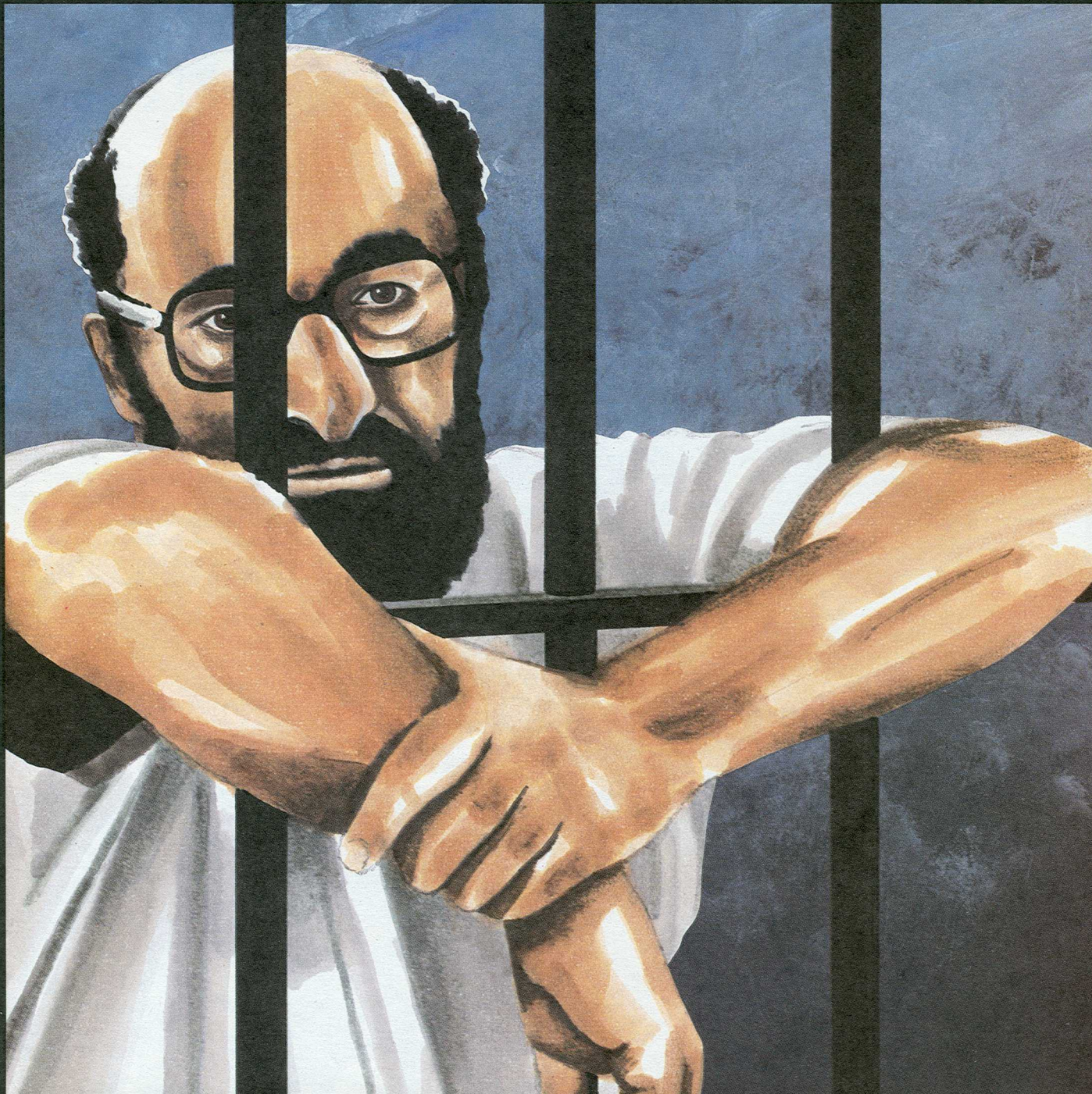


A film about the right to challenge the law



# DEMOCRACY ON TRIAL THE MORGENTALER AFFAIR

1970 to 1976

Directed by Paul Cowan  
Produced by the National Film Board of Canada



National  
Film Board  
of Canada

Office  
national du film  
du Canada



# DEMOCRACY ON TRIAL

## THE MORGENTALER AFFAIR 1970 to 1976

*"The victories and defeats of our minorities and dissenters are, in their own way, the history of the successes and failures of our institutions: of our parliament, our legislatures and our courts; of our politicians, our judges and ourselves."*

— Mr. Justice Thomas Berger, former B.C. Supreme Court Judge and author of *Fragile Freedoms: Human Rights and Dissent in Canada*.

Dr. Henry Morgentaler is a dissenter — a physician who is convinced it is his moral duty to challenge a law which, rightly or wrongly, he considers unjust.

Dr. Morgentaler's first challenge to the federal abortion law originated in Quebec and went all the way to the Supreme Court of Canada. It began in 1970 when Dr. Morgentaler was arrested for performing abortions in his Montreal clinic. Between 1970 and 1976 when the affair ended, Dr. Morgentaler was charged with 13 violations of Canadian law. He was tried three times and each time was

acquitted by a jury, yet he spent ten months in prison.

The Morgentaler Affair began as a legal battle over the abortion law but turned into a complex, precedent-setting civil rights case. It will be remembered as a crucial test of the democratic judicial process and the case that resulted in the Morgentaler Amendment — an important modification to the Criminal Code which affirms the right of Canadian citizens to be judged by a jury of their peers.

As for the abortion issue, Dr. Morgentaler's challenge did not result in changes

to the federal abortion law, but it did affect how the law is currently applied. While the abortion law is officially still in force throughout the country, in Quebec, as a result of the Morgentaler Affair, the law is considered technically unenforceable. Consequently, since 1976, the Quebec government has not prosecuted Dr. Morgentaler for performing abortions. In fact, Quebec authorities accepted Dr. Morgentaler's offer to train other doctors who now perform abortions in government-run clinics.





## The film

*Democracy on Trial: The Morgentaler Affair* condenses Dr. Morgentaler's complex six-year legal battle with Quebec and federal courts into a concise one-hour review of the case. The film does not debate the abortion issue nor take a stand on the validity of the law; it neither condones nor condemns Dr. Morgentaler's method of contesting the law. Instead, it provides the viewer with a clear understanding of the legal ramifications of the Morgentaler Affair as well as a brief personal history of this physician who risked his career and his freedom for a question of principle.

The film contains newsreel footage and interviews, but consists mainly of dramatized scenes which recreate in a very realistic manner the major events in the case. Dr. Morgentaler and his lawyer, Claude-Armand Sheppard, play themselves in these re-enactments.

In writing the script and staging the re-enacted scenes, the filmmakers went to great lengths to ensure factual accuracy. Wherever possible, they incorporated into the script verbatim sections of official records and court transcripts. When records were unavailable or inaccessible, the filmmakers conducted lengthy pre-production interviews with key figures involved in the case, including police officers and witnesses.

## Why the film was made

The filmmakers wanted to produce a film that would reveal how our society responds to emotionally charged challenges of controversial laws because, in their opinion, only challenges of this nature reveal the weaknesses and strengths of our judicial system.

The Morgentaler Affair need not have been the subject of this film. It could have been any one of several cases in which Canadians have, out of principle or out of necessity, contested laws they considered unfair or outdated. The filmmakers maintain that cases such as the Morgentaler Affair — and others concerned with issues such as homosexuality, capital punishment, censorship, or native and language rights — define to what degree we will accept dissent, whose rights we are prepared to defend, and what price individuals must pay for challenging laws they consider unjust.

## The major events in the Morgentaler Affair

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### 1968

Dr. Morgentaler first decides to defy the federal abortion law. He begins to perform abortions in his Montreal clinic.

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### June 1970

The police raid his clinic for the first time; Dr. Morgentaler is arrested and released on bail.

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### 1970-1973

Dr. Morgentaler's lawyer, Claude-Armand Sheppard, uses a series of legal tactics to stave off the trial date and to raise public awareness of the issue. The abortion debate becomes heated and Dr. Morgentaler is at the center of it. While anti-abortion groups stage massive protests and pro-choice groups rally to his defense, Dr. Morgentaler continues to operate his clinic.

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### Spring 1973

Dr. Morgentaler steps up his acts of defiance. He announces publicly that between 1968 and 1973 he has performed more than 5000 abortions. On Mother's Day, in a nationwide broadcast, the CTV network shows Dr. Morgentaler performing an abortion in his clinic.

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### August 1973

The police raid Dr. Morgentaler's Montreal clinic a second time. He is arrested again and released on bail. He now faces a total of 13 abortion-related charges.

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### October/November 1973

Dr. Morgentaler goes on trial in Montreal to face a charge of having illegally performed an abortion. He does not deny having performed the abortion. Instead, his lawyer argues that the jury should declare Dr. Morgentaler "not-guilty" because the operation was necessary, successful, and of benefit to the patient. The jury acquits Dr. Morgentaler.

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### February 1974

The Crown appeals the jury's not-guilty verdict.

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### April 1974

The Quebec Court of Appeal rules on the Crown's appeal and, in a move unprecedented in Canadian legal history, overturns the jury's acquittal without ordering a new trial. The Quebec Court of Appeal substitutes a verdict of "guilty" and sentences Dr. Morgentaler to 18 months in prison.

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### Fall 1974

The Supreme Court of Canada denies Dr. Morgentaler's appeal of the Quebec Court of Appeal decision.

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### March 1975

Dr. Morgentaler enters Bordeaux Jail.

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### May 1975

Quebec Justice Minister Jérôme Choquette orders a second trial, seeking a conviction that would reinforce the Appeal Court's decision. Dr. Morgentaler is once again acquitted by a jury but is sent back to prison to serve the remainder of the original 18-month sentence.

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### Summer/Fall 1975

Jérôme Choquette announces his intention to appeal the jury's verdict and to order another trial on the outstanding charges. Amidst a storm of public protest, the federal parliament debates how a man can twice be acquitted by a jury and still be forced to remain in prison.

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### Winter/Spring 1976

On the same day that Dr. Morgentaler is released from prison (after serving 10 months of his sentence), newly appointed federal Justice Minister Ron Basford announces there will be a new trial on the first charge against Dr. Morgentaler. The doctor goes on trial for the third time, is acquitted once again by a jury, and is officially cleared of the charge. Justice Minister Basford introduces an amendment to the Criminal Code. Known as the "Morgentaler Amendment," it states that a higher court can uphold a jury decision, or order a new trial, but cannot overturn a jury's verdict.

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### Post-1976

Because of the legal ramifications of the Morgentaler Affair and because juries were unwilling to convict Dr. Morgentaler, the Quebec government informs Ottawa that it cannot enforce the federal abortion law. Ottawa does not react to Quebec's decision; the federal law stands unchanged, though unenforced in Quebec. Dr. Morgentaler decides to challenge the law in other provinces.

## The significance of the Morgentaler Affair

*Democracy on Trial: The Morgentaler Affair* takes us back in time to review an important case that shook the foundations of our judicial, political, and medical establishments. It reminds us that this legal battle was not solely about abortion, but also about challenging laws, legal rights, the role of juries, the powers of higher courts, the responsibilities of politicians, and the influence of the public.

The film concludes with defense attorney Claude-Armand Sheppard's assessment of the Morgentaler Affair in terms of its significance for the Canadian judicial system. According to Sheppard, the Morgentaler Affair:

- demonstrated the incredible contribution of the jury system to humanizing and changing the law;
- revealed that eventually citizens will revolt against absurd or unenforced laws;
- proved that determined individuals, ready to make sacrifices and risk their freedom, can set the system on its ears and force people to face issues they do not want to face.

## Questions and suggestions for discussion

What options are available to a citizen who wants to change a law?

What is the cost of challenging a law through the courts and what are the odds of winning?

How does our judicial system differ from the American or British system?

Who should decide if a law is just or unjust — judges, juries, or parliament? Or should the law be the subject of a referendum?

Discuss the responsibilities of the police, of lawyers, judges, juries, politicians and the public in passing, enforcing, upholding, amending or repealing laws.

Research cases of precedent-setting challenges to Canadian laws.

Discuss current challenges to the Canadian Constitution and the Charter of Rights and Freedoms.

What was the outcome of each challenge and how does it affect you?

Research examples of laws that are ambivalent or unenforced.

Discuss how you would challenge these laws.

## Suggested audiences

- Legal Information, Human Rights, and Civil Liberties groups
- Law Reform societies
- University faculties of Political Science, Law, and Government
- High school courses on Man and Society and Civics
- Public libraries and community associations

*Directed and Edited by:* Paul Cowan

*Written by:* Jefferson Lewis

*Production Manager:* Daniel Hausmann

*Assistant Director:* Mike Mahoney

*Cinematographers:* Paul Cowan, Mike Mahoney

*Sound:* Jacques Drouin

*Music Composition:* Alex Pauk, Zena Louie

*Narration:* William Hutt

*Research:* Jefferson Lewis, Dominique Parent

*Assistant Editor:* Adam Symansky

*Additional Camera:* Susan Trow

*Music Recording:* Louis Hone

*Music Editing:* Julian Olson

*Sound Editing:* Bernard Bordeleau

*Sound Mixing:* Jean-Pierre Joutel, Adrian Croll

*Producers:* Adam Symansky, Jefferson Lewis, Paul Cowan

*Executive Producers:* Robert Verrall, Andy Thomson

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