The Twentieth Anniversary of Regina v. Morgentaler

January 28, 2008 marked the twenty-year anniversary of the Supreme Court of Canada's decision in R. v. Morgentaler, which legalized medical abortion in Canada [1]. The legal issues split the high court then – five judges were in favour of striking down the abortion law while two dissented – and the moral issues surrounding abortion still divide Canadian society today.

The Decision

The legislation at issue was section 251 of the Criminal Code which required a pregnant woman who wanted an abortion to apply to a "therapeutic abortion committee" of an "accredited or approved" hospital [2]. The committee, comprised of at least four physicians, would determine whether the continuation of the pregnancy would endanger the pregnant woman's health. If the committee found that the woman's health was not endangered then she was left with a difficult choice: either she had to carry an undesired pregnancy to term or commit a crime to obtain effective and timely medical treatment.

The case began in 1983, when Dr. Henry Morgentaler and two colleagues were charged in Ontario with performing illegal miscarriages. They were acquitted by a Toronto jury in 1984, but the verdict was reversed by the Ontario Court of Appeal [3].

Chief Justice Dickson of the Supreme Court, with Justice Lamer concurring, held that the provision violated the section 7 right to life, liberty and security of the person under the Charter of Rights and Freedoms. The provision violated the security of the person guarantee because "the removal of the decision making power [and delegation of it to the committee] threatens women in a physical sense [and] the indecision of knowing whether an abortion will be granted inflicts emotional stress" [4].

The Chief Justice noted that the interests protected by section 7 may be impaired by the state if the principles of fundamental justice are respected. However, section 251 was not in accordance with the principles of fundamental justice because it was "manifestly unfair":

1. "Health" was undefined in the legislation, allowing the committee to apply their own definition of the term which may not include psychological health;
2. Four physicians had to be available to authorize and perform an abortion, which was difficult in rural or underserviced areas of Canada; and
3. Abortions could only be performed in hospitals accredited or approved by the Minister of Health. [5]

Finding an infringement of section 7, the Chief Justice considered whether the legislation was saved by section 1. It was not: although the protection of the interests of pregnant women was a valid legislative objective, the means chosen did not satisfy the proportionality component of the Oakes test.

Justice Beetz, with Justice Estey concurring, agreed with the Chief Justice Dickson's judgment, highlighting that the administrative delay inherent in the decision-making mechanism of the provision created an additional risk to pregnant women's health and constituted a violation of the right to security of the person. This interpretation supported the petitioner's argument in Chaoulli v. Quebec (Attorney General), a 2005 decision of the Supreme Court that considered whether delays for medical treatment as a result of waiting lists in hospitals violated the section 7 guarantee [6].

Justice Bertha Wilson, in a separate but concurring opinion, found a violation of both the security of the person and the liberty interest under section 7. She held that "liberty" under the Charter included "the right to make fundamental personal decisions without interference from state" [7]. In doing so, she spoke decisively about the rights of women with regard to abortion:

The decision of a woman to terminate her pregnancy falls within the class of protected decisions [because it will have] profound psychological, economic and social consequences for the pregnant woman…The right to reproduce or not to reproduce…is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being…The purpose of [section 251] is to take the decision away from the woman and give it to a committee. [8]

She also wrote:

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience…but because he relates to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma. [9]

Justice Wilson determined that it was for legislature to determine the "point in the pregnancy [when] the protection of the foetus [becomes] such a pressing and substantial concern as to outweigh the fundamental right of the woman to decide whether or not to carry the foetus to term" [10].

Justice McIntyre dissented, and Justice La Forest concurred. Both disagreed with the majority opinion that section 7 of the Charter guaranteed the right to have an abortion, "given the language, structure and history of the constitution and given the history, traditions and underlying philosophies of our society" [11].

Twenty Years Later…

Twenty years after the decision, and pro-life activists continue to challenge the legalization of abortion in Canada while pro-choice advocates question the weight of the Supreme

Court's judgment on health-care providers. The latter group may have a point. The Globe and Mail recently reported that fewer than one fifth of Canadian hospitals perform abortions; Prince Edward Island does not provide abortions; before abortions are performed in New Brunswick two physicians must provide referrals; and in Ottawa, the wait-time for an abortion is six weeks. In Northern Canada, generally no abortions are performed since "virtually every hospital and clinic offering abortion services in Canada is located within 150 kilometres of the U.S. border, and there is not a single abortion provider north of the Trans-Canada highway in Ontario" [12].

Although the legal issues surrounding abortion are long-settled, the moral and political debate continues. To this day, public opinion on the issue remains as divided as the high court was twenty years ago.

Cases

- R. v. Morgentaler, [1988] 1 S.C.R. 30.
- Chaoulli v. Quebec (Attorney General), 2005 SCC 35, [2005] 1 S.C.R. 791.
- Tremblay v. Daigle, [1989] 2 S.C.R. 530, in which the Supreme Court of Canada upheld an appeal by a woman to have an abortion on the basis that a foetus is not a legal person under Quebec law.

Sources

1. Andre Picard, "Choice? What choice?" The Globe and Mail (24 January 2008).

Further Reading

1. Daphne Bramham, "20 years after Charter ruling, abortion battle not fully won" Vancouver Sun (27 January 2008).
2. "Both sides of debate mark 20 years of legal abortion" CBC News (28 January 2008).
3. Heather Mallick, "Why doesn't this man have the Order of Canada?" The Globe and Mail (18 January 2003).

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

[2] R.S.C. 1970, c. C-34.

[3] In 1975, the law was changed so that a jury verdict could no longer be overturned by a higher court on appeal. This change in the law was known as the "Morgentaler Amendment."

[4] Supra note 1 at page 56.

[5] Ibid. at pages 115 -119.

[6] 2005 SCC 35, [2005] 1 S.C.R. 791.

[7] Supra note 1 at page 166.

[8] Ibid. at page 172.

[9] Ibid. at page 171.

[10] Ibid. at page 181.

[11] Ibid. at page 146.

[12] Andre Picard, “Choice? What choice?” The Globe and Mail (24 January 2008).