

Defying the Law of the Land: The Lawyer's Role in Civil Disobedience in Canada

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Abstract

A lawyer's role in relation to the issue of civil disobedience is far from settled. Lawyers advocate for values such as "truth" and "justice;" however, they are also instructed to respect the rule of law and the legislature's role in creating laws and policy. Due to the tension between values and law, lawyers must choose which clients to represent as well as determine what constitutes effective counsel. The *Charter of Rights and Freedoms* adds another complex dimension to this dilemma because of the fine line between "civil disobedience" and the assertion of *Charter* rights through test case litigation. It is easy to look back at historical moments, such as the civil rights movement, and recognize when civil disobedience is justified. However, we do not always have the luxury of hindsight, and we must not deny that there are legitimate reasons to practice civil disobedience today. The legal history of Dr. Henry Morgentaler is an example of the juxtaposition between advocacy and policy. Throughout his legal battles, Dr. Morgentaler was labelled a criminal who performed civil disobedience, but who is now highly regarded as someone who fought for *Charter* rights. Therefore, with competing obligations to one's client, fellow lawyers, and the public in general, lawyers must chart their own ethical course in these matters.

Keywords: Charter of Rights and Freedoms, legal ethics, reproductive rights, Henry Morgentaler, test case litigation

Introduction

Lawyers have a number of duties attached to their role – to their clients, to the court, to each other, and to the public at large. While it is important for lawyers to appreciate the rule of law, law is ostensibly also about justice and morality. Civil disobedience occupies an uncertain philosophical and practical place in relation to the role of the lawyer.

Justice James MacPherson of the Ontario Court of Appeal aptly outlined the quandary civil disobedience

creates for judges, because it involves a "flaunting of the law" which often leads to "the repression of activists and agitators for change."¹ According to MacPherson, "the dissident must be given some room for manoeuvre, while the status quo is to be defended."² The *Charter* adds

¹ James MacPherson "Civil Disobedience and the Law: The Role of Legal Professionals" (2003) 41 *Osgoode Hall L.J.* 371 at 372.

² *Ibid.*

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another dimension to this problem – the line between “civil disobedience” and someone acting within their *Charter* rights is not immediately apparent.³ An example of someone who has been considered in both categories is Dr. Henry Morgentaler, an individual who was named to the Order of Canada as a result of his civil disobedience and advocacy.

Test Case Litigation

Morgentaler and his lawyers used his case as a test case. Mónica Roa and Barbara Klugman use the term “strategic” litigation instead of test case litigation, but are referring to the same or very similar subject matter. They defined the term as “the litigation of a public interest case that will have a broad impact on society beyond the specific interests of the parties involved.”⁴ They list four necessary conditions for successful change using strategic litigation: an existing rights framework, an independent and knowledgeable judiciary, civil society organization with the capacity to frame social problems as rights violations and to litigate, and a network able to support and leverage the opportunities presented by litigation.⁵

C. Matthew Hill wrote about the potential of test case litigation. He highlights its “ability to generate public sympathy, increase an organization’s financial and constituent support and augment legislative and public protest activity.”⁶ One example of a particularly successful test case litigator was Thurgood Marshall. Marshall developed test case litigation strategies which “systematically identified and vindicated constitutional rights of African Americans, thereby creating an avenue of access to the democratic process for all citizens regardless of their status.”⁷

In the 1960s, the United States Supreme Court expressly sanctioned test case litigation as a method of achieving equality: “In the context of NAACP objectives, litigation is not a technique of resolving private differences;

it is a means for achieving the lawful objectives of equality of treatment by all government.”⁸

In Canada, the Supreme Court clarified public interest standing in the 2012 case *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*.⁹ The Court references the principle of legality, the idea that “state action should conform to the Constitution and statutory authority and that there must be practical and effective ways to challenge the legality of state action.”¹⁰ In order to meet the requirements for public interest standing, a potential litigant must show: (1) the case raises a serious justiciable issue, (2) they have a real stake or genuine interest in that issue, and (3) the suit is “a reasonable and effective means of bringing the issues before the courts in all the circumstances.”¹¹ The Court rejected a more restrictive approach to the third requirement.¹²

Why Do People Follow the Law?

In his work *Why People Obey the Law*, Tom R. Tyler advanced two main theories in the field as to why people choose to follow the law: instrumental and normative.

Instrumental Theory

The instrumental perspective views people as “shaping their behaviour to respond to changes in the tangible, immediate incentives and penalties associated with following the law” thereby forming “judgements about the personal gains and losses resulting from different kinds of behavior.”¹³ This type of thinking forms the basis of “deterrence literature” – the idea that increasing the severity and likelihood of punishment for committing a crime will lead to less people committing the offence.¹⁴ Approaching compliance with the law with an instrumental perspective leads to a focus on “the extent and nature of the resources that authorities have for shaping behaviour” – i.e. external factors used to influence individuals’ behavior.¹⁵

³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

⁴ Monica Roa & Barbara Klugman, “Considering Strategic Litigation as an Advocacy Tool: A Case Study of the Defence of Reproductive Rights in Columbia” (2014) 22:44 *Reproductive Health Matters* 31 at 31.

⁵ *Ibid.*

⁶ C. Matthew Hill, “We Live Not on What We Have: Reflections on the Birth of the Civil Rights Test Case Strategy and its Lessons for Today’s Same-Sex Marriage Litigation Campaign” (2005) 19 *Nat’l Black LJ*. 175 at 202.

⁷ Julius L. Chambers, “Thurgood Marshall’s Legacy” (1992) 44 *Stan. L. Rev.* 1249 at 1249-1250.

⁸ *Ibid* at 1250.

⁹ 2012 SCC 45, [2012] 2 SCR 524.

¹⁰ *Ibid* at para 31.

¹¹ *Ibid* at para 53.

¹² *Ibid* at para 44.

¹³ Tom R. Tyler, *Why People Obey the Law*, (Chelsea, Michigan: BookCrafters Inc, 1990) at 3.

¹⁴ *Ibid.*

¹⁵ *Ibid* at 4.

Normative Theory

Normative theory, on the other hand, is concerned with the influence of what people consider "moral and just."¹⁶ According to Tyler, if people conceive of compliance with the law as "appropriate because of their attitudes of how they should behave, they will voluntarily assume the obligation to follow legal rules."¹⁷ Their thought process on obeying the law is not dependent on the certainty or severity of punishment. Approaching compliance with the law with a normative perspective would lead to a focus on people's "internalized norms of justice and obligation."¹⁸

In Tyler's experiments and research, he concluded that the normative factors were more useful in predicting whether people would obey or disobey the law than the self-interest (instrumental) model used in many disciplines.¹⁹ Tyler states that, "people obey the law because they believe that it is proper to do so, they react to their experiences by evaluating their justice or injustice, and in evaluating the justice of their experiences they consider factors unrelated to outcome, such as whether they have had a chance to state their case and been treated with dignity and respect."²⁰

What is Civil Disobedience?

Thoreau on Civil Disobedience

Transcendentalist author and philosopher Henry David Thoreau not only wrote a classic text on civil disobedience – he also practiced it himself. In July 1846, he was arrested for not paying his poll tax.²¹ The local constable offered to pay his tax for him and try to persuade the selectman to reduce the tax if Thoreau thought it was too high. Thoreau replied that he had not paid it "as a matter of principle and didn't intend to pay it now."²² For years, his non-payment of the poll tax was simply ignored, much to his chagrin.²³ Thoreau had purposely abstained from paying the poll tax out of a belief that the American-Mexican war and slavery were wrong and he had a moral duty to not support those causes through the payment of

his taxes.²⁴ Townspeople were curious about his eagerness to be incarcerated. This led to Thoreau performing lectures, the content of which would later be published as the now-famous essay *Civil Disobedience*.²⁵

Civil Disobedience reflected Thoreau's actions. He wrote of a "higher law" that went above the law of one's land – one's "inner voice."²⁶ He thought the law of the land would, more often than not, be congruent with one's inner voice. However, when the law of the land was not in line with one's conscience, he asserted it was "one's duty to obey that "higher law" and deliberately violate the law of the land."²⁷ In the event that one did violate the law of the land, it was necessary to be willing to accept the "full consequences of that action, even to the point of going to jail."²⁸ He argued that being incarcerated is not as negative as one would initially assume, as it would attract attention to the injustice of the particular law itself, and help to "draw its repeal."

It is not desirable to cultivate a respect for the law, so much as for the right. The only obligation which I have a right to assume, is to do at any time what I think right. It is truly enough said, that a corporation has no conscience; but a corporation of conscientious men is a corporation *with* a conscience. Law never made men a whit more just; and, by means of their respect for it, even the well-disposed are daily made the agents of injustice.²⁹

Thoreau's actions implied that the democratic channels of law reform are unsatisfactory, partly because they take too long. Voting does not require real action; casting a vote is simply passively imputing intention.³⁰ Even if he was to try to petition the government, there is no guarantee they would listen, and innocent people would lose their lives in the meantime under an unjust law.³¹

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid* at 178.

²⁰ *Ibid.*

²¹ Henry David Thoreau & Walter Harding, *The Valorium Civil Disobedience*, (New York: Ywayne Publishers Inc, 1967) at 11.

²² *Ibid.*

²³ *Ibid* at 13.

²⁴ *Ibid* at 14.

²⁵ *Ibid* at 18.

²⁶ *Ibid* at 19.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid* at 37.

³¹ *Ibid* at 40.

Elements of Classic Civil Disobedience

Classic civil disobedience has four components – (1) clear identification of the law being challenged; (2) open disobedience of the law; (3) non-violence; and (4) acceptance of legal consequences of breaking the law.

Socrates

One could argue that the philosopher Socrates performed civil disobedience by openly refusing to accord to the Athenian law of the time, and accepting the legal consequences of breaking the law: drinking the hemlock which caused his death.³² Socrates answered to a power higher than the law of the day and valued his integrity or "cause" above all else. His was not a Thoreau-esque form of civil disobedience, as his main object was not legislative or policy reform.

Mohandas Gandhi

According to scholar Sharon Nepstad, Mohandas Gandhi was heavily influenced by Thoreau's notion of non-cooperation with an oppressive system and realized that the British colonizers could not keep their control over India unless the people of India cooperated with them.³³ He identified "various ways that Indians tacitly supported British rule and thus devised a strategic plan to systematically withdraw support until British control disintegrated." As Indians engaged in general strikes, refused to buy British goods, and ignored unjust laws, the British concluded that it was no longer economically fruitful to remain in India.³⁴ The British Raj left voluntarily in 1947. Many people revere Gandhi for his non-violent approach to creating change. Gandhi is quoted as saying, "civil disobedience does not admit of any violence or countenancing of violence, directly or indirectly."³⁵

Dr. Martin Luther King, Jr.

In his essay on "Love, Law, and Civil Disobedience," Dr. King differentiated between just and unjust laws:

This brings in the whole question of how can you be logically consistent when you advocate obeying some laws and disobeying other laws. Well, I think one would have to see the whole meaning of this movement at

this point by seeing that the students recognize that there are two types of laws.

There are just laws and there are unjust laws. And they would be the first to say to obey the just laws, they would be the first to say that men and women have a moral obligation to obey just and right laws... a just law is a law that squares with a moral law. It is a law that squares with that which is right, so that any law that uplifts human personality is a just law.³⁶

Dr. King held that disobeying a law because of one's conscience was expressing at that moment "the very highest respect for the law."³⁷ He pointed to examples of unjust laws across the world:

We must never forget that everything Hitler did in Germany was "legal". It was illegal to aid and comfort a Jew, in the days of Hitler's Germany. But I believe that if I had the same attitude then as I have now I would publicly aid and comfort my Jewish brothers in Germany if Hitler were alive today calling this an illegal process.

If I lived in South Africa today in the midst of the white supremacy law in South Africa, I would join Chief Luthuli and others in saying break these unjust laws.³⁸

The above passage emphasizes how there can be a difference between what is moral and what is legal. Different individuals and groups hold differing moral views, and this can create conflict.

The Legal Profession and Civil Disobedience in Canada

Duties of Lawyers

As with other areas of legal ethics, lawyers have a number of different and, at times, competing duties.

Duty to Client. While plans to commit civil disobedience have not yet met the public safety exception to lawyer-client privilege, it is still worth considering. In Brent Cotter's chapter on "The Lawyer's Duty to Preserve

³² Plato, *Apology*, (Ithaca, New York: Cornell University Press, 1979).

³³ Sharon Erickson Nepstad, *Nonviolent Revolutions: Civil Resistance in the Late 20th Century*, (New York: Oxford University Press, 2011) at 9.

³⁴ *Ibid.*

³⁵ *Supra* note 1 at 380.

³⁶ David R. Weber, *Civil Disobedience in America*, (Ithaca, New York: Cornell University Press, 1978), at 215.

³⁷ *Ibid* at 216.

³⁸ *Ibid* at 217.

Client Confidences," he says the "lawyer's duty to preserve the confidences of his or her client is at the heart of the lawyer-client relationship."³⁹ In order for the client to trust their lawyer, they need to be assured that information shared is kept confidential, albeit with a few limited exceptions. This duty is set out in the Federation of Law Societies of Canada Model Code of Professional Conduct, stating at 3.3-1:

- (1) A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:
- (a) expressly or impliedly authorized by the client;
 - (b) required by law or a court to do so;
 - (c) required to deliver the information to the Law Society, or
 - (d) otherwise permitted by this rule.⁴⁰

If a lawyer were to be informed by their client that they were planning to disobey the law, the lawyer would only be able to break confidentiality if the content fell under a recognized exception.

One exception to the rule of keeping client confidences is the "public safety" exception. In the 1999 case *Smith v Jones*, a man was charged with aggravated sexual assault on a sex worker.⁴¹ The defendant's lawyer told him that his meeting with a psychiatrist would be privileged in the same way that his meeting with a lawyer is privileged. He revealed to his psychiatrist disturbing information of ongoing plans to kidnap, sexually assault and then murder sex workers. His interview with the psychiatrist was not privileged in the normal manner in order to protect the public. This situation is an especially egregious case – the vast majority of situations would be less serious and therefore not qualify under this exception.

In addition to keeping client confidences, a lawyer is also expected to be a loyal advocate for and further the aims of their client. Rule 5.1-1 of the *Model Code* states that "when acting as an advocate," the lawyer must "...represent the client resolutely and honourably within the limits of the law."⁴² The lawyer must "raise fearlessly every issue,

advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law."⁴³

Duty to Other Lawyers. One consideration a lawyer might have when deciding to assist a client in breaking the law would be the impact such an action could have on the reputation for the profession as a whole. Due to the fact that the legal profession is self-regulating and the Law Society has a monopoly on the practice of law, it is in the interest of all lawyers to attain and maintain a high level of respect for the profession in the eyes of the public. The Law Society of Saskatchewan's *Code of Professional Conduct* (2012) states at 1.01(1) "A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public, and other members of the profession honourably and with integrity."⁴⁴

Duty to the Court. Michael Code discusses the area of ethics and criminal law practice in *Lawyers' Ethics and Professional Regulation*, bringing attention to the ethical duties of lawyers as "officers of the court."⁴⁵ According to Code, the courts and the legal profession developed at the same time in history. Lawyers can be considered part of the machinery of the court.⁴⁶ The role of lawyer as officer of the court is elucidated in *R v O'Connell*:

This Court in which we sit is a temple of justice; and the Advocate at the Bar, as well as the Judge upon the Bench, are equally ministers in that temple. The object of all equally should be the attainment of justice; now justice is only to be reached through the ascertainment of truth, and the instrument which our law presents to use for the ascertainment of the truth or falsehood of a criminous charge is the trial by Jury; the trial is the process by which we endeavour to find the truth...That learned Counsel described the Advocate as the mere mouth-piece of his client; he told us that the speech of the Counsel was to be taken as that of the client and thence seemed to conclude that the client only was answerable for its language

³⁹Alice Woodley et al., *Lawyers' Ethics and Professional Regulation, Second Edition*, (Markham: LexisNexis Canada Inc., 2012), at 207.

⁴⁰ Federation of Law Societies of Canada, *Federation Model Code of Professional Conduct*, Ottawa: FLSC, 2017.

⁴¹ *Smith v. Jones*, [1999] 1 SCR 455, 169 DLR (4th) 385, [1999] 8 WWR 364.

⁴² *Supra* note 40.

⁴³ *Ibid* at 5.1-1.

⁴⁴ Law Society of Saskatchewan, *Code of Professional Conduct*, February 2012.

⁴⁵ *Supra* note 39 at 456.

⁴⁶ *Ibid*.

and sentiments. Such, I do conceive, is not the office of an Advocate.⁴⁷

The values in *O'Connell* – truth and justice – are difficult to pin down in a tangible way. Code notes that the cases regarding the duty as officers of the court places a “premium on Counsel’s honesty and integrity.”⁴⁸ On the one hand, “integrity” and “justice” might mean assisting a client in a plan to commit civil disobedience, as the law may be draconian or discriminatory. On the other hand, “honesty” and respect for the court could lead a lawyer against assisting her client in committing civil disobedience because breaking the law would be contrary to the goals and function of the court as an instrument for enforcement of the law.

Two aspects of civil disobedience – *openly* disobeying the law and accepting the legal consequences of breaking the law – are consistent with the emphasis on honesty that the Code discusses. While secretly breaking the law would be contrary to the values of the role of “officer of the court”, publicly breaking them for what the client and/or lawyer considers the pursuit of justice is more of a grey area.

Duty to the Public. Duty to the public is a broad and subjective duty – it can be construed to either support or oppose the idea of civil disobedience. While one could argue that law and order must be upheld and change should occur through traditional parliamentary channels, it would also be valid to argue that one’s personal sense of morality and conscience should override the written law in instances where it is warranted, especially if lives are at stake.

In 1937, an Ontario public health nurse, Dorothea Palmer, was acquitted of disseminating birth control information. Due to an obscure *Criminal Code* provision her actions were deemed to be in the public good (*pro bono publico*), and were justified.⁴⁹

Prohibition on Assisting in Crime. If a lawyer were retained by a client contemplating performing what they considered to be “civil disobedience,” there could ostensibly be a duty to disclose confidential information under the Law Society of Saskatchewan’s *Code of Professional Conduct*:

“s. 2.03(4) A lawyer may divulge confidential information, but only to the extent necessary:

(...) (d) If the lawyer has reasonable grounds for believing that a crime is likely to be committed and disclosure could prevent the crime.”⁵⁰

However, the commentary for this section lists a number of factors to be considered when weighing whether to disclose information or not. This includes the nature of the crime, whether the disclosure would prevent the crime, and whether the client envisions involving the lawyer in the events relating to the crime.⁵¹ Interestingly, the commentary also suggests the lawyer listens to their own conscience when making the decision about whether to disclose.⁵² The idea of listening to one’s conscience above other factors is a prominent theme for famous practitioners of civil disobedience such as Thoreau and King.

Examples of Civil Disobedience in Canada: Dr. Henry Morgentaler

Background

In 1896, Canada’s Parliament declared abortions to be illegal and anyone performing them was subject to life imprisonment.⁵³ In 1892, s. 197(c) of the *Criminal Code* deemed it an indictable offence to “offer or sell, advertise, publish an advertisement of or have for sale or disposal any medicine, drug or article intending or represented as a means of preventing conception or causing an abortion.”⁵⁴

In Britain, the restrictions on abortion were lessened in 1936, when Dr. Alec Bourne handed himself to the authorities in order to bring about a test case. He had “performed an abortion for a fourteen-year-old girl raped by four soldiers” and was acquitted on the basis that if the pregnancy were to continue it would make the victim a “physical or mental wreck.”⁵⁵ This legal precedent was adopted in Canadian jurisprudence.

Canadian historians Angus McLaren and Arlene Tigar McLaren, in their work *The Bedroom and the State*, estimate that approximately 4000 to 6000 Canadian women died from illegal abortions between 1926 and 1947.⁵⁶ The primary cause of death was usually “infection,

⁵⁰ *Supra* note 44.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Supra* note 49 at 65.

⁵⁴ *Ibid* at 66.

⁵⁵ *Ibid.*

⁵⁶ Childbirth by Choice Trust, *No Choice: Canadian Women Tell Their Stories of Illegal Abortions*, (Toronto: Childbirth by Choice Trust, 1998) at 14.

⁴⁷ *Ibid.*

⁴⁸ *Ibid* at 357.

⁴⁹ Catherine Dunphy, *Morgentaler: A Difficult Hero*, (Toronto: John Wiley & Sons Canada, Ltd., 2003) at 67.

haemorrhaging from a ruptured uterus, drug poisoning and embolisms."⁵⁷ It is estimated that the annual number of illegal abortions prior to 1969 was between 20 000 and 120 000.⁵⁸ According to Statistics Canada, from 1900 to 1972, 1793 people were charged and 1155 convicted of inducing an abortion.⁵⁹

In the collection of information and stories *No Choice: Canadian Women Tell Their Stories of Illegal Abortion*, many women stated they were aware of putting their lives at risk to end their pregnancies. One woman stated, "I would rather take a chance of death than continue this pregnancy."⁶⁰ The conditions these operations were being performed in were quite precarious – the majority of providers, according to the stories collected "showed little concern and seemed to be in the business solely for the money."⁶¹

In 1964, Morgentaler became president of the Montreal Humanist Fellowship.⁶² He convinced the Fellowship in Montreal, as well as other chapters, to support a then-radical position that abortion should be provided to any woman in her first trimester.⁶³ On October 19, 1967, he testified at Parliament's health and welfare standing committee.⁶⁴ He was grilled for hours on a number of related and unrelated topics. The next morning, his testimony was in several major newspaper articles and he was being contacted for television interviews.⁶⁵ In addition to interview requests, he was inundated with requests to perform on-demand abortions for women across the country.⁶⁶ Many of them were desperate and were hopeful he could help them after hearing his proposal to end the "illegal and dangerous backroom abortion racket."⁶⁷ Dr. Morgentaler at this point in time was determined to stay within the boundaries of the law.

In 1969, the *Criminal Code* was amended to add an exception to the prohibition on the procedure - hospitals with therapeutic abortion committees could approve and provide an abortion if the pregnancy would endanger the woman's "life or health."⁶⁸ This exception was very narrow.

No doctor who provides the procedure was allowed to be on one of the committees, and the criteria for what could be considered dangerous to the woman's life or health was very discretionary, as "health" was not defined.⁶⁹

Morgentaler's motivation partly came from his days as an intern and resident in hospitals, such as Montreal's Royal Victoria which "routinely had entire wards of women – some dying, some with pelvic inflammatory disease, others having hysterectomies – there because of botched abortions."⁷⁰ In the 1960s, there were three individuals performing abortions whom he considered to be reputable and safe: one died, one left the country because he knew the police were closing in, and one later turned out to not be a doctor at all.⁷¹ There was no credible doctor to whom he could refer the multitude of women who approached him for the procedure by 1968.

He first performed the procedure for a friend's teenage niece on January 9, 1968. At this point in time, he did not intend to be caught by the police. In March 1969, he closed his family practice to specialize in family planning. In 1970 Morgentaler wrote,

I still cannot believe that I, who have always been a law-abiding citizen, could bring myself to defy the law of the land and the state and to risk imprisonment, loss of licence to practice medicine, the contempt of my colleagues, the ruin of my family, and the opprobrium that goes with that terrible word: *abortionist*.

I consider my attitude one of civil disobedience to a cruel and immoral law. I do not believe we should disobey all laws. I am sure there is an element of danger in every citizen's deciding for himself which law is good or bad and which one he will obey or disobey.⁷²

On June 1, 1970, he was arrested for the first time – an American had tipped off the FBI about his clinic.⁷³ He had informed Montreal lawyer and fellow activist Claude-Armand Sheppard much earlier about his plan to perform the procedure, and Sheppard had agreed to represent him if he was caught. Morgentaler pleaded not guilty to the charges of conspiracy to commit abortion and procuring

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid* at 23.

⁶⁰ *Ibid* at 25.

⁶¹ *Ibid* at 23.

⁶² *Supra* note 49 at 57.

⁶³ *Ibid* at 60.

⁶⁴ *Ibid* at 62.

⁶⁵ *Ibid* at 63.

⁶⁶ *Ibid* at 64.

⁶⁷ *Ibid.*

⁶⁸ *Ibid* at 72.

⁶⁹ *Ibid.*

⁷⁰ *Ibid* at 77.

⁷¹ *Ibid* at 78.

⁷² *Ibid* at 75.

⁷³ *Ibid* at 86.

abortion.⁷⁴ He was released on \$2000 bail on June 6, 1970.⁷⁵ Morgentaler's defence counsel was called as a witness for the prosecution.⁷⁶ The Quebec Court of Queen's Bench found "apparent illegality by improper use of search warrant, enabling those executing it to go on a 'fishing expedition', seizing everything they thought 'was good for the cause', without regard to relevance to the charge under which the search warrant was obtained."⁷⁷

In August 1973, Morgentaler's clinic was raided and he was arrested for a second time.⁷⁸ He spent two nights in custody.⁷⁹ In Morgentaler's subsequent trial, Sheppard used section 45 of the *Criminal Code* which stated that surgical procedures could be done without criminal liability, so long as reasonable care and skill were taken and the operation benefitted the patient.⁸⁰ After 24 hours of deliberation, the jury declared him to be not guilty.⁸¹ He still faced 12 other charges, however, and was not allowed to perform abortions as part of his bail conditions.

On April 26, the Quebec Court of Appeal, in a surprising move, cancelled the jury's verdict and replaced it with their own – guilty.⁸² This was particularly surprising, as this was the first time a court of appeal had used this power conferred upon it in 1930.⁸³ Neither the United States nor Britain gave their courts of appeal the right to overturn a jury verdict of not guilty. While this was the first time a Canadian court used this power, it was also the last – two years later, Parliament introduced what was known as "the Morgentaler Amendment" to remove this power.⁸⁴

The Quebec Court of Appeal ordered that Justice Hugessen sentence him, but the Justice refused. The Court of Appeal ruled that he be detained until he was released on bail, and since Justice Hugessen had refused to sentence him, they ruled that he was not allowed to grant him bail.⁸⁵ Morgentaler appealed to the Supreme Court. After Dr. Morgentaler spent ten days in a detention centre, the Justice reconsidered his former position and sentenced him to eighteen months in prison and three years' probation,

but released him on \$25 000 bail pending the Supreme Court decision.⁸⁶

Morris Manning was Morgentaler's new lawyer when he appeared before the Supreme Court for the second time. In a 6-3 decision, the Court upheld the Court of Appeal's decision – he would have to serve time in prison.⁸⁷ While in prison, former Prime Minister John Diefenbaker called on cabinet to release him.⁸⁸ The National Film Board made a documentary re-enacting the trial, and support was mobilized across the country.

Facing his second count of procuring an abortion, Morgentaler pleaded not guilty against the wishes of Sheppard.⁸⁹ The jury took less than an hour to find him not guilty.⁹⁰ While still in custody, he suffered a heart attack after being placed in solitary confinement with no clothes. The National Parole Board denied his request for parole, despite the fact that he had served a third of his 18-month sentence.⁹¹ More than 140 Montreal doctors signed a public declaration that they had performed, recommended or assisted in abortions.⁹²

On January 26, 1976, the Quebec Court of Appeal upheld the second jury acquittal, making it "a point to validate Sheppard's defence of necessity" in the process.⁹³ Three days later, Justice Minister Basford announced that his convictions from the first trial were being set aside, and a new trial would take place.⁹⁴ However, Morgentaler's medical licence had been suspended hours earlier. When the Supreme Court refused to allow the Crown to appeal his second acquittal, Sheppard was "jubilant, saying the Supreme Court's support of the Quebec appeal court ruling meant that the defence of necessity (an abortion is acceptable if it is in the interest of the woman's health) had become part of the law."⁹⁵

For a third time, a jury acquitted him on September 18, 1976. However, Dr. Morgentaler still had eight other charges.⁹⁶ He was supposed to face another trial on December 13, but the Parti Québécois (PQ) was elected into office, and the provincial Justice Minister declared that

⁷⁴ Bernard M. Dickens, "The Morgentaler Case: Criminal Process and Abortion Law" (1976) 14:2 *Osgoode Hall LJ* 229 at 230.

⁷⁵ *Ibid.*

⁷⁶ *Ibid* at 231.

⁷⁷ *Ibid* at 232.

⁷⁸ *Supra* note 49, at 105.

⁷⁹ *Ibid* at 106.

⁸⁰ *Ibid* at 110.

⁸¹ *R v Morgentaler (No 4)* (1973), 42 DLR (3d) 444.

⁸² *Supra* note 49 at 112.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid* at 113.

⁸⁶ *Ibid* at 114.

⁸⁷ *Ibid* at 126.

⁸⁸ *Ibid* at 134.

⁸⁹ *Ibid* at 137.

⁹⁰ *Ibid.*

⁹¹ *Ibid* at 144.

⁹² *Ibid.*

⁹³ *Ibid* at 146.

⁹⁴ *Ibid.*

⁹⁵ *Ibid* at 152.

⁹⁶ *Supra* note 74 at 241.

all prosecutions against him were dropped.⁹⁷ Morgentaler resumed performing the procedure at his Montreal clinic, but only with the second opinion of another doctor, to avoid future prosecutions.⁹⁸

The Badgley Report was written by the Committee on the Operation of Abortion Law, under Professor Robin Badgley.⁹⁹ The Committee was tasked with finding out whether the 1969 changes in the abortion laws were "operating equitably across Canada."¹⁰⁰ In February 1977, the Badgley Report was released, confirming that the exception to the abortion provision in the *Criminal Code* was "largely illusory", especially for marginalized women.¹⁰¹ There was still no consistent definition of criteria for the "health" of the applicant. The report concluded, "All this was not the fault of the government or its laws, but of the country's medical institutions and people's ignorance of birth control methods."¹⁰² When criticized by Morgentaler, the federal Justice Minister stated that the provision of medical services was a provincial matter.¹⁰³

In the majority of provinces, "pro-life" groups had successfully taken over hospital boards. For example, in New Brunswick, anti-abortion mobilization convinced a therapeutic abortion committee to suspend requests.¹⁰⁴ Only one doctor in Newfoundland performed the procedure – and only seven procedures per week. The condition of care in the rest of the country inspired Morgentaler to take up his civil disobedience campaign again – in June 1982 he announced plans to open clinics in Toronto and Winnipeg. He hired well-known criminal defence lawyer Greg Brodsky to represent him in Manitoba.¹⁰⁵

During the opening of his new Toronto clinic, a man threatened Morgentaler with gardening shears. Reporters caught it on camera. Around 200 people showed up at the clinic that evening in support of Morgentaler.¹⁰⁶ In June 1983, police raided his Winnipeg clinic and imprisoned the staff, and in July, his Toronto clinic was raided as well.

On July 29th, an arsonist attempted to burn down his Toronto clinic.¹⁰⁷

While Morgentaler's Manitoba lawyer, Brodsky, was eager to launch a constitutional challenge regarding the clinic in Winnipeg, the charges pending in Ontario led to a trial regarding his Toronto clinic first.¹⁰⁸ Morgentaler's Toronto lawyer, Manning, collaborated with people from the women's movement in planning their strategy.¹⁰⁹ Manning had a reputation for including a wealth of background research into every legal argument – he would "present thirty or forty reasons to sustain his point, culled from legal judgments and arguments from all over the world."¹¹⁰

Ontario's Crown Attorney announced that he would not be pressing charges of procuring an abortion against the three doctors at the pre-trial.¹¹¹ Manning's motion was dismissed on July 20, 1984- the three doctors faced a full trial in October of that year, opting again for a jury trial.¹¹² Yet again, the result from the jury was an acquittal – for all three doctors. The Ontario Attorney General announced he would appeal the decision. Dr. Morgentaler reopened his Toronto clinic on December 10. Police arrested Dr. Robert Scott nine days later, and issued a warrant for Morgentaler's arrest on December 20. He was arrested yet again on September 26, 1986, along with his colleagues Dr. Nikki Colodny and Dr. Scott.¹¹³ Crown Attorney Paul Culver announced the charges were stayed until the ruling from the Supreme Court hearing. Colodny rejected Manning as a lawyer and retained Marlys Edwardh.

In his factum to the Supreme Court, Manning listed a number of *Charter* arguments: that section 7 included the right to decide whether to terminate a pregnancy, section 15 equality guarantee was violated by the fact that not all hospitals were required to have therapeutic abortion committees, and a violation of s. 2's freedom of conscience right.¹¹⁴ After four consecutive days of argument, the verdict would not be returned for over a year.

On January 28, 1988, the Supreme Court delivered its decision. In a 5-2 decision, the Court struck down s. 251 of the *Criminal Code* on the basis that it violated s. 7's security of the person guarantee and was not justified under s. 1.¹¹⁵ Chief Justice Dickson found that s. 251 forced some

⁹⁷ *Supra* note 49 at 156.

⁹⁸ *Ibid* at 159.

⁹⁹ *Supra* note 74 at 241.

¹⁰⁰ *Ibid* at 241-242.

¹⁰¹ *Supra* note 49 at 167.

¹⁰² *Ibid*.

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid* at 174.

¹⁰⁵ *Ibid* at 202.

¹⁰⁶ Vicki Russell, *Morgentaler Attacked at Clinic Opening*, (The National, 1983), online: CBC Digital Archives <<http://www.cbc.ca/archives/entry/morgentaler-attacked-at-clinic-opening>> (13 November 2015).

¹⁰⁷ *Supra* note 49 at 224.

¹⁰⁸ *Ibid* at 229.

¹⁰⁹ *Ibid* at 230.

¹¹⁰ *Ibid* at 231.

¹¹¹ *Ibid* at 233.

¹¹² *Ibid* at 235.

¹¹³ *Ibid* at 285.

¹¹⁴ *Ibid* at 290.

¹¹⁵ *Ibid* at 297.

women to carry a fetus irrespective of her own "priorities and aspirations."¹¹⁶ Since this decision, no provision has been enacted to replace s. 251.

Morris Manning, when reflecting on his role as an advocate, said,

I believe individual liberty and individual rights are very important and I decide on an individual basis whether I am going to act for people who are oppressed, either in my view or their view. I like to defend people who are subject to government regulation in a way that they don't want to be. Only occasionally do I get involved in a case that is a cause, one that dramatically affects a lot of other people. The Morgentaler cause was one of them.¹¹⁷

Outcomes

Morgentaler's legal odyssey can be seen as more in line with the normative theory of legal compliance than the instrumental theory. Before and after the therapeutic abortion exception, thousands of Canadians sought illegal abortions. Many did so out of perceived necessity. The heavy legal penalty was not enough to deter them from seeking providers for the procedure. Similarly, Morgentaler himself was not deterred by countless life sentences in prison. His non-compliance with the law largely came from his personal sense of justice. He saw many women dying or becoming ill from illegal abortions and felt it was his duty to provide a safe alternative. Morgentaler later said,

What struck me after all these years was that judges have complete disregard for what happens to people...We need a system of law – no doubt about it. But laws should be rational, responsive to people's needs, based on good reasons, should have acceptance among the people. And obsolete laws must be changed or turfed out.

Remarkably, in 2008 Dr. Morgentaler was named to the Order of Canada.¹¹⁸ This fact is noteworthy, given the fact that he went on trial several times, facing many criminal charges with the possibility of life in prison. The fact that this could happen within one person's lifetime speaks to the

importance of public opinion in shaping law and public policy over time.

While his decades-long campaign was successful in many respects, the legal status of abortion is far from settled in Canada. According to Christopher Manfredi, abortion rights in Canada were not settled in *Morgentaler* (1988) as the Court did not declare a constitutional right to abortion and the Court expressly "invited Parliament to make another attempt at abortion regulation in light of its judgment."¹¹⁹ However, Manfredi writes that abortion has been "by far the most successful area for feminist legal mobilization."¹²⁰

Joseph Borowski

Joseph Borowski tried to further his cause through the courts in a manner similar to Morgentaler. As a Manitoba NDP MLA in 1971, he resigned from cabinet to protest public funding of abortions.¹²¹ In subsequent years, he refused to pay income taxes to protest the same cause – resulting in him being sentenced to incarceration in 1973, 1975 and 1979.¹²² Borowski, like Morgentaler, was also good at choosing lawyers – Morris Shumiatcher had excellent legal credentials. Both Borowski and Morgentaler believed that lawyers must "use ingenuity and creativity."¹²³

However, Borowski was not successful in achieving his aims through the courts in comparison to Morgentaler. Although anti-abortion forces spent more than \$200, 000 on the case and brought in experts from around the world, the Saskatchewan Court of Queen's Bench ruled on October 13, 1983 that fetuses were not protected under the Constitution, and that the *Criminal Code* provisions on abortion were valid.¹²⁴ Borowski did not perform civil disobedience in the same way Morgentaler did, as he did not break the particular law he was trying to overturn, but instead broke other laws for that purpose.

The most impressive legal triumph Borowski had was being granted standing at the Supreme Court in 1980 when he challenged the federal government's jurisdiction to create an exception to the abortion provisions – raising the question of whether a fetus has a "right to life". In *Borowski v Canada* (1989), the Supreme Court ruled that the

¹¹⁹ Christopher P. Manfredi, *Feminist Activism in the Supreme Court*, (Vancouver: UBC Press, 2004) at 178.

¹²⁰ *Ibid* at 192.

¹²¹ F. L. Morton, *Morgentaler v Borowski: Abortion, the Charter, and the Courts*, (Toronto: McLellan and Stewart Inc, 1992) at 356.

¹²² *Ibid*.

¹²³ *Supra* note 49 at 192.

¹²⁴ *Supra* note 49 at 227.

¹¹⁶ *R v Morgentaler*, [1988] 1 SCR 30, 63 OR (2d) 281, 44 DLR (4th) 385.

¹¹⁷ *Supra* note 49 at 230.

¹¹⁸ CBC News, *Morgentaler Among Those Named to Order to Canada*, (CBC, 2008) online: CBC News Canada <<http://www.cbc.ca/news/canada/morgentaler-among-those-named-to-order-of-canada-1.705838>>. (13 November 2015).

issue was moot because the *Criminal Code* Provisions under challenge were already found to be invalid.¹²⁵

Relevant Factors in the Canadian Legal Context

Common Law Jurisdiction

The common law, as opposed to civil law, is somewhat flexible and can change and develop over time to meet the needs of the day. Ontario Court of Appeal Justice MacPherson listed four categories of cases that come before judges:

- I. Cases in which people do not want to be in court
- II. Cases in which people want to be in court
- III. Cases in which people end up in court – they may or may not want to be there, but they are willing to defend their position if challenged.
- IV. Cases in which people knowingly break the law and end up in court – civil disobedience¹²⁶

For the fourth category, he concluded that while lawyers can say they are advancing the interests of their client, judges are not able to do the same. He states, "For a judge, the rule of law is more important than any single law, even a bad law."¹²⁷ However, Justice MacPherson is operating under the assumption that practitioners of civil disobedience are targeting governments to change laws, instead of expecting the judiciary to rule the law to be unconstitutional.

This is a strange assumption, as Canada's most famous practitioner of civil disobedience, Dr. Morgentaler, completed his mission through the courts instead of through the more traditional legislative route. *Charter* jurisprudence is relatively new and still developing – invalidation of a statute through judicial review by way of civil disobedience is not out of the realm of possibility. MacPherson argues that if your client claims their conduct is lawful under *Charter* jurisprudence, it should no longer be considered civil disobedience; however, the distinction between civil disobedience and so-called lawful activity is subjective and discretionary.

¹²⁵ *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342, 57 DLR (4th) 231, [1989] 3 WWR 97.

¹²⁶ *Supra* note 1 at 380.

¹²⁷ *Ibid.*

The Rule of Law as Constitutional Principle

While much of Canada's Constitution is written, the Supreme Court has ruled that there exist unwritten constitutional principles as well. According to prominent Canadian constitutional law scholar Peter Hogg, there are "a number of cases where the Supreme Court of Canada has found an unwritten constitutional principle in the Constitution, and has treated the principle as an implied term of the Constitution that is enforceable in precisely the same way as if it were an express term."¹²⁸ When the *Charter* was created in 1982, the preamble states, "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."

The rule of law is an important constitutional principle,¹²⁹ and has been taken to mean, among other things, "the law is supreme over officials of the government as well as private individuals and thereby preclusive of the influence of arbitrary power."¹³⁰ While the rule of law is mostly about the government following its own laws, it also states that law applies to everyone and is "supreme".

In his reply to American Supreme Court Justice Abe Fortas' booklet on civil disobedience, Howard Zinn argues that not much weight should be placed on the general principle of obedience to the law – strict obedience should take a back seat to a higher sense of morality.¹³¹ He reasons that outbreaks of civil disobedience have been a result of problems instead of the cause of them.¹³² He states, "Those who fear the spread of social disorder should keep in mind that civil disobedience is the organized expression of revolt against existing evils; it does not create the evils, but rationalizes the natural reactions to them, which otherwise burst out from time to time in sporadic and often ineffectual disorders."¹³³

The opening words of s. 91 of the *Constitution Act, 1982* grants the federal Parliament the power "to make laws for the peace, order, and good government of Canada." Valuing "peace, order and good government" instead of something similar to the American "life, liberty and the pursuit of happiness" in a founding constitutional document indicates a preference for order and obedience to the law.

¹²⁸ Peter W. Hogg, *Constitutional Law of Canada: 2014 Student Edition*, (Toronto: Thomson Reuters Canada, 2014) at 15.9(g).

¹²⁹ *Roncarelli v. Duplessis*, [1959] SCR 121, 16 DLR (2d) 689.

¹³⁰ *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para 58, [2005] 2 SCR 473.

¹³¹ Howard Zinn, *Disobedience and Democracy: Nine Fallacies on Law and Order*, (Cambridge, Massachusetts, 2002) at 11.

¹³² *Ibid* at 18.

¹³³ *Ibid.*

The Constitution Act, 1982

Since the passage of the *Charter of Rights and Freedoms*, significantly more laws are reviewed on *Charter* grounds than federalism grounds.¹³⁴ Since the *Charter* has only been around since 1982, there is a chance that some existing laws are unconstitutional, as Canada has shifted from a jurisdiction of legislative supremacy to one of constitutional supremacy. While in the past, the *Colonial Laws Validity Act* and later the *Supreme Court Act* formed the justification for the machinery of judicial review, judicial review for constitutionality is now also justified under s. 52(1) of the *Constitution Act, 1982*.

Peter Hogg argues, however, that laws are rarely struck down, partly because governments want to comply with the *Charter*.¹³⁵ According to Hogg, "To achieve that end, every Canadian government employs a staff of constitutional lawyers in the department headed by the Attorney General... One of the roles of these lawyers is to examine all legislative proposals that are being considered by government, and to provide an assessment of the risk of a successful constitutional challenge to each proposal."¹³⁶ However, some legal minds think this trend has been changed somewhat during the Harper government's tenure.¹³⁷ In *Schmidt v Canada (Attorney General)*, the Federal Court held that the Minister of Justice is "not bound by the opinion reached by the lawyers of the Legal Services Branch who performed their analysis regarding consistency with guaranteed rights."¹³⁸ All that is required from the Minister of Justice is that a "credible argument" can be made for the legislation's constitutionality.¹³⁹

Justice MacPherson has noticed a marked change in the law since the passage of the *Charter* with respect to civil disobedience. He references a 1998 Ontario Superior Court case he ruled on – *Daishowa Inc. v Friends of the Lubicon*.¹⁴⁰ The Lubicon Cree is a "small and poor" native band in Northern Alberta, engaged in a long-standing land rights dispute with the Alberta government.¹⁴¹ Daishowa Inc. is a multi-national forest products company. The Alberta government granted Daishowa logging rights in the

contested territory claimed by the Lubicon Cree. An advocacy group for the Lubicon Cree mounted a boycott campaign against Daishowa products from major Canadian retailers – leading to 50 companies ceasing to purchase Daishowa's products.

Daishowa brought forth legal proceedings claiming the Friends of the Lubicon's conduct was "tortious in several respects – interference with economic and contractual relations, intimidation, defamation, and the use of unlawful means, including unlawful secondary picketing."¹⁴² Judge MacPherson ruled that, while 25 years ago Daishowa would have been successful in its tortious claims, freedom of expression was protected, especially where the purpose of the expression is to persuade the listener to exercise economic power in a way that challenges a corporation's position on economic and public policy issues.¹⁴³

The Friends of the Lubicon were not looking to compete with Daishowa, but instead to draw attention to a public issue. Before the *Charter*, this line of reasoning would not have been allowed, and the Friends of the Lubicon would be considered to have engaged in acts of civil disobedience "even by themselves."¹⁴⁴

Lawyers Assisting Clients in Civil Disobedience

While assessing relevant Canadian case law, a few themes came to light. On the whole, it appears to be much better to argue that your client was acting lawfully – because their behaviour was protected by the *Charter* – than to argue that your client was willfully breaking the law in an act of civil disobedience.

While the difference may be one of mere semantics, many judges have scorned litigants for trying to use "civil disobedience" as a mitigating factor or defence for their actions. The failure to pay income tax is a particular area where judges are not sympathetic to claims of civil disobedience, such as in *Law Society of Alberta v Hermo Pagtakhan*¹⁴⁵ and *Grabowski v State Farm Fire and Casualty Co.*¹⁴⁶

Many judges have compared the litigant unfavourably to famous historic practitioners of civil disobedience. In *Astley v Verdun*, the judge stated that the litigant "is not a Canadian Rosa Parks."¹⁴⁷ In *The Queen v Montague*, the Ontario Superior Court noted that "Civil disobedience as a political technique is only morally

¹³⁴ *Supra* note 128 at s. 5.5(a).

¹³⁵ *Ibid* at s. 36.5(d).

¹³⁶ *Ibid*.

¹³⁷ Justin Ling, *Harper Government's Legal Settlements Suggest Strategy of Confrontation*, (CBC News, 2014), online: CBC News Politics <<http://www.cbc.ca/news/politics/harper-government-s-legal-setbacks-suggest-strategy-of-confrontation-1.2729421>> (13 November 2015).

¹³⁸ 2016 FC 269 at para 285, 3 FCR 447.

¹³⁹ *Ibid* at 284.

¹⁴⁰ *Daishowa Inc v Friends of the Lubicon* (1998), 39 OR (3d) 620, 158 DLR (4th) 699, 52 CRR (2d) 7 (ONSC).

¹⁴¹ *Supra* note 1 at 377.

¹⁴² *Ibid* at 378.

¹⁴³ *Supra* note 140.

¹⁴⁴ *Supra* note 1 at 379.

¹⁴⁵ *Law Society of Alberta v. Hermo Pagtakhan*, 2008 LSA 22 (CanLII).

¹⁴⁶ *Grabowski v. State Farm Fire and Casualty Co.*, 2003 ABQB 18 (CanLII).

¹⁴⁷ *Astley v Verdun*, 2013 ONSC 6734, at para 12.

justifiable and thus eligible for the protection of the court where the perpetrator has been denied access to the political institutions of the nation. This was the case at the time of Gandhi. This was the case at the time of Martin Luther King, Jr.¹⁴⁸ Setting such a high bar for when this behaviour could be accepted in the court may be problematic, as during the civil rights era when it was not clear to every judge that such acts of civil disobedience were justified. In fact, quite the opposite view prevailed. Always looking to the past for cues can perhaps distract judges from the relevant issues of the present day.

Another theme is the preference of judges for the "rule of law" above considerations of the underlying morality of individual laws. In *Astley v Verdun*, the judge said the litigant needed to understand that "his actions were not those of a prisoner of conscience engaged in legitimate civil disobedience but rather those of a person who has undermined the rule of law."¹⁴⁹ Henderson J stated in *Hamilton (City) v Loucks* that it is his duty to "ensure that each and every person follows the law."¹⁵⁰ In *Platinex v Kitchenuhmaykoosib Inninuwug First Nation*, Smith J went as far as to say that "if civil disobedience is allowed to occur, the confidence that the public has in the administration of justice will erode and ultimately undermine the social contract and culture of obedience by which our society operates."¹⁵¹

The very issue of whether or not one has to wait for a constitutionally suspect law to be declared unconstitutional before it can be disobeyed was addressed in *Newfoundland (Treasury Board) v Newfoundland Association of Public Employees*. Morgan JA ruled that until a law was declared unconstitutional, it must be followed as if it were compliant with the Constitution.¹⁵² Although any citizen can challenge the constitutionality of a law, Morgan JA cautions citizens to respect the law before it is declared to be so.

The conclusion in *Newfoundland (Treasury Board)* does not quite fit with the outcome in *Morgentaler* (1988). Morgentaler was acting in direct violation of the law. He did not wait until it was declared unconstitutional. He was extremely successful in achieving his aim and was eventually even honoured with being named to the Order of Canada.

As mentioned earlier, a lawyer is not allowed to assist their clients in conducting future crimes. Whether or not a lawyer would be required to break confidentiality would depend upon the severity of the crime, the conscience of the lawyer, etc. Many legal interest groups conduct test case litigation, and walk a fine line between being a loyal advocate and assisting in future crimes.

Overall, a lawyer would have greater freedom than a judge to argue that their client's behaviour was consistent with the *Charter*, even if it bordered on the realm of civil disobedience. Many judges view their role as upholding the rule of law, and are not sympathetic to arguments about the underlying law being unjust. However, if an advocate was to frame their argument so that the client does not view their own conduct as breaking the law because of their *Charter* rights, a judge might have an easier time finding in favour of the client.

Conclusion

The proper role of a lawyer in relation to civil disobedience is far from settled. On the one hand, lawyers are supposed to be advocates for far-reaching values such as "truth" and "justice". On the other hand, lawyers should respect the rule of law as well as the role of the legislature in creating law and policy. Given this tension, lawyers must make their own choices in deciding who to represent and how to counsel them.

The *Charter* adds another dimension to this problem – the line between "civil disobedience" and someone acting within their *Charter* rights is a fine one. Henry Morgentaler is a perfect example of this. Throughout his legal battles, he was labelled a criminal who was performing civil disobedience, yet today he is highly regarded by many as someone who fought for *Charter* rights.

While it is easy to look back at history such as the civil rights movement and say that was a time where civil disobedience was justified, and deny that there are legitimate instances to do so today, it is important to note that we do not have the luxury of hindsight. While it might not be as immediately obvious that an unjust law warrants civil disobedience, it may well be a worthy cause.

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¹⁴⁸ *The Queen v Montague*, 2012 ONSC 2300 at para 42, 101 WCB (2d) 466.

¹⁴⁹ *Supra* note 147 at para 37.

¹⁵⁰ *Hamilton (City) v Loucks* (2003), 232 DLR (4th) 362 at para 56 (ONSC).

¹⁵¹ *Platinex Inc v. Kitchenuhmaykoosib Inninuwug First Nation*, 2008 CanLII 11049 at para 41 (ON SC).

¹⁵² *Newfoundland (Treasury Board) v Newfoundland Association of Public Employees*, 1986 CanLII 2399 at para 13 (NLCA).

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