



Position Paper #65

Abortion is a Charter Right

While Canada remains one of the few countries in the world without abortion laws, much contention and polarization on the issue persists, including on the issue of whether abortion is a fundamental human right under the Canadian *Charter of Rights and Freedoms* (the Charter).

This position paper will first demonstrate how and why abortion is a Charter right in Canada, and then place abortion within the frameworks of women's rights and international law.

The 1988 *R v Morgentaler* decision¹ is often seen as the turning point for abortion rights in Canada, though it did not explicitly find abortion to be a Charter right. The Court decided that the restrictive criminal laws on abortion violated the Charter rights of women, specifically security of the person according to Section 7 of the Charter² because the laws negatively impacted their physical and psychological health. Justice Dickson notably said: “*forcing a woman, by threat of criminal sanction, to carry a foetus 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 security of the person.*”¹

However, Justice Bertha Wilson wrote a concurrent decision, saying that the rights to life, liberty, conscience, and privacy were also violated by these laws. Based on both majority and concurrent decisions, abortion could be considered a *de facto* Charter right, as any imposed restriction would violate Charter rights.³

A frequent argument is that the specific word “abortion” does not feature in the Charter, and it is therefore not a Charter right. However, Charter rights are enumerated in a broad sense, and judicial interpretation allows for judges to apply Charter rights in new ways to various situations. This results in case law that expands Charter rights, sets precedent for future cases, and ultimately becomes part of Charter law.⁴ Since 1988, all provincial and federal court cases related to abortion⁵ have upheld women's rights and denied fetal rights on the basis that this would infringe women's Charter rights.

As a result of the *Morgentaler* decision, many other Supreme Court cases have helped shape the current interpretations of abortion rights. In some decisions, such as those of *Tremblay v Daigle* (1989), *Winnipeg Child and Family Services v. DFG* (1997), and *Dobson v Dobson* (1999), the Court upheld the Charter rights of pregnant women and dismissed fetal rights.

Other cases such as *Brooks v Canada Safeway Ltd* (1989), *Blencoe v. BC Human Rights Commission* (2000), and the later cases of *Canada v Bedford* (2013) and *Carter v. Canada* (2015), recognized and expanded the rights to equality, liberty, personal security, and privacy. These cases have all contributed to strengthening the right to abortion under those Charter rights. In fact, the Morgentaler decision has become a cornerstone of human rights jurisprudence in Canada, having been cited in many other decisions.⁵

The right to abortion is about women's equality. Indeed, the Charter's Section 15 guarantees equality on the basis of sex, which means women, transgender people,⁶ and men are equal citizens. Therefore, no-one should endure any sort of discrimination pertaining to their sex or gender. That includes pregnancy discrimination, which Canada's Supreme Court has ruled is sex discrimination.^{7, 8} As such, governments must ensure abortion access for women and transgender people. A good explanation of how restrictive government laws and policies around abortion violate women's equality rights can be found in the *Notice of Application* to file a lawsuit against the PEI government in 2016, by Abortion Access Now PEI Inc.⁹ Specifically, denying abortion or putting up barriers to the service perpetuates stigma, as well as the "historical disadvantage, prejudice and stereotyping experienced by women in relation to reproductive health." In particular, it "disproportionately disadvantages younger women, Aboriginal women, disabled women, single mothers, LGBTQ people, and victims of domestic violence."

From an international law perspective, the right to gender equality is a significant element in human rights law. Indeed, all fundamental human rights documents protect women from discrimination and the enjoyment of their human rights. According to the Committee on the Elimination of Discrimination against Women (CEDAW), discrimination against women includes "*laws that criminalise medical procedures only needed by women and that punish women who undergo those procedures*".¹⁰

Furthermore, international law protects women's right to "*the highest attainable standard of physical and mental health*".¹¹ In 2000, the Committee on Economic, Social and Cultural Rights (CESCR) included in the definition of the right to health "*the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference,*" which "*requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health*".¹²

Abortion is also seen as part of the fundamental rights of women due to the dangers of unsafe abortion. Indeed, the International Covenant on Civil and Political Rights (ICCPR) protects the right to life. In 2000, the United Nations Human Rights Committee pressed states to call out "*any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions*".¹³ Thus, there is consensus amongst international human rights bodies that maternal deaths resulting from unsafe abortion amount to a violation of women's right to life. Regionally, Africa's Maputo Protocol is the main legal instrument for the protection of women and girls' rights and is notable for its recognition of abortion as a human right under broad conditions (article 14).¹⁴

Finally, international law protects the right of “reproductive self-determination” for women. The European Court of Human Rights has linked pregnancy to a woman’s private life and integrity, and recognized that States therefore must protect these elements. This means that States have the obligation to ensure that women are able to make an informed decision about whether or not to terminate their pregnancies, and if they choose to do so, that it must be done in a safe and time-sensitive manner.¹⁵

Anti-choice activists sometimes point to two international conventions that supposedly recognize the rights of fetuses: the 1990 UN Convention on the Rights of the Child, with its phrase “before as well as after birth”; and the American Convention on Human Rights, which aims to protect life “from conception”. But neither of these phrases have been given any force and effect because of the conflict with women’s rights. Authoritative interpretations have clarified that right-to-life protections do not apply before birth because of the potential for negating human rights protections for women. Treaty-monitoring bodies have consistently stressed the importance of protecting women's rights, calling on states to remove barriers such as the denial of safe and legal abortions, and to ensure that the rights of pregnant women are given priority over an interest in prenatal life.¹⁶

In conclusion, while the issue of abortion remains socially contested around Canada, the 1988 Morgentaler case and subsequent case law by the Supreme Court have painted a clear picture: abortion is a Charter right in Canada and any attempt to curtail or restrict this right would be a violation of the Charter rights of women and transgender people. Similarly, the international law perspective mirrors the domestic law perspective in many ways, by protecting the right to abortion through the medium of key international human rights and women’s rights instruments.

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- 1 R. v. Morgentaler. Jan 28, 1988. SCR 30. <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/288/index.do>
 - 2 Charter of Rights and Freedoms. 1982. <http://laws-lois.justice.gc.ca/eng/Const/page-15.html>
 - 3 Bertha Wilson’s statements from the 1988 Morgentaler decision that invited Parliament to pass a Charter-compliant abortion law are from another era and would not be said by today’s Supreme Court justices. Thirty years ago, it seemed inconceivable not to have an abortion law, but Canada’s successful history without one has proved otherwise. Successive federal governments have done their duty by pledging not to legislate on abortion. (See: <http://www.arcc-cdac.ca/action/wilson.html>)
 - 4 Gilbert, Daphne. Jan 18, 2018. Student jobs grant program respects Charter rights. *Ottawa Citizen*. <http://ottawacitizen.com/opinion/columnists/gilbert-student-jobs-grant-program-respects-charter-rights>
 - 5 Abortion Rights Coalition of Canada. 2018. *Abortion Court Cases and Laws in Canada*. <http://www.arcc-cdac.ca/court-decisions-laws-abortion-canada.pdf>
 - 6 Section 15 of the Charter does not specifically mention gender identity or sexual orientation as grounds for discrimination, but the federal government and every province and territory in Canada have enacted human rights laws that prohibit discrimination on such grounds.
 - 7 Brooks v. Canada Safeway Ltd. 1989. 1 SCR 1219. <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/455/index.do?r=AAAAAQAcQnJvb2tzIHVuIENhbmFkYSBTYWZld2F5IEx0ZAAAAAAB>
 - 8 The Supreme Court Justices in the Morgentaler decision did not cite Section 15, presumably because it was still new at that time (only coming into force in 1985) and had no jurisprudence.
 - 9 Abortion Access Now PEI Inc. *Notice of Application*. January 2016. <http://www.leaf.ca/wp-content/uploads/2016/01/AAN-PEI-050116-Draft-Notice-of-Application.pdf>

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- 10 Committee on the Elimination of Discrimination against Women, General Recommendation No. 24, 1999. Article 12 of the Convention (Women and Health). <http://www.refworld.org/docid/453882a73.html>
 - 11 United Nations. *International Covenant on Economic, Social and Cultural Rights*. 1966. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>
 - 12 Office of the High Commissioner for Human Rights. Committee on Economic, Social and Cultural Rights. 2000. *General Comment No. 14*. <http://www.refworld.org/pdfid/4538838d0.pdf>
 - 13 UN Human Rights Committee. 2000. *General Comment No. 28 Equality of rights between men and women*. https://www.nichibenren.or.jp/library/ja/kokusai/humanrights_library/treaty/data/HRC_GC_28e.pdf
 - 14 African Commission on Human and Peoples' Rights. July 11, 2003. *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*. http://www.achpr.org/files/instruments/general-comments-rights-women/achpr_instr_general_comment2_rights_of_women_in_africa_eng.pdf
 - 15 Center for Reproductive Rights. 2008. *Tysiac v. Poland (European Court of Human Rights)*. <https://www.reproductiverights.org/case/tysiac-v-poland-european-court-of-human-rights>
 - 16 Center for Reproductive Rights. 2014. *Whose Right to Life? Women's Rights and Prenatal Protections under Human Rights and Comparative Law*. https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/GLP RTL ENG Updated 8%2014_Web.pdf