Court Affirms Morgentaler's Standing in Constitutional Challenge

Seven years ago, Dr. Henry Morgentaler launched a constitutional challenge of government provision of services under New Brunswick's *Medical Services Payment Act*,[1] specifically, the exclusion of funding for abortions not certified as "medically required," and the requirement that those abortions be "performed in an approved hospital facility." Morgentaler claims that a denial of funding erects a barrier to medical services that violates women's section 7 *Charter* rights to life, liberty and security of the person.[2] Until now, the matter had been unable to proceed because the province had challenged Morgentaler's standing to bring this issue before the courts.[3]

Standing, or *locus standi*, is the right of an individual to participate in a case, based on the individual's connection to the matter at hand. A person who is directly impacted by a *Charter* violation may be granted standing on the authority of section 24(1) of the *Charter*, which reads:

> *Anyone whose rights or freedoms as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.*

In this case, it is the rights of Morgentaler's patients, rather than Morgentaler himself, that are claimed to have been infringed or denied. For Morgentaler's case to proceed through the New Brunswick courts, he must be able to lay claim to "public interest" standing because he cannot claim that his own *Charter* rights have been directly infringed. Indeed, a series of Supreme Court of Canada cases, known as "the standing trilogy," [4]developed the concept of public interest standing and establishes three questions that a court must consider before granting it to a litigant. The court has summarized these questions as follows:

> *First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?[5]*

In the *Medical Services Payment Act* case, the New Brunswick Court of Appeal said that "the answer to the first question is dependent upon the court's

assessment of the applicant's chances of success. That exercise necessarily requires a consideration of the pleadings to determine whether, as a matter of law, the applicant's challenge is founded on a theory that could prevail at trial."[6]

With regard to the second question, the court noted that the province concedes that Morgentaler has a "genuine interest" in the impugned legislation and is also "directly affected" by its provisions.[7]

The court focused the bulk of its analysis on the third question, namely, whether there is a reasonable and effective way to bring the issue before the court other than the one chosen by Morgentaler. The court concluded that "the prohibitive cost of litigation and the intimate and private nature of the decision to terminate a pregnancy" effectively prevents the young women who are directly affected by the legislation from bring the matter before the courts.[8] Thus the province's appeal was dismissed and Morgentaler's standing in the case was reaffirmed.

The province may appeal the decision to the Supreme Court. According to a spokesperson for Dr. Morgetaler, such an action would be a delaying tactic that will succeed only if the appeal process outlives Morgentaler, who is already 86 years old.[9]

Further Reading

Martha Peden, The Twentieth Anniversary of Regina v. Morgentaler, *Centre for Constitutional Studies* (4 March 2008)

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[1] RSNB 1973, c M-7.
[2]*2009 NBCA 26* at para 1.
[3] "Morgentaler clinic worker says N.B. government 'waiting for him to give up'" *CBCnews.ca* (25 May 2009).
[4] *Thorson v Attorney General of Canada*, [1975] 1 SCR 138; *Nova Scotia Board of Censors v McNeil*, [1976] 2 SCR 265; *Minister of Justice (Can.) v Borowski*, [1981] 2 SCR 575.
[5] *Canadian Council of Churches v. Canada*, [1992] 1 SCR 236 at 22.
[6] *Supra* note 2 at para 10.
[7] *Ibid* at para 11.
[8] *Ibid* at para 59.
[9] *Supra* note 3.