

DEPARTMENT OF JUSTICE

CONFIDENTIAL

March 24, 1981

BY HAND

MEMORANDUM TO: DEPUTY MINISTER
B.L. STRAYER
F.E. GIBSON
E. GOLDENBERG ✓

FROM: SENIOR COUNSEL
(PUBLIC LAW)

RE: ABORTION LAWS OF THE CHARTER OF RIGHTS
- REQUEST FROM THE CATHOLIC REGISTER -

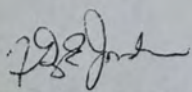
At the suggestion of Eddie Goldenberg, Mr. Stan Koma of the Catholic Register in Toronto telephoned me this morning to state three questions relating to the Charter provisions and abortion on which the Register wants the stated position of the Minister of Justice or in his absence that of the Department.

-- Mr. Koma indicated that they wanted these responses by tomorrow if possible, intending to publish them along with other comments on the earlier document dated March 6 which the Minister sent to the Register (copy attached). I indicated that I would take this request up with my superiors to determine whether we can comply with the request.

-- Also attached hereto is a statement of the three questions along with the possible responses thereto. I would appreciate having your views on this material as soon as possible.

Personally, I have serious doubts about the wisdom of continuing this debate and particularly by means of a public record. As far as I can see, no matter what we say on the issue we will continue to be attacked by those on both sides of it. This would be the case even if we were able to give definitive answers to how the Charter will be interpreted and of course we cannot even do that.

May I please have your instructions on this matter.


F.J.E. Jordan
Encls.

March 24, 1981

The Catholic Register has requested a response from the Minister of Justice to the following questions relating to the relationship between the provisions of the Charter of Rights and Freedoms and the present laws relating to abortion in Canada.

QUESTIONS

1. Since the unborn baby has no legal rights until that baby is born (Dehler v. Ottawa Civic Hospital), and since women have all the rights contained in the Charter of Rights, could not the Charter of Rights be used in future court battles to strike down the present abortion laws or future efforts by Parliament to restrict abortions?
2. Since there are strong differences of opinion among lawyers on whether Parliament or the Supreme Court of Canada will have the final say on abortion laws, what assurances can you give that the courts will not abrogate Parliament's authority to legislate on abortion?
3. If the Supreme Court of Canada in the future did rule that abortion on demand was legal in Canada, what procedure would be necessary to overrule this decision?

RESPONSES

1. While the Charter of Rights may be invoked in future court cases to test the validity of present or future abortion laws enacted by Parliament, it is the view of the Minister (Department) of Justice that the courts will rule that the Charter of Rights does not in any way inhibit Parliament's existing authority to enact legislation respecting abortion. In other words, the Charter provisions are neutral on the question of abortion, entrenching neither a constitutional right to obtain an abortion nor a constitutional bar to enactment of laws governing the matter of abortion. The reasons for this conclusion are indicated in the response to the second question.

2. The view that the courts will not abrogate Parliament's authority to legislate on abortion is based on the following considerations. The only provisions of the Charter that may be considered to have a bearing on the question of abortions are sections 7 (the right to life and liberty) and 15 (equality rights).

Under the "right to life" in section 7 it may be argued (as some contend) that this gives a guarantee that human life can never be taken (including that of the unborn if "everyone" is capable of being interpreted to encompass the unborn). This ignores the qualification in section 7 which provides for the deprivation of life in accordance with "the principles of fundamental justice". This qualification means that a life can be taken as long as the laws providing for such action are procedurally fair.

Under the "right to liberty" in section 7, which language in the United States' Bill of Rights has been interpreted as conferring on women a qualified right to obtain abortions, this right too is guaranteed subject to deprivation in accordance with laws that are procedurally fair. Consequently, the "right to liberty" is not an absolute right, but one which can be limited or otherwise modified if fair procedures are followed. This is rather different from the situation in the United States' Bill of Rights which provides that the right to liberty can only be deprived by "due process of law". Into this "due process" clause, the American courts have imparted substantive as well as procedural rights, which means that right to liberty and, hence, to a qualified right to abortion cannot be abrogated by law.

In light of this difference in the wording between section 7 of the Charter and the "due process" clause of the United States' Bill of Rights, it is evident that Canadian courts will not find an entrenched right to abortion in section 7 of the Charter.

With respect to the "equality clause" (section 15 of the Charter), the only bearing that this might have on the abortion question is the argument that access to abortions under the law must be assured equally to all women. This same issue has been raised in several recent cases before the United States' Supreme Court under the "equal protection" clause of that country's Bill of Rights.

In response to arguments that "equality" of rights meant that governments must ensure that public funds be made available equally to those requiring medical treatment for childbirth and abortion, the United States' Supreme Court has ruled that it was no violation of the equality rights for a State to provide public funds for childbirth treatment while denying them for abortion treatment. There is no reason to believe that Canadian courts would come to a different conclusion under section 15 of the Charter. Indeed, Chief Justice Laskin, in the Morgantaler case (1976), concluded that the "equality" provision of the Canadian Bill of Rights was not offended simply because the operation of section 251 of the Criminal Code (in authorizing the establishment of accredited abortion facilities) might not apply equally throughout Canada.

For all the foregoing reasons, we are satisfied that the Charter of Rights as drafted will not permit the courts to abrogate Parliament's present authority to legislate on abortion.

3. In the hypothetical event that the Supreme Court were to rule at some point in the future that there was a constitutional right to abortion on demand (an unqualified position not even taken by the United States' Supreme Court), the procedure for overruling such a decision would be the following.

During the first two years following adoption of the Constitution Act (which includes the Charter of Rights) an amendment to the Charter to reverse such a decision would be by unanimous agreement of Parliament and the ten provinces (unless some other amending procedure was agreed to by Parliament and the provinces during this period).

Following this period, an amendment to the Charter would be made by the permanent general amending procedure (either the "Victoria formula": agreement of Parliament, and the legislatures of Ontario, Quebec, two of the four Atlantic provinces and two of the four Western provinces with more than 50% of the Western population or such other amending formula as might be adopted by a national referendum) or by the national referendum procedure set out in section 46 of the Constitution Act.