

R. v. Morgentaler
R. v. Morgentaler, [1988] 1 S.C.R. 30

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Background Info

In the 19th Century, Canadian law followed the precedence of the United Kingdom. The United Kingdom passed a law known as Lord Ellenborough's Act, also known as "The Quickening." The Lord Ellenborough's Act states that it is illegal to kill a fetus after movement is detected within the mother's womb.¹ From 1841 to 1849, Canada similarly followed the United Kingdom by creating their own criminalization laws against abortion. In 1973, Dr. Henry Morgentaler started his first abortion clinic in Montreal, Canada. Despite the laws against uncertified abortions, Morgentaler announced his abortion clinic openly to the public. Morgentaler was later arrested for starting the abortion clinic as his actions went against s.125 of the Criminal Code of Canada. After serving his sentence, Morgentaler started more uncertified abortion clinics, leading to another arrest. This led to the Morgentaler filing for an appeal and the start of the *R. v. Morgentaler case*.

Canadian Charter of Rights and Freedoms

According to s.7 of the Canadian Charter of Rights and Freedoms, the law states that "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."² Furthermore, the Charter also accounts for the limits and boundaries that s.7 of the Charter states. This is seen in s.1 of the Charter as it "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."³

Safety of Pregnant Women

According to s.251 of the Criminal Code, this law states that all abortions are illegal nationwide. However, there are contradictions to the implementations of s.251 as the banning of all abortions in Canada clashes with s.1 of the Canadian Charter of Rights and Freedoms. Lawyers in favour of Morgentaler argued that s.251 of the Criminal Code cannot be saved under s.1 of the Canadian Charter of Rights and Freedoms as it denies women's security over their bodies. Therefore, the existence of s.251 of the Criminal Code not only places societal stress and strain on pregnant women, but it also decreases the autonomy that women have over their bodies.

Safety of the Fetus + "Potential Life"

The court discussed whether "everyone" in s.7 of the Charter included fetuses that have yet to be born in pregnant women. According to the holdings in *Roe v. Wade*, the term "potential life" was introduced. Roe concluded that although the fetus is considered a "potential life," and that there is "importance in the protection of potential life," fetuses are not "viable."⁴ Thus, the term "everyone" in s.7 of the Charter does not include fetuses.

¹ *Smitten With Learning* (January 22, 2022)

² *R.v. Morgentaler* (1988)

³ *Section 1 Reasonable limits*

⁴ *Roe v. Wade* (1973)

Rational reasoning

According to s.7 of the Canadian Charter of Rights, it states that “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.”⁵ However, with the safety of the woman yielding higher priority than the life of the fetus, the court argued that pregnant women’s psychological and physical security should be maximized. Additionally, the repercussions of illegalizing abortion were also taken into account as the requirement of possessing an abortion certification delayed pregnant women’s access to proper medical treatment. This not only conflicts with Canada’s objective of ensuring national “right to life” and “security,” but it also increases the level of risk placed upon women’s psychological and physical well-being.⁶

Holding/Conclusion

The court concluded that s.251 of the Criminal Code was unconstitutional and that the existence of it increased pregnant women’s psychological and physiological risk. Moreover, s.251 violates pregnant women’s right to life, liberty, and security within s.7 of the Canadian Charter of Rights and Freedoms. Fetuses were also concluded to be “potential life” worth “protecting,” however, the law tackled this discussion by introducing the notion of “viability.” Hence, a fetus is only “viable” once it is capable of successfully operating after birth.

⁵ *Consolidated federal laws of Canada, the Constitution Acts*

⁶ *Consolidated federal laws of Canada, the Constitution Acts*

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