

1988 Supreme Court Decision

Morgentaler, Smoling and Scott v. The Queen
[Indexed as R. v. Morgentaler]

What the judges said about Parliament being within its rights to protect the fetus, and why the law was struck down

Full text of the decision can be found at: <http://www.canlii.org/ca/cas/scc/1988/1988scc2.html>

1. What the judges said:

(Note: emphasis has been added in the quotes below.)

Dickson C.J.C.:

Section 54: “Like Beetz and Wilson JJ., **I agree that protection of foetal interests by Parliament is also a valid governmental objective. It follows that balancing these interests, with the lives and health of women a major factor, is clearly an important governmental objective.**”

Beetz J.:

Section 131: “.... Parliament seeks to assure that there is a reliable, independent and medically sound opinion that the continuation of the pregnancy would or would be likely to endanger the woman’s life or health. Whatever the failings of the current system, I believe that the purpose pursuant to which it was adopted does not offend the principles of fundamental justice. As I shall endeavour to explain, the current mechanism in the [Criminal Code](#) does not accord with the principles of fundamental justice. This does not preclude, in my view, Parliament from adopting another system, free of the failings of s. 251(4), in order to ascertain that the life or health of the pregnant woman is in danger, by way of a reliable, independent and medically sound opinion.”

Section 132: “**Parliament is justified in requiring a reliable, independent and medically sound opinion in order to protect the state interest in the foetus.** This is undoubtedly the objective of a rule which requires an independent verification of the practising physician’s opinion that the life or health of the pregnant woman is in danger.”

Section 135: “The assertion that an independent medical opinion, distinct from that of the pregnant woman and her practising physician, does not offend the principles of fundamental justice would need to be reevaluated if a right of access to abortion is founded upon the right to “liberty” in s. 7 of the *Charter*. I am of the view that there would still be circumstances in which the state interest in the protection of the foetus would require an independent medical opinion as

to the danger to the life or health of the pregnant woman. **Assuming without deciding that a right of access to abortion can be founded upon the right to “liberty”, there would be a point in time at which the state interest in the foetus would become compelling. From this point in time, Parliament would be entitled to limit abortions to those required for therapeutic reasons and therefore require an independent opinion as to the health exception.”**

Section 162: “ **I am of the view that the protection of the foetus is and, as the Court of Appeal observed, always has been, a valid objective in Canadian criminal law. I have already elaborated on this objective in my discussion of the principles of fundamental justice. I think s. 1 of the *Charter* authorizes reasonable limits to be put on a woman’s right having regard to the state interest in the protection of the foetus.”**

Estey J. concurs with Beetz J.

McIntyre J. (dissenting):

Section 195: “I would only add that even if a general right to have an abortion could be found under s. 7 of the Charter, it is by no means clear from the evidence the extent to which such a right could be said to be infringed by the requirements of s. 251 of the Code. In the nature of things that is difficult to determine. The mere fact of pregnancy, let alone an unwanted pregnancy, gives rise to stress. The evidence reveals that much of the anguish associated with abortion is inherent and unavoidable and that there is really no psychologically painless way to cope with an unwanted pregnancy.”

Section 196: “It is for these reasons I would conclude, that save for the provisions of the Criminal Code, which permit abortion where the life or health of the woman 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. Accordingly, it is my view that s. 251 of the Code does not in its terms violate s. 7 of the Charter.”

Section 213: “Before leaving this case, I wish to make it clear that I express no opinion on the question of whether, or upon what conditions, there should be a right for a pregnant woman to have an abortion free of legal sanction. No valid constitutional objection to s. 251 of the Criminal Code has, in my view, been raised and, consequently, if there is to be a change in the law concerning this question it will be for Parliament to make. **Questions of public policy touching on this controversial and divisive matter must be resolved by the elected Parliament.** It does not fall within the proper jurisdiction of the courts. Parliamentary action on this matter is subject to judicial review but, in my view, nothing in the Canadian Charter of Rights and Freedoms gives the Court the power or duty to displace Parliament in this matter involving, as it does, general matters of public policy.”

Section 215: “**The solution to [the abortion] question in this country must be left to Parliament. It is for Parliament to pronounce on and to direct social policy. This is not because Parliament can claim all wisdom and knowledge but simply because Parliament is elected**

for that purpose in a free democracy and, in addition, has the facilities—the exposure to public opinion and information—as well as the political power to make effective its decisions.”

Lamer J. concurs with Dickson C.J.C.

Wilson J.:

Section 257: “It would be my view, and I think it is consistent with the position taken by the United States Supreme Court in *Roe v. Wade*, that the value to be placed on the foetus as potential life is directly related to the stage of its development during gestation...in balancing the state’s interest in the protection of the foetus as potential life under s. 1 of the Charter against the right of the pregnant woman under s. 7 greater weight should be given to the state’s interest in the later stages of pregnancy than in the earlier. The foetus should accordingly, for purposes of s. 1, be viewed in differential and developmental terms.”

Section 258: “A developmental view of the foetus, on the other hand, supports a permissive approach to abortion in the early stages of pregnancy and a restrictive approach in the later stages. In the early stages the woman's autonomy would be absolute; her decision, reached in consultation with her physician, not to carry the foetus to term would be conclusive. The state would have no business inquiring into her reasons. **Her 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.**”

La Forest J. concurs with McIntyre J.

2. Why the abortion law was struck down:

Only one of the seven judges, Justice Wilson, found a constitutional right to abortion, but even then, only in the early stages of pregnancy: “In the early stages the woman’s autonomy would be absolute... Her 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 two dissenting judges, McIntyre and La Forest, found that the abortion law (Section 251 of the Criminal Code, currently Section 287), was not unconstitutional.

The four judges in the majority opinion, Dickson, Lamer, Beetz and Estey, did not find a right

to abortion, but did find that Section 251 was unconstitutional for procedural and administrative reasons that impacted on a woman's Charter 7 right to "security of the person." For example, not all women had equal access to therapeutic abortion committees and hospitals performing abortions, and delays caused by the system could prevent a woman whose life or health was endangered by the pregnancy from obtaining an abortion until later in the pregnancy when the abortion becomes more dangerous to the woman's health, or could prevent her from getting the abortion altogether. (Remember, the law allowed abortion only when the woman's life or health was at risk; it was never meant to allow 'abortion on demand.') So these judges felt this was a clear violation of a woman's right to "security of the person." In addition, there was "the absence of any clear legal standard to be applied by the committee in reaching its decision" as to whether a woman's life or health was at risk because the law did not provide any definition of "health." (Dickson, Section 45).