

# Respectfully Submitted



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## POLICY REPORT for Parliamentarians Courtesy of the Association for Reformed Political Action (ARPA) Canada

*"[T]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."*<sup>1</sup>

*- United Nations Convention on the Rights of the Child*

Pre-born children are politically toxic to many Parliamentarians. Yet nowhere is the current state of Canadian law more disconnected from human rights, scientific fact, Supreme Court rulings, international standards, and public opinion. Consider the facts:

- Canadian criminal law provides no legal protection for pre-born children. The *Criminal Code* holds that a “child” becomes a “human being” worthy of protection only after it has fully proceeded from the body of its mother.<sup>3</sup> Science unequivocally contradicts this outdated legal definition.<sup>4</sup>
- Every country in the world *except Canada* has legal protections for pre-born children.<sup>5</sup> In Canada, a child can be aborted for any reason, at any stage of development. And they are aborted in massive numbers. The Abortion Rights Coalition of Canada estimates that at least 104,158 abortions occurred in Canada in 2015.<sup>6</sup> The Canadian Institute of Health Information reports that 12.7% of abortions occur at 13 weeks or later, and 2.4% of abortions occur after 20 weeks.<sup>7</sup> This accounts for about 12,500 abortions per year after 13 weeks of which approximately 2,500 occur after 20 weeks when, according to the Canadian Medical Association, a child becomes viable outside the womb.<sup>8</sup>

European Gestational Restrictions for Abortion on Request <sup>2</sup>		
Country		Gestational Limit
	Austria	12 weeks
	Finland	0 weeks
	France	12 weeks
	Germany	12 weeks
	Italy	12 weeks
	Netherlands	13 weeks
	Poland	0 weeks
	Sweden	18 weeks

- The Supreme Court of Canada, in the 1988 *Morgentaler* decision, unanimously agreed that Parliament has a legitimate interest in protecting pre-born children and may pass laws for their protection.<sup>9</sup>
- Public opinion polls consistently find that most (92%) of Canadians do not support unrestricted abortion access and would support legal protections for pre-born children at some point before birth.<sup>10</sup>
- Medical professionals treat the fetus as a patient, a separate living human to whom a duty of care is owed.<sup>11</sup>  
Canada's policy on pre-born human rights is outdated. It also contravenes the most basic human right – the right to life. It is time to implement science-based, life-affirming public policy on this issue.

## Pre-born Children

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## The Science

According to Canada’s *Criminal Code*, section 223, “A child becomes a human being ... when it has completely proceeded, in a living state, from the body of its mother.” It adds that “a person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being.”<sup>12</sup> This raises the question: what is a child before it “becomes a human being”?

Dr. Dianne Irving, in “When do human beings begin”, answers that question with scientific precision:

*[S]omething very radical occurs between the processes of gametogenesis and fertilization: the change from a simple part of one human being (i.e., a sperm) and a simple part of another human being (i.e., an oocyte... or "egg")... to a new, genetically unique, newly existing, individual, whole living human being (a single-cell embryonic human zygote). That is, upon fertilization, parts of human beings have actually been transformed into something very different from what they were before; they have been changed into a single, whole human being.*<sup>13</sup>

Physician Philip Hawley confirms this:

*Every single discovery in the field of human embryology has pointed to conception as the moment in which a whole and complete human being is created. No scientific discovery—not one—points to any other moment along the continuum of life. And technologies like high-resolution ultrasound have made evident the humanness of unborn children at progressively earlier stages of development. Those who insist on parsing words like “person” and “life” and “human” have found no refuge in either common sense or science.*<sup>14</sup>

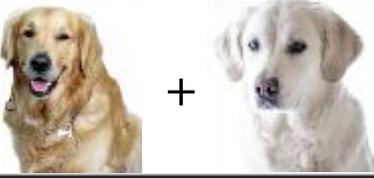
In other words, the *Criminal Code*’s definition of human being is scientifically wrong. A child before birth is a human being. The commonly used term “fetus” (sometimes spelled “foetus”) comes from the Latin for “young, offspring, progeny”.<sup>15</sup> It is not a different “thing”.

## Political & Legal Context

English law historically recognized the life of a pre-born child at “quickening”, the moment when a mother feels her child move for the first time (around 16 weeks). The law also allowed a child to sue for injuries inflicted against her in the womb. From 1892 until 1969, all abortions were illegal in Canada. In 1969, Parliament amended the *Criminal Code*, permitting abortions for health reasons (health was undefined) if a panel of three physicians agreed.

In 1988, a majority of the Supreme Court of Canada ruled that section 251 (the abortion provision) was unconstitutional, largely for technical reasons. Two years later, the federal government introduced new abortion legislation. It passed all three votes in the House of Commons but failed to pass at the Third Reading in the Senate because of a tie vote. Since 1988, Canada has had no law protecting pre-born children at any stage of pregnancy.

**Law of Biogenesis**  
Living things reproduce after their own kind:

	+		=	
	+		=	
	+		=	

When two human beings reproduce, their offspring will only ever be human.

In 1989, shortly after *Morgentaler*, the Law Reform Commission compiled a report titled “Crimes against the Foetus”, a detailed review of the law’s treatment of pre-born children. The Commission examined the *Criminal Code* definition of “human being” and detailed the many ways in which it was unduly complex, inconsistent, and not “in line with ordinary intuitions to the product of human conception...”<sup>16</sup> The report concludes: “Clearly, therefore, our criminal law relating to the foetus needs overhaul whatever one’s view about the issue of abortion.”<sup>17</sup>

***“You do have a right over your own body – it is your body. But the foetus is not your body; it’s someone else’s body. And if you kill it, you’ll have to explain.”***

– Prime Minister Pierre Trudeau<sup>1</sup>

## **The Pre-born Child and the Supreme Court**

In the case of *R v Morgentaler* (1988), the Court split four ways. In total, five of the seven judges found section 251 of the *Criminal Code* unconstitutional. It was not because they decided there was a “right” to abortion. Rather, they found the procedure in place for accessing a legal abortion was arbitrary. All seven judges agreed that protecting the fetus is a valid legislative objective.<sup>18</sup> As such, they recognized the state’s authority to limit the “liberty” and “security of the person” of women seeking abortions for the sake of pre-born children.

An accurate reading of the *Morgentaler* decision shows the Supreme Court expected Parliament to enact a new abortion law. The Supreme Court has affirmed Parliament’s responsibility repeatedly. For example, in the 1989 *Borowski* decision, the Court said that it must not “*pre-empt a possible decision of Parliament* by dictating the form of legislation it should enact.”<sup>19</sup>

In 1997, the Supreme Court of Canada recognized that the “born alive rule” – the legal rule that recognizes *legal personhood* only after birth – was out of date. Justice Major, in *Winnipeg Child*, wrote that the born alive rule is “a legal anachronism based on rudimentary medical knowledge and should no longer be followed...”<sup>20</sup> He went on to say that we should no longer follow such an outdated rule “when technologies ... can clearly show us that a foetus is alive and has been or will be injured by conduct of another.”<sup>21</sup> But nothing has changed since. The Supreme Court of Canada, indeed all of Canada, is still waiting for a response from Parliament.

## **Human Rights Belong to Human Beings**

All human beings, including pre-born humans, have human rights, the most basic of which is the right to life. Humans are not granted these rights by the state. They are intrinsic to our humanity. They are given to us by God, who made humanity in His image and set us apart from the rest of creation.<sup>22</sup> God gives the civil government the responsibility to recognize these rights and, through law, to protect human life.<sup>23</sup>

If the state refuses to protect human life before birth, upon what grounds can it oppose those, like ethicist Peter Singer, who argue that protection should not begin until some time after birth? Singer argues, “Why should a being’s potential to become rationally self-aware make it wrong to end its life before it has the capacity for rationality or self-awareness?”<sup>24</sup> Who gets to determine what makes a life worthy of life?

The 1948 Universal Declaration of Human Rights recognizes, “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind”.<sup>25</sup> Human rights are *Universal*, meaning they apply to all human beings *without distinction of any kind*. Canada has committed to protecting human rights. We have failed to protect the human rights of pre-born persons or even acknowledge them. It is time to move away from that.

## Public Opinion

If you approach people on the street and ask them how late an abortion is allowed in Canada, eight out of ten will get it wrong, because they assume there is some legal limit. A January 2013 Angus Reid poll found that just 21% of respondents were aware that Canada allows abortion without restrictions.<sup>26</sup> This contradicts the claims of some politicians that there is a consensus in favour of the status quo. With so many Canadians ignorant of the current situation, how can anyone claim that there is a consensus in support of it?

In fact, only 35% of Canadians, when made aware of the status quo, believe it should continue<sup>27</sup>, while 77% support making abortion illegal in the third trimester.<sup>28</sup> A 2017 poll suggests 61% of Canadians think the pre-born should receive constitutional recognition.<sup>29</sup> And, according to a 2011 poll, 92% of Canadians believe that sex-selective abortion should be illegal.<sup>30</sup> There are few issues on which Canadians are so united.

## Consequences of Having No Law

Having no legal protections for the pre-born has consequences beyond the lives lost through abortions:

- **Compromising women's health:** Dozens of peer-reviewed studies show a strong correlation between abortion and increased risks of breast cancer, future premature births, and serious mental health consequences.<sup>31</sup> Yet these facts are not presented to women who are considering an abortion.
- **Gender imbalance:** A Canadian Medical Association Journal study found that some girls are being aborted solely because of their sex. "The numbers are definitely tilted because women are aborting the girls," Amandeep Kaur, CEO at Punjabi Community Health Services in Mississauga told the CBC.<sup>32</sup>
- **Born-alive, left to die:** Statistics Canada data reveals that between 2000 and 2009, there were 491 recorded abortions that resulted in a child being born alive and then being left to die or "terminated" after birth.<sup>33</sup> The rate has increased since.<sup>34</sup>
- **Denying motherhood:** Women who would carry their child to term are denied that choice and denied justice when they are attacked during pregnancy. In southern Ontario in 2015, Cassie Kaake and her pre-born daughter Molly were brutally murdered. The next year, MP Cathay Wagantall introduced a private member's bill in memory of Cassie and Molly. Molly's father, Jeff Durham, who identifies as pro-choice, led the grassroots "Molly Matters" campaign, calling on Parliament to recognize the injustice done to his daughter. The bill was defeated, in large part due to fear of suggesting pre-born children deserve legal recognition.<sup>35</sup> Less than six months after the bill's defeat, another Ontario woman – nine months pregnant – was murdered and her child did not survive. Again, the killer was only charged for the mother's death.<sup>36</sup>
- **Aging our population:** Canada's fertility rate in 2016 was 1.6 children per woman, far less than the 2.1 needed to naturally sustain the population. Canada's rapidly aging population will be the greatest factor impacting Canada's economy and public finances in the coming decades. Yet too many policy makers fail to recognize the impact of over 100,000 children aborted annually.



## Recommendations

We understand that Canadians have different views about when a pre-born child should receive protection in the *Criminal Code*. But that does not mean the status quo should remain. Parliamentarians have a duty to show leadership on behalf of pre-born Canadians. At the very least, Parliamentarians could pass a law to bring us in line with other nations, including comparable nations in Europe.

ARPA Canada has a draft bill that would align Canadian law with our European counterparts.<sup>37</sup> We would be happy to provide a copy on request. The draft bill would amend Canada's *Criminal Code* by adding restrictions and conditions on abortion in order to provide some protection for pre-born children. The draft law is constitutional and a moderate step in the right direction from where Canadian law is today. It outlines clear conditions for allowing an abortion with stricter conditions for abortions beyond the first trimester. It penalizes practitioners who perform abortions recklessly or without consent and requires independent counseling 48-hours prior to having an abortion.

Canadian law is outdated, violates human rights, and ignores the state's basic responsibility to protect all human life. If Parliamentarians are willing be honest about where they and their constituents stand, we are confident this draft law would be supported by a majority of Canadians and MPs. It is in line with public opinion, constitutionally sound, and would better protect women and their pre-born children.

## Citations, Resources and Research

<sup>1</sup> *Convention on the Rights of the Child*, 20 November 1989, U.N.T.S. vol. 1577, p.3 (adopted by resolution 44/25 of 20 November 1989 at the Forty-fourth session of the General Assembly of the United Nations and ratified by the Parliament of Canada, December 13, 1991), online: <[https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch\\_IV\\_11p.pdf](https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf)>.

<sup>2</sup> *Abortion Policies: A Global Review*, The Population Policy Data Bank maintained by the Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat, online: <<http://www.un.org/esa/population/publications/abortion/profiles.htm>>. Some of the countries listed in the chart on page one of this report allow abortions at later stages, but only with multiple official authorizations.

<sup>3</sup> *Criminal Code*, R.S. C., 1985, c. C-46, s. 223:

- (1) A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother, whether or not
  - (a) it has breathed;
  - (b) it has an independent circulation; or
  - (c) the navel string is severed.
- (2) A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being.

<sup>4</sup> Dr. Dianne N. Irving, "When do human beings begin? 'Scientific' myths and scientific facts" (1999) *International Journal of Sociology and Social Policy*, 19:3/4:22-36, online: <<https://www.princeton.edu/~prolife/articles/wdhbb.html>>. See also Keith L. Moore, *The Developing Human: Clinically Oriented Embryology*, 7th edition (Philadelphia, PA: Saunders, 2003) pp. 16: "Human life begins at fertilization, the process during which a male gamete or sperm unites with a female gamete or oocyte (ovum) to form a single cell called a zygote. This highly specialized, totipotent cell marked the beginning of each of us as a unique individual." And see Signorelli et al., *Kinases, phosphatases and proteases during sperm capacitation*, CELL TISSUE RES. 349(3):765 (Mar. 20, 2012) where they write: "Fertilization is the process by which male and female haploid gametes (sperm and egg) unite to produce a genetically distinct individual." And see Ronan O'Rahilly and Fabiola Mueller, *Human Embryology and Teratology*, 3rd edition (New York: John Wiley & Sons, 2000), p. 8: "Although life is a continuous process, fertilization... is a critical landmark because, under ordinary circumstances, a new, genetically distinct human organism is formed when the chromosomes of the male and female pronuclei blend in the oocyte" (emphasis added).

<sup>5</sup> ARPA Canada has been examining international abortion laws for over 5 years and has not been able to find one country without laws protecting the preborn at some stage. China and North Korea were in our company but North Korea recently passed comprehensive abortion legislation and China developed laws prohibiting gendercide. See also note 2 above.

<sup>6</sup> *Statistics – Abortion in Canada*, Abortion Rights Coalition of Canada, (5 April 2017), online: <<http://www.arcc-cdac.ca/backgrounders/statistics-abortion-in-canada.pdf>>.

<sup>7</sup> *Induced Abortions Reported in Canada in 2014*, Canadian Institute for Health Information, data tables available online: <[https://www.cihi.ca/sites/default/files/document/induced\\_abortion\\_can\\_2014\\_en\\_web.xlsx](https://www.cihi.ca/sites/default/files/document/induced_abortion_can_2014_en_web.xlsx)>. The CIHI data is incomplete in that reporting is voluntary for private clinics and not all abortions are reported.

<sup>8</sup> Canadian Medical Association, "Induced Abortion" *CMA Policy*, online: <<http://policybase.cma.ca/dbtw-wpd/PolicyPDF/PD88-06.pdf>>.

<sup>9</sup> *R. v. Morgentaler*, [1988] 1 S.C.R. 30: Chief Justice Dickson, at page 75; Justice Beetz, at page 124; Justice Wilson, at page 181; Justice McIntyre never questions this and it underlies his entire analysis.

- <sup>10</sup> See Ipsos Public Affairs, “Constitution Day 2017 Public Opinion Research” (March, 2017), at p. 10, online: <<http://www.ipsos-na.com/download/pr.aspx?id=16531>> where 61% of Canadians indicated support for constitutional protection for pre-born children. See also Environics Research Group, “Canadians’ Attitudes Towards Abortion” (2011) at p. 6, online: <<http://www.lifenews.com/wp-content/uploads/2011/10/lifecanada2.pdf>> and see Angus Reid Public Opinion, “Canadians Have Mixed Feelings on Abortion, But Shun a New Debate” (2013) at p. 4, online: <[http://www.angusreidglobal.com/wp-content/uploads/2013/01/2013.01.28\\_Abortion\\_CAN.pdf](http://www.angusreidglobal.com/wp-content/uploads/2013/01/2013.01.28_Abortion_CAN.pdf)>.
- <sup>11</sup> Arthur Goldberg, “Abortion Stops a Beating Heart: The Heartbeat Protection Act of 2017” *The Public Discourse* (9 March 2017), online: <[www.thepublicdiscourse.com/2017/03/18833](http://www.thepublicdiscourse.com/2017/03/18833)>. Goldberg writes, “The emerging field of fetal medicine permits doctors to diagnose fetal abnormalities and illnesses in the womb and to treat them *in utero*, increasing children’s chances of living and being born healthy... Fetal anemia... is one example... Another example is congenital diaphragmatic hernia... Fetal surgical methods can also repair a condition called spina bifida, a malformed spinal cord, prior to birth.” Justice Picard and Gerald Robertson write, in *Legal Liability of Doctors and Hospitals in Canada*, a leading text, “One significant aspect of obstetrics that distinguishes it from other areas of medical practice is that the physician owes a duty of care of two patients simultaneously: the expectant mother and her fetus...”
- <sup>12</sup> *Criminal Code*, s. 223, *supra* note 3.
- <sup>13</sup> Irving, “When do human beings begin?”, *supra* note 4.
- <sup>14</sup> Dr. Philip Hawley, Jr. “On Abortion, Medical Science is Still Waiting to be Heard” *The Public Discourse* (15 September 2015), online: <<http://www.thepublicdiscourse.com/2015/09/15643/>>.
- <sup>15</sup> *A Latin Dictionary* by Lewis & Short, Oxford University Press, (1966) at 744, s.v. “fetus”.
- <sup>16</sup> *Crimes Against the Foetus, Working Paper 58*, Law Reform Commission of Canada (1989), at p. 57.
- <sup>17</sup> *Crimes Against the Foetus*, LRCC, *supra* note 16, at p. 27.
- <sup>18</sup> *Morgentaler 1988*, *supra* note 9: Chief Justice Dickson, at page 75; Justice Beetz, at page 124; Justice Wilson, at page 181; Justice McIntyre never questions this and it underlies his entire analysis.
- <sup>19</sup> *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, 57 DLR (4<sup>th</sup>) 231 at para 47, emphasis added.
- <sup>20</sup> *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925 at para. 102.
- <sup>21</sup> *Winnipeg Child*, *supra* note 20, at para. 109. Justice Major wrote in dissent, but the majority also acknowledged that the born alive rule was out of date. Unlike Justice Major, however, the majority believed that it must be left up to legislatures to change the law.
- <sup>22</sup> Genesis 1:27: “So God created human beings in his own image. In the image of God he created them; male and female he created them.” For an extended explanation of this passage to the legal question at hand, see Mark Penninga, *A Judeo-Christian Account of Human Dignity in Canadian Law and Public Policy*, (Master of Arts Thesis, University of Lethbridge, Department of Political Science, 2008), online: <<https://www.uleth.ca/dspace/bitstream/handle/10133/671/penninga,%20mark.pdf>>.
- <sup>23</sup> Romans 13. For an extended explanation of this, see Dr. Cornelis Van Dam, *God & Government: Biblical Principles for Today: An Introduction and Resource* (Eugene, OR: Wipf & Stock, 2011).
- <sup>24</sup> Peter Singer, “Analysis: Why it’s irrational to risk women’s lives for the sake of the unborn” *The Scotsman* (15 August 2012), Online: <<http://www.scotsman.com/news/opinion/analysis-why-it-s-irrational-to-risk-women-s-lives-for-the-sake-of-the-unborn-1-2467196>>.
- <sup>25</sup> *Universal Declaration of Human Rights*, 10 December 1948, (adopted by General Assembly resolution 217 A at the hundred and eighty-third plenary meeting), online: <<http://www.un.org/en/universal-declaration-human-rights/>>.
- <sup>26</sup> Angus Reid Public Opinion, “Canadians Have Mixed Feelings on Abortion, But Shun a New Debate” (2013) at 4, online: <[http://www.angusreidglobal.com/wp-content/uploads/2013/01/2013.01.28\\_Abortion\\_CAN.pdf](http://www.angusreidglobal.com/wp-content/uploads/2013/01/2013.01.28_Abortion_CAN.pdf)>.
- <sup>27</sup> Angus, “Canadians Have Mixed Feelings on Abortion, But Shun a New Debate”, *supra* note 26 at 6.
- <sup>28</sup> Environics Research Group, “Canadians’ Attitudes Towards Abortion” (2011) at 8, online: <<http://www.lifenews.com/wp-content/uploads/2011/10/lifecanada2.pdf>>.
- <sup>29</sup> Ipsos Public Affairs, “Constitution Day 2017 Public Opinion Research” (March, 2017), at p. 10, online: <<http://www.ipsos-na.com/download/pr.aspx?id=16531>>.
- <sup>30</sup> Environics, “Canadians’ Attitudes Towards Abortion”, *supra* note 28 at 11.
- <sup>31</sup> *Hush: The Documentary*, 2016, DVD (Mighty Motion Pictures: Punam Kumar Gill Film). For the 42 scientific, peer-reviewed and published medical studies cited in the film, see: <<http://hushfilm.com/science/>>.
- <sup>32</sup> Timothy Sawa and Annie Burns Pieper, “Fetal gender testing offered at private clinics: Raises fears that gender selection happening in Canada” *CBC News* (12 June 2012), online: <<http://www.cbc.ca/news/canada/fetal-gender-testing-offered-at-private-clinics-1.1183673>>.
- <sup>33</sup> Patricia Maloney, “Late term abortions statistics - born alive” *Run With Life blog* (19 October 2012), online: <<http://run-with-life.blogspot.ca/2012/10/late-term-abortions-statistics-born.html>>.
- <sup>34</sup> Steve Weatherbe, “Babies left to die? 182 children born alive, then died, after failed abortions in 2013-14: StatsCan” *LifesiteNews.com* (14 April 2015), online: <<https://www.lifesitenews.com/news/babies-left-to-die-182-children-born-alive-then-died-after-failed-abortions>>.
- <sup>35</sup> See, for example, the comments of Liberal MP Bill Blair and New Democrat MP Murray Rankin in “‘Preborn Children’ Bill Linked To Tragedy Spurs Difficult Debate” by Ryan Maloney, *Huffington Post* (10 April 2016), online: <[http://www.huffingtonpost.ca/2016/10/04/preborn-children-bill-c225-cassie-mollys-law-jeff-durham\\_n\\_12331126.html](http://www.huffingtonpost.ca/2016/10/04/preborn-children-bill-c225-cassie-mollys-law-jeff-durham_n_12331126.html)>.
- <sup>36</sup> “Murder charge against Pickering man upgraded in death of pregnant wife: Nicholas Tyler Baig now faces 1st-degree murder charge in death of Arianna Goberdhan” *CBC News* (13 April 2017) online: <<http://www.cbc.ca/news/canada/toronto/arianna-goberdhan-nicholas-tyler-baig-1st-degree-murder-charges-1.4069977>>.
- <sup>37</sup> Our draft bill can be viewed online at We Need a LAW “International Standards Abortion Law”, online: <[weneedalaw.ca/initiatives/international-standards-abortion-law](http://weneedalaw.ca/initiatives/international-standards-abortion-law)>.