

Morgentaler v. Her Majesty the Queen
and the Attorney General
Of Canada (1988)



Decriminalizing Abortion in Canada:
A Case Law Analysis

Leslie Norber
Honors Capstone
Spring 2008

Abstract: *This paper discusses the majority opinion of the Supreme Court of Canada landmark case Morgentaler et. al. v. Her Majesty the Queen and the Attorney General of Canada (1988). This case decriminalized the medical procedure of abortion and eased many federal prohibitions and regulations of the practice, making it easier and less intimidating for a woman to access should she choose to terminate her pregnancy. The format of this paper is that of a court case brief which discusses background information surrounding the case, the constitutional questions addressed in the litigation, the majority holding of the Court, and a synopsis of the significance and legacy of the case.*

Background

January 28, 2008 marks the 20th anniversary of the Supreme Court of Canada's landmark decision in *Morgentaler et. al. v. Her Majesty the Queen and the Attorney General of Canada* (1988) (also known as *R. v. Morgentaler*) which decriminalized abortion in Canada. Prior to this case, abortion was prohibited in Canada with exceptions granted only for the life or health of the woman. Dr. Henry Morgentaler, the namesake in this case, is an abortion practitioner who immigrated to Canada from Poland after surviving imprisonment in two concentration camps during the Holocaust. Morgentaler credits his survival with a "heightened feeling of injustice and I saw injustice meted out to women who needed abortions...I was sensitized to injustice and when I was in a position to do something about it, I felt it was a duty to do so, at whatever risk there was. I had a feeling I was fighting for fundamental justice" (Solomon and Woodford). Although abortion was illegal, Morgentaler, despite death threats, a clinic bombing in Toronto, and incarceration, still provided this medical procedure.

Prior to this case, women in Canada seeking abortion services must have prior, certified approval from at an accredited hospital's Therapeutic Abortion Committee. Outraged by these restrictions to what they considered a woman's right to have complete control over whether or not to terminate a pregnancy, Morgentaler and two other Canadian doctors, Leslie Frank Smoling and Dr. Robert Scott, opened an abortion clinic in Toronto in order to challenge this law. This clinic was established illegally, lacking the proper licensure and legal permission from either national or provincial governments.

This case was not the first time Morgentaler had been involved in abortion rights litigation under which he had faced criminal charges for providing abortion services. The three doctors involved in this case were indicted under charges of conspiring with each other to provide abortions in violation of the Canadian Criminal Code. Morgentaler and his counsel argued that the section of the Canadian Criminal Code under which they were charged violated their guaranteed rights under the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights. In trial court, this motion was dismissed, and the Ontario Court of Appeal dismissed Morgentaler's appeal. The trial was heard again by a judge and jury, following which the three appellant doctors were acquitted. The Crown appealed, and the appellants also filed a cross-appeal. This appeal was permitted by the Court of Appeal in Ontario and a new trial was ordered. The issues addressed in the appellants' cross-appeal were also addressed as they were related to the issues raised in the Crown's appeal (*R v. Morgentaler*).

Morgentaler v. Her Majesty the Queen and the Attorney General of Canada (1988) addressed multiple questions relating to the Canadian Charter of Rights and

Freedoms, Canada's Criminal Code, issues of court jurisdiction, and the Canadian Constitution Act of 1867:

Constitutional Questions

1. Does the Criminal Code prohibiting abortion with exceptions for life or health of the woman infringe a woman's right to life, liberty, and security of person? If so, is such an infringement in accordance with fundamental justice? Is this legislation reasonable and demonstrably justified in a free and democratic society (as specified in the Canadian Charter of Rights and Freedoms)?
2. Does a Therapeutic Abortion Committee enforcing abortion provisions improperly delegates criminal law powers to a non-court body (Constitution Act of 1867)?
3. Does the Attorney General have a constitutional right of appeal in this situation? Does a prohibition of such an appeal demonstrate too great of a constitutional cost?
4. Does the prohibition of abortion and the illegality of procuring an abortion (with exceptions of life and health of the mother) violate the Criminal Code? Do abortion provisions *ultra vires* Parliament?
5. Was a judge's address to a jury, which advised them to ignore a specific law in violation of criminal law? (R v. Morgentaler)

Holding

This case produced three different majority opinions, none of which received more than two signatures. Although the final vote distribution in this case was 5-2 due to the lack of a conclusive statement from the majority, no *Morgentaler* precedent is considered binding under Canadian law.

The five justice majority in this case held that the anti-abortion law in question violated Part 1, Section 7 of the Canadian Charter of Rights and Freedoms which states:

Life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (Constitution Act, 1982).

The Court also held that the doctors' acquittals from the lower courts be restored. Although the Court acknowledged the fact that it was within the authority of the Canadian government to create a law restricting access to abortion, the Court concluded that the deprivation of rights resulting from such policy could not be justified under Part 1, Section 1 of the Canadian Charter of Rights and Freedoms which states:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society (Constitution Act, 1982).

A main component of the majority opinions rested on the assertion that, in violation of Section 7, "State interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitutes a breach of security of the person (*R. v. Morgentaler*).” As for the law in relation to the Canadian Criminal Code, Section 251, one of the statutes attaching heavy restrictions on securing this medical procedure (which also granted Canadian women the right to contraceptives), was found to clearly interfere with a “woman’s physical and bodily integrity” (*R. v. Morgentaler*).

The Court held that such restrictions constituted a violation of the Canadian guarantee of “security of the person” by essentially forcing a woman to carry a fetus to term by attaching criminal sanctions to her choice to terminate her pregnancy. While abortion was not completely prohibited in Canada prior to 1988, in order to receive legal clearance to have the procedure done, a woman had to meet externally determined criteria

from a therapeutic abortion committee which were “unrelated to her own priorities and aspirations” (R. v. Morgentaler). According to the law at the time, abortion could only be approved by a therapeutic abortion committee at an accredited or approved hospital (per provincial approval)—where at least four doctors had to be available to perform the procedure (R. v. Morgentaler). Clearly not every medical provider or hospital was able to meet these requirements, and not every facility that was eligible to have a therapeutic abortion committee was required to do so (R. v. Morgentaler).

These external criteria and limitations, plus the inability for a woman to choose to have an abortion for her own personal and private reasons the Court found to be a “profound interference with a woman’s body and thus an infringement of security of the person” (R. v. Morgentaler). The amount of time that elapses from a woman approaching a therapeutic abortion committee, receiving approval for the procedure, and actually having it performed could raise the likelihood of medical complications for the woman as well as harm the psychological integrity of the woman seeking the procedure (R. v. Morgentaler). The Court also found the lack of standardization across the committee system troubling; the guidelines each committee may choose in order to grant or deny a woman an abortion are often vague and varied depending on which committee was approached, leaving a woman unable to understand in advance what criteria would be used by the committee with which she meets (R. v. Morgentaler). This further contributed to the Court’s determination that the existing law relating to the ability of a woman to access abortion services interfered with an individual right to “security of the person.”

One of the claims in this case by Morgentaler and the other doctors in question was that the administration of the abortion system prior to 1988 involved procedural unfairness. This claim arose from the fact that many women who wanted to receive an abortion were unable to access the procedure due to governmental restrictions (i.e. therapeutic abortion committees). However, the Court does not find fault or “procedural unfairness” with the administration of the system and stated that the system in place “was considered adequate to deal with the type of abortion Parliament had envisaged. This speaks to another Morgentaler claim against section 251 of the Criminal Code. The Court held that any inefficiency in the administrative scheme is caused principally by forces external to the statute” (R. v. Morgentaler), or that provided the government’s policies regarding abortion, the system in place was permissible and aligned with the government’s goals of restricting abortion. While the government restrictions on abortion the Court found inconsistent with constitutional law in Canada largely on a “security of the person” argument, the Court did not find fault with the system that carried out such law.

According to Canadian law, should an infringement to the right, life, and security of the person occur, it is only permissible if it “[comports] with the principles of fundamental justice” (R. v. Morgentaler). These principles are enshrined in the “basic tenets” (R. v. Morgentaler) of the legal system in Canada, namely Part 1, Section 7 of the Canadian Charter of Rights and Freedoms.

According to Justices Beetz and Estey, Canadian Parliament has recognized that the life and health of a pregnant woman “takes precedence over the interest in prohibiting abortions including the interest of the state in the protection of the foetus” (R. v.

Morgentaler). Forcing a woman to carry a fetus to term when the pregnancy is likely to endanger her life or health is, according to the Justices, a violation of the “security of the person” liberty as written in Part 1, Section 7 of the Canadian Charter of Rights and Freedoms. According to the Court, this “security of the person” requirement applied in context means that women in Canada possess a right to access medical attention for a condition that poses a danger to her life or health, here, pregnancy, without fear of sanction (*R. v. Morgentaler*).

The Court held that the right to security of the person also includes the security of a woman’s physical and psychological integrity. Criminalized abortion the Court found to be inconsistent with the most basic of Canadian Charter promises of security of the person (*R. v. Morgentaler*). Interestingly, the Court does not ever provide an explicit or medical definition of what constitutes a danger to a woman’s life or health. Considering the emphasis the majority opinions place on physical and psychological integrity, it can be reasonably concluded that in order for a woman to choose to end her pregnancy, the pregnancy need not only take a negative physical toll on her body; that is, a woman could provide a reason of undue mental stress resulting from an unwanted pregnancy which would now be considered reason enough to terminate her pregnancy.

One section of the Criminal Code in question which the Court found problematic in terms of the security of the person guarantee, s. 251, demonstrates the protection of a fetus is the government’s primary interest (*R. v. Morgentaler*), thus subordinating the importance of life and health of the woman of whose body it is a part. The objective of laws protecting a fetus as well as assigning some limitations and conditionalities as to when a woman may have an abortion the Court found related to “concerns which are

pressing and substantial in a free and democratic society” per Section 1 of the Canadian Charter of Rights and Freedoms. Therefore, while the Canadian government does have the right to assign restrictions, regulations, and limitations to the medical procedure of abortion, holds the Court, they may only do so if those means are “reasonable and demonstrably justified (*R. v. Morgentaler*).” While the government may have an objective to protect a fetus, and an interest in ensuring that a woman is receiving care from a qualified provider, those interests may not make a woman’s right to security of the person ancillary (*R. v. Morgentaler*). The Court held that the sections of the Criminal Code challenged in this case do not “constitute a reasonable limit to the security of the person” for which the government was unable to demonstrate necessity or provide satisfactory justification. Security of the person is among the government’s most urgent standards legislation must satisfy, which the holding in this case demonstrates unequivocally.

The guarantee of liberty contained in Section 7 of the Canadian Charter of Rights and Freedoms affords an individual “a degree of personal autonomy over important decisions intimately affecting his or her private life (*R. v. Morgentaler*)”. The Court noted that while the understanding of liberty “in a free and democratic society does not require the state to approve [of decisions such as abortion] but it does require the state to respect them (*R. v. Morgentaler*)” and declares abortion in a “class of protected decisions (*R. v. Morgentaler*).” The Court recognizes that the decision to have an abortion is one that involves psychological, economic, and social ramifications—though it is a medical procedure, such a decision requires a woman to take into account non-medical circumstances. Criminalizing such a choice and giving non-standardized and unregulated

authority to therapeutic abortion committees under Section 251 of the Criminal Code leaves a woman unable to make her own “personal and private decision (R. v. Morgentaler).”

The Court also thought that abortion law at the time was also making a powerful statement about reproductive identity and autonomy: The difficulty of obtaining a legal abortion, under threat of criminal sanctions in essence forces a woman to cede control of her *own* capacity and right to reproduce to the state. The Court stated that such actions are a “direct interference with the woman’s physical “person” (R. v. Morgentaler).” Depriving a section 7 guarantee of liberty to a woman directly conflicts with a freedom of conscience as enumerated in section 2(a) of the Charter (R. v. Morgentaler). As choosing an abortion is a personal decision, according to section 2(a), that freedom belongs to an individual---and the Court states that “in a free and democratic society the conscience of the individual must be paramount to that of the state (R. v. Morgentaler).” According to the Court, the abortion restrictions challenged placed the interest of the state and fetus above the liberty and freedom of conscience that the Charter affords Canadian women.

As a fetus develops and comes closer to birth the state’s interest in protecting it increases. According to the Court, there is no one definitive moment when which a state interest in protecting the fetus becomes “compelling” and holds that such determinations should be made by provincial legislatures (R. v. Morgentaler). The abortion law at the time basically removes a woman’s ability to have an interest in her fetus other than carrying it to term.

The Supreme Court of Canada receives the right to judicial review under the Charter, though this is not a limitless grant of power. On discussing the limitations of its

own power, the Court holds in *Morgentaler*, “The courts must confine themselves to such democratic values as are clearly expressed in the Charter and refrain from imposing or creating rights with no identifiable base in the Charter (R. v. Morgentaler).” The Charter does not explicitly state that a woman has a constitutional right to an abortion “in either the language, structure or history of the constitutional text, in constitutional tradition, or in the history, traditions or underlying philosophies of our society” (R. v. Morgentaler).

The Court states that there has “always” been a public interest in protecting the unborn and suggests there is no conclusive indication of a “general acceptance of the concept of abortion at will” in Canadian society (R. v. Morgentaler). And, if the Court could not be any clearer on the subject and laws in question, it writes that, “The interpretative approach to the Charter adopted by this Court affords no support for the entrenchment of a constitutional right of abortion” (R. v. Morgentaler). While the Court clearly holds in favor of a woman’s liberty and security of person as guaranteed in the Charter, and also acknowledges the right of the state to impose reasonable restrictions on those rights, the Court does not go so far as to declare that the right to an abortion in Canada is so fundamental that it belongs enshrined in its own constitutional provision.

One reason the Crown appealed to the Supreme Court in this case was that during one of the lower court trials as this case worked its way through the Canadian justice system, a trial judge instructed a jury to ignore a codified law when making its decision. The Court, in a section of the opinion labeled *Per Curiam* essentially slaps the judge on the wrist and states, “It was quite simply wrong to say to the jury that if they did not like the law they need not enforce it” (R. v. Morgentaler).

Though the multitude of opinions in this case provide slightly different reasons for overturning sections of the Criminal Code that nearly ban abortion, the rationale discussed here is reflective of a general consensus of the Supreme Court of Canada.

Significance

By his own estimate, Morgentaler has performed over 100,000 abortions since becoming a provider in 1969 (Solomon and Woodford) even before the procedure was decriminalized. Due to Morgentaler's dedication to his cause, abortion is now decriminalized in Canada, making it significantly easier to access safely and with less negative stigma associated with it. According to the Morgentaler Clinic which provides abortion and family planning services, women seeking an abortion need not secure a physician referral, receive partner or parental permission for the procedure, nor endure any sort of waiting period (The Morgentaler Clinic). Morgentaler Clinics, at least in the province of Ontario (including Toronto and Ottawa clinics) are "licensed and funded by the Ontario Ministry of Health" (The Morgentaler Clinic). As such, abortion services are fully covered under the Ontario Health Insurance Plan and several other health care plans available in the province (The Morgentaler Clinic).

Although individual provinces may (and do, as not all provincial health care insurances cover abortion procedures) put restrictions on when a woman may elect an abortion, the criminal penalties that were associated with the medical procedure prior to 1988 have been lifted in accordance with the decision in this case.

According to a nationwide research study externally commissioned by Life Canada, an activist group that seeks "to promote the sanctity of all human life from

fertilization to natural death...to advocate for the preborn, the disabled, the infirm and the elderly who are all uniquely created by God” (Life Canada), six out of ten Canadians surveyed in 2007 believe “life should be legally protected some time prior to the point of birth (Environics Research Group 7). The same study also reports that 47% of Canadians do not think that abortions should be financed by public funds except for emergencies (mother’s life and health, rape, and incest) (Environics Research Group 4). Although it is important to bear in mind that these data were provided by an anti-choice interest group, they clearly indicate that the post-1988 availability and funding structure for the procedure in Canada is not universally embraced and that 20 years later the *Morgentaler* decision is still considered controversial.

Dr. Morgentaler currently operates six clinics in Canada that bear his name and continues to fight for a woman’s right to reproductive autonomy and choice. Although the right to an abortion is now codified in Canada, that does not mean that women are free to exercise that right absolutely. Morgentaler is currently taking legal action against the provincial government of New Brunswick over enabling access to his medical services by the poor (Solomon and Woodford) and other issues with provinces opting to not fund abortion services as well as restricting availability of such services.

An active and vocal Humanist, Dr. Morgentaler was awarded an honorary Doctor of Laws degree from the University of Western Ontario in the summer of 2005 (The Morgentaler Clinic) and still continues to advocate on behalf of a woman’s right to choose to carry a pregnancy to term.

Works Cited

Solomon, Sam and Gillian Woodford. "The *Morgentaler* Decision Turns 20." National Review of Medicine. 15 Jan. 2008.

Morgentaler v. Her Majesty the Queen and the Attorney General Of Canada (R. v. Morgentaler) No. 1 S.C.R. 30. Supreme Court of Canada. 28 January 1988.

The Morgentaler Clinic. The Morgentaler Clinic of Toronto, Ontario. 18 April 2008. <<http://www.morgentaler.ca>>

Life Canada. Life Canada. 18 April 2008. <<http://www.lifecanada.org>>

Environics Research Group. "Canadians' Attitudes Toward Abortion Issues: Commissioned Research Conducted for: LifeCanada." October 2007. Life Canada. 18 April 2008 <<http://www.lifecanada.org/html/resources/polling/2007PollReport.pdf>>