

# A Hidden Agenda? The Politics of Abortion under a Majority Conservative Canadian Government\*

*William Mathie\*\**

ABSTRACT: Canada became one of the only countries in the world with no legal restrictions on abortion when its Supreme Court struck down its existing law in 1988. A very weak law against abortion was defeated by a tie vote of Canada's Senate in 1990, opposed by opponents of abortion because of its weakness and by friends of abortion happy to have no law. In 2011 Canada's Conservative party led by Stephen Harper obtained a parliamentary majority. The party included many MPs who wanted to see abortion restricted but its leader had promised to prevent any debate on abortion in the House. His political foes nevertheless accused Harper of having a hidden agenda. This essay explores the dilemma Harper faced as he tried to prevent the debate that many of his supporters wanted and the lessons that might be learned from that experience by Harper's successor if and when he achieves power.

**M**Y SUBJECT IS THE POLITICS OF ABORTION in Canada. In taking up that subject, I would observe two things. First, is the fact that the abolition of African slavery in the United States only became possible when a political party came into being whose interest it was to put slavery on the

---

\* The present essay was presented at a meeting of the University Faculty for Life in 2012. It has been slightly revised to reflect the electoral defeat of the Conservative government in October 2015 and a brief epilogue has been added sketching some of the implications of events since then that affect the issue explored in this essay.

\*\* William Mathie is an Associate Professor of Political Science at Brock University, retired. Mathie earned his Ph.D. and M.A. at the University of Chicago. He has written on Aristotle, Hobbes, Tocqueville, and Lincoln and on Canadian philosopher George Grant's understanding of the implications of *Roe v. Wade* for the liberal understanding of justice. He was also the founding director of a Great Books/Liberal Studies program at Brock and has written on liberal education.

political agenda – and keep it there.<sup>1</sup> Second, since the 1970s America’s two chief political parties have opposed each other on the issue of abortion, and abortion has become a significant political issue in the U.S.<sup>2</sup> A recent study of abortion in Canada, the U.S., and England has argued that the successful efforts of British and Canadian political leaders to keep abortion out of politics and the “failure” of American politicians to do so is largely a result of the difference between our political institutions.<sup>3</sup>

Some years ago I examined the efforts of several Canadian politicians to keep abortion off Canada’s political agenda as those efforts had shaped Canada’s new Conservative Party as it emerged to fight the 2004 Federal election that reduced Canada’s long dominant Liberal party to a perilous minority.<sup>4</sup> In that essay I reviewed the role of Canada’s Supreme Court and our Parliament in bringing about the Canadian *status quo* on abortion: no law restricting abortion in any way or at any time in the course of pregnancy. In 1988 our Court had swept away Canada’s abortion law – a law that had been established by a 1969 amendment to the Criminal Code and had permitted

<sup>1</sup> Don Fehrenbacher has observed that prior to 1854 antislavery “was primarily a sentiment, whereas proslavery from the beginning was a powerful interest.” With the formation of the Republican party “diffuse antislavery sentiment had at last been converted into a major, organized political interest, with its own self-sufficient reasons for survival and growth.” The party’s sectional basis meant that it did not have the reason all previous political parties had to avoid the issue. *The Dred Scott Case* (New York NY: Oxford Univ. Press, 1978), p. 192.

<sup>2</sup> Drew Halfmann claims that in 1970 it was “not obvious that either party would embrace the abortion issue or which side the parties might take” and describes how this changed in the 1970s. *Doctors and Demonstrators: How Political Institutions Shape Abortion Law in the United States, Britain, and Canada*. (Chicago IL: Univ. of Chicago Press, 2011), p. 145. See especially Appendix 1, in which Halfmann furnishes excerpts from the Republican and Democratic party platforms from 1972 through 2008, documenting the increasingly opposed position of the parties. See also William Saletan, *Bearing Right: How Conservatives Won the Abortion War* (Berkeley and Los Angeles CA: Univ. of California Press, 2004) for an account of how opposing abortion became part of a successful Republican strategy at the state and federal level in these same years. See also Jeffrey Bell, *The Case for Polarized Politics: Why America Needs Social Conservatism* (New York NY: Encounter Books, 2012), and Ramesh Ponnuru, “Divided We Stand,” *Claremont Review of Books*, Summer 2012.

<sup>3</sup> This is the thesis of Halfmann’s study.

<sup>4</sup> “‘Shut Up!’ He Explained: How the Effort to Keep Abortion Off the Political Agenda has Shaped Canadian Politics” in *Life and Learning XV*, ed. Joseph W. Koterski, S.J. (Bronx NY: Univ. Faculty for Life, 2006), pp. 321-347.

abortions so long as they were performed in accredited hospitals with the approval of a three-member Therapeutic Abortion Committee. The Canadian Court, or at least most of the majority who found the 1969 law unconstitutional, attacked it for its arbitrary application – under that law, access to abortion, or to a legal defense against prosecution for having had an abortion, depended upon proximity to a hospital where a Therapeutic Abortion Committee had been established.<sup>5</sup> A year later the Court dismissed an appeal against the 1969 law launched by a former member of the Saskatchewan government, Joe Borowski. Borowski had asked the Court to consider whether the availability of abortion under the 1969 law did not violate the rights of the unborn as implicit in Canada's Charter of Rights and Freedoms, made part of Canada's constitution in 1981. In the *Morgentaler* case the Court had claimed that it could decide as it did without addressing the Borowski appeal. In refusing to consider the appeal, the Court observed that the law to which Borowski objected was no longer the law. In another 1989 decision the Court denied the rights of the fetus or its father in reversing the decision of Quebec's high court to grant an injunction that would have stopped an abortion.<sup>6</sup> Though, as opponents of abortion and others have insisted, our Court did not say that Parliament could not legislate so as to restrict abortion in a way that would avoid the Court's censure, this task proved too much for the two Parliaments that tried to do so, in 1989 and 1990. The government's last effort, the last effort by any Canadian government, to make an abortion law, Bill C-43, a weak law that declared abortion wrong without making it difficult, died in Canada's unelected upper house on a tie vote.<sup>7</sup>

In my earlier essay I also looked at how avoiding doing anything about abortion had affected Canadian politics, and especially how it had shaped our political parties. I cited one study that claimed that the sudden and almost complete extinction of Canada's Progressive Conservative Party, the party in power since 1984 and reduced to two seats in 1993, had been in part a result of

---

<sup>5</sup> *Morgentaler, Smoling and Scott v. The Queen* [1988], 1 S.C.R. 30.

<sup>6</sup> *Borowski v. Attorney General of Canada* (189, 57 D.L.R. (4th) 231 (S.C.C.); *Daigle v. Tremblay*, [1989] 2 S.C.R. 530.

<sup>7</sup> The opponents of C-43 in Senate included opponents of abortion who complained that the law would not stop abortion and supporters who wanted no law that disapproved of abortion in any way. Canada's major pro-life political organization, Campaign Life Coalition, continues to oppose any law that would forbid some but not all abortions.

deep dissatisfaction on the part of social conservatives. I also looked at how those who had played a leading role in the effort to create a new and more solidly conservative party in Canada – men like the man who became Canada’s Prime Minister in 2006 and continued in this office until October 2017, Stephen Harper – had tried to keep abortion off the table as something that might divide conservatives. At first this was done by adopting the rule that Members of Parliament must defer to their constituents’ opinions in moral matters like abortion. But many members of the movement out of which this new party was created were themselves committed moral conservatives and hated this policy. Finally, the “referendum principle” was declared a failure, by its inventor, a Calgary political scientist and long-time adviser of Mr. Harper, and abandoned. The new principle approved by the Conservative party’s first policy convention in 2005 and heralded as a reform that would “restore democratic accountability” declared that individual Conservative Members of Parliament should be freed of party discipline to vote as they saw fit in all matters except the budget and main estimates. At that same convention, delegates narrowly (55/45) approved a resolution affirming that the party would not try to legislate on abortion.

I concluded my previous paper with the suggestion that those hoping to establish a centre-right party in Canada that could win a parliamentary majority *and* those hoping to restrict abortion might *both* benefit by beginning to talk about abortion. In May of 2011 the new Conservative Party did win a majority of seats in Parliament.<sup>8</sup> But it could seem that they did so while – or even by – rejecting this suggestion. Throughout the campaign that brought the Conservatives to power in 2011, the Prime Minister insisted that the government he led would not legislate on abortion, or even permit its discussion in the House of Commons. In fact, when one Saskatchewan MP boasted of the Government’s refusal to fund International Planned Parenthood as a “pro-life” move, the Prime Minister denied this claim and made sure that his denial was widely circulated. One interpreter saw this as a very deliberate move intended to reassure voters that Harper did not mean to accommodate right-to-lifers.<sup>9</sup> The Prime Minister had made the same pledge to avoid action

---

<sup>8</sup> The Conservatives won 166 out of 308 seats and 39.6% of the popular vote.

<sup>9</sup> F. Ellis and P. Woolstencroft, “The Conservative Campaign: Becoming the new natural governing party?” in *The Canadian Federal Election of 2011*, ed. J. H. Plammett and C. Dornan (Toronto ON: Dundurn Press, 2011), p.35. I thank Patrick Kelly

and talk on abortion in previous election campaigns and for the most part has acted as that denial would suggest he would act as a Prime Minister whether with minority or majority support in Parliament.

Still, Harper's abortion record was ambiguous enough to allow both supporters and opponents of abortion to disagree about his innermost thoughts on the subject. Would Harper have been willing to talk about abortion or even consider legislation to restrict it if he had supposed the political advantages outweighed the disadvantages of doing so? Or was he perfectly content with the *status quo*? The record that leads to – or allows – this disagreement is mixed if only slightly. In 2007 Harper voted with all but four members of his party to approve on second reading the Unborn Victims of Crime bill (C-484), which would have added to the penalties in the criminal law when an unborn child was killed or harmed in the commission of an offense against the child's mother. Though the Bill's author insisted that the Bill would not restrict abortion in any way, it did draw an angry if tardy response from abortion supporters. When this response became louder as it did after the bill's passing at second reading, Harper's Justice Minister announced that the Government would introduce its own version of this law that would make it perfectly clear that the law implied nothing as to "fetal rights." In fact, the original private member's bill disappeared when the Parliament in which it was proposed ended and the MP who was its author did not seek re-election. And this bill as originally proposed, or even as watered down in its new promised version, has not been seen since.<sup>10</sup> In 2010 Harper and most of his cabinet voted against a private member's bill proposed by Rod Bruinooge, a Manitoba MP, then the leader of Parliament's pro-life caucus. Bruinooge's bill was debated and defeated in November 2010. Known as "Roxanne's law," the bill would have made it a punishable offense to coerce a woman into ending her pregnancy.

So, what were the bright spots? One, albeit an ambiguous one, was this: In 2010 as host and President of the G-8 summit soon to take place in Canada, Harper proposed a maternal health initiative for the third world. That initiative

---

for bringing this event and its interpretation to my attention. Kelly's research help to me in preparing this paper has extended far beyond the present scope of my text.

<sup>10</sup> According to one MP the Government later concluded that the legitimate aims of Epp's bill could be accomplished through sentencing rules. See also "Proposed law would stiffen penalties for violence against pregnant women: Abortion debate won't be re-opened, Conservatives say," at <http://www.cbc.ca/news/canada/story/2008/08/25/nicholson-penalties.html>.

did not include abortion, at least on Canada's part, and this omission drew fire from abortion supporters inside and outside Canada. On a visit to Ottawa, American Secretary of State Hillary Clinton told Canada that its G-8 plan must include abortion, but Canada refused. Canada's Foreign Affairs Minister said that Clinton was expressing her own personal opinion, not speaking as Secretary of State. In fact, in the short run at least, Harper's decision brought the government some immediate satisfaction. How? A motion by the Opposition Liberals was introduced in the House that demanded that the government's health initiative include "the full range of family planning initiatives, sexual and reproductive health options" and should "refrain from advancing the failed right-wing ideologies previously imposed by the...Bush administration in the United States, which made humanitarian assistance conditional upon 'a global gag rule' that required all non-governmental organizations receiving [US] funding to refrain from promoting medically sound family planning."<sup>11</sup> The Liberals introduced the motion hoping that it would expose a sharp and embarrassing division between pro-life and pro-choice Conservative MPs. In fact, the Liberal motion was defeated (142/138). Though the Liberal leader demanded his members support the motion, three did not and several absented themselves from the House. At least one interpreter of Harper's surprising action in taking a step that was in complete agreement with pro-life sentiment has suggested that the Prime Minister anticipated the Liberal weakness that was revealed by the collapse of Liberal party discipline in the vote and accepted the suggestion of members of his caucus that he need not explicitly justify the government's exclusion of abortion from its health

---

<sup>11</sup> The Liberal motion proposed by Bob Rae was this: "That, in the opinion of the House, the government's G8 maternal and child health initiative for the world's poorest regions must include the full range of family planning, sexual and reproductive health options, including contraception, consistent with the policy of previous Liberal and Conservative governments, and all other G8 governments last year in L'Aquila, Italy; that the approach of the Government of Canada must be based on scientific evidence, which proves that education and family planning can prevent as many as one in every three maternal deaths; and that the Canadian government should refrain from advancing the failed right-wing ideologies previously imposed by the George W. Bush administration in the United States, which made humanitarian assistance conditional upon a "global gag rule" that required all non-governmental organizations receiving federal funding to refrain from promoting medically-sound family planning." <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4360697&File=5&Language=E&Mode=1&Parl=40&Ses=3>.

plan; he could rather attack the Liberal motion as gratuitously insulting to our American trading partner.<sup>12</sup> If there was another “bright spot” in the Conservative abortion record, it was the fact that many Conservative MPs in 2008 alerted abortion opponents to the fact that Canada’s most famous abortionist was about to be given Canada’s highest honor: membership in the Order of Canada. Those MPs thus set in motion a widespread and vehement protest against that award. Did Harper and his Office sanction the MPs’ move? Certainly the Prime Minister distanced himself from the process that had led to the *Morgentaler* award and did nothing to prevent backbench Conservatives from encouraging the protests against that award.

Whatever hope could be found in these last two events, Harper and his government generally answered “hidden agenda” charges by repeating that the government would not legislate against abortion or even permit its discussion in Parliament. And they did what they could to control or suppress any such discussion of abortion. As we have seen the private members whose bills reached the floor of the House of Commons under Harper insisted that they did not mean to alter our abortion regime. For a time the Government and its leader seemed to accept this claim in the case of the Unborn Victims of Crime Bill of 2007; opponents of the Bill did not.

But in 2012 the Harper government faced a more subtle and dangerous challenge. On April 25th and September 21st, Canada’s House of Commons spent a total of two hours debating abortion. In any case, this is what the media and members of the Opposition and both supporters and opponents of abortion said the House was doing. It is not what the man who introduced Motion 312 said he intended. To be sure, the motion the House debated on April 25th and September 21st and voted down on September 25th made no explicit mention of abortion. That motion, M312, would rather, if passed, have established a committee to review Clause 223(1) of Canada’s Criminal Code that declares that “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)

---

<sup>12</sup> Speaking to a reporter the Liberal Leader admitted “it had been a bad day at the office.” Susan Delacourt, “Why Stephen Harper took a hard right on abortion,” *Toronto Star*, May 1, 2010. See also “Liberals defeat own family planning motion,” <http://www.cbc.ca/news/politics/story/2010/03/23/politics-liberals-contraception-g8-motion.html>.

the navel string is severed.” The committee that would have been established by Motion 312 would be asked to answer four questions: (1) what medical evidence exists to demonstrate that a child is or is not a human being before the moment of complete birth, (2) is the preponderance of medical evidence consistent with the declaration in Subsection 223(1) that a child is only a human being at the moment of complete birth, (3) what are the legal impact and consequences of Subsection 223(1) on the fundamental human rights of a child before the moment of complete birth, (4) what are the options available to Parliament in the exercise of its legislative authority in accordance with the Constitution and decisions of the Supreme Court to affirm, amend, or replace Subsection 223(1).<sup>13</sup>

Stephen Woodworth, the Conservative Member of Parliament from Kitchener Centre, who proposed Motion 312<sup>14</sup> insisted, in introducing his motion in the House – and subsequently – that his motion “*really* was not about abortion.” What he understood his motion to be “about” and how he saw the relation between his motion and the issue of abortion I shall consider when I examine what Woodworth said in opening the first, and closing the second, of the two hour-long debates devoted to Motion 312. At present, I would note that the words just quoted are taken from Woodworth’s own summary of what he said at a “Pro-Life Conference” on October 27, 2012.<sup>15</sup>

The assumption that Woodworth’s motion *was* “about abortion” certainly animated the effort of various pro-life groups to mount extensive petition campaigns in its support. The claim that Woodworth’s motion if passed would “recriminalize” abortion was also made repeatedly by the small groups of opponents who gathered on the Hill on the day preceding the first hour of debate devoted to the motion and on the day of the final vote. Media reports on those protests made the same assumption. That assumption, and the allegation

---

<sup>13</sup> <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=41&Ses=1&DocId=5524696#OOB-7539981>.

<sup>14</sup> Woodworth had won a sort of lottery that entitled him to a brief Parliamentary discussion of and vote on the motion he had introduced so long as it was deemed “votable” (see below at n14). See <http://www.parl.gc.ca/procedure-book-livre/Document.aspx?Language=E&Mode=1&sbdid=DFC709E5-ED90-48E5-B7EC-02E6D98BF07B&sbpid=1>.

<sup>15</sup> Woodworth’s office forwarded this summary to me with the heading “Recap Remarks (November 12, 2012).” The Conference was sponsored by the national organization, *Life Canada*, and Ontario’s *Association for Life*.



that the very fact that the motion had been introduced and was now being debated by the House, contradicted the Prime Minister's repeated claim that his government would not reopen the debate on abortion figured, prominently in almost all of the speeches made against Woodworth's motion by members of the Opposition during the two hours devoted to the motion. The charge was made even in Question Period on the day Woodworth's motion was to receive its first hour of debate by Thomas Mulcair, the then Leader of Canada's Official Opposition, the New Democratic Party. Mulcair introduced his question by reminding the House of the Prime Minister's reputation for exercising tight control over his party – Harper, he said, “would not let his Conservatives do something he did not agree with....” Twice Mulcair asked Harper why he had “allowed his Conservative MPs to reopen the debate on abortion?” Harper replied thus:

Mr. Speaker, every private member can table bills and motions in the House. Party leaders do not have any control over that. This particular motion was deemed votable by an all-party committee of the House. I think that is unfortunate. In my case, I will be voting against the motion.<sup>16</sup>

---

<sup>16</sup> Harper, S. (2012, April 26) “Justice.” Canada. Parliament. House of Commons. *Edited Hansard* 111. Oral Questions. Retrieved from <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=41&Ses=1&DocId=5524696#OOB-7537857> [1425] A review of the minutes of the all party-committee Harper mentions suggests the possibility that Harper may have tried indirectly but narrowly failed to secure a decision by the all party committee that the Woodworth motion was not votable. Though advised by the subcommittee's “Researcher,” Michel Bédard that the motion was votable since it did not fall outside federal jurisdiction, nor clearly violate provisions of the Constitution, nor take up an issue already decided by the House or on the Order Paper as an item of government business, one member of the committee, did doubt that it was “votable.” Philip Toone, an NDP MP claimed that the motion had “to do with abortion,” something that had been “decided over and over again,” and that the question of when a person acquired legal rights had been decided in the case of *Tremblay v. Daigle* (and even earlier) and that this established the constitutional status of what Woodworth wanted to question. A second member of the Subcommittee, Scott Reid a Conservative MP suggested the decision as to whether Motion 312 was “votable” be postponed until committee members had an opportunity to review the Daigle case. Following upon the observation by Bédard that the Woodworth motion already restricted the committee to the examination of “options available to Parliament in the exercise of its lawful authority in accordance with the Constitution and decisions of the Supreme Court,” a third MP, Stéphane Dion, the former Federal Leader of the Liberal Party, spoke against ruling the motion unvotable

If Woodworth's motion and the review of a subsection of the Canadian Criminal Code he wanted were not "about abortion" what were they about? Woodworth gave this answer to those attending the pro-life conference at which he spoke a month later: "they are about whether we should enshrine in Canadian law the inherent worth and dignity of every human being."<sup>17</sup> The explicit intention of Woodworth's motion was to establish a committee of Parliament that would ask whether modern medical evidence confirms what the Criminal Code claims, that a child only becomes a human being when it is alive wholly outside its mother's womb. The committee proposed would also consider "the legal impact and consequences" of this clause of the Criminal Code. What the Criminal Code is doing in Subsection 223(1) according to Woodworth is defining what a human being is in Canada. The principle upon which Woodworth and his supporters insisted is that "we should never accept any law that decrees some human beings are not human beings." All of our laws should, he said, speak the truth or "call all things by their right names." Parliament should now re-examine the definition of a human being set out in the Criminal Code in light of the findings of contemporary medical science, Woodworth argued, because that definition derives from a 400-year-old definition that perhaps "made sense when leeches and bloodletting were standard medical practices" but is no longer plausible in light of what medicine knows and parents can see for themselves through ultrasound technology about the facts of prenatal life in the womb. Indeed, Woodworth supposed, few Canadians believe that birth is a moment of magical transformation that changes a child from a non-human to a human being." Most "know that our existing definition dishonestly misrepresents the reality of who is a human

---

or postponing a decision by the committee. Though Dion said he shared Toone's dislike for Motion 312, he thought nothing "comes before the right Parliament has to debate issues" and he could not see a constitutional basis for preventing the debate Woodworth wanted. With Toone abstaining, the vote on Reid's motion to defer a decision was tied and then defeated by the vote of the Chair of the Subcommittee, Harold Albrecht, another Conservative MP. Albrecht would ultimately vote for Motion 312, Reid against it. See Minutes of the Subcommittee on Private Members' Business, Committee on Procedure and House Affairs for March 8, 2012. Canada. Parliament. House of Commons. *Edited Hansard* Retrieved from <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5439037&Language=E&Mode=1>.

<sup>17</sup> See above at n13.

being.”

The inquiry he proposed was important, Woodworth said, because “our law defining a human being must absolutely be an honest law based on cogent evidence and sound principle.” Why is this important? Because, Woodworth observed, in the absence of an “honest law” the powerful “can strip vulnerable people of all rights by decreeing that they are not human beings.” Further, if any human beings can be deprived of their inalienable rights by denying their humanity, the rights of all are put at risk. Woodworth cited the decision of the American Supreme Court in the Dred Scott case that African Americans were not persons under the US Constitution and the decision of Canada’s Court that women were not persons under some Canadian laws as examples of how the denial of humanity can deprive the weak of their rights. A new and terrifying instance of the same thing Woodworth found in a recent article in a respected journal of medical ethics whose authors argued that the killing of the newborn is justified in some cases because “there is no difference between a child before birth and the newborn.”<sup>18</sup>

A few of those who spoke against Woodworth’s motion acknowledged that medical evidence “speaks to the viability of the fetus” but insisted that “‘fetal viability’ does not define personhood.”<sup>19</sup> But mostly the argument I have just summarized was ignored by those who spoke against Woodworth’s motion in the two debates that followed. Some questioned what they took to be Woodworth’s assumption that the Criminal Code’s definition was questionable just because it was four hundred years old, or denied that it was four hundred years old inasmuch as it had been made part of Canadian law “in 1892 and not in 1600” and/or reaffirmed by Canadian courts in their abortion decisions and even in a civil case pertaining to an injury suffered by a child in the womb.<sup>20</sup> Some accused Woodworth of wasting Parliament’s time or public money by proposing an inquiry into what was already established in Canadian law.<sup>21</sup> Some said he was contradicting himself or being disingenuous in claiming to

---

<sup>18</sup> The statements by Woodworth quoted or paraphrased above are taken from the first hour of debate on April 26, 2012, Private Members’ Business: Special Committee on Subsection 223(1) See Canada. Parliament. House of Commons. *Edited Hansard* 111. 41st Parliament, 1st Session, Retrieved from <http://www.parl.gc.ca/HousePublications/Publication.aspx? DocId=5524696&Language=E&Mode=1#OOB-7539981>.

<sup>19</sup> Fry, Hedy (2012, April 26) op.cit.

<sup>20</sup> Boivin, Francoise (2012, April 26) op.cit.

<sup>21</sup> Fry, Hedy (2012, April 26)1 op.cit.

ask for the study of a question for which he already had the answer.<sup>22</sup> All of his opponents assumed that the effect of his motion would be to create the prospect of recriminalizing abortion and that this was Woodworth's actual and secret intention. Motions like Woodworth's, one MP said, "turn pregnant women into lesser citizens whose rights are subordinated to those of a fertilized egg."<sup>23</sup> On this assumption, several of the NDP and Liberal speakers in the debate took Woodworth's motion and the fact that the Prime Minister had not prevented the making of the motion as evidence of the Conservatives' violation of election promises and their ongoing effort to reverse progress towards equality for Canadian women. One called Motion 312 a "backdoor trial balloon" to test public opinion; another attributed the motion to the "Conservative Party's Trojan horse agenda." A third accused the Government of "speaking out of both sides of its mouth on this issue."<sup>24</sup>

How did Woodworth himself understand the relation between his proposal and the question of abortion? The implications of the parliamentary inquiry that Woodworth proposed were somewhat open, Woodworth said: having considered whether existing medical evidence supported the assumption of the Criminal Code that a child became a human being only at the moment of complete birth, the committee was asked to determine "the legal impact and consequences of Subsection 223(1) on the fundamental human rights of a child before the moment of complete birth" and identify "the options available to Parliament in the exercise of its authority in accordance with the Constitution and decisions of the Supreme Court to affirm, amend, or replace Subsection 223 (1)." The Committee, he proposed, was not asked or authorized to make any recommendations as to any possible legal restrictions upon abortion. But, of course, the fact of abortion and the implications of Woodworth's motion for that fact were, as we have seen, central to the opposition to the motion. And, opponents of the motion insisted that the Supreme Court had already settled the question that Woodworth wanted to open by the decisions that it had made when it ruled Canada's previous restrictions upon abortion unconstitutional. As

---

<sup>22</sup> Francoise Boivin (2012, April 26) at op.cit. (1735).

<sup>23</sup> Mathysen, Irene (2012, September 21) at Canada. Parliament. House of Commons. *Edited Hansard* 111. 41st Parliament, 1st Session, (1350). Retrieved from <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=41&Ses=1&DocId=5715306#OOB-7683778>.

<sup>24</sup> Fry at (1800), Ashton, Niki at (1815) op.cit.

to the first objection Woodworth's answer took the form of a question and his own answer to that question:

If the evidence tells us that a child is a human being before the moment of complete birth, will we close our eyes to the truth simply to justify abortion? *Do we need to pretend a child is not human until the moment of complete birth in order to justify abortion?* We do not. Even if a child is found to be a human being, it is arguable that the mother's rights will outweigh her child's rights. (emphasis added)

Yet, even if it were to be argued that the rights of the mother should prevail, Woodworth added, "it is never, ever, acceptable to deny that one of them is a human being." Though he did not discuss this in his speech in Parliament, one could suppose, as his critics and supporters did, that a discussion of the *status quo* on abortion in Canada might be the result of any change in Subsection 223(1).

But what of the objection that the Supreme Court had already settled the question Woodworth posed? Two answers might be given. The first was given by Michel Bédard, the adviser to the Subcommittee that deemed Woodworth's motion votable: this was that the motion itself asked the committee it would create to look for options "in accordance with the Constitution *and decisions of the Supreme Court*" (emphasis added). The committee Motion 312 would have established would presumably have been required to review for itself the meaning and effect of those decisions. To deny that Parliament can consider the meaning of the Court's decisions for itself would seem to deny Parliament itself its authority.<sup>25</sup> The second answer offered by Woodworth in his speech introducing his motion was that the Court itself had invited the very inquiry for which he was asking when it ruled unconstitutional Canada's 1969 law. To be precise, one of the judges making that ruling, Madame Justice Bertha Wilson, had acknowledged a legitimate state interest in the protection of the fetus at some point in its development and had said that the point at which that interest became compelling was best "left to the informed judgment of the legislature which is in a position to receive submissions on the subject from all relevant disciplines." Wilson was moreover, Woodworth added, an "eminent jurist with impeccable feminist credentials." He might also have noted that if hers was only one of the three opinions that made up the majority in the *Morgentaler*

---

<sup>25</sup> To his great credit this is what Stephane Dion seemed to be championing in the subcommittee's deliberations as to whether Motion 312 was votable.

ruling, it was also the ruling that most nearly recognized a right to abortion. Speaking later in the debate, in support of Motion 312, another MP observed that Wilson could not have thought that her suggestion that Parliament study the evidence as to when life in the womb should be protected “contradicted her rejection of Canada’s last abortion law.”<sup>26</sup>

With a view to the theme of this essay, the prospects for a law restricting abortion under a majority Conservative government in Canada, the most important speech against Woodworth was that of Gordon O’Connor the House Majority Leader, who had been chosen to speak by the Prime Minister.<sup>27</sup> O’Connor’s speech was important accordingly both because of what he said and because of who he was. O’Connor declared the question that Woodworth had posed, of what it is to be human, to be outside the competence and authority of Parliament. He surmised that the “ultimate intention” of Woodworth’s motion was to apply Canada’s homicide laws at some point in the child’s development in the womb, and he denounced that intention. His argument was that if “the legal definition of when one becomes a human being were to be adjusted so that a fetus is declared to be a person at some earlier stage of gestation, then the homicide laws would apply and abortion within that period would be considered homicide” [1805].<sup>28</sup> He said that the definition of what it is to be human in terms of live and complete birth had always been “part of Canada’s criminal law” and reflected “the well-established legal

---

<sup>26</sup> Anderson, David (2012, September 21) at Canada. Parliament. House of Commons. *Edited Hansard* 111. 41st Parliament, 1st Session, (1405). Retrieved from <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=41&Ses=1&DocId=5715306#OOB-7683778> 1405.

<sup>27</sup> Media reports on the debate commonly attached more importance to O’Connor’s speech than to Woodworth’s.

<sup>28</sup> O’Connor’s speech was the fifth of 6 speeches in the first hour of debate on April 26, 2012, Private Members’ Business: Special Committee on Subsection 223(1) See Canada. Parliament. House of Commons. *Edited Hansard* 111. 41st Parliament, 1st Session, Retrieved from <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5524696&Language=E&Mode=1#OOB-7539981> O’Connor added that under the existing 223(1) “if someone intentionally injures a child before or during its birth such that it dies after becoming a human being, then the criminal law treats that as a homicide.” Why he did so is unclear. In light of a study based on Canadian Institute of Health Statistics showing that some 40-50 infants “who are born alive and later die are classified as ‘termination of pregnancy.’” Three Canadian MPs have recently asked for a police investigation into these possible homicides.

principle that the law does not recognize a fetus or unborn child as a legal person possessing rights separate from its mother until it is born alive.”<sup>29</sup>

O’Connor went much further than this, however. According to his interpretation Canada’s Supreme Court “had also declared that the right to liberty guarantees a degree of autonomy over important decisions intimately affecting private life.” And he said this: “The decision of whether or not to terminate a pregnancy is essentially a moral decision, and in a free and democratic society, the conscience of the individual must be paramount and take precedence over that of the state.” Though O’Connor claimed to recognize that the issue of abortion “raises strongly held divergent views within and outside Parliament,” his speech made it clear that he did not understand why this should be the case. Certainly he could not, he said, “understand why those who are adamantly opposed to abortion want to impose their beliefs on others....”<sup>30</sup>

Did O’Connor speak for his Leader in the sense that all that he said was what Mr. Harper wanted said or would have said himself if present? This is an important question to ask, for while Harper insisted that he did not want, and

---

<sup>29</sup> Clarke D. Forsythe, Chief Counsel of Americans United for Life, has shown that the principle to which O’Connor appeals is far from “well established” through a careful historical analysis of the treatment of that principle in the common law. Forsythe shows that the principle was evidentiary and not substantive reflecting the fact that medical science when the principle was established reasonably supposed that the fact of homicide as a result of an injury upon the fetus in the womb could not then be clearly established as it can be now through ultra sound technology. “An examination of the origins and reasons for the born alive requirement [reveals] that at common law the rule was entirely an evidentiary standard, mandated by the primitive medical knowledge and technology of the era, and that the rule in its origin was never intended to represent any moral judgment on the criminality of killing an unborn child *in utero*.” In fact, Forsythe shows that at least some American courts have recognized the evidentiary character of the rule in addressing charges of vehicular homicide against the fetus. “Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms,” *Valpariso University Law Review* 21 (1986-1987): 563-66.

<sup>30</sup> Though it is not my business here to assess O’Connor’s speech, one could say of him what Lincoln said of Stephen Douglas: Douglas could not understand why anyone would object to the decision of any particular white community to enslave or emancipate or disenfranchise black Americans because he had no idea of the humanity of the enslaved – implicitly or unconsciously he denied it. O’Connor cannot understand why anyone would want to restrict abortion because he has no idea of the humanity of the unborn.

would not permit, a debate on abortion as long as he was Prime Minister, he never explicitly said that he approved the *status quo* on abortion.<sup>31</sup> What he rather suggested was that he thought the topic should be avoided, sometimes even that pro-lifers should concentrate their efforts on changing public opinion so that a law restricting abortion might become possible. Nor did O'Connor actually claim that what he said in favour of the status quo was what Harper would have said – though the fact that he had been chosen by his Leader to speak in the debate could lead to this suspicion. What he did say – correctly – was that Harper had consistently maintained – since the Party's first policy convention in 2005 – that a Conservative government would not support any legislation to regulate abortion or reopen this debate.

On September 25, 2012, the debate on Motion 312 was concluded and the following day the Motion was defeated. In the five month's that passed between the first debate and final debate and vote on Motion 312 media reports and statements by organized opponents of the motion altered from the assumption that the motion would win little support to a gradual awareness that this might not be the case. Chantal Hébert, a well known newspaper columnist and frequent CBC panelist, while observing in early May that the evidence was mounting against the claim of the Opposition and abortion supporters that Harper was "using the backdoor of private members' bills to reopen an issue he has otherwise promised to leave alone," said that the defeat she anticipated "at the hands of the most socially-conservative friendly majority government in decades – would be a crushing blow to the anti-abortion cause. It could be construed as its biggest setback since the Supreme Court ruling [in the *Morgentaler* case]."<sup>32</sup> Joyce Arthur the most often quoted advocate of abortion in Canada thought that the first hour of debate on the Woodworth motion could "prove to be a watershed moment, one that could end the abortion debate in Canada forever." In light of the O'Connor speech, which Arthur took to be an

---

<sup>31</sup> In a televised debate in the first election in which he competed as his party's leader, Harper used the language of choice in describing his position. A pro-life adviser complained of this and says that Harper accepted the correction and generally avoided this language afterwards.

<sup>32</sup> "Harper seeks to put the abortion issue to rest," *Toronto Star*, May 11, 2012. In September, two weeks before the vote, Chantal Hébert admitted that the vote was expected to be "a tight one" and would "test Harper's election promise to keep a lid on the abortion debate." "Fetal rights and language rights could live up next Parliament," *Toronto Star*, September 14, 2012.



unqualified repudiation of Woodworth's motion from the Conservatives' own leader, she predicted "a resounding defeat of Woodworth's motion, because only the most hard-core anti-choice Conservatives will likely vote in favour of it now."<sup>33</sup> Supporting Arthur's expectation were press reports that the Prime Minister's Office was "putting heavy pressure on members of the Conservative caucus to vote down" the Woodworth motion. It was reported that "senior Tories" had warned backbench Conservative MPs that a vote for the motion was "a vote against Mr. Harper."<sup>34</sup>

In fact, the vote that defeated Motion 312 was 203 to 91, a result far closer than the motion's opponents and (probably) its supporters had expected. Though 95 MPs had voted for the Bruinooge bill against coercing a woman into having an abortion two years earlier, ten of those 95 votes had been cast by Liberal members of the Opposition. Of the 91 votes in favor of the Woodworth motion, only four were cast by Liberals. Despite the efforts of the Prime Minister's office, a majority of Conservatives in the House – 86 vs. 74 – voted in favor of Woodworth's motion. And eight members of the Government and two Parliamentary Secretaries voted for Motion 312; these included Jason Kenney, the Minister of Immigration, who is widely regarded as a key figure in the obtaining of a Conservative majority in the 2011 election; Rona Ambrose, the Minister responsible for women's issues; and Julian Fantino, a former Commissioner of the Ontario Provincial Police and "star candidate" in a 2010 by-election victory. Support for Motion 312 was also substantial in all but three provinces.<sup>35</sup> In Ontario, for example, 37 MPs voted for the Woodworth motion, 68 against; 33 Ontario Conservatives supported the motion, while 38 opposed it. To be sure, the efforts of the Prime Minister's

---

<sup>33</sup> "The science and art of defeating Motion 312," Arthur, the founder and Executive Director of Canada's Abortion Rights Coalition of Canada took credit for what she supposed a very successful campaign against Motion 312. She urged continued effort not so much to defeat the motion as to "make the government look bad" and produce a "feel good victory that women need badly right now." <http://rabble.ca/columnists/2012/05/science-and-art-defeating-motion-312>.

<sup>34</sup> Stephen Chase, "Harper eager to quash anti-abortion motion," *The Globe and Mail*, June 6, 2012.

<sup>35</sup> The votes by province for and against Motion 312 were as follows: Alberta 19/8, British Columbia 13/20, Manitoba 6/7, New Brunswick 5/5, Newfoundland and Labrador 1/6, Northwest Territories 0/1, Nova Scotia 0/11, Ontario 35/68, Prince Edward Island 2/2, Quebec 0/70, Saskatchewan 10/3.

office to defeat the Woodworth motion may have had some success: a dozen Conservative MPs who had voted for the Bruinooge motion in 2010, voted against Motion 312, and nineteen who did not vote at all on the Bruinooge Bill voted against Motion 312 – mostly these were MPs who were elected for the first time in 2011. But there is equally compelling evidence that the support in Parliament for a discussion of abortion or an examination of the issues posed by the Woodworth motion remains significant: six MPs who had voted against the Bruinooge Bill supported Motion 312 – two were cabinet members – and eleven of those who had not voted on the earlier bill – mostly new MPs – supported Motion 312. Assuming no change in the Prime Minister’s policy so long as he and his party held office – that he and his Office would continue to discourage and manage to defeat all measures that are perceived by abortion advocates as threats to the abortion status quo but continue to allow a free vote<sup>36</sup> on Private Members’ bills like Motion 312 – it would be reasonable to suppose that no effort to restrict or even debate abortion would have won majority support in Canada’s House of Commons while a sizeable number of mostly Conservative MPs would continue to support just this.<sup>37</sup>

The prospects for any change in the abortion *status quo* in Canadian law on this reading depended (at the time of writing) upon my assumption that the Prime Minister would remain in office and proceed as he had proceeded since becoming Leader of Canada’s Conservative Party and now head of a Conservative government. If Harper – or any future leader of a Conservative government – approaches this question strictly as a calculation of the foreseeable costs and benefits of maintaining or altering his stance – that he (or she) neither favors the present abortion freedom nor its restriction as such – was there – is there – a case for proceeding in a different way? What were the costs of

---

<sup>36</sup> According to Party rules a vote may be entirely free, as was the vote on Motion 312, or it may be more or less controlled with all members required to vote as the Leader demands, or Cabinet members only bound to do so, or both members of the Cabinet and Parliamentary Secretaries required to do so. It is reported that Harper considered demanding that members of his Cabinet vote against Motion 312 but relented when it became clear in caucus that there was strong opposition to this possible move.

<sup>37</sup> The day after the Woodworth motion was defeated a BC MP announced that he would introduce a motion condemning the use of abortion for sex-selection. Kim MacKrael, “New debate looms over sex-selective abortion motion,” *The Globe and Mail*, Oct. 01 2012.

proceeding as Harper did? What were his options? As we have seen, in the case of the Woodworth motion in Parliament the Opposition claimed that the Prime Minister's failure to prevent or silence the debate on abortion demonstrated weakness or hypocrisy or dishonesty or some mix of the three on his part. How did Harper defend himself against this attack? He insisted that he regretted the fact that there was to be a discussion of abortion after all and announced that he would vote against the motion. He authorized the Government's House Leader to condemn the argument of the Private Member who had introduced Motion 312 while leaving it unclear whether that member's case for the status quo was one he shared or not. And he is said to have used the informal rewards and threats at his disposal to secure the defeat of the Woodworth's motion. These things the Prime Minister did do. With what result? Possibly the vote on Motion 312 was affected significantly. And a few journalist observers were persuaded that Harper had no hidden agenda. But the charge was not abandoned by the opponents of Motion 312 inside or outside Parliament. And even those persuaded that Harper had no secret sympathy for the foes of abortion in his Party could only replace the hidden agenda charge with that of weakness. Even at that moment in the early summer of 2012 when abortion rights activists expected Motion 312 to be smashed, this expectation did not mean that those abortion supporters were about to become Conservatives. In fact, the greatest hope. Of Joyce Arthur, their leader, was that a humiliating defeat of Motion 312 would contribute to the replacing of the Conservatives with a far more left-wing federal government. The benefit for the Conservatives of Harper's stance must rather be in averting the damage resulting from the "hidden agenda" charge.

What damage is done by the "hidden agenda" charge? That cost we might suppose consists in the lost support of those who will vote against the government because they fear it intends to open the debate on abortion and then to restrict abortion? Is there evidence that this cost is actual and significant? To assess that cost accurately one would need to determine how many of those who feared – or said that they feared – that Harper wanted to re-open the abortion debate would support the Conservatives if they were persuaded that Harper did not intend this. How many votes are lost by the Conservatives whenever the hidden agenda charge is made, say in response to a Conservative candidate's anti-abortion remarks during an election campaign? One important member of Harper's government told me that the series of elections through which Harper's Conservatives became a minority and then

a majority government do not demonstrate actual damage to the party when the “hidden agenda” charge was leveled. Polling by the party showed unchanged or even improving levels of voter support just when media attention was focused on strong anti-abortion remarks by Conservative candidates. The actual and, he admitted, real cost for the Party was not in the direct loss of support but in the preoccupation of the media with the issue during an election campaign; the actual cost was that Harper was kept “off-message” as long as the media persisted in making the hidden agenda charge the election story. Finally, I note that according to at least one back-bencher from a partly rural and small-town riding there are some like this member who think that they would lose support – perhaps fatally – if it became clear to their constituents that the government meant to do nothing about abortion.

Does their vehemence in making the “hidden agenda” charge not show clearly that there is an advantage for the Opposition in making it? Not necessarily, for their advantage may arise not from the charge itself but from the Government’s response to the charge and its failure to keep its promise to prevent debate on the subject. A review of the debate on Motion 312 leads one to suspect that the Opposition would prefer to attack Harper for his failure to silence the debate rather than to enter into the discussion of abortion itself.

So, what were Harper’s options in facing the challenge posed by Motion 312? He could have done as he did: try to suppress the debate without declaring his position on abortion. He could have used informal means to accomplish this as he did in the case of the Bruinooge and Woodworth motions. He won the vote on Motion 312, but he could not prevent the debate he promised to avoid or persuade a majority of his own party in Parliament to follow his lead: proceeding as he did in the case of Motion 312, he exposed himself to the accusation of duplicity or weakness. He could have whipped his MPs or insisted that members of the cabinet vote as he wanted them to, but this would have betrayed the promise he had made when he became leader of the new Conservative Party that he would allow Members of Parliament to vote according to their conscience on moral questions, and he would have seriously damaged his reputation as a leader who could be trusted. He could have explicitly embraced the *status quo* as his lieutenant, O’Connor, did in the case of Motion 312, but this would have alienated those conservatives who comprised more than half of his caucus and were his most reliable supporters. Or he could have found a way to talk about abortion.

## EPILOGUE

In October 2015 the Conservative government of Stephen Harper was defeated by the Liberals under the leadership of Justin Trudeau, whose father had presided in 1969 over the legislative liberalization of Canada's abortion law through the "therapeutic abortion" scheme, itself ruled unconstitutional by the Supreme Court in 1988. As Liberal leader, Justin Trudeau insisted that he would accept no parliamentary candidates who did not support abortion.<sup>38</sup> As Prime Minister, Trudeau established a policy for Canada's summer grants program for those employing students that made organizations unwilling to "attest" their support for an unlimited abortion right ineligible for grants. When Mr. Harper resigned as Conservative leader shortly after the defeat of his party in 2015, the Conservative parliamentary caucus selected Rona Ambrose (who had voted for motion 312) as interim leader and initiated a process that would see a former speaker of the House, Andrew Scheer, made Conservative leader in May 2017. Scheer who will lead his party in the federal election scheduled for Fall 2019 had, as an MP, supported private members' bills that would limit abortion except when his role as speaker prevented him doing so. As a candidate for the leadership he promised neither to introduce legislation on abortion nor to prevent action or discussion on abortion by others in Parliament. His election in the very complex scheme the Party established to choose a leader from the many who sought the post apparently resulted from the fact that he was second choice for the surprising number of Conservative party members who voted for one or two other candidates who promised action on abortion. That Scheer will be accused, as his predecessor was, of possessing a "hidden agenda" to restrict abortion as Canada approaches its next federal election seems certain. How he will respond to that charge will depend in part on how he reads the lessons of the Harper policy and its consequences.

---

<sup>38</sup> According to an analysis of the 2015 election by Campaign Life Coalition, a Canadian pro-life political organization, 23 of 58 pro-life incumbents, including Stephen Woodworth the author of Motion 312, lost their seats, while 6 new pro-life MPs were elected. The same analysis identified 41 of the Conservatives elected as pro-life and observed that 47% of pro-life Conservative candidates were elected while only 31% of those seen as pro-abortion were elected. (<https://www.campaignlifecoalition.com/hot-news/id/259>).