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The Legal Status of Women in Canada – The Legal Model beyond the 49th Parallel The Right to Choose – Abortion Law Then and Now

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Abstract

Among women's rights the right to give birth or not occupies a special place. Lately this right has been the object of numerous discussions. By not taking a 'pro' or 'contra' attitude, this paper aims to provide a historical overview and examines possible similarities and differences of the legal regulations on the issue of abortion in Canada and Croatia. Could "the North" be a legal model for "South" and is there a whole range of different "Norths"?

Keywords: women's right, abortion, legal regulation, punishment

Résumé

Parmi les droits de la femme celui de mettre au monde un enfant ou non, occupe une place primordiale. Actuellement, ce droit suscite de nombreuses discussions et polémiques. Sans se déclarer « pro » ou « contra », ce travail se propose de donner un aperçu historique et de rechercher les similitudes ou les différences possibles entre les régimes juridiques sur l'avortement au Canada et en Croatie. Le « Nord » peut-il être pris comme modèle pour le « Sud » ou bien là aussi existe-t-il une multitude de « Nords » différents?

Mots-clés: droit de la femme, avortement, réglementation légale, sanction



No matter whether we look at Canada as “the North” in relation to such a big state as the United States of America, or perhaps a small European state like Croatia, or if we look at the whole range of different “Norths” within Canada, legal status of women deserves to be the object of this research. If the North in the western culture is the fundamental direction, is Canada a good one in the field of women’s rights? The legal position of women, especially the issues of gender equality and the right to choose (abortion), that I am dealing with in this text, are the issues of relevance to contemporary legal systems. These issues can be determined by many factors, one of which is the legal legacy. Can we find a legal model beyond the 49th parallel and is legal history a part of it? Maybe the Northern position is more relevant. Canadian law opposes the gender discrimination on the grounds of its “Charter of Rights and Freedoms” (section 15, part of the Constitution Act, 1982.). These principles are also reflected in the Canadian Human Rights Act (R.S.C., 1985, c.H-6) and the Multiculturalism Act (R.S.C., 1985, c.24) with the provision to protect and promote the rights of aboriginal women and foreigners.

Two hundred years ago the law excluded women from public life. During this long period women were fighting for their public and private rights. The war for women’s rights started at the end of the nineteenth century and is still going on. In the 1970s women in Canada became more aware of their legal rights and after cases as Bliss, Lavell and Bedard (discrimination against female Indians) 1982 Canadian Charter of Rights and Freedoms gave a better guarantee against sexual discrimination.

Among many rights that can be mentioned as women’s rights one is especially interesting. That is the women’s right to choose to give birth or not. Here I must state that this research is not about being “pro” or “against.” Rather, it is about presenting the facts. While doing so, one must be aware that Canada and Croatia are in many ways two different countries and that any comparison of their legal regulations must take into account many factors that affected this diversity, such as economic achievements, population, religious and political atmosphere, to name but a few.

I.

Before 1800 there was no statute in England or Canada which prohibited abortion. In 1803, England passed Lord Ellenborough’s Act or the Malicious Shooting Act (43 Geo. 3, c.58). The sentence for those who performed or attempted to perform a post “quickenings” abortion was the death penalty. New Brunswick, the province that passed the greatest number of statutes on abortion in Canada in the nineteenth century, found the model in that Act. As the first province in Canada, seven years after England, New



Brunswick passed the Statute on Abortion. The others followed. Nevertheless, illegal abortions were still common and resulted in the death of several hundred women per year. The mortality rate was as high as the infection rate. Following the English model of Lord Ellenborough's 1803 Act (Backhouse 1983:67), Canadian statutes also had the English model of the "quickening"¹ distinction until 1841. Then, in 1841, Upper Canada became the first province to abolish the "quickening" distinction² (An Act for Consolidating and Amending the Status in This Province Relative to Offences against the Person, 4 & 5 Vict., c.27. s.13). The death penalty was replaced with the maximum penalty of life imprisonment. By eliminating the "quickening" distinction, the maximum sentence of life imprisonment became also a penalty for prior "quickening" abortions. In 1842 New Brunswick eliminated the "quickening" distinction and in 1843 changed the sentence to a maximum of fourteen-year imprisonment (An Act to amend An Act further to amend the Law relating to Offences against the Person, 1843, N.B., 6 Vict., c.29, ss.1,2.). In 1849 and 1851 abortion legislation in New Brunswick and Nova Scotia included women as subjects of criminal offences. The first federal consolidation of criminal law in 1869 incorporated provincial abortion legislation. But, it found its penalty model in the English law. In 1861 England raised the penalty from three years to life imprisonment in the Offences Against the Person Act (s.58). Therefore, in 1869 according to Canadian Criminal Code, abortion was a criminal offence liable to life imprisonment. The 1892 Criminal Code (Criminal Code, 1892, (Can.), 55 & 56 Vict., c.29, ss.272–274) took over the prohibition with the life imprisonment:

Everyone who, with the intent of procuring the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and liable to imprisonment for life. (Criminal Code, Part VIII3 Offences Against the Person and Reputation).

The penalty for women who procured their own abortion changed from a maximum of life to a maximum of seven-year imprisonment (s.273). Later legislation changed the punishment in the case where the subject of crime is a woman herself:

Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment of two years (R.S.C. 1970, c. C-34).

1) Signs of life felt by the mother as a result of the fetal movements, usually first noted at 17 to 20 weeks of pregnancy.

2) English law abolished the quickening distinction in 1837. The death penalty and transportation for fourteen years were replaced by a three-year imprisonment.



After the case of Lottie Leanne Clarke and the results of Canada's Abortion Law, in the 60s the movement to liberalize the law began. Since Criminal Law Amendment Act (introduced by Pierre Trudeau's government) was passed on May 14, 1969 abortion in Canada is no longer illegal (Bill C-150 received Royal Assent after its adoption by the House of Commons on 14 May 1969 and by the Senate on 12 June 1969). The Criminal Law Amendment Act decriminalized abortions and legalized them in cases when a committee of three hospital doctors signed a statement that the procedure was necessary for the physical or mental well-being of the woman. The interpretation of Criminal Law Amendment Act by different doctors and hospitals led, however, to uneven access. The so called Badgley Committee reported in 1977 that abortion law had not been equitably applied in Canada.

In 1988, the Supreme Court of Canada, in the case of *R. v. Morgentaler* found the abortion provisions in the Criminal Code, section 251, to be unconstitutional (Richer 2008 : 2–4). Consequently the abortion in Canada was no longer limited by criminal law but by the Canada Health Act. In other words, abortion has been legally unrestricted in Canada since 1988. According to the section 7 of Canadian Charter of Rights and Freedoms, [e]veryone 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." The *Morgentaler* decision was a complicated one; in *Morgentaler* case the Court did not consider the question of whether the "unborn" were part of the word "everyone" who have the independent right to life, liberty and security (Dunsmuir 1998:8). In 1989, in the case *Tremblay v. Daigle* (*Tremblay v. Daigle* [1989] 2 SCR 530, para.38.) the Supreme Court of Canada ruled that women alone had the right to make their choice and that fathers had no legal say in the women's choice to terminate a pregnancy. In this case the Court found that fetus had no legal status as a person. Since a fetus is not considered to be a "legal" person, it therefore has no rights until it is born alive. This is explained in the *Winnipeg Child and Family Services (Northwest Area) v. (G.)* (D.F. by Justice Mc Lachlin [1997] 3 S.C.R. 925, para. 11.). With the decriminalization of abortion, the question was raised regarding the rights that are to be granted to a fetus or unborn child. After the *Morgentaler* decision, there were two attempts to enact the new law to re-criminalize abortion, but without success.

The Canada Health Act is Canada's federal legislation for publicly funded health care insurance (Canada Health Act). That is to say, all abortions are "medically necessary" and the Canada Health Act identifies "medically necessary" as the one which is "physician performed". According to the Canada Health Act Annual Report 2013–2014:



The Act sets out the primary objective of Canadian health care policy, which is “to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.”

The Act establishes criteria and conditions related to insured health services and extended health care services that the provinces and territories must fulfill to receive the full federal cash contribution under the Canada Health Transfer (CHT).

The aim of the Act is to ensure that all eligible residents of Canadian provinces and territories have reasonable access to medically necessary hospital and physician services on a prepaid basis, without charges related to the provision of insured health services.” (Health Canada)

According to the Act, abortions must be publicly funded whether performed in a hospital or a clinic, and abortion must be included in provincial billing agreements. It should be equally available to all women regardless of where they live in Canada. But, provinces differed. Some had very few hospitals and clinics that provided abortions or they refused to pay for abortions that took place outside hospitals; in Manitoba there were no providers in the North; in Ontario where there were long wait times in some hospitals; and Nova Scotia provided only limited funding (Abortion Access and Funding). Interestingly, in British Columbia “The Access to Abortion Services Act” (RSBC 1996) provides a “bubble zone” around clinics, hospitals and homes of physicians to prevent harassment by anti-choice protesters, and out of all provinces Quebec provides the best abortion access. In some of the provinces (such as New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Yukon, Northwest Territories, Nunavut), women are not allowed to undergo an abortion without the referral of a physician, and in each of the provinces the gestational limitations are different. Differences between the provinces based on the above-mentioned reasons resulted in differences in the number of induced abortions, as is shown in table 1 (Canadian Institute for Health Information).³

3) In 2007, CIHI took over the collection and compilation of abortion statistics from Statistics Canada (StatsCan https://www.cihi.ca/sites/default/files/document/ta_11_alldatatables20140221_en.pdf, visited 16.09.2016.



Province/Territory	Number of Induced Abortions Reported by Hospitals	Number of Induced Abortions Reported by Clinics	Total
Newfoundland and Labrador	186	868	1,054
Prince Edward Island	0	0	0
Nova Scotia	2,119	0§	2,119§
New Brunswick	442	616	1,058
Quebec	9,930	15,470	25,400**
Ontario	12,137	15,249**	27,386**
Manitoba	2,529	1,459	3,988
Saskatchewan	2,015	0§	2,015§
Alberta	2,173	11,114	13,287
British Columbia	4,198	2,930*	7,128*
Yukon	145	0§	145§
Northwest Territories	35	0§	35§
Nunavut	93	0§	93§
Total Reported	36,002	47,706*	83,708*

* Clinical data for B.C. is incomplete.

Table 1 Number of Induced Abortions⁴ Reported in Canada in 2012, by Province/Territory

There are also differences between the “North” and “South” of Canada. For example, in the Yukon Territory the gestation limit is twelve months and costs are covered if a woman must travel outside of Yukon; with similar cases in the Northwest Territories (where the gestation limit is fourteen months), and in Nunavut. And if we are talking about the North of Newfoundland and Labrador, there are no abortion services and for many women that means a long travel to clinics. The situation in the North of Quebec is the same as in the whole of Quebec: it is the best province for abortion access.

In 2015, when this article is written, Canada has no legal restrictions on abortion although regulations between provinces vary even nowadays (due to geography,

4) See the important notes for the each of the provinces relating to table 1 in CIHI source.



health care system, poverty). However, it seems that liberal Canadian law system in the field of women's rights has been inspired by the concept of the "North". And there is the fact I must underline: although there are no legal restrictions on abortion in Canada, the number of all abortions performed in Canada has been decreasing according to the data by Statistics Canada (in *Women in Canada: A Gender-based Statistical Report*) and the data by Abortion Rights Coalition of Canada (table 2).⁵ Maybe this is due to the increased access to contraception or because of the restrictive access policies in some provinces or campaigns by pro-life organisations. As I read in Karine Richer's work published for Parliamentary Information and Research Service: "No conclusion can be drawn on this issue, but it is certain that abortion will remain a controversial topic in Canada for years to come." (Richer 2008: 24).

Historical Abortion Statistics tables show abortion rate (residents) in 1995 16.0, in 2000 15.5 and in 2005 13.7 (Johnstons Archive). Statistics Canada recorded total of 2,838,328 abortions between 1974 and 2006. Canadian Institute for Health Institution tables show a recorded total of 353,034 abortions between 2007 and 2010, which means that the total number of "reported" abortions that took place between 1974 and 2010 in Canada is 3,191,362.⁶ To get a conclusion on a legal regulation and its consequences, we should relate this number the number of child births in that period.

Abortion rates

Description	2007	2008	2009	2010	2011	2012	2013	2014
Total	98,762	95,876	93,755	90,747	92,524	83,708	82,869	81,897
Hospital abortions	47,281	44,375	41,640	38,611	37,150	36,002	35,003	33,931
Clinic abortions	51,481	51,501	52,115	52,136	53,374	47,706	47,866	47,966
By Province/Territory :								
Newfoundland/ Labrador	850	904	956	1,068	1,026	1,054	223 *	1,051
Prince Edward Island	0	0	0	0	0	0	0	0
Nova Scotia	2,119	2,126	2,119	2,125	2,157	2,119	2,077	2,061
New Brunswick	1,082	1,096	1,104	1,098	1,056	1,058	1,036	528*
Quebec	27,697	27,295	27,139	26,106	26,245	25,400	25,253	25,083
Ontario **	32,331	32,150	30,268	28,765	28,114	27,386	25,108	23,746

5) Although, "it's difficult to make any firm conclusions about trends in Canada's abortion rate, and the CIHI data should be treated with caution" (Statistics Abortion in Canada 2015:4).

6) http://www.cihi.ca/CIHI-ext-portal/pdf/internet/TA_10_ALLDATATABLES20120417_EN, visited 4.09.2015.



	2007	2008	2009	2010	2011	2012	2013	2014
Manitoba	3,978	4,025	4,247	4,150	3,998	3,988	3,873	4,015
Saskatchewan	1,806	1,889	2,019	1,915	1,928	2,015	1,921	1,960
Alberta	12,590	13,062	13,150	13,084	13,372	13,287	13,376	13,815
British Columbia	15,770	12,914*	12,461*	12,149*	14,341	7,128 *	9,574 *	9,196*
Yukon	116	139	128	147	155	145	121	102
Northwest Territories	328	171	57	40	45	35	211	255
Nunavut	95	105	107	100	87	93	96	85

** See notes on Ontario report.

Table 2 (Source: Abortion Rights Coalition of Canada)

According to the Abortion Rights Coalition of Canada, the abortion rates in Canada are declining.

II.

On the other hand, far away, and a little bit more to the South, a small European country of Croatia had a very similar situation. By 1952, abortion was a crime punished by imprisonment for both the pregnant woman and the abortion procurer. That law was inherited from the nineteenth century, when Croatia was part of the Habsburg Monarchy, where abortion was a crime. In the 1852 Criminal Code (Part I, c.XVI art. 144), abortion, then called “pometnuće”, was a crime punishable with six months to ten years of imprisonment for those who procure abortion and a maximum of five years for women. In 1952 the “Law on the Procedure for Carrying out the Permitted Abortion” (Sl. list, 4/52) was passed, thus marking the beginning of a rather liberal legislation. Similarly to Canada, in the 60’s abortion legislation went through a process of liberalization. The reason was a high level of maternal morbidity and mortality at the time.

Based on a medical, eugenic and legal indication, abortion was not illegal from 1952 and based on a social indication it was not illegal from 1960. From 1969 the commission approval was not requested any more and after that time illegal abortions were almost eliminated. In 1978 the “Act concerning the medical measures for materialization of the right to freely decide on the birth of children” (Narodne novine 18/78, 88/09) was passed in Croatia. It was based on the article 191 of 1974 Croatian Constitution (Ustav SRH, Narodne novine 8/1974) which proclaimed that



“it was the human right to decide on the birth of children.” Besides abortion, the 1978 Law concerned fertility regulation, contraception, sterilization and the treatment of infertility. It also amended the Criminal Code.

When Croatia achieved independence from the former Socialist Federal Republic of Yugoslavia in 1991, the law regulating abortion was not changed although the provision on the “right to decide on the birth of children” is not a constitutional provision any more (Hrabar 2015:796). According to articles 15 to 28, abortion is allowed on request during the first ten weeks of pregnancy. It must be performed by a physician in a hospital within a department of gynaecology or obstetrics or in another authorized health-care facility. If the woman is under the age of sixteen, the authorization of her parents or guardian and the guardianship authority is required. After the first ten weeks of pregnancy, abortion must be approved by a commission of two physicians, and a social worker or a registered nurse:

The commission may consent to an abortion when it is medically established that it would otherwise be impossible to save the woman’s life or prevent damage to her health, whether it be during pregnancy, delivery or post-partum; when the probability that the child would be born with a serious congenital physical or mental defect is medically established; or when the conception is a consequence of a criminal act of rape, criminal act of sexual intercourse with an incompetent person, criminal act of sexual intercourse in consequence of abuse of authority, criminal act of sexual intercourse with a child or criminal act of incest (art. 22 “Act concerning the medical measures for materialization of the right to freely decide on the birth of children”).

The woman can appeal to a commission of the second instance.

In 1990 there were 38644 legal abortions in the public hospitals and that number is declining (Hlača 2009:143). In 2006 there were 4733 and in 2007 there were 4573 induced abortions. According to Table 3 we can say that the number of legally induced abortion is still declining.

**Table 3.** Total number of legally induced and spontaneous abortions and other abortions recorded by Croatian health institutions from 1992 to 2014 (Hrvatski zdravstveno statistički ljetopis, 2014: 252, tbl 2)

GODINA Year	Broj prekida trudnoće UKUPNO Abortion		O D T O G A Of this				Broj legalno induc. pobačaja na 100 rodilja No. of legally ind. abortions per 100 childbearing women	
	Spontani Spontaneous	%	Legalno induc Leg. induced	%	Ostali pobačaji Other abortion	%		
1994.	28.014	3.396	13,1	19.673	75,6	2.945	11,3	43
1995.	19.950	3.021	15,1	14.282	71,6	2.647	13,3	31
1996.	19.634	3.520	17,9	12.339	62,8	3.775	19,2	25
1997.	16.400	3.377	20,6	10.036	61,2	2.987	18,7	21
1998.	15.292	3.180	20,8	8.907	58,2	3.205	21,0	19
1999.	14.700	2.894	19,7	8.064	54,9	3.742	25,5	18
2000.	13.870	2.666	19,2	7.534	54,3	3.670	26,5	17
2001.	12.814	2.521	19,7	6.574	51,3	3.719	29,0	17
2002.	12.002	2.313	19,3	6.191	51,6	3.498	29,1	16
2003.	10.999	1.971	17,9	5.923	53,9	3.105	28,2	15
2004.	10.288	1.802	17,5	5.232	50,9	3.254	31,6	13
2005.	10.255	1.906	18,5	4.563	44,5	3.786	37,0	11
2006.	10.224	1.803	17,6	4.733	46,3	3.688	36,1	11
2007.	10.609	1.804	17,0	4.573	43,1	4.232	39,9	11
2008.	10.616	1.691	15,9	4.497	42,4	4.428	41,7	10
2009.	10.417	1.442	13,8	4.450	42,7	4.525	43,4	10
2010.	10.150	1.413	14,0	4.043	39,8	4.694	46,2	10
2011.	10.401	1.501	14,4	4.347	41,8	4.553	43,8	11
2012.	10.087	1.696	16,8	3.571	35,4	4.820	47,8	9
2013.	8.922	1.772	19,9	3.161	35,4	3.989	44,7	8
2014.	9.103	1.681	18,5	3.020	33,2	4.402	48,4	8

* Podatak o broju rodilja iz zdravstvenih ustanova Hrvatske - Data on childbearing women from health institutions in Croatia

For comparison, in 2010 the abortion rate in Croatia was 4.7 per 1000 women and a year before it was 13,7 in Canada (World Abortion Policies).

III.

As this research is in its beginnings, many questions that are yet to be answered will necessarily be left open. But my task was not to answer the questions or decide should this work be “pro” or “against.” It was to compare Canadian and Croatian abortion legislations and their developments. Both Canadian and Croatian systems are liberal. Although Canadian and Croatian abortion legislations and their developments seem to be very similar, they are based on different grounds. There are many facts I did not mention, such as political system before 1990 in Croatia, demographic structure and economic achievements in both countries, etc. Also there are differences within Canada (the details need further study) that are based on many factors.

If there are to be any conclusions, I must inevitably point out that “North” and “South” are one of many determinants which are not negligible. Perhaps it is especially noticeable on the reality of Canada’s vast territory. Further research may reveal something else. Nonetheless, Canada – as the “North” with a whole range of different “Norths”, and taking into account different historical backgrounds and other circumstances – can



be considered as a useful legal model in the process of drafting a new Croatian law on abortion.

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