A 'RIGHT' TO ABORTION? - ABORTION IN CANADIAN COURTS – Office of David Anderson, MP (July 2018)

Up until 1969, abortion was illegal in Canada under Section 251 of the Criminal Code. A doctor could receive up to a life sentence for performing the procedure, and a woman up to two years. In 1969, Pierre Elliot Trudeau's government amended the law to make it possible for a woman to have an abortion if the pregnancy threatened the life or health of the mother. Whether the pregnancy jeopardized the life or health of the mother had to be decided by a committee of doctors.

Although you can still find the law in Canada's Criminal Code under Section 287, it was rendered meaningless by the 1988 Supreme Court decision on R. v. Morgentaler. This ruling was decided with 5 justices in favour and 2 against. The court decided that the abortion law was unconstitutional, ruling that it conflicted with Section 7 of the Charter of Rights and Freedoms, which states: "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."

Chief Justice Brian Dickson stated:

> "Forcing a woman, by threat of criminal sanction to carry a fetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of her security of the person."

The majority of the court decided that Section 7 did not imply that provision of abortion was right or wrong. Rather, the ruling was made on the basis that the procedure at that time, which required abortion requests to be approved by a committee of doctors in a hospital, presented too many barriers and was "manifestly unfair".

The conclusion was as follows:

> "While Parliament is justified in requiring a reliable, independent and medically sound opinion as to the 'life and health' of the pregnant woman in order to protect the state interest in the fetus, and while any such statutory mechanism will inevitably result in some delay, certain of the procedural requirements of s. 251 of the Criminal Code are nevertheless manifestly unfair. These requirements are manifestly unfair in that they are unnecessary in respect of Parliament's objectives in establishing the administrative structure and in that they result in additional risks to the health of pregnant women."

The court did not determine that there should be no law at all, but that the current one was arbitrary and potentially could take too long, thereby endangering the health and wellbeing of the mother.

The following requirements were believed to be unfair: 1) the requirement that all therapeutic abortions had to take place in an accredited or approved hospital; 2) The requirement that the committee come from the accredited or approved hospital where the abortion is to be performed; 3) The provision that allows hospital boards to increase the number of people on committees; and 4) The requirement that all physicians who require lawful therapeutic abortions be excluded from the committee.

The court made no proclamations on the rights of the unborn. Rather, they decided that it wasn't necessary in this particular case to decide whether or not the fetus had a right to life.

Justice Bertha Wilson was the closest to implying that abortion was a right. She said that one of the problems with Section 251 was that, "It asserts that a woman's capacity to reproduce be subject not to her own control but to that of the state. This is a direct interference with the woman's physical person." Justice Wilson also argued that the decision to terminate a pregnancy was a moral one and fell under freedom of conscience, with the conscience of the individual being paramount to the state.

This reasoning is deeply flawed, since calling something a moral decision does not automatically exempt it from the control of the state. Most decisions involve a "moral" component. All such acts are not protected under freedom of conscience.

Despite providing the most liberal outlook on the case, Justice Wilson still believed that the state had a role to protect the fetus, just not at its early stages of development.

Wilson stated that:

"The value to be placed on the fetus as potential life is directly related to the stage of its development during gestation… this view of the fetus supports a permissive approach to abortion in the early stages where the woman's autonomy would be absolute and a restrictive approach and the later stages where the state's interest in protecting the fetus would justify its prescribing conditions."

She added that the precise point at which the state has an interest in protecting the fetus should be decided by the legislature on the basis of expert testimony.

Therefore, all 7 justices agreed that the state had some interest in protecting the fetus and expected a new law to be created to fill the gap left by their decision on the 1988 R. v. Morgentaler case.

The Absence of a Law

Soon after the Morgentaler decision, the Mulroney government introduced a bill in an attempt to address the lack of an abortion law. Bill C-43 stipulated that someone inducing an abortion could be found indictable and sentenced to a prison sentence of no more than two years. However, a woman could legally obtain an abortion if a physician decided that the pregnancy put the woman's health or life at risk. Health was broadly defined to include physical, mental and psychological health. This bill was defeated by a tie vote in the Senate on its third reading.

The Library of Parliament's paper on the history of abortion in Canada after R. v. Morgentaler states:

> "The decriminalization of abortion in Canada, while allowing more women to obtain, and more doctors to perform abortions without fear of legal sanctions, did not settle the issue of what rights, if any, were to be granted to the fetus or unborn child."

The court cases left a challenge to the legislature to create a law protecting the rights of the unborn. Justice McLachlan wrote: "If Parliament or the legislatures wish to legislate legal rights for unborn children or other protective measures, that is open to them, subject to any limitations imposed by the Canadian constitution."

Currently, under Canadian law, a child's rights only begin after it is born. The lack of legal rights for unborn children has been given precedent by a number of legal cases. The Saskatchewan Court of the Queen's Bench and the Saskatchewan Court of Appeal ruled that a fetus was not protected under Section 7 or Section 15 of the Charter of Rights and Freedoms. The Supreme Court refused to hear an appeal in this regard because of its decision in the Morgentaler case.

In Quebec, a superior court ruled in favour of a father who wanted to stop the mother of his unborn child from having an abortion. The Quebec court decided that the fetus was a human being and therefore entitled to protections under Section 1 of the Quebec Charter. However, the Supreme Court later ruled that a fetus was not included under the term 'human being' in the Quebec Charter and there was no evidence that the authors of the Charter intended it to be included.

In cases where a fetus was harmed either through criminal action or accidently, Canadian courts have ruled that the one responsible for harming the fetus is not liable since the fetus is not a person. In the 1997 Winnipeg Child and Family Services case, the question brought before the courts was whether a pregnant woman addicted to glue sniffing could be legally detained and prevented from continuing the harmful habit for the welfare of the fetus. The majority decision in this case was that these actions could not be taken:

> "The law of Canada does not recognize the unborn child as a legal person possessing rights. This is a general proposition applicable to all aspects of the law. Once a child is born, alive and viable, the law may recognize that its existence began before birth for certain limited purposes. But the only right recognized is that of the born person. Any right or interest the fetus may have remains inchoate and incomplete until the child's birth."

The court decided that they do not have parens patriae over unborn children, which means they don't have the authority to intervene on behalf of the child. They also decided that if they ruled that the woman could be legally detained for the above mentioned purpose, such a decision would have major implications to the law and therefore went beyond the power of the court to implement. It is the court's job to determine the application of the law. Changes of law that will have major and far reaching consequences are the jurisdiction of the legislature.

Justices John Sopinka and John Major were the two dissenting views on this case. They believed that:

> "The superior court judge was within his jurisdiction under parens patriae to order the respondent to refrain from the consumption of intoxicating substances, and to compel the respondent to live at a place of safety until the birth of her child. The jurisdiction available under parens patriae to act in the best interests of a child should include the power to act in the best interests of a fetus. The parens patriae jurisdiction exists for the stated purpose of doing what is necessary to protect the interests of those who are unable to protect themselves."

They also concluded that the 'born alive' rule (the child only has rights once born alive) was anachronistic and should be set aside in the particular case. This rule was created when medical science was unable to determine whether the child in utero was alive at the time it was subjected to injury. Today's medical science has dispelled all such doubts. Additionally, they reasoned that:

> "When a woman chooses to carry a fetus to term, she must accept some responsibility for its well-being and the state has an interest in trying to ensure the child's health. Since the pregnant woman has the right to decide her lifestyle, a court's ability to intervene to protect the fetus must be limited to extreme cases where her conduct has, on proof to the civil standard, a reasonable probability of causing serious irreparable harm to the unborn child."

Canada is now one of three countries that have no restrictions on abortion; the remaining two being China and North Korea. However, China does have a law prohibiting sex-selective abortions.

Many countries that allow abortions impose gestational limits well before the viability mark of 22 or 23 weeks. In the United States, the states determine the limits on abortion, with a range from partial birth abortions through to states that have

implemented tight restrictions. The Netherlands has set a limit of 13 weeks; Germany, France, Austria and Italy all have gestational limits of 12 weeks. Sweden has set the limit at 18 weeks. In Australia, it varies from state to state; Queensland only allows abortions in the case of it endangering a woman's health, but in the Australian Capital Territory, it is unrestricted.

The majority of the countries in the world place some restrictions on abortion. This is not because those countries are backwards, or unsupportive of women's rights, but because they recognize that abortion goes beyond the 'my body, my choice' argument. Science has proven that the preborn child has a beating heart; functioning brain and nervous system; and formed fingers, toes, hands and feet that move about in utero. Scientifically, it is clear that a baby at 12 weeks is just as much a human being as a baby at 12 months. As the judges in the Winnipeg Child case concluded, the 'born alive' rule is medically and scientifically anachronistic. As Pierre Elliot Trudeau said, "You have a right to your own body – it is your body. But the fetus is not your body; it's someone else's body. And if you kill it you will have to explain."

The absolute 'right' to an abortion without conditions does not exist in Canadian law. Canadian courts have been clear on that. Is it time that Canadians and indeed Parliament carry out what the Court has suggested – to have a debate about what 'life' means in Canada, to determine the role that abortion should have, and to put in place laws that will protect every Canadian's right to 'life, liberty and security of the person', as stated in Section 7 of the Canadian Charter of Rights and Freedoms?