POSITION

WRITTEN BY: We *Need* a Law

UNDER SECTION 7

ABORTION *is not* A CHARTER RIGHT

Section 7. *Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*

The terminology of "rights" is a constant feature in the abortion debate, with some asserting that "abortion is a right." In order for effective dialogue on this issue we need to share an understanding of the definition and the source for such a claim. Some will link this supposed "right to abortion" with section 7 of the *Canadian Charter of Rights and Freedoms*, citing the Supreme Court decision in *R v. Morgentaler* (1988) as the source. A careful reading of *Morgentaler*, however, cannot support a conclusion that Canadian law includes a right to abortion.

THE SCOPE OF THE 1988 *MORGENTALER* DECISION

The question of whether abortion is a *Charter* right under section 7 was considered in the 1988 Morgentaler decision at the Supreme Court of Canada, but it was not the main issue of that case. When looking at the Supreme Court's dealing with section 7 in this case we need to make two notes. First, while five of the justices struck down the 1969 abortion law, they did so for three separate reasons, without a common rationale. This means that while the result is clear – the previous abortion law is unconstitutional – the reason why it is unconstitutional is not clear. Drawing conclusions from the decision must be done with qualifications and by drawing from the various reasons.

Second, the legal question of the rights of a pre-born child was deliberately sidelined by the Supreme Court and left to be determined

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by Parliament. The Supreme Court Justices understood that their role was limited to evaluating Parliament's chosen legislative framework under the rights and freedoms guaranteed in the *Charter*. The regime challenged in *Morgentaler* required a woman to obtain permission from a "Therapeutic Abortion Committee" in order to have an abortion. These committees were appointed by hospitals, and their duty was to consider whether continuing the pregnancy "would or would be likely to endanger her life or health."[1] Once she received a certificate from the committee, a woman could then obtain an abortion.

It was this specific statutory framework, not abortion itself, that the Supreme Court examined in *Morgentaler*. Chief Justice Dickson, quoting Justice McIntyre, put it this way: "the task of this Court in this is not to solve nor seek to solve what might be called the abortion issue, but simply to measure the content of s. 251 against the *Charter*."[2] The Supreme Court was not trying to determine the morality of abortion and whether abortion should be legal or not. Rather, the Court's goal was to examine the current regulatory framework in light of *Charter* guarantees.

SECTION 7 AND WOMEN IN THE *MORGENTALER* DECISION

The majority of justices in the 1988 *Morgentaler* decision struck down the previous law on the basis that it interfered with the life, liberty, or security of the persons (different decisions considered different interests) in a matter that was not in accordance with the principles of fundamental justice. The interests considered in this decision were not solely those of women choosing to have an abortion, but also of those who could be criminally prosecuted for performing an abortion and subsequently face imprisonment. A physician who performed an abortion faced imprisonment, and the Supreme Court is less lenient to laws that engage the section 7 liberty interests by way of potential imprisonment.

In terms of whether there is a right to abortion, Chief Justice Dickson (writing with Justice Lamar) most clearly sidelined the question, focusing instead on the procedural elements of the law and the impact of the Therapeutic Abortion Committees on women's health. Justice Beetz (writing with Justice Estey) held that Parliament had carved out an exception to a prohibition on abortion, but had not created anything resembling a right to abortion. He explicitly stated: "given that it appears in a criminal law statute, s 251(4) cannot be said to create a 'right' [to abortion], much less a constitutional right, but it does represent an exception decreed by Parliament."[3] Justice McIntyre (with

Justice La Forest) similarly concluded that, except when a woman's life is at risk, "no right of abortion can be found in Canadian law, custom or tradition, and that the *Charter*, including s. 7, creates no further right."[4]

Justice Wilson, writing alone, gave the most expansive definition of women's interests under section 7, finding that the guarantee of "liberty" included "a degree of personal autonomy over important decisions intimately affecting their private lives."[5] This idea of autonomy of "choice" when it comes to abortion is found only in Justice Wilson's decision. It is important to note that this conclusion was not endorsed by the other six justices and was not without limits, even in Justice Wilson's own estimation.

Ultimately, the 1988 *Morgentaler* decision did not assume a right to abortion, did not create a right to abortion, and cannot be interpreted as implying a right to abortion. Supreme Court Justice Sheilah Martin describes this conclusion in a book published prior to her appointment to the Supreme Court in 2018 by Prime Minister Justin Trudeau. There she notes that although they struck down the abortion law, "the Supreme Court did not clearly articulate a woman's right to obtain an abortion… and left the door open for new criminal abortion legislation when it found that the state has a legitimate interest in protecting the fetus."[6] University of Alberta Law Professor Erin Nelson similarly states: "The Court struck down the law not because criminal prohibition of abortion is impermissible under the Charter, but because the law created an arbitrary and unfair decision-making process."[7]

Even as recently as 2013, the Supreme Court of Canada has affirmed this understanding of the 1988 *Morgentaler* decision. They point out that the previous abortion law was found unconstitutional because Parliament passed the previous law with the purpose of protecting women's health but in effect "caused delays that were detrimental to women's health."[8] There is no suggestion that the result of the 1988 *Morgentaler* decision was due to any right to abortion under the *Charter*.

PRINCIPLES OF FUNDAMENTAL JUSTICE

The finding that an abortion law engages women's section 7 interests – whether it be the interest of liberty to make autonomous choices or the other interests of life or security of the person – is insufficient on its own to establish a violation of section 7, and it is definitely not enough to create a positive right to abortion. As Justice McIntyre says, "All laws… have the potential for interference with individual priorities and aspirations. In fact, the very purpose of most legislation is to cause such interference. It is only when such legislation goes beyond interfering with priorities and aspirations, and abridges rights, that courts may intervene."[9]

The reality is that laws, specifically criminal laws, engage section 7, because they interfere with potentially private and personal decisions by threatening criminal sanctions, including the deprivation of liberty. The question then becomes whether the impugned law interferes with someone's life, liberty, or security of person "in accordance with the principles of fundamental justice" – the second half of section 7. Canadian jurisprudence shows that these principles all revolve around the question of whether Parliament is trying to achieve a compelling purpose with the impugned law, and whether the means chosen to achieve that objective are arbitrary, overbroad, or grossly disproportionate.

All the justices in the 1988 *Morgentaler* decision agreed that protecting fetal interests was a legitimate and important state interest. Even with her expansive understanding of women's interests under section 7, Justice Wilson clarifies Parliament's ability to legislate abortion:

> [A woman's] reasons for having an abortion would, however, be the proper subject of inquiry at the later stages of her pregnancy **when the state's compelling interest in the protection of the foetus would justify it in prescribing conditions.** The precise point in the development of the foetus at which the state's interest in its protection becomes "compelling" I leave to the informed judgment of the legislature which is in a position to receive guidance on the subject from all the relevant disciplines. It seems to me, however, that it might fall somewhere in the second trimester. (emphasis added)[10]

Even the understanding of section 7's liberty guarantee as including the freedom to make "fundamental personal choices"[11] does not end the debate, especially when such a choice directly impacts another person's *Charter* guarantees. While the courts have failed to extend *Charter* protection to pre-born children to date, they have consistently affirmed Parliament's ability to legislate protection of fetal interests.

Rather than being a closed issue of "women's rights", the question of whether a future abortion law in Canada would withstand a section 7 analysis will largely depend on its

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purpose and the means chosen to achieve that purpose. The Supreme Court has affirmed repeatedly that "a 'complex regulatory response' to a social ill will garner a high degree of deference."[12] Unlike the Supreme Court, which is limited to hearing individual cases based on a confined set of facts, Parliament is able to hear from a variety of voices and act in a way that considers broader societal interests. The Supreme Court shows deference to Parliament knowing that Parliament is in a better position to make such determinations.

CONCLUSION

Parliament has considered various legislative proposals that would create a new abortion law; however, none of them have passed due to political pressures on both sides of the issue, leaving "Canada with no federal abortion law – no gatekeeping, no restrictions on clinics, and no gestational limits."[13] In her analysis of *Morgentaler* and Parliament's inaction on abortion, Professor Nelson highlights that "Canada is the sole Western nation without any criminal (or direct governmental) control over the provision of abortion services."[14] Every other democratic country has managed to protect pre-born children to some degree. Canada stands alone in leaving the question unanswered – not because there is a right to abortion, but because of the inaction of Parliament.

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REFERENCES

1 *Criminal Code* R.S.C., 1985, c. C-46 at s. 287(4)(c). This was s. 251 at the time of the 1988 *Morgentaler* decision.

2 *R. v. Morgentaler*, [1988] 1 SCR 30 at p. 46.

3 *R. v. Morgentaler*, [1988] 1 SCR 30 at p. 86.

4 *R. v. Morgentaler*, [1988] 1 SCR 30 at p. 148. Dissenting in result.

5 *R. v. Morgentaler*, [1988] 1 SCR 30 at p. 171.

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7 Nelson, E. (2011). Regulating Reproduction. In J. Downie, T. Caulfield, & C. M. Flood (Eds.), *Canadian Health Law and Policy* (pp. 295-340). Markham, ON: LexisNexis Canada Inc at p. 297.

8 *Canada (Attorney General) v. Bedford*, [2013] 3 SCR 1101 at para 98.

9 *R. v. Morgentaler*, [1988] 1 SCR 30 at p. 142.

10 *R. v. Morgentaler*, [1988] 1 SCR 30 at p. 183.

11 *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307.

12 *Carter v. Canada (Attorney General)*, [2015] 1 SCR 331 at para 97 in the context of medical assistance in dying.

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We Need a Law

P.O. BOX 1377 STN B
OTTAWA, ONTARIO K1P 5R4

1-866-410-9625
info@WeNeedaLaw.ca

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