 56(b.1), 56.2. The law was struck down by the province's Court of Appeal in 1995: *Morgentaler v New Brunswick (Attorney General)* (1995), 121 DLR (4th) 431, 156 NBR (2d) 205 (NB CA) [*Morgentaler NB*]. Nova Scotia's *Medical Services Act*, RSNS 1989, c 281, prohibited the provision of abortion outside hospitals and was ultimately struck down by the Supreme Court in 1993: *R v Morgentaler*, [1993] 3 SCR 463 at 490, 107 DLR (4th) 537 [*Morgentaler SCC 93* cited to SCR]. Until recently, Prince Edward Island

This account of Bill 53 focuses a lens on early *Charter* decision-making, both political and judicial, and reveals how the Bill's journey was shaped by tensions inherent in constitutionalism, democracy, and the separation of powers.

The paper begins by reviewing the history of abortion restriction in this country and setting the legal and political context in which the Bill was introduced, namely a time of activism reflecting dissatisfaction with the halfway position introduced by the *Criminal Code*[7] amendment fifteen years earlier. Next, the debates at the legislative assembly are discussed, as is the decision to send the Bill for a reference following second reading, a choice seemingly intended to avoid political backlash by offloading the controversial issue to the judiciary.[8] The content of the Bill is reviewed, and the influence of American sources on the Bill's drafting is explored. Finally, the Court of Appeal's decision is reviewed, and the implications for future provincial regulation of abortion—namely, the limited capacity of provinces to legislate in this area—are highlighted.

II. Canada, 1985: Abortion Regulation at a Constitutional Crossroads

This section of the paper briefly reviews the history of abortion regulation in Canada, focusing particularly on the 1969 reform, the introduction of the *Charter*, and the parallel journeys of *Borowski* and *Morgentaler*,[9] to illustrate the historical and legal context in which Bill 53 was considered. A description of Bill 53's introduction and the corresponding debate in the Legislative Assembly concludes this part.

The first statutes prohibiting abortion were enacted in Canada and in the United Kingdom in the early 19th century.[10] Prior to this, at common law, abortions performed before quickening were not criminal.[11] Legislation in the latter half of the 19th century increasingly restricted the practice,[12] and shortly after Confederation, the federal government enacted *An Act respecting Offences against the Person,* which prohibited the provision and receipt of abortion as well as the supply of material used to cause abortions.[13] That prohibition was included in the 1892 *Criminal Code* and in its subsequent revisions.[14]

had an informal policy in place prohibiting abortions from taking place in that province: see Joanna N. Erdman, "A constitutional future for abortion rights in Canada," *Alberta Law Review* 54, no. 3 (March 2017): 727.

7 *Criminal Code*, RSC 1970, c C-34, s 251.

8 Knopff and Morton have made this same observation. In their view, the government's decision to invoke the reference procedure to deal with Bill 53 was a quintessential example of "issue avoidance," permitting the Legislature to duck the controversial issue by off-loading it to the courts: Rainer Knopff & F. L. Morton, *Charter Politics* (Scarborough: Nelson Canada, 1992), 30–31.

9 *R v Morgentaler, Smoling and Scott*, [1984] OJ No 3291, 12 DLR (4th) 502 (Ont H Ct J); *R v Morgentaler, Smoling and Scott*, [1984] OJ No 3386, 14 DLR (4th) 184 (Ont CA); *R v Morgentaler,* [1988] 1 SCR 30 at 86–87, 44 DLR (4th) 385 [*Morgentaler SCC 88* cited to SCR].

10 Constance B. Backhouse, "Involuntary motherhood: Abortion, birth control and the law in nineteenth century Canada," Windsor Yearbook of Access to Justice 3 (1983); *Lord Ellenborough's Act* (UK), 1803, 43 Geo III, c 58; *An Act…for the further prevention of the malicious using of means to procure the miscarriage of women* (UK), 1810 (NB), 50 Geo III, c 2.

11 Backhouse, 64–65.

12 Ibid., 69–74.

13 1869 (Can), c 20.

14 *Morgentaler SCC 93*; *Morgentaler SCC 88*; *Criminal Code,* SC 1892, c 29, ss 272–74; *Criminal Code*, RSC 1906, c 146, ss 303–06; *Criminal Code,* RSC 1927, c 36, ss 303–06; *Criminal Code*, SC 1953–54, c 51, ss 237–38.

In 1969, Parliament introduced a narrow exception to the *Criminal Code* prohibition. The reform efforts were led by physicians who feared prosecution given legal uncertainty about when abortions could be performed if needed to preserve the health of pregnant women.[15] The discussion at the time was couched in "a discourse of medicalization, which focused on the practical needs of doctors."[16] Under the new regime, women seeking abortions could apply to "therapeutic abortion committees" (TACs) for approval, which TACs were authorized to grant if the woman's health was "endanger[ed]" by continuation of the pregnancy.[17] While the 1969 reform is sometimes described as decriminalization, abortion generally remained criminal, attracting significant penalties for those who acted outside the TAC framework.[18] The amendment has been described as "a political compromise" that attempted to placate both anti-abortion and pro-choice groups while providing clarity and guidance to physicians, but it also—perhaps most importantly from the perspective of the federal government—took abortion off the federal legislative agenda and shifted enforcement to the provinces.[19]

The TAC regime operated dismally in practice. The "health" criterion was inconsistently applied across the country, the system was plagued by delays, and, as a result, many women were unable to access abortion in a timely manner.[20] Feminist groups, which had largely not been involved in the 1969 reform, were critical of the new regime and its continued restrictions, and they organized against it.[21]

Shortly after the reforms were implemented, Dr. Morgentaler was charged for performing abortions without TAC approval. His acquittal by a Montreal jury was overturned on appeal, and his conviction upheld by the Supreme Court in 1975.[22] His clinic continued, however, and subsequent attempts at prosecution ended in jury acquittals, leading the Quebec Attorney General to end its efforts to prosecute him.[23]

At around the same time, anti-abortion campaigner Joe Borowski had joined forces with Regina-based lawyer Morris Shumiatcher to launch an independent

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15 Jane Jenson, "Getting to *Morgentaler*: From one representation to another," in *The Politics of Abortion*, ed. Janine Brodie, Shelley A. M. Gavigan, and Jane Jenson (Toronto: Oxford University Press, 1992), 24–25.

16 Ibid., 21.

17 *Criminal Code*, RSC 1970, c C-34, s 251.

18 F. L. Morton, *Morgentaler v Borowski: Abortion, the Charter and the Courts* (Toronto: McClelland & Stewart Inc., 1992), 27.

19 Ibid.

20 Susan A. McDaniel, "Implementation of abortion policy in Canada as a women's issue," *Atlantis: Critical Studies in Gender, Culture & Social Justice* 10, no. 2 (April 1985): 89; Robin F. Badgley (chair), *Report of the Committee on the Operation of the Abortion Law* (Ottawa: Printing & Publishing Supply & Services Canada, 1977), 251–79.

21 Lorna Weir, "Left popular politics in Canadian feminist abortion organizing, 1982–1991," *Feminist Studies* 20, no. 2 (Summer 1994): 249; Morton, *Morgentaler v Borowski*, 29; Judy Rebick, *Ten Thousand Roses: The Making of a Feminist Revolution* (Toronto: Penguin Group, 2005), 35–46. Examples of organization include the "Abortion Caravan," originating in Vancouver in 1970, and "mock tribunals" held in cities across the country, which centered on women's voices and experiences with the TACs. For more information see Beth Palmer, "Abortion on trial: Abortion tribunals in the 1970s and 1980s," in *Abortion: History, Politics, and Reproductive Justice after Morgentaler*, ed. Shannon Stettner, Kristin Burnett, and Travis Hay (Vancouver: UBC Press, 2017), 114–17; Jenson, "Getting to *Morgentaler*," 44.

22 *Morgentaler v The Queen* (1975), [1976] 1 SCR 616, 53 DLR (3d) 161 [*Morgentaler SCC 75* cited to SCR]; Morton, *Morgentaler v Borowski*, 48.

23 Rebick, *Ten Thousand Roses,* 48, 156; Morton, *Morgentaler v Borowski*, 19.

challenge to the 1969 amendment in court. In a claim filed in Regina Queen's Bench in September 1978, they argued the *Bill of Rights*[24] protected a fetal right to life and sought to enjoin public funding of abortions.[25] Preliminary questions regarding jurisdiction and standing took the case to the Supreme Court, which ruled in Borowski's favour in 1981, setting the stage for the claim to finally come to trial.[26]

Both uncertainty and potential were introduced with the *Charter* in April 1982. Unlike the 1969 *Criminal Code* amendment, the *Charter* was substantively impacted by the work and lobbying of women's groups.[27] However, the drafters refused to include in the *Charter* either a right to abortion or a right of the fetus to life, despite requests from feminist groups and anti-abortion groups, respectively.[28] The government insisted that the document was "scrupulously neutral" on the abortion question and its language could not be interpreted as encompassing any rights that would decide the matter one way or another.[29] Others, however, anticipated the *Charter*'s potential impact. For example, in an article published in 1982, Professor Friedland observed that s. 7 provided ammunition for both sides to challenge the existing law in court.[30]

With the support of feminist organizers, Morgentaler opened abortion clinics in Toronto and Winnipeg, with an eye to an eventual *Charter* challenge, "hop[ing] that the *Charter* would serve as a catalyst for more aggressive judicial review of Canada's abortion law."[31] In short order, the clinics were raided by police, Morgentaler was charged, and his trial set to proceed in Ontario.[32] His lawyer brought a pre-trial application, asking the judge to declare s. 251 unconstitutional.[33] The judge rejected the application and the matter proceeded to trial before a jury, ending with an acquittal that was then appealed by the Crown.[34] The Ontario Court of Appeal—which released its decision on October 1, 1985, a month and a half before Bill 53 was before the Saskatchewan Court of Appeal—rejected the argument that the *Charter* protected a woman's right to an abortion

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24 *Canadian Bill of Rights*, SC 1960, c 44.

25 Morton, *Morgentaler v Borowski*, 93; *Borowski v Minister of Justice of Canada and Minister of Finance of Canada*, [1980] 5 WWR 283, 6 Sask R 238 (QB).

26 Morton, *Morgentaler v Borowski*, 93–101; *Minister of Justice (Can) v Borowski*, [1981] 2 SCR 575, [1981] SCJ No 103.

27 Morton, *Morgentaler v Borowski*, 111.

28 Ibid., 111–113.

29 Ibid., 122.

30 M. L. Friedland, "Legal rights under the Charter," *Crim Law Quart* 24 (1982): 433.

31 Morton, *Morgentaler v Borowski*, 129; Rebick, *Ten Thousand Roses,* 157–65. Stettner *et al.* have observed that, although media attention often focused on Morgentaler's legal battles, groups supporting abortion access also mobilized during this time to pressure the government to liberalize abortion laws and to object to Morgentaler's prosecution. For example, the Canadian Association for the Repeal of the Abortion Law (later, the Canadian Abortion Rights Action League) (CARAL) was established in 1974 and sought "to overturn the abortion law and provide political and financial support for Morgentaler's efforts": Shannon Stettner, Kristin Burnett, and Travis Hay, "Introduction," in *Abortion: History, Politics, and Reproductive Justice after Morgentaler,* ed., Shannon Stettner, Kristin Burnett, and Travis Hay (Vancouver: UBC Press, 2017), 10.

32 Rebick, *Ten Thousand Roses,* 156–65.

33 Morton, *Morgentaler v Borowski*, 170.

34 Ibid., 182–94.

and allowed the Crown's appeal.[35] Morgentaler filed his notice of appeal with the Supreme Court two weeks later.[36]

Meanwhile, in Saskatchewan, Borowski had amended his arguments to claim that s. 7 of the *Charter* encompassed a fetal right to life. At trial, Shumiatcher called medical experts from around the world to testify on fetal development, with the intention of demonstrating that recent medical advancements confirmed that the fetus was a biologically distinct being from its mother right from the time of conception.[37] In October 1983, Justice Matheson rejected Borowski's claim. While largely accepting the medical evidence, he found it unhelpful to the *legal* question of whether fetuses had rights, a question he answered in the negative.[38] Borowski appealed to the Saskatchewan Court of Appeal. His case was heard December 16–18, 1985, the same week the Court heard arguments on the constitutionality of Bill 53.[39]

While much of the above discussion has addressed the national picture in the lead up to the reference, it is also important to appreciate the provincial context in which the Bill arose—especially a provincial government that was described at the time as "openly hostile to abortion."[40] Premier Grant Devine was adamant that Morgentaler would not be permitted to open a clinic in the province.[41] Members of caucus, including the Premier and Health Minister Graham Taylor, were vocally pro-life.[42] The government paid the Saskatchewan Pro-Life Association tens of thousands of dollars in the mid-1980s to develop abstinence-only and anti-abortion education programs for high school students, becoming the "first administration in Canada to support the right-to-life movement with public money."[43] The rate of abortion dropped in the province in the early- to mid-1980s, a decline the Premier attributed to the government's "strong public

35 Ibid., 211.

36 Supreme Court of Canada (website); Cases, SCC Case Information, Case no. 19556; "Henry Morgentaler v. Her Majesty the Queen," last modified May 4, 2018, https://www.chicagomanualofstyle.org/book/ed17/part3/ch14/psec207.html.

37 *Borowski v. Attorney General of Canada and Minister of Finance of Canada*, 1983 CanLii 2157, paras 34, 47, 29 Sask R 16 (QB); Morton, *Morgentaler v Borowski*, 135–53, 169.

38 Morton, *Morgentaler v Borowski*, 169; *Borowski v. Attorney General of Canada,* paras. 22–55.

39 Morton, *Morgentaler v Borowski*, 213.

40 "Stop signs and detours in way of abortion," *Maclean's*, July 25, 1983, 36, https://archive.macleans.ca/issue/19830725#!&pid=36.

41 Beverley Spencer, "Province will tell Morgentaler to stay out," *Leader-Post* (Regina, SK), April 26, 1985, A1.

42 Dale Eisler, "A heated debate in Saskatchewan," *Maclean's*, May 2, 1983, 24, https://archive.macleans.ca/issue/19830502#!&pid=24.

43 Anne Collins, *The Big Evasion: Abortion: The Issue that Won't Go Away* (Toronto: Lester & Orpen Dennys, 1985), 46; "More women leave Sask for abortions," *StarPhoenix* (Saskatoon, SK), December 21, 1985, C15; Eisler, "Heated Debate," 24. Saskatchewan Planned Parenthood also received funding from the government at this time. The provincial government ended funding for both Planned Parenthood and the Saskatchewan Pro-Life Association in 1987. David McGrane, "Gender and Saskatchewan social democracy from 1900 to 2000," (paper presented to Annual Conference of Canadian Political Science Association, Toronto, ON, June 3, 2006); Beverly Spencer, "Pro-life group wants government to shun 'anti-family' groups," *Leader-Post* (Regina, SK), June 27, 1986, A12; Alanna Mitchell, "Abortion foes hope for victory in Saskatchewan proposed Medicare cutoff could set national pattern," *The Globe and Mail* (Toronto, ON), May 6, 1992, A1; Murray Mandryk, "Pro and anti-abortion groups slam gov't funding cuts," *Leader-Post* (Regina, SK), April 29, 1987, A5.

stance against abortions."[44] Others, however, have attributed it to restricted access, rather than reduced demand, leading many women to seek assistance outside the province.[45]

According to polls from the time, support for legalization of abortion was lower in Saskatchewan than in the country generally. For example, in a 1984 poll, just over a quarter of Saskatchewan respondents supported decriminalizing abortion while half opposed such a move, compared with 46% of Canadians in favour of decriminalization and 43% opposed (the remaining respondents either did not know or declined to answer).[46]

Against this national and provincial backdrop, Progressive Conservative backbencher and first-time member of the legislative assembly (MLA) Gay Caswell introduced Bill 53 in the Legislative Assembly on April 23, 1985.[47] While Bill 53 was a private member's bill, Caswell believed it was widely supported by her party, including by members of cabinet, and she was certain that it had the support to pass had it gone to a vote.[48] Publicly available documents like Hansard and newspapers from the time indicate that the Bill had some support among MLAs, though the exact degree is hard to gauge. The day after the Bill was introduced, Premier Grant Devine was quoted in the Regina *Leader-Post* as "support[ing] the concept," but he added a caveat: "I won't say I support every inch of the bill."[49] A handful of MLAs spoke in favour of the Bill at second reading, but neither the Minister of Health nor the Premier was among them.[50] It is possible the Bill had extensive support behind closed doors, but that support never materialized into the government adopting the Bill as its own.

While the Bill had some public support,[51] it also had vocal critics, including several academics who spoke out against it. Law professor Howard McConnell noted its "constitutional hazards,"[52] while professors Eric Colvin and Donna Greschner called it "an outrageous violation of the Constitution,"[53] and Jennie

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44 Devine, letter (August 15, 1985), 41. See also "Abortion drop said due to gov't action," *Leader-Post* (Regina, SK), April 30, 1985, A4.

45 "More women leave," C15; Rosemary Knes, "Evidence indicates legal abortions becoming harder to get," *The Ottawa Citizen* (Ottawa, ON), October 4, 1986, B5.

46 Environics Research Group Limited, "Environics Focus Canada 1984-1 [dataset]," (1984), Toronto, ON, Canada: Environics [producer], Canadian Opinion Research Archive (cora-efc1984-E-1984-1) [distributor], Q73, http://odesi1.scholarsportal.info/webview/. Note that support among both Saskatchewan and Canadian respondents increased significantly if the woman's life or health was endangered by continuation of the pregnancy or if the pregnancy resulted from rape: Ibid., at Q74N2-N4.

47 Legislative Assembly of Saskatchewan, *Debates and Proceedings,* 20-4, vol 28 (23 April 1985), 1271.

48 Gay Caswell, reader's viewpoint, "Bill Intended to Help Women," *Leader-Post* (Regina, SK), June 19, 1985, A7; Gay Caswell, interview, June 26, 2019.

49 Murray Mandryk, "Bill would require written consent for abortion," *Leader-Post* (Regina, SK), April 24, 1985, A4.

50 Legislative Assembly of Saskatchewan, *Debates and Proceedings,* 20-4, vol 28 (May 21 1985; June 11, 1985) [*Bill 53 2nd reading*]; Vern Greenshields, "NDP may avoid abortion debate," *StarPhoenix* (Saskatoon, SK), June 6, 1985, A4.

51 See, for example, Jim Church, reader's viewpoint, "'Freedom' bill unjustly criticized," *Leader-Post* (Regina, SK), June 11, 1985, A7; Roy K. Holm, reader's viewpoint, "Church supports pro-life efforts," *Leader-Post* (Regina, SK), June 10, 1985, A7; Caswell, interview, June 26, 2019.

52 Beverley Spencer, "Proposed legislation 'could be vulnerable to attack,'" *Leader-Post* (Regina, SK), April 24, 1985, A4.

53 Eric Colvin and Donna Greschner, viewpoints, "Enactment of Bill 53 would violate constitution," *Leader-Post* (Regina, SK), June 8, 1985, A6.

Abell, writing on behalf of the National Association of Women and Law, described the Bill and its assumptions as "offensive," "paternalistic," and "fascis[t]."[54] Pro-choice groups also rallied against the Bill, calling for Minister of Health Graham Taylor to resign.[55] The Bill—and its supporters and detractors—received a fair amount of media attention in the two major provincial newspapers, priming the pump for a dramatic flare-up over abortion which some members of the governing party likely wished to avoid.

Second reading of the Bill began on May 21, 1985, and continued three weeks later, on June 11, 1985. On May 21, Caswell's speech was pre-empted by sustained applause from dozens of supporters in the gallery,[56] prompting the speaker to remind the public that "participation is by elected members."[57] Caswell's speech leaned in to the idea that the Bill was essentially reiterating well-established and non-controversial informed consent requirements. She spoke at length about ostensible physical and psychological risks associated with abortion, drawing on medical and anecdotal sources.[58] Noting that informed consent was required for other medical procedures and for risky activities, she saw no reason why it would not be required in this context as well.[59] She urged: "whatever position you are, whether you call yourself pro-life or pro-choice, or whatever you can, you can't really legitimately argue against information."[60] Her efforts to cast Bill 53 as one dealing purely with medical information were echoed by other MLAs who spoke in support of the proposed legislation. For example, Weiman stated:

> This Bill's whole thrust is to inform women in our society of those risks that are involved when you choose that route of termination. The Bill asks very plainly and very succinctly that every woman should have the right to know the physiological and the anatomical characteristics of the unborn child, should she go that route … [I]t is a Bill of information, education, and, I might add, health.[61]

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54 Jennie Abell, reader's viewpoint, "Association seeks support in fight against abortion bill," *Leader-Post* (Regina, SK), May 31, 1985, A7.

55 "Anti-abortion bill raises protests," *Leader-Post* (Regina, SK), June 8, 1985, A5; Beverley Spencer, "Groups plan campaign against abortion bill," *Leader-Post* (Regina, SK), June 1, 1985, A3.

56 "Abortion bill provisions said totally consistent," *Leader-Post* (Regina, SK), May 22, 1985, A4.

57 *Bill 53 2nd reading*, 2381.

58 Ibid., 2381–87. Current medical consensus holds that abortion is a safe medical procedure and generally does not negatively impact the mental health of women with unwanted pregnancies who desire an abortion: Sam Rowlands, "Misinformation on abortion," *European Journal of Contraception & Reproductive Health Care* 16, no. 4 (May 2011): 233; Elizabeth G. Raymond and David A. Grimes, "The Comparative Safety of Legal Induced Abortion and Childbirth in the United States," *Obstetrics and Gynecology* 119, no. 2 (February 2012): 215; Kari White, Erin Carroll, and Daniel Grossman, "Complications from first-trimester aspiration abortion: A systematic review of the literature," *Contraception* 92, no. 5 (November 2015): 422; Vignetta E. Charles, C. B. Polis, S. K. Sridhara, and R. W. Blum, "Abortion and long-term mental health outcomes: A systematic review of the evidence," *Contraception* 78, no. 6 (December 2008): 436; American Psychological Association, Task Force on Mental Health and Abortion, "Report of the Task Force on Mental Health and Abortion," Washington, DC: Author, (200-8): 3–4, http://www.apa.org/pi/wpo/mental-health-abortion-report.pdf; M. Antonia Biggs, U. D. Upadhyay, C. E. McCulloch, and D. G. Foster, "Women's mental health and well-being 5 Years after receiving or being denied an abortion," *JAMA Psychiatry* 74, no. 2 (February 2017): 169.

59 *Bill 53 2nd reading,* 2381.

60 Ibid., 2387.

61 Ibid., 2389–91.

Similarly, Minister of Social Services Gordon Dirks denied that the Bill would restrict abortion, asking rhetorically, "how can information limit access to abortion?"[62]

While downplaying the moral dimensions of Bill 53, the MLAs acknowledged the moral dimensions of abortion. For example, Caswell observed:

> The law clearly still is on the side of life. … [W]e obviously don't have a law that says that abortion and taking a pregnancy to term are neutral factors. We do not have abortion on demand that says one choice is as good as another and we are morally neutral. The Criminal Code says that abortion is illegal except for certain restrictions.[63]

Others referenced the state's interest in the fetus and in promoting human life.[64] The Bill's supporters made little mention of women's rights, an omission that New Democratic Party (NDP) MLA Ned Shillington drew attention to when he noted:

> While the proponents of this Bill would like to say it's a Bill about abortion, it is in fact a Bill about human rights, the rights of women … No one would quarrel with the role which has been enunciated in a sense for the Bill, and that is that all consent should be free and fully informed. No one suggests it should be otherwise. … It is our position however that this Bill doesn't accomplish that, doesn't contribute to it, and is offensive on the grounds of human rights.[65]

Minister Dirks, who rose to speak in favour of the Bill, noted that "because of the sensitive and potentially divisive nature of this legislation," it would be desirable to have an advisory opinion from the Court of Appeal on its constitutionality.[66] Minister of Justice Gary Lane then spoke at length about potential constitutional concerns and stated that a reference was "a responsible way to deal with this legally difficult issue."[67] MLAs voted unanimously to send it to the Court of Appeal for an advisory opinion.[68]

Shillington observed that the procedure was "most unusual," as the government had made no effort to rectify potential constitutional infirmities as one might usually expect for a bill that a government was serious about passing.[69] He added, "I think the Bill is therefore dead. I would have felt better if the members of the Assembly had voted in that fashion, instead of accomplishing the same thing in this oblique fashion."[70]

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62 Ibid., 3256 (citing comments attributed to Dr. L. M. Hanson).
63 Ibid., 2385.
64 See e.g. Ibid., 3256.
65 Ibid., 3260–62.
66 Ibid., 3257.
67 Ibid., 3258. Minister Lane added that Caswell had agreed to delete the spousal consent requirement, which, in his view, would cure the *Charter* infirmities: Ibid. It appears that Caswell agreed to dispose of the spousal consent requirement in order to shore up support for the Bill: Vern Greenshields, "Caswell vows to keep fighting," *StarPhoenix* (Saskatoon, SK), June 12, 1985, A20. However, both versions (i.e. with spousal consent and without) of the Bill were sent to the Court of Appeal: Order in council (July 15, 1985), obtained through Access to Information (ATI) request from the Government of Saskatchewan (Gov. SK) (hereinafter called ATI from Gov. SK), 13–16 (of package received). The Court did not comment on what effect deleting the spousal consent requirement would have on the Bill's constitutionality.
68 *Bill 53 2nd reading*, 3263; Greenshields, "Keep Fighting," A20.
69 *Bill 53 2nd reading*, 3260.
70 Ibid., 3261.

Apparently, the idea to send the Bill for a reference was rather last minute, and Caswell was informed of the plan only a few hours prior to the vote.[71] She was surprised by the change in direction as, based on earlier discussions with colleagues, she had believed the Bill would make it to a vote that day.[72] The Health Minister had also reportedly told interested parties that the Bill was expected to pass.[73]

What should one make of Bill 53's unusual journey? Why send it for a reference without first going through committee, amending it, or voting on it? It may be that the reference was a genuine request for assistance on a tricky legal issue.[74] After all, the *Charter* had limited government legislative capacity in ways that were still unclear, and American jurisprudence and academic commentary certainly supported the notion that abortion regulation would be vulnerable to *Charter* attack. On the federalism question, the boundary between criminal law and health law powers was murky (and remains so[75]). Thus, a cautious government may have wanted to avoid the costs of enacting and implementing politically controversial legislation, only to see it struck down shortly thereafter. But, governments have sometimes been known to use the reference power "to avoid 'hot potatoes.'"[76] This is also a plausible read of the government's actions. Instead of holding a vote and taking a side on a polarizing bill, the government could be seen to be doing *something* on abortion, without having to commit to any particular policy. It allowed Devine to state a few weeks later in correspondence with a Saskatchewan resident unhappy with the decision to send the Bill for a reference, "This government remains fully committed to reducing the number of abortions in Saskatchewan … I fully support the principles of Mrs. Caswell's bill, I also recognize the need to proceed on a firm constitutional footing."[77]

Devine and other MLAs could maintain a pro-life stance without having to bear the political costs of controversial legislation and off-load the political question by turning it into a legal matter for the judiciary.[78]

Thus, in the second half of 1985, the Saskatchewan Court of Appeal became set on two counts—*Borowski* and Bill 53—to wade into a national conversation on abortion, the rights of women, and the rights of fetuses, and the limits of government legislative authority. The *Charter*'s potential was about to crystalize: the Saskatchewan Court of Appeal found itself at a constitutional crossroads that could impact the future of abortion regulation in Canada.

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71 Greenshields, "Keep Fighting," A20.
72 Ibid.
73 Ibid.
74 Mathen canvasses reasons a government may seek an advisory opinion, with the legitimate desire for advice identified as one of several reasons: Mathen, *Courts Without Cases*, 182.
75 See, for example, *Reference re Assisted Human Reproduction Act*, 2010 SCC 61.
76 Mathen, *Courts Without Cases*, 187.
77 Grant Devine, letter (August 15, 1985), ATI from Gov. SK., 41–42.
78 See Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada,* Revised Edition (Toronto: Thompson Education Publishing Inc., 1994), 455 (arguing that "the Charter has merely handed over the custody of politics to the legal profession").

III. Bill 53: Content and Connection to American Laws

Bill 53 had two main components: the bulk of it introduced new consent requirements, and the remaining provisions created mandatory reporting requirements for physicians and TACs. The new consent requirements—third-party consent, mandated information, and forty-eight-hour waiting period—did not apply in life-threatening, urgent circumstances.[79] The consent and reporting elements of the Bill are detailed below, followed by a discussion tracing the Bill's origins to American legislation.

First, the Bill prohibited physicians from performing, and TACs from approving, abortions for married women or minors without the consent of their husbands or parents, respectively.[80] The spousal consent requirement would have aligned the law with existing TAC practice, formalizing a widespread but informal requirement that spousal consent be obtained as a condition of approval.[81] The Badgley report, released in 1977, found that, nationally, nearly 70% of hospitals required a husband's consent prior to the procedure; that number was lower in Saskatchewan, at 50%.[82] The provision requiring parental consent for "financially dependent"[83] minors seeking abortions also mirrored TAC practice in the province.[84] The Bill empowered judges to waive this requirement if a woman's life was endangered by continuing the pregnancy or if the third party could not "be located after a reasonable search."[85] However, a waiver was not available in cases of estrangement or abuse. Accordingly, a woman, estranged from her abusive husband but not yet divorced, living with and pregnant by another man, would be required to obtain permission from her abusive spouse to abort a fetus that was not biologically related to him (the Bill did not require the consent of the fetus's biological father). For comparison, less than 20% of TACs at the time required a husband's consent if the parties were separated, according to one survey.[86]

Bill 53 also required that certain information be given to a woman (and her husband or parents, if their consent were required) prior to consent being obtained.[87] This information included the gestational age of the fetus; an explanation of the procedure and health risks associated with it; alternatives to abortion; and a "detailed description" of the fetus (for example, its "appearance" and "brain and heart functions").[88] This sort of provision has been alternatively described as "mandatory counselling";[89] "informed consent";[90] "women's right to know laws";[91]

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79 *Bill 53*, s 8.
80 Ibid., ss 3(c), 3(d).
81 Aldean Stachiw, "Manitoba's abortion story: The fight for women's reproductive autonomy: 1969–2005" (master's thesis, University of Manitoba, 2006), 23, citing Badgley, *Abortion Law*, 239–240.
82 Badgley, *Abortion Law*, 240.
83 *Bill 53*, s 2(f).
84 Badgley, *Abortion Law*, 239.
85 *Bill 53*, s 7.
86 Badgley, *Abortion Law*, 240, footnote 6.
87 *Bill 53*, s 4.
88 Ibid.
89 Theodore J. Joyce, Stanley K. Henshaw, Amanda Dennis, Lawrence B. Finer, and Kelly Blanchard, "The impact of state mandatory counseling and waiting period laws on abortion: A literature review," Guttmacher Institute, April 2009, https://www.guttmacher.org/sites/default/files/report_pdf/mandatorycounseling.pdf.
90 Ibid.
91 Paul Stam, "Woman's Right to Know Act: A legislative history," *Issues Law Med* 28, no. 1 (Summer 2012): 4–5.

and a mandated "script"[92]. While Bill 53 and its supporters in the Legislative Assembly adopted the language of "informed consent," it is worth noting that the Bill likely reached beyond the common law governing informed consent to medical treatment. The responsibility of physicians under the common law was described by the Supreme Court in *Hopp v Lepp*:

> [I]n obtaining the consent of a patient for the performance upon him of a surgical operation, a surgeon, generally, should answer any specific questions posed by the patient as to the risks involved and should, without being questioned, disclose to him the nature of the proposed operation, its gravity, any material risks and any special or unusual risks attendant upon the performance of the operation.[93]

In other words, the common law by this time required that a physician disclose information about the nature of the procedure and associated risks in order for a patient's consent to be sufficiently informed and thus legally valid. Thus, the Bill's requirement that a woman be informed of the nature of the procedure and its risks, being coextensive with common law requirements, was functionally unnecessary, as this information was already mandated by law. However, the Bill also required that women be provided with a "detailed description" of the fetus and community supports that would assist them in taking their pregnancies to term. This information was not required by common law and would have constituted an expansion of information that must be provided. The term "informed consent" to describe this sort of legislation can be a convenient short-hand, but it also risks confusing the common law requirements of informed consent with the additional information required by this type of legislation, which is concerning given that studies from the United States have found that these sorts of provisions are often used to mandate the sharing of medically incorrect or misleading information. For example, a study published in 2016 found that essentially a third of this legally mandated information shared in American states was not accurate.[94]

Finally, the reporting obligations required physicians and TACs to advise the Minister of Health of certain information regarding patients and the procedure, including "the medical basis for approving each therapeutic abortion" and "the age and marital status of each woman."[95] From that information, the Minister would compile and share an annual statistical update of abortions occurring in the province.[96]

It is important to remember that the TAC regime was still in operation at this time, so, had the Bill become law, a woman seeking an abortion would have been required to go through the TAC process and also meet the consent requirements of

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92 Zita Lazzarini, "South Dakota's abortion script – Threatening the physician-patient relationship," *New England Journal of Medicine* 359 (November 2008): 2189–91.

93 *Hopp v Lepp*, [1980] 2 SCR 192 at 210, 112 DLR (3d) 67; *Reibl v Hughes*, [1980] 2 SCR 880, 114 DLR (3d) 1.

94 Cynthia R. Daniels, Janna Ferguson, Grace Howard, and Amanda Roberti, "Informed or misinformed consent? Abortion policy in the United States," *Journal of Health Politics, Policy and Law* 41, no. 2 (April 2016): 181.

95 *Bill 53*, s 9(1).

96 Ibid., s 9(2).

Bill 53 before she could receive an abortion. One issue, which would become a contentious (and in fact decisive) matter at the Court of Appeal, was whether the Bill imposed additional requirements such that it ultimately restricted access to the TAC regime.

While unique in Canada, Bill 53 did have comparator legislation, found south of the border. The sorts of requirements found in Bill 53 were also found in several American states at the time[97] and, indeed, by 1985, some version of every one of the Bill's components had received constitutional scrutiny by the American Supreme Court. That Court found spousal and parental consents unconstitutional in 1976[98] but upheld a law requiring parental notification in the case of dependent minors in 1981.[99] It upheld reporting requirements in 1976.[100] And, in 1983, the Court released its decision in *City of Akron*, striking down both a mandatory counselling provision and a twenty-four-hour waiting period.[101]

Caswell confirmed that the Bill drew on American sources for inspiration.[102] Indeed, she was first inspired by the Akron, Ohio, ordinance which had been enacted by the City of Akron in 1978 (and was later found in large part to be unconstitutional by the American Supreme Court in 1983).[103] She then contacted Americans United for Life, an anti-abortion legal policy group based in Washington, DC, which worked with her in drafting the Bill.[104] Americans United for Life, which was founded in 1971 and continues to operate today, assists legislators in drafting, enacting, and defending abortion regulation.[105] Legislative counsel responsible for aiding private members in drafting bills also provided advice on Bill 53.[106]

The Americans had extensive jurisprudential and legislative experience with abortion restriction by 1985, so it is not surprising Caswell turned south of the border for assistance. The lawyers arguing the reference also turned to American case law to make their arguments,[107] and so too did the lawyers in *Morgentaler*.[108] Given the infancy of the *Charter*, the American experience was a point of orientation, as Canadians tried to get their bearings in uncharted waters.

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97 See, for example, Pa Stat Ann tit 18 §§ 3201-3220 (1982); ND Cent Code vol 3A § 14-02.1-03 (Supp 1985); SD Codified Laws § 34-23A (1986); Mont Code Ann § 50-20-101-112 (1985).

98 *Planned Parenthood v Danforth*, 428 US 52 (1976), 96 S Ct 2831 [*Danforth*]. See also *Bellotti v Baird*, 443 US 622 (1979), 99 S Ct 3035. The Court subsequently upheld parental consent provisions that enable judges to waive the requirement: *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833 (1992), 112 S Ct 2791 [*Casey*].

99 *HL v Matheson*, 450 US 398 (1981), 101 S Ct 1164.

100 *Danforth*.

101 *City of Akron v Akron Center for Reproductive Health, Inc.*, 462 US 416 (1983), 103 S Ct 2481 [*City of Akron*]. Both conclusions were later overturned by *Casey*.

102 Gay Caswell, reader's viewpoint, A7.

103 *City of Akron*; *Ohio v Akron Center for Reproductive Health, Inc.*, 497 US 502 (1990), 110 S Ct 2972.

104 Caswell, interview, June 26, 2019.

105 "About," Americans United for Life, accessed July 10, 2019, https://aul.org/about/.

106 Caswell, interview, June 26, 2019.

107 *Reference Re Freedom of Informed Choice (Abortions) Act*, 1985 CanLii 2909 (Sask CA) (Factum against Bill 53 at 26) [*Gauley factum*]; *Reference Re Freedom of Informed Choice (Abortions) Act*, 1985 CanLii 2909 (Sask CA) (Factum for the constitutionality of Bill 53 at 23) [*Gritzfeld factum*].

108 Morton, *Morgentaler v Borowski*, 178.

IV. Arguments in the Court of Appeal and the Court's Opinion

Two constitutional questions were referred: did Bill 53 comply with the division of powers under sections 91 and 92 of the *Constitution Act, 1867,* and did Bill 53 violate the *Charter*? The government selected two experienced civil litigators, Tom Gauley and ER Fitzgerald, who agreed to argue the case and were confirmed to their positions by court order.[109] Coincidentally, Tom Gauley had acted as Saskatchewan's representative on the Canadian Bar Association's (CBA's) Committee on the Constitution in 1977–78, which put forward the CBA's recommendations for repatriation of the Constitution.[110] The Committee recommended that Canada adopt a constitutionalized Bill of Rights, including protecting rights to liberty, security of the person, and privacy.[111] The privacy recommendation is particularly noteworthy, as privacy rights had been the basis for *Roe v Wade*[112] a few years earlier in 1973. Abortion, however, was not expressly mentioned in the CBA document. Less than a decade after his involvement in the CBA's constitutional project, Gauley would be arguing that "liberty" and "security of the person" in a now constitutionalized bill of rights protected a woman's right to abortion.

At the behest of the Court, advertisements were placed in the Saskatoon *StarPhoenix* and the Regina *Leader-Post*, inviting interested persons to apply to intervene in the reference proceedings.[113] Three groups sought permission to participate: the Saskatchewan Action Committee Status of Women, the Saskatchewan Pro-Life Association, and the Saskatchewan Medical Association. Interestingly, the lawyers for the Saskatchewan Action Committee (Myron A. Kuziak) and the Saskatchewan Pro-Life Association (Tom Schuck) both had brushes with the *Borowski* trial decision, having acted for groups attempting to intervene in that trial —Kuziak for the Canadian Civil Liberties Association and Schuck for Campaign Life Canada—though their efforts to do so had been unsuccessful.[114] The Saskatchewan Medical Association also applied to intervene, taking neither a for or against stance on the larger issue but seeking to put forward arguments protecting and prioritizing the physician–patient relationship.[115]

Chief Justice Bayda denied all applications for leave. In a brief endorsement dated October 29, 1985, he wrote, "[t]he question raised by the reference is not one of fact, or of mixed fact and law, but of law alone. More particularly, it is a question of constitutional law."[116] The material put forward by the parties related to factual

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109 Sid Dutchak (Minister of Justice), letter (January 9, 1986), ATI from Gov. SK., 34; *Reference re: The Freedom of Informed Choice (Abortions) Act (Saskatchewan)*, [1985] SJ No 769 (CA) [*Bill 53 endorsement*].

110 Committee on the Constitution, the Canadian Bar Association, *Towards a new Canada* (Montreal: Pierre Des Marais Inc., 1978) Chairman Jacques Viau, Executive Vice-Chairman and Director of Research Gerard V La Forest.

111 Ibid., 14, 19.

112 *Roe v Wade*, 410 US 113 (1973), 93 S Ct 705.

113 Sid Dutchak, letter (January 9, 1986), 36; Advertisement in newspaper, ATI from Gov., 29.

114 *Borowski v Canada (Minister of Justice)*, [1983] 144 DLR (3d) 657, 23 Sask R 259 (QB).

115 *Reference Re Freedom of Informed Choice (Abortions) Act*, 1985 CanLii 2909 (Sask CA) (Application for Leave to Intervene of the Saskatchewan Medical Association, para 3).

116 *Bill 53 endorsement.*

issues, he observed, and thus would not assist the court on the legal issues.[117] So, to the disappointment of the would-be intervenors, the reference proceeded with only Gauley and Gritzfeld to make submissions.

The lawyers' facta are a historical snapshot of *Charter* jurisprudence in its infancy. The courts were still in the process of sorting out the structure and content of the *Charter*. In fact, the Supreme Court's decision in *BCMVA Reference*[118]—which confirmed that s. 7 included substantive as well as procedural rights—was released only two days before the Court of Appeal heard arguments on Bill 53. Given the lack of Supreme Court jurisprudence, the lawyers looked elsewhere for guidance: American literature, American case law on abortion, *Charter* decisions from lower courts,[119] and the Supreme Court's Bill of Rights jurisprudence.

While sections 2 (religion, expression) and 15 (equality) were referenced, chiefly in play was s. 7 of the *Charter*, which guarantees 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."[120] Gauley argued that s. 7 encompassed "a right to personal bodily integrity and a concomitant right to control both the interference as well as non-interference with this right by others."[121] This, he wrote, meant that "women *prima facie* have the individual right to consent and agree to an otherwise lawful abortion."[122] The Bill violated a woman's substantive rights, he alleged, by denying her "personal control over the question of abortion,"[123] and violated her procedural rights by providing third parties with an "absolute veto" that could be exercised arbitrarily or against a woman's best interest.[124] Gauley's proposal—that s. 7 included a free-standing right to make decisions about abortion—was bold, as no Canadian judge had yet found this to be the case (though Justice Wilson would soon take this position in *Morgentaler*).

In response, Gritzfeld argued that s. 7 was not triggered as the Bill did "not deprive any person of their liberty or security as those terms are commonly understood."[125] American case law on abortion was not useful, he wrote, because, unlike in the United States, a right to abortion was not "constitutionally enshrined."[126] In his view, the consent provisions were not constitutionally problematic because they essentially replicated existing common law requirements.[127] The spousal consent requirement, he argued, could be justified because it reflected the "sanctity of marriage" and the husband's interest in his wife's pregnancy.[128]

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117 Ibid., 2.
118 [1985] 2 SCR 486, 1985 CanLII 81.
119 Both the Ontario Court of Appeal's decision in *Morgentaler* and Justice Matheson's decision in *Borowski* were cited in the facta.
120 *Charter*, s 7.
121 *Gauley factum,* 26.
122 Ibid.
123 Ibid.
124 Ibid., 30–32.
125 *Gritzfeld factum*, 23.
126 Ibid., 25-28.
127 Ibid., 31–32.
128 Ibid., 41.

In contrast to the *Charter*'s uncertainty, division of powers law at the time was a familiar and predictable entity. There was even Supreme Court precedent on point: the issue of jurisdiction over abortion had been raised in the 1975 *Morgentaler* case. While the majority of the Court did not comment on the issue, Justice Laskin (dissenting on other grounds) upheld s. 251 as a valid exercise of the federal criminal law power. Additionally, *Westendorp*[129] had been decided by the Supreme Court just two years previously and arguably provided a close parallel to Bill 53. In that case, a unanimous Court struck down a municipal bylaw which prohibited gathering on streets for purposes related to prostitution. The Chief Justice concluded that the bylaw was clearly intended to penalize prostitution and thus, as an exercise of the federal criminal law power, fell outside the jurisdiction of the province. Gauley thought the comparison to *Westendorp* was undeniable.[130]

Given that division of powers law was well-established, it is not surprising that Gauley and Gritzfeld did not dispute what law governed. Rather, they disagreed on the proper characterization to give Bill 53. In Gritzfeld's view, the Bill's primary purpose was to create health consents, meaning it was authorized either by s. 251 of the *Criminal Code* (which preserved consent requirements) or by the province's authority over health.[131] Gauley argued that the Bill went beyond merely dealing with health information and was in fact a "colourable attempt to enact legislation that falls squarely under section 91(27)."[132] To illustrate the additional hurdles Bill 53 created for women seeking abortions, he set out the requirements of Bill 53 and s. 251 side by side.[133] Having demonstrated the overlap between the two frameworks as well as the additional constraints contained in the Bill, Gauley could then convincingly state:

> Parliament provided a means whereby what would be unlawful, would if the proper procedure was followed, become lawful.
>
> Bill 53 purports to superimpose on the exception provided by the Code burdens and difficulties not envisaged by the Code and is therefore an attempt, in essence, to prevent a female who is pregnant from coming within the exception the Criminal Code provides. It is in effect an attempt to strengthen the criminal law. This the Legislature cannot do.[134]

Justices Cameron, Wakeling, and Gerwing heard arguments on December 19, 1985. A relatively junior panel, Justice Cameron had been appointed only four years previously, and Justices Wakeling and Gerwing, who were appointed on the same date, had been on the bench only a year when the Reference came before them.[135] The Court issued its decision the following day, a remarkably quick turnaround time (in contrast, the panel's decision in *Borowski* was not released until the spring of 1987). Justice Wakeling, who authored a minimalist decision for the

[129] [1983] 1 SCR 43, 1983 CanLII 1.
[130] *Gauley factum*, 19–20.
[131] *Gritzfeld factum*, 2–14.
[132] *Gauley factum*, 19.
[133] Ibid., 16–17.
[134] Ibid., 18.
[135] David Mittelstadt, *The Court of Appeal for Saskatchewan: The First Hundred Years* (Regina: University of Regina Press, 2018), 349, 326.

unanimous panel, found the Bill fell outside provincial jurisdiction over health. He essentially adopted the side-by-side comparison set out in Gauley's factum and concluded that "the pith and substance of this legislation is to stiffen and make more restrictive the existing criminal law in relation to abortions."[136] He cited a handful of Supreme Court decisions and observed that the Bill closely paralleled the unconstitutional municipal bylaw in *Westendorp*. The panel declined to comment on the *Charter* issues.

V. Aftermath: Evaluating the Reference Case and its Impact

Why was the bench silent on the rights implications of Bill 53? It could be that there was no majority on the *Charter* question and the panel opted to speak with one voice on the issue with consensus rather than deliver multiple, conflicting decisions, which could increase uncertainty while having limited precedential value.

Alternatively, perhaps the panel was exercising a philosophy of judicial minimalism. Cass Sunstein describes minimalism "as an effort to leave things open by limiting the width and depth of judicial judgments."[137] Minimalism may be preferable because it best utilizes scarce judicial resources; it reduces the possibility of error that accompanies wide-ranging and general articulations that reach beyond the narrow issue in the case; and it "maximize[s] the space for democratic deliberation about basic political and moral issues."[138] Sunstein recognizes that minimalism is not appropriate in all cases but argues that it the most appropriate course of action "when the Court is dealing with an issue of high complexity about which many people feel deeply and on which the nation is in flux (moral or otherwise)."[139] Under these criteria, Bill 53 called for a minimalist decision: abortion was morally and politically contentious; the legal landscape had only recently changed with the introduction of the *Charter* in 1982; and the *Charter* question was already on its way to the Supreme Court, as Morgentaler had filed his notice of appeal a month prior. In these circumstances, it was preferable for the Court of Appeal not to say anything on the *Charter* issue and wait for the Supreme Court's resolution to come down in the near future.

The government did not appeal the Court's decision, despite some pressure from constituents to do so. The Department of Justice, an independent lawyer, and Gritzfeld himself all advised the government that an appeal was unlikely to be successful.[140] Indeed, the Minister of Justice (now Sid Dutchak, who had taken over from Gary Lane), in reply to a letter from a concerned citizen, penned a seven page letter outlining the legal arguments in support of the Court of Appeal's decision to justify the government's refusal to appeal. He concluded "the Bill, taken as a whole,

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136 *Reference re Freedom of Informed Choice (Abortions) Act*, 1985 CanLII 2909, paras 4–5, 44 Sask R 104 (CA).

137 Cass R. Sunstein, "Foreword: Leaving things undecided," *Harvard Law Rev* 110, no. 4 (February 1996): 99.

138 Ibid.

139 Ibid., 8.

140 Sid Dutchak (Minister of Justice), letter (April 13, 1986), ATI from Gov. SK., 57; Sid Dutchak (Minister of Justice), letter (July 17, 1986), ATI from Gov. SK., 68.

can only be regarded as aimed at restricting abortion as an evil or public wrong by prohibiting abortions unless the requisite information has been given and consents obtained."[141]

All three would-be intervenors—who, it will be recalled, were denied leave to intervene by Chief Justice Bayda—requested that the government pay the legal fees associated with preparing their applications. The Saskatchewan Action Committee made their case most forcefully, writing that it had been "misled by [the] Department [of Justice] to believe that there were grounds on which intervenor status could be granted to interest groups."[142] The government refused to pay for any of the expenses, replying that only an opportunity to apply for leave had been promised, and that chance had in fact been granted.[143]

Caswell was "disappointed but not surprised" by the Court of Appeal's decision.[144] In particular, she was frustrated that she never had the opportunity to defend the Bill or respond to concerns raised.[145] Although the Bill never made it to a vote, she felt that the Bill had "accomplished a great deal," including "establish[ing] that the right to life movement is a powerful political force."[146] Caswell lost her seat to the NDP's John Brockelbank in the 1986 provincial election,[147] but her advocacy work continued: the following year, she founded the anti-abortion group Victorious Women of Canada.[148]

The government's position on abortion continued after the Reference much as before. In the spring of 1986, Premier Devine replied to a Saskatchewan resident unhappy with the Court of Appeal's decision:

> [I]t remains a firm objective of this government to reduce the number of unnecessary abortions in Saskatchewan. My colleagues and I are concerned that abortion is being regarded as a form of birth control, and that is a situation which we find objectionable. I think our concern is clearly reflected in the position we have taken against free-standing abortion clinics and in our continued support for Saskatchewan Pro-Life educational programs.[149]

The Devine government's opposition to abortion culminated with a referendum, administered in tandem with the 1991 provincial election, asking voters whether public funding for abortion should be discontinued.[150] Nearly two thirds of

[141] Sid Dutchak (Minister of Justice), letter (March 3, 1986), ATI from Gov. SK., 46.
[142] Saskatchewan Action Committee, letter to Justice Minister Lane (November 30, 1985), ATI from Gov. SK., 26.
[143] Sid Dutchak (Minister of Justice), letters (January 9 and April 24, 1986), ATI from Gov. SK., 34, 36; 63–64.
[144] Larry Johnsrude, "Court's ruling on abortion bill not surprising says MLA Caswell," *StarPhoenix* (Saskatoon, SK), December 21, 1985, A3.
[145] Caswell, interview, June 26, 2019.
[146] Gay Caswell, "Bill 53 Made its Point," *StarPhoenix* (Saskatoon, SK), June 19, 1985, A5.
[147] Dan Zakreski, "Brockelbank retakes seat from PC's Gay Caswell," *StarPhoenix* (Saskatoon, SK), October 21, 1986, A3.
[148] Ann Rauhala, "REAL Women divided by high-level moves," *Globe and Mail* (Toronto, ON), May 26, 1987, A1.
[149] Grant Devine, letter (April 24, 1986), ATI from Gov. SK., 61.
[150] McGrane, "Gender and Saskatchewan," 20.

respondents agreed it should be axed.[151] The NDP, which won the election, declined to follow the voters' direction due to *Charter* concerns.[152]

While the Reference killed the Bill, the precedential impact of the decision has been limited. The Reference was not cited in the Supreme Court decisions in *Morgentaler* in 1988 (striking down the TAC regime on *Charter* grounds) or *Borowski* in 1989 (declining to decide the fetal rights claim because the issue had become moot in light of *Morgentaler*). It was cited, briefly but with approval, in the 1993 *Morgentaler* decision, in which the Supreme Court struck down Nova Scotia's prohibition on private abortion clinics. The Supreme Court wrote:

> The guiding principle is that the provinces may not invade the criminal field by attempting to stiffen, supplement or replace the criminal law (*Reference re Freedom of Informed Choice (Abortions) Act* (1985), 44 Sask. R. 104 (C.A.)) or to fill perceived defects or gaps therein…[153]

Otherwise, the reference decision has garnered little attention—judicial, academic or popular—in the last few decades.

VI. Conclusion

The 1980s were a watershed for abortion regulation in Canada, from the introduction of the *Charter* in 1982 to the 1988 *Morgentaler* decision decriminalizing abortion. In 1985, in the midst of ongoing lobbying by pro-life and pro-choice groups and the legal sagas of Joe Borowski and Henry Morgentaler, a backbencher introduced into the Saskatchewan Legislative Assembly a consent-focused abortion bill. This paper has documented its odd journey from drafting at an American law firm to ultimate demise at the Court of Appeal. In particular, two features of this journey stand out.

First, Bill 53 may reveal something about governance tendencies in the *Charter* era. Mandel, Morton, and others have expressed concern that the *Charter* has actually had undemocratic effects, by enabling politicians to off-load difficult and controversial issues to the judiciary by casting them as legal, rather than political, questions.[154] Indeed, Mandel has noticed the increasing popularity of reference procedures designed to side-step tricky issues.[155] The experience of Bill 53 is very much in this vein: politicians failed to debate the substance of the Bill in any meaningful way, nor did they attempt to remedy the constitutional defects prior to sending it for a reference. The Court's decision gave legislators cover to not act on the issue, despite the fact that the decision still left some space (albeit small) for provincial activity on abortion. Bill 53's journey however, serves as a reminder that the political potential and tendency to off-load difficult questions did not arise with and is not grounded in the *Charter*; division of powers law can also be employed to decide controversial moral and political questions without engaging in the moral

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151 Ibid.
152 Legislative Assembly of Saskatchewan, *Saskatchewan Hansard*, Legislative Meeting Archive (14 May 1992), Debates, 401 (Mr. Trew), www.legassembly.sk.ca/legislative-business/meetings/.
153 *Morgentaler SCC 93*, 498.
154 Mandel, *Legalization of Politics*, 4, 72; Morton, *Morgentaler v Borowski*, 310–14, 319–20.
155 Mandel, *Legalization of Politics*, 72.

substance of those questions. For judicial review on *Charter* grounds, the political aspects of decision-making are never far from the surface, whereas the seemingly dry nature of federalism doctrine can easily obscure behind-the-scenes politics. While pro-choice proponents may be satisfied with the ultimate outcome, one cannot claim Bill 53's demise at the hands of the Court of Appeal was a clear victory for women's rights, either: women's rights and experiences were absent from the Court's decision-making.

Second, the Court opted for a minimalist decision, which left the rights issue for another day and thus avoided the controversy that a *Charter* decision would have attracted. Indeed, the decision made few waves when it was made and has drawn little attention since. Ironically, however, evaluating the decision in 2019—particularly, in light of demonstrated willingness on the part of provincial governments to employ the s. 33 notwithstanding clause and musings of some provincial politicians about the desirability of abortion restriction[156]—the Court's minimalist federalism decision may actually have more profound and longer-term implications for abortion regulation in Canada than had the Court decided the matter on the basis of the *Charter*. While a *Charter* decision would have been shortly superseded by the Supreme Court's decision in *Morgentaler* and *Charter* rights can be overridden by s. 33, federalism constraints remain constitutionally inviolable. Thus, a provincial government willing to use s. 33 to enact abortion restriction will be thwarted, not by the *Charter*, but by federalism. The Reference case is one of a handful of appellate-level cases on the scope of provincial power over abortion: as a whole, these cases very much limit provincial capacity to restrict access to abortion.[157] Thus, for a court that seemingly sought to limit the scope of its impact and for a decision that has largely faded from the public radar, the Reference may have significant and lasting implications.

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[156] Bill 21, *An Act respecting the laicity of the State*, 1st Sess, 42nd Leg, Quebec, 2019 (assented to 16 June 2019), SQ 2019, c 12; Richard Moon, "Doug Ford's use of the notwithstanding clause reduces democracy to majority rule," *CBC News* (opinion), September 13, 2018, https://www.cbc.ca/news/opinion/doug-ford-notwithstanding-1.4821302; Arthur White-Crummey, "Abortion becomes a divisive issue in Sask. party leadership campaign," *Leader-Post* (Regina SK), November 23, 2017, A5; Rob Ferguson, "Doug Ford reopens abortion debate: PC hopeful says it's time to consider whether girls need parental permission," *Toronto Star*, March 6, 2018, A8.

[157] Along with *Morgentaler SCC 93* and *Morgentaler NB*; see Burningham, "Provincial Jurisdiction over Abortion."