Abortion Rights Coalition of Canada

Abortion and the Canadian Charter of Rights and Freedoms

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Partnered with Pro Bono Students Canada | PBSC

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PBSC UNIVERSITY OF NEW BRUNSWICK CHAPTER

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Purpose

The purpose of this project is to discuss abortion in the context of the Canadian *Charter of Rights and Freedoms*[1] (Charter). The goal is to provide a review and analysis of relevant jurisprudence and legal commentary regarding abortion and the extent of its protection under Sections 2(a), 15(1), and 7 of the Charter.

1 INTRODUCTION

Who is "ARCC"?

The *Abortion Rights Coalition of Canada*[2] (ARCC) is a broad-based national feminist organization consisting of groups and individuals who support ARCC's vision and mandate. Founded in 2005, ARCC is the only nation-wide political pro-choice group devoted to ensuring abortion rights and access.

Some of ARCC's main goals are to protect and improve access to reproductive health services, prevent and work against any reduction of reproductive health services or infringement of reproductive rights, advocate and lobby for reproductive choice and services, and educate the public.

ARCC also supports the concept of reproductive justice, recognizing that the sexual and reproductive health and rights of people from many diverse communities are disproportionately affected by marginalization and oppression, including 2S/LGBTQQIPA+ people, Indigenous communities, racialized communities, youth, people with disabilities, and other vulnerable groups.

[1] *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[2] *Abortion Rights Coalition of Canada*. Visit: <https://www.arcc-cdac.ca/>.

Project Outline

This project begins with an overview of ss. 2(a), 15(1), and 7 of the Charter, followed by an analysis of leading jurisprudence addressing the issue of abortion. The project subsequently reviews the common law's position on fetal rights and other relevant Charter claims that specifically focus on human dignity, health, and safety. Drawing on legal commentaries and case law precedents, the project concludes by summarizing how the rights of individuals who are capable of pregnancy[3] have been interpreted under the Charter in the context of abortion.

2 SETTING THE FOUNDATION

Any law that violates the rights inscribed under the Charter—and is not justified under s. 1—is invalid and of no force or effect.4 This section defines the purpose and scope of relevant Charter rights, outlining the circumstances in which courts have found violations of ss. 2(a), 15(1), and 7 of the Charter. Additionally, this section delves into the role and interpretation of s. 1 of the Charter, focusing on its purpose and how the Supreme Court of Canada (SCC) has applied it to assess and justify limitations on Charter rights in cases of infringement.

The Canadian Charter of Rights and Freedoms

Section 2(a): Freedom of Conscience

> [2] Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;[5] [...]

The purpose of s. 2(a) is to "prevent interference with profoundly held personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being."[6] *Religion* has been defined as a "comprehensive system of faith and

[3] Laws and precedents on abortion rights affect any person who can get pregnant, including ciswomen, non-binary and transgender individuals, and other gender-diverse people. This document strives to be gender inclusive but may use gendered language when discussing case law that refers to women.

[4] *Charter, supra*, note 1 at s.52.

[5] *Ibid*, at s.2(a).

[6] Department of Justice Canada, Government of Canada, *Charterpedia*, s.2(a) (Department of Justice Canada, 2024), online: <https://www.justice.gc.ca>. (See also: *R v Edwards Books and Art Ltd.*, [1986] 2

worship"[7] typically involving beliefs in a divine or superhuman power. *Conscience*, on the other hand, includes any moral beliefs of what is right or wrong, whether "grounded in religion or in a secular morality."[8]

Michael J. Sandel, a professor from Harvard Law, argues that religious liberty consists of a parallel freedom to *choose*.[9] Other legal professors, such as Richard Moon from the University of Windsor, suggest that the scope of s. 2(a) rights serve a greater purpose in protecting autonomy, allowing individuals to make significant decisions about their own lives.[10]

The SCC has similarly interpreted the scope of s. 2(a) protections as a freedom for individuals to hold and practice their own beliefs and morals, provided these actions do not interfere with the fundamental rights of others.[11] In order to constitute a breach of this section, a law or state action must interfere with an individual's ability to hold or practice their own personal beliefs.[12]

Non-conformity with *neutrality* is also a component of s. 2(a) which may give rise to a breach. In Canadian constitutional law, neutrality means that the government must not favour one religious group over another, or to discriminate against people based on their religious beliefs. For example, it would be considered a violation if the state were to impose its own religious or conscience beliefs onto the population by forcing them to adopt or favour one belief over another.[13]

S.C.R. 713 at page 759; *R v Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at page 346; *Syndicat Northcrest v Amselem*, [2004] 2 S.C.R. 551 at para 41; *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 at para 32).

[7] *Ibid*. (See: *Amselem*, *supra*, note 6 at para 39).

[8] *Ibid*. (See: *R v Morgentaler*, [1988] 1 S.C.R. 30, at page 37).

[9] Michael J. Sandel, "Religious Liberty—Freedom of Conscience or Freedom of Choice" (1989) 1989:3 Utah L Rev 597.

[10] Richard Moon, *Freedom of Conscience and Religion*, 2nd ed (Toronto: University of Toronto, 2014).

[11] *Charterpedia*, *supra*, note 6. (See: *Ross v New Brunswick School District Board No. 15*, [1996] 1 S.C.R. 825 at para 72; *B. (R.) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at page 385; *Big M, supra*, note 6 at page 337; *Amselem, supra*, note 6 at para 62).

[12] *Ibid*. (See: *Hutterian Brethren, supra*, note 6 at para 32; *Amselem, supra*, note 6 at paras 56-57; *Multani v Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 at para 34; *Law Society of British Columbia v Trinity Western University*, [2018] 2 S.C.R. 293 at para 63).

[13] *Charterpedia*, *supra*, note 6. (See: *Mouvement laïque québecois v Saguenay (City)*, [2015] 2 S.C.R. 3 at para 83).

Section 15(1): Equality and Non-Discrimination

> [15] (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.[14]

Subsection 15(1) seeks to ensure that all individuals are treated with *equal respect and dignity* under the law.[15] It emphasizes that no person should be deemed less worthy of recognition, value, or consideration as a member of Canadian society.[16] However, this provision does not impose a positive obligation on the government to actively address inequality; it merely requires that, if the government does act, it must do so without discrimination.[17]

The SCC has identified a breach of s. 15(1) in cases where a law or state action creates a discriminatory *distinction* based on an *enumerated* or *analogous* ground.[18] Enumerated grounds are explicitly listed in the provision, such as race, religion, and sex. Analogous grounds, by contrast, refer to characteristics that form the basis for stereotypical or prejudicial treatment rooted in personal characteristics that are either immutable or can only be changed at an unacceptable cost to one's personal identity.[19]

Section 7: Life, Liberty and Security of the Person

> [7] 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.[20]

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[14] *Charter*, *supra*, note 1 at s.15.
[15] *Charterpedia*, *supra*, note 6 at s.15. (See also: *R v Kapp*, [2008] 2 S.C.R. 483 at para 15 citing *Andrews v Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 171 *per* McIntyre J.).
[16] *Ibid*. (See: Quebec (A.G.) v A., [2013] 1 S.C.R. 61 at para 417).
[17] *Ibid*. (See generally: *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, [2004] 3 S.C.R. 657; *R v Sharma*, 2022 SCC 39; *Eldridge v British Columbia (Attorney General),* [1997] 3 S.C.R. 624; *Vriend v Alberta*, [1998] 1 S.C.R. 493).
[18] *Ibid*. (See: *Law v Canada,* [1999] 1 S.C.R. 497).
[19] *Ibid*. (See generally: *Fraser v Canada (Attorney General),* 2020 SCC 28 at para 116, citing *Kahkewistahaw First Nation v Taypotat* [2015] 2 S.C.R. 548 at para 17; *Withler v Canada,* [2011] 1 S.C.R. 396 at para 43; *Quebec v A, supra*, at paras 327-332; *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] 1 S.C.R. 464 at para 28; *Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18 at para 35).
[20] *Charter*, *supra*, note 1 at s 7.

Section 7 embodies principles that form the foundation of justice and fair process.[21] Given the fundamental nature of the rights protected under this section, the SCC has yet to identify any circumstances where a breach of an individual's right to life, liberty, or security of the person could be justified.[22] In other words, when s. 7 rights have been violated, the SCC has never upheld the law or state action responsible for the infringement.

The concept of *security of the person* has a broad application, being engaged in both psychological and physical aspects. It includes but is not limited to: (i) a person's right to control their own bodily integrity;[23] (ii) protection against threats to physical or mental health;[24] or (iii) where the state causes severe psychological harm that is greater than ordinary stress or anxiety.[25]

Conversely, the right to *life* is narrowly applied. A breach of this right is only considered where there is a real and substantial risk to a person's survival, whether directly or indirectly.[26] Situations that simply make life more difficult do not meet the threshold for a violation.

The right to *liberty*, while protecting against physical restraints such as imprisonment,[27] also protects personal autonomy—or the right to choose. It encompasses "inherently private choices" that go to the "core of what it means to enjoy individual dignity and independence."[28]

The law states that you cannot be deprived of any s. 7 rights unless the deprivation complies with the *principles of fundamental justice*.[29] If a breach of s. 7 has been found, the second stage of the legal inquiry requires courts to consider whether the deprivation is in accordance with those principles. Since these principles are not exhaustively defined under

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[21] *Charterpedia*, *supra*, note 6 at s.7. (See also: *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 19).
[22] *Ibid*. (See: *Godbout v Longueuil (City)*, [1997] 3 S.C.R. 844 at para 66; *Association of Justice Counsel v Canada (Attorney General)*, 2017 2 S.C.R. 456 at para 49).
[23] *Ibid*. (See: Morgentaler, supra, note 8 at page 56; *Carter v Canada (Attorney General),* 2015 1 S.C.R. 331; *Rodriguez v British Columbia (Attorney General),* [1993] 3 S.C.R. 519; *Blencoe v British Columbia (Human Rights Commission),* [2000] 2 S.C.R. 307 at para 55; *A.C. v Manitoba (Director of Child and Family Services),* [2009] 2 S.C.R. 181 at paras 100-102).
[24] *Ibid*. (See: *R v Monney*, [1999] 1 S.C.R. 652 at para 55; *Chaoulli v. Quebec (A.G.)*, 2005 1 S.C.R. 791 at paras 111-124 and 200; *R v Parker*, 49 O.R. (3d) 481 (C.A.)).
[25] *Ibid*. (See: *Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at para 59).
[26] *Ibid*. (See: *Carter*, *supra*, note 23 at para 62).
[27] *Ibid*. (See: *R v Vaillancourt*, [1987] 2 S.C.R. 636 at page 652).
[28] *Ibid*. (See: *Godbout*, *supra*, note 22 at para 66; *Association of Justice Counsel v Canada (Attorney General)*, [2017] 2 S.C.R. 456 at para 49).
[29] *Ibid*. (See: *Charkaoui*, *supra*, note 21).

the Charter, they have been open to interpretation and shaped by courts over time. Generally, these principles include rules and standards that ensure fairness, reasonableness, and justice in the legal process.[30]

In *R. v. Jones*,[31] the Court held that if a law is "so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of fundamental justice," that law "must be struck down."[32] Courts have recognized four main principles: where a law is vague, arbitrary, overbroad, or grossly disproportionate, it will be deemed manifestly unfair.[33] In essence, laws must be clear and understandable, have a purpose that aligns with their effects, must not go beyond what is necessary to achieve their purpose, and must not have effects that are too extreme in relation to their purpose.[34]

Section 1: Reasonable and Justified Limitations

[1] The *Canadian Charter of Rights and Freedoms* 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.[35]

Even when a court finds a violation of a Charter right, that violation may be nonetheless found as a *justified or reasonable limitation* of that right. The purpose of s. 1 is to permit government action where the limitation is "necessary to achieve an important objective" and is "appropriately tailored, or proportionate."[36]

In *R. v. Oakes*,[37] the SCC established that the application of s. 1 requires consideration of values and principles of "inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions."[38]

To justify a breach, the limit must be "reasonable" and "demonstrably justified," meaning:

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[30] *Charterpedia*, *supra* note 6, at s.7. (See: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at paras 62-67).
[31] *Ibid*. (See: *R v Jones*, 2017 SCC 60 at page 304).
[32] *Ibid*. (See: *Morgentaler*, *supra*, note 8 at page 72).
[33] *Ibid*. (See: *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SCC 17 at para 124).
[34] *Ibid*. (See: *Morgentlaer*, *supra*, note 8 at page 74).
[35] *Charter*, *supra*, note 1 at s 1.
[36] *Charterpedia*, *supra*, note 6 at s.1. (See: *Canada (Attorney General) v. JTI-Macdonald Corp*., [2007] 2 SCR 610 at para 36).
[37] *Ibid*. (See: *R v Oakes*, [1986] 1 SCR 103).
[38] *Ibid*, at page 136.

(1) the legislative goal has to be pressing and substantial, sufficient to justify limiting a Charter right; and
(2) proportionality between the objective and the means used to achieve it.[39]

When dealing with proportionality under the second branch, the court must consider whether the limit is:

(i) rationally connected to the objective;
(ii) the degree of limitation is more than reasonably necessary to accomplish the objective; and
(iii) the deleterious and salutary effects of the infringing law.[40]

In other words, to 'salvage' a legislative provision that otherwise breaches the Charter requires balancing. A statutory provision that infringes any section of the Charter can only be saved under s. 1 if the party seeking to uphold the provision can demonstrate first, that the objective of the provision is "of sufficient importance to warrant overriding a constitutionally protected right or freedom"[41] and second, "that the means chosen in overriding the right of freedom are reasonable and demonstrably justified in a free and democratic society."[42]

3 INTERPRETING CANADIAN CASE LAW

Abortion has been, and remains, a regulated practice in Canada. However, a historical distinction can be found when comparing previous *Criminal Code of Canada*[43] (Code) provisions with the impact of modern jurisprudence. Historically, the Code sanctioned and penalized the procedure of abortion, rendering it criminal in a variety of circumstances. Yet, with the advent of the Charter and its subsequent interpretation, abortion was effectively decriminalized following the SCC's decision in *R. v. Morgentaler*,[44] which struck down

[39] *Charterpedia*, *supra*, note 6, at s.1. (See: *Egan v. Canada*, [1995] 2 SCR 513, at para 182; *Vriend*, *supra*, note 17 at para 108; *Canada (Attorney General) v Hislop*, [2007] 1 SCR 429, at para 44; *JTI-Macdonald*, *supra*, note 37 at paras 35-36).
[40] *Ibid*. (See: *RJR-MacDonald, supra*, note 37 at para 63*; Ross, supra*, note 11*; Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1996] 3 SCR 480; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 SCR 1326; *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483; *R v Keegstra*, [1990] 3 SCR 697; *R v Butler*, [1992] 1 SCR 452; *Thomson Newspapers Co. v Canada (Attorney General)*, [1998] 1 SCR 877 at para 87).
[41] *Ibid*. (See: *Big M*, *supra*, note 6 at page 352).
[42] *Ibid*. (See: *Morgentaler*, *supra*, note 8 at page 73).
[43] *Criminal Code*, R.S.C., 1985, c C-46, s 745.
[44] Morgentlaer, supra, note 8.

unconstitutional provisions of the Code governing abortion access.[45] Today, abortion is regulated at the provincial level,[46] primarily through provincial health policies and regulations.[47]

The purpose of this section is to discuss SCC rulings regarding abortion and the Charter, as well as its approach to fetal rights claims. Through the analysis of landmark cases, it examines how Charter rights have been recognized and applied in various contexts. This section begins by exploring the arguments and avenues considered in the leading case, *R. v. Morgentaler*. It continues by examining the SCC's approach to fetal rights claims in an overview: i) *Tremblay v. Daigle;*[48] ii) *Winnipeg Child Family Services v. DFG*;[49] and iii) *Dobson v. Dobson.*[50] Taken together, this section summarizes the implications of each case, illustrating how they collectively inform the interpretation of relevant Charter provisions.

R. v. Morgentaler (1988)

Section 251 of the Code, as it then was, prohibited the "procuring of a miscarriage." The primary objective of this provision was the protection of the fetus, ultimately limiting a pregnant person's access to abortion.[51] Pregnant persons were threatened by criminal sanction—liable for a term of imprisonment for life—if they obtained an abortion without meeting the criteria laid out under the exculpatory provision.

Subsection 251(4) of the Code was viewed as an *exculpatory* provision, where only those who first obtained a certificate from a therapeutic abortion committee of an accredited or approved hospital were excused from punishments. In other words, this provision outlined the conditions under which an abortion could be legally performed in Canada. Such criteria were restricted to 'special circumstances' that related to the endangerment and health of an individual, unrelated to their own priorities and aspirations.[52]

Dr. Henry Morgentaler was a medical practitioner who performed abortions for pregnant persons without certificates, as required under s. 251(4), and was eventually

[45] Kelly Gordon & Rachael Johnstone, "Abortion Anarchy? The Case for Abortion Decriminalization" (2024) Sage Journals, DOI: <0.1177/09646639241256011>.
[46] Public Health Agency of Canada, *Abortion in Canada* (Ontario:*Government of Canada, 2024)*, online: <https://www.canada.ca>.
[47] *Canada Health Act*, R.S.C., 1985, c. C-6. (See also: "Canadian Regulation of Abortion" (Vancouver: Abortion Rights Coalition of Canada, 2023), online: <https://www.arcc-cdac.ca>).
[48] *Tremblay v Daigle*, [1989] 2 SCR 530.
[49] *Winnipeg Child and Family Services (Northwest Area) v G. (D.F.)*, [1997] 3 SCR 925.
[50] *Dobson (litigation Guardian of) v Dobson*, [1999] 2 SCR 753.
[51] Westlaw Canada, *Digest Of The Week — A Look Back At Morgentaler* (Toronto: Thomson Reuters Canada Limited, 2014), online: <https://www.westlawcanada.com>.
[52] Westlaw Canada, *supra*, note 51.

charged. Dr. Morgentaler was first tried in 1978 and was convicted to a term of 18 months imprisonment. Although he was eventually acquitted by three different juries with a defence of necessity,[53] his constitutional challenge of s. 251 was not argued successfully until after the 1982 enactment of the Charter. The Charter's enactment broadened the scope of Canadian rights and created the ability for individuals to contest laws or government action that interfered with those rights.

The legal merits of imposing restrictions on abortion were critiqued by the SCC in 1988 by the SCC in *R. v. Morgentaler*,[54] a landmark decision that remains central to the constitutionality of restrictive abortion laws. *Morgentaler* marked the first time the SCC examined the constitutionality of s. 251—a case considered to have established the foundation for considering abortion regulation under the lens of the Charter.[55] In fact, *Morgentaler* was one of the first instances where the SCC outlined the framework under which the Charter should be interpreted and applied.

Specifically, Dr. Henry Morgentaler, Dr. Leslie Frank Smoling, and Dr. Robert Scott appealed to the SCC, contesting the constitutionality of s. 251 under s. 7 of the Charter.[56] They argued that an individual has an "unfettered right to choose whether or not an abortion is appropriate in her individual circumstances" and that the Code severely infringed upon the life, liberty, and security of pregnant individuals.[57] They submitted that 'security of the person' includes the "explicit right to control one's body and to make fundamental decisions about one's life,"[58] and was restricted by s. 251.

The *Morgentaler* decision brought 4 differing opinions, 3 of which resulted in a finding that s. 251 was unconstitutional and could not be saved under s. 1. Chief Justice Dickson (Justice Lamer concurring) explored the impact of s. 251 on security of the person. His position specifically related to the effect of s. 251(4), arguing that it had profound consequences causing significant and unnecessary delays for those who met the criteria.[59]

Early in his analysis, Dickson reaffirmed that the role of the Court in cases of Charter challenges is not to adjudicate on public policy.[60] Rather, he explained:

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[53] *Morgentaler v The Queen*, [1976] 1 SCR 616.
[54] Morgentlaer, supra, note 8.
[55] "Abortion is a Charter Right" (Vancouver: Abortion Rights Coalition of Canada, 2018), at page 1, online: <https://www.arcc-cdac.ca>.
[56] *Morgentlaer*, *supra*, note 8 at page 45.
[57] *Ibid*, at page 50.
[58] *Ibid*, at page 54.
[59] *Morgentlaer*, *supra*, note 8 at page 57.
[60] *Ibid*, at page 53.

> The goal of Charter interpretation is to secure for all people "the full benefit of the Charter's protection." To attain that goal, this Court has held consistently that the proper technique for the interpretation of Charter provisions is to pursue a "purposive" analysis of the right guaranteed. A right recognized in the Charter is "to be understood, in other words, in the light of the interests it was meant to protect."[61]

Drawing on *R. v. Caddeau*,[62] Dickson highlighted that a deprivation of security of the person has severe consequences. He emphasized that such deprivation arises from violations of an individual's ability to exercise control over their own physical and mental integrity.[63]

Further, Dickson referenced Justice Lamer's position in *Mills v. The Queen*,[64] where Lamer had argued that:

> [S]ecurity of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" . . . These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.[65]

Here, Dickson established that the deprivation of security of the person can involve both physical and psychological harm—it entails state interference with bodily integrity and serious state-imposed psychological stress.[66]

Under this lens, Dickson found that inefficiencies in the procedural and administrative structures created by s. 251 denied the rights of security of the person.[67] Subsection 51(4) was seen to interfere with security of the person by creating significant delays that had profound mental and physical consequences for those who did meet the criteria. Dickson noted, "[a]nything that contributes to delay in performing abortions increases the complication rates by 15 to 30%, and the chance of dying by 50% for each week of delay."[68]

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[61] *Ibid*, at pages 51-52, citing *Big M*, *supra*, note 6 at pages 295 & 344.
[62] *R v Cadeau*, (1982), 40 O.R. (2d) 128.
[63] *Morgentaler*, *supra*, note 8 at page 54.
[64] *Mills v The Queen*, [1986] 1 SCR 863 at pages 919-920.
[65] *Morgentaler*, *supra*, note 8 at page 55.
[66] *Ibid*, at page 56.
[67] *Morgentaler*, *supra*, note 8 at page 62.
[68] *Ibid*, at pages 57-59.

These delays were caused by a lack of eligible or "accredited"[69] hospitals, insufficient medical staff, and the limited establishment of therapeutic abortion committees.[70]

Specifically, Dickson argued that s. 251 criteria hindered the ability to access abortions in a timely manner by restricting the practical availability of the exculpatory provisions of s. 251(4). The system regulating access to therapeutic abortion was deemed "manifestly unfair" because it contained "so many potential barriers" in a way that "the defence it created [would] in many circumstances be practically unavailable to women who would prima facie qualify for the defence" or would at least "force such a woman to travel great distances at substantial expense and inconvenience in order to benefit from a defence that is held out to be generally available."[71]

Furthermore, Dickson underscored that the s. 251(4) 'exception' may even become heavily restricted, or entirely denied, through provincial health care regulation.[72] The "inadequate guidelines"[73] defining when abortions should be granted, coupled with the vague definition of 'health concerns,' led to wide discrepancies in how therapeutic abortion committees applied the law. In other words, these committees applied a widely different approach to the acceptance or denial of abortion certificates:

> Various expert doctors testified at trial that therapeutic abortion committees apply widely differing definitions of health. For some committees, psychological health is a justification for therapeutic abortion; for others it is not. Some committees routinely refuse abortions to married women unless they are in physical danger, while for other committees it is possible for a married woman to show that she would suffer psychological harm if she continued with a pregnancy, thereby justifying an abortion. It is not typically possible for women to know in advance what standard of health will be applied by any given committee.[74]

Finding a violation of s. 7, Dickson proceeded with a purpose and effect analysis of the impugned law. He found the primary objective of the impugned legislation not to be the protection of the health of women, but rather the protection of the fetus.[75] Though he acknowledged this as a "perfectly valid legislative objective,"[76] he also recognized that "[e]ven if the purpose of legislation is unobjectionable, the administrative procedures created by law

[69] *Ibid*, at page 67.
[70] *Ibid*, at pages 66-67.
[71] *Ibid*, at page 72.
[72] *Ibid*, at page 67.
[73] *Ibid*, at page 68.
[74] *Morgentaler*, *supra*, note 8 at pages 68-69.
[75] *Ibid*, at page 38.
[76] Ibid.

to bring that purpose into operation may produce unconstitutional effects."[77] Due to the unconstitutional effects caused by the provision, Dickson determined that its objective was not sufficiently pressing and substantial to justify the servere disproportionate effects it had on pregnant individuals. As such, the provision could not be saved under s. 1.

In their concurring opinion, Justices Beetz and Estey agreed that the procedural requirements of s. 251 significantly delayed a pregnant woman's access to medical treatment that resulted in additional dangers to their health.[78] They agreed that the provision was "manifestly unfair" and "unnecessary in respect to Parliament's objectives"[79] which constituted a deprivation of the right to security of the person. Although they came to their agreement for different reasons, they ultimately held that:

> If an act of Parliament forces a person whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate treatment or no treatment at all, the right to security of the person has been violated.[80]

In her separate opinion, Justice Wilson argued that s. 7 elements should not be considered independently or in isolation. In fact, she argued that considering all potential rights captured by s. 7 is paramount to understanding its application.[81] In assessing security of the person, Wilson cited *Singh v. Minister of Employment and Immigration*,[82] where the Court held that security of the person must encompass "freedom from the threat of physical punishment or suffering as well as freedom from the actual punishment or suffering itself."[83] In other words, mere exposure to a threat would be enough for a violation.

Further, Wilson stated that the right of liberty under s. 7 was inextricably tied to human dignity.[84] She argued that "an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state" and considered as a "critical component of the right to liberty."[85] With her extensive examination of s. 7, Wilson quickly concluded that s. 251 of the Code was a

[77] *Ibid*, at page 62.
[78] *Ibid*, at page 81.
[79] *Ibid*, at page 82.
[80] *Ibid*, at page 90.
[81] *Ibid*, at page 163.
[82] *Singh v. Minister of Employment and Immigration*, [1985] 1 SCR 177.
[83] *Morgentaler*, *supra*, note 8 at page 162.
[84] *Ibid*, at page 164.
[85] *Ibid*, at page 166.

"complete denial of the woman's constitutionally protected right under s. 7, not merely a limitation on it."[86]

Wilson also briefly contemplated the impact of s. 251(4) in regard to s. 2(a) rights. Like the right to liberty, Wilson interpreted s. 2(a) to include a woman's right to make fundamental decisions about her body, including the decision to terminate a pregnancy.[87] She argued that forcing an individual to carry a pregnancy to term against their will could infringe upon their freedom of conscience.[88] In support of her position, Wilson reasoned that decisions about abortion are deeply personal and rooted in individual conscience, and that state interference in such decisions is an infringement on this Charter right.[89]

The dissent in *Morgentaler* was presented by Justice McIntyre, with Justice La Forest concurring. While they agreed with the finding of a s. 7 violation, their disagreement was centered on the balancing under s. 1. Specifically, they struggled with the implications of unrestricted access to abortion. McIntyre argued that to qualify as a constitutional right, a law must cause more than just stress or anxiety; it must inflict serious physiological stress.[90] He suggested that "many forms of government action deemed to be reasonable, and even necessary in our society, will cause stress and anxiety to many, while at the same time being acceptable exercises of government power in pursuit of socially desirable goals."[91] Continuing, McIntyre stated:

> All laws...have the potential for interference with individual priorities and aspirations. In fact, the very purpose of most legislation is to cause such interference. It is only when such legislation goes beyond interfering with priorities and aspirations, and abridges rights, that courts may intervene.[92]

McIntrye further emphasized that "it is not the role of the judiciary in Canada to evaluate the wisdom of legislation enacted by our democratically elected representative, or to second-guess difficult policy choices that confront all governments."[93] He contended that s. 251(4) was designed to address specific circumstances, aiming to restrict abortion to cases where the continuation of a pregnancy would, or would likely, endanger the life or health of the individual concerned, rather than providing unrestricted access to abortion.[94] McIntyre

[86] *Ibid*, at page 183.
[87] *Ibid*, at pages 176-178.
[88] Ibid.
[89] Ibid.
[90] *Ibid*, at page 146.
[91] *Ibid*, at page 147.
[92] *Morgentaler*, *supra*, note 8 at page 142.
[93] *Ibid*, at page 137.
[94] *Ibid*, at page 155.

believed the resulting effects of the statute were attributed to external factors—primarily the general demand for abortion irrespective of the provision—and acknowledged that it is not within its purview to strike down a statutory provision solely based on these external pressures.[95]

Although *Morgentaler* did not establish a written-in-stone right to abortion, it has been considered as the starting point in developing the constitutional parameters of the protection against abortion restrictions through an individual's right over their own body.[96] *Morgentaler* established that in order to breach s. 7, legislation must interfere with the security of a person in a way that significantly and disproportionately prevents them from preserving their health and safety. While it is not the role or responsibility of the courts to resolve public policy debates, *Morgentaler* reaffirmed that "the courts can be concerned with social or economic implications only to the extent that they assist in answering the question whether or not the right claimed is one entitled to constitutional protection."[97]

Fetal Rights and the Common Law

Tremblay v. Daigle (1989)

At the time of the *Morgentaler* decision, it was unclear as to whether a fetus was included in the term 'everyone' under s. 7 so as to have an independent right to life. The Justices in *Morgentaler* refrained from assessing any claims of fetal rights and the meaning of 'the right to life' as an independent constitutional value. However, only a year after *Morgentaler*, the SCC was confronted with another abortion related challenge, where the issue of whether fetuses could claim separate constitutional protections were addressed.

Tremblay v. Daigle[98] did not involve a Charter challenge directly but instead considered the parameters of tort law in its capacity to enforce injunctions. Specifically, the Court in *Tremblay* addressed whether an injunction could be granted to prevent a woman from obtaining an abortion on the grounds that it interfered with the rights of the fetus and the father. While *Morgentaler* had dealt with the rights of women, *Tremblay* shifted the focus to the alleged rights of a fetus and the father's role in decisions about abortion. The jurisprudence of *Tremblay* addresses the previous arguments surrounding fetal rights by implementing a common law rule requiring that a fetus is to be "born not only alive but viable"[99] before any legal rights of personhood can accrue.

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[95] Ibid.
[96] "Abortion is a Charter Right," *supra*, note 55.
[97] *Morgentaler*, *supra*, note 8 at pages 158-159.
[98] Tremblay, supra, note 48.
[99] *Ibid*, at page 546.

Jean-Guy Tremblay sought an interlocutory injunction from the Superior Court to prevent his ex-partner, Chantal Daigle, from obtaining an abortion when she was 18 weeks pregnant. Counsel for Tremblay raised arguments under s. 7 of the Charter, contending that Tremblay's rights to life, liberty, and security of the person were at stake.[100] However, the Court did not accept these arguments, as s. 7 protections are generally understood to apply to individuals facing state action, not private disputes between individuals.[101] Instead, the Court turned to the *Quebec Charter of Rights and Freedoms*,[102] focusing on whether the fetus could be granted legal rights. In doing so, the Court directly confronted the issue of fetal rights and whether a fetus could be recognized as a legal person under the law.

The SCC considered, but ultimately rejected, the argument that fetuses have legal rights. The Court's decision was rooted in the function and historical treatment of fetuses within the law. Specifically, the Court considered how the fetus is treated in various areas of law, such as property law, tort law, and family law. For example, while a fetus can be a beneficiary in a will, such rights are not recognized until the fetus is born alive and viable. The Court noted that this treatment is consistent with both civil law and common law traditions, reinforcing that fetuses do not have independent legal status. They concluded:

> The treatment of a feotus in tort law, property law and family law reveals a similar situation as found under the Civil Code, namely, that the foetus has no rights in private law...in light of this treatment of foetal rights in civil law and, in addition, the consistency to be found in the common law jurisdictions, it would be wrong to interpret the vague provisions of the Quebec Charter as conferring legal personhood upon the foetus.[103]

Another critical factor in the Court's decision was the ambiguity surrounding the term *human* in legal contexts.[104] The Charter uses “human” without providing a precise definition, and the Court noted that such linguistic inquiries do not clarify the intent of the legislature.[105] For example, the Court pointed out that juridical persons—entities like corporations or organizations—are a “fiction of the civil law.”[106] Even though they are not human beings, they are still considered ‘persons’ who hold rights and obligations, such as entering contracts, owning property, or suing and being sued, similar to natural persons. This concept further highlighted that the legal recognition of *personhood* does not necessarily align with biological

[100] *Ibid*, at page 536.
[101] *Ibid*, at page 541.
[102] Charter of Human Rights and Freedoms, CQLR c. C-12.
[103] *Tremblay*, *supra*, note 48 at pages 569-570.
[104] *Ibid*, at page 555.
[105] *Ibid*, at page 554.
[106] *Ibid*, at page 532.

definitions of human life, and this distinction played a key role in rejecting the idea that a fetus could be granted legal personhood before birth.

Additionally, the Court dismissed the argument that a father should have a legal right to prevent an abortion. The Court stated that there was no legal or legislative basis for granting a father veto power over a woman's decision regarding her pregnancy. They argued, "[t]here is nothing in the Quebec legislation or case law to support the argument that the father's interest in a foetus he helped create gives him the right to veto a woman's decision in respect of the fetus she is carrying."[107]

In conclusion, the Court in *Tremblay* firmly rejected the notion that fetuses have legal rights that could override a woman's autonomy over her body. The Court's decision was grounded in established legal principles, including the treatment of fetuses in various areas of law, the ambiguity surrounding legal definitions of personhood, and the clear constitutional protections afforded to individuals over their bodily integrity. While the Court acknowledged the legitimate interests of the father, it ultimately upheld the primacy of a woman's right to make decisions about her own body, free from interference.

Winnipeg Child and Family Services v. D.F.G. (1997)

Continuing with tort law inquiries regarding the relationship between a mother and her fetus, the SCC in *Winnipeg Child and Family Services v D.F.G.*[108] primarily addressed whether the long-standing tort law principle—that remedies for negligent behavior cannot be pursued until a cause of action is brought by a juridical person—should be altered.[109] This case concerned a mother (D.F.G.) who was addicted to sniffing glue. Due to the 'serious risk' to her fetus, Winnipeg Family Service wished to order her detention and admission into a facility per the Court's *parens patriae* power.[110] Specifically, this case considered whether the common law should extend the existing power of *parens patriae* to cover the prevention of harm to an unborn child. Although this case was not directly concerned with the issue of abortion, *Winnipeg* nevertheless reinstated and expanded the legal discussion on the status of a fetus.

The SCC asserted that the proposed changes were significant, as they would impact the rights and remedies available in numerous other areas of tort law. Specifically, these changes involved complex moral decisions and the potential for conflicts between

[107] *Ibid*, at page 533.
[108] *Winnipeg*, *supra*, note 49.
[109] *Ibid*, at para 23.
[110] *Parens patriae* is a legal term which describes the Court's responsibility to protect persons deemed incapable of protecting their own interest by reasons of their particular personal characteristics. This public policy power protects against abuse and negligent behaviours towards vulnerable populations.

fundamental interests and rights.[111] The Court examined various policy considerations, all of which shared the underlying principle that fetuses are not recognized as legal persons.[112]

First, the Court found that there were no grounds for the agency to bring an action because, in law, a fetus is not a recognized person until it is "born alive and viable."[113] Adding to this common law principle, Justice McLaughlin clarified that a fetus does not possess the capacity to sue its own mother—they are one entity. It is only after birth when a fetus assumes a separate personality.[114] Given the unity of mother and fetus, McLaughlin upheld the view of the Appellate court, arguing that the Court's *parens patriae* jurisdiction is only exercisable after the birth of the child.[115] The Court also acknowledged that, subject to any limitations imposed by the Constitution, it is open to Parliament or the legislatures to create legal rights for unborn children if they so desire.[116] The fact that Parliament had not yet created such rights weighed heavily on the Court's decision.

Second, the SCC dealt with whether there is a duty of care between a mother and her fetus. In determining whether a new duty of care arises, the court must consider whether: (1) there is a sufficiently close relationship between the parties to give rise to a duty; and (2) that there are no considerations that ought to negate or limit the scope of the duty.[117] Only by separating the mother and the fetus into separate entities, a legally contradictory venture, could the Court consider the first branch to be met.[118]

However, the Court warned that recognizing a duty of care, obliging a mother to make certain lifestyle choices for the benefit of her unborn child, would have excessive implications:

> [W]hen the lifestyle in question is that of a pregnant woman whose liberty is intimately and inescapably bound to her unborn child…[a] host of policy considerations may be raised against the imposition of tort liability…[m]ost obviously, recognizing a duty of care owed by a mother to her child for negligent prenatal behaviour may create a conflict between the pregnant woman as an autonomous decision-maker.[119]

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[111] *Winnipeg*, *supra*, note 49 at paras 19-20.
[112] *Ibid*, at para 15.
[113] *Ibid*, at para 16.
[114] *Ibid*, at para 27.
[115] *Ibid*, at para 7. (See also generally: *Re F (in utero)*, [1988] 2 All E.R. 193 (C.A.)).
[116] *Winnipeg*, *supra*, note 49 at para 12.
[117] *Ibid*, 35.
[118] *Ibid*, at para 36.
[119] *Ibid*, at paras 34-36.

The Court also discussed the implications for liberty and equality, particularly the potential consequences of recognizing a duty of care. While no constitutional challenge was directly raised in this case, the Court considered the broader ramifications of altering the legal framework. Imposing a legal duty of care on pregnant women would inevitably limit their liberty, forcing them to make certain decisions under threat of legal consequences.[120]

The Court further acknowledged that such a duty could disproportionately affect certain groups of women, particularly those from lower socio-economic backgrounds. Women who are illiterate, economically disadvantaged, or lacking in education might be more likely to fall afoul of the law if the duty were imposed, resulting in legal penalties or even the imposition of injunctive relief.[121] The Court expressed concern that such a system could disproportionately affect minority women and those with limited access to resources, further exacerbating inequalities in society.

In concluding thoughts, the Court reinstated its role as being restricted from making decisions for the fetus, for doing so would inevitably consist of making decisions for the mother herself.[122] The Court found the law of tort, as it presently stands, does permit an action for injury to the fetus after its birth. However, for the reasons discussed, the Court was reluctant to find a power of the courts to entertain such an action *before* the child's birth.[123]

Dobson v. Dobson (1999)

Dobson v. Dobson[124] re-considered the issue of whether a duty of care exists for an unborn fetus. The case involved Cynthia Dobson, who was involved in a motor vehicle accident while pregnant. After the accident, Dobson's father filed a lawsuit on behalf of the child, who had been born with cerebral palsy, claiming that the injury occurred as a result of the accident and was caused by the mother's actions. The child's legal claim argued that, had it not been for the actions of the mother, the child would not have been born with the condition.

Although the action concerned a child who was, in fact, 'born alive and viable,' the SCC considered whether the duty existed *while the infant was in utero*. The SCC's decision addressed the broader question of whether a pregnant woman has a duty of care to her fetus, and the implications this duty might have on privacy, autonomy, and the regulation of personal conduct during pregnancy. The Court concluded that, while it may be possible for

[120] *Ibid*, at para 51.
[121] *Ibid*, at para 40.
[122] *Winnipeg*, *supra*, note 49 at para 56.
[123] *Ibid*, at para 17.
[124] *Dobson*, *supra*, note 50.

a child to sue for prenatal injuries once born, public policy considerations strongly militate against imposing a legal duty of care that "cannot, and should not, be imposed by the courts upon a pregnant woman towards her foetus or subsequently born child."[125]

Similar to the reasoning expressed in *Winnipeg*, the majority of the Court found that the consequences of such a duty would have significant and potentially harmful implications for an individual's rights and freedoms. Justice Cory, who wrote for the majority, highlighted several public policy concerns that weighed against recognizing a duty of care in these circumstances. Justice Cory enumerated the concerns, accentuating privacy, autonomy, and the difficulty of defining a reasonable standard of conduct for a pregnant woman. He argued that the intrusion into a woman's personal life would be extreme if such a duty were imposed, noting that:

> [A] pregnant woman's every waking and sleeping moment, in essence, her entire existence, is connected to the foetus she may potentially harm. If a mother were to be held liable for prenatal negligence, this could render the most mundane decision taken in the course of her daily life as a pregnant woman subject to the scrutiny of the courts…There is no rational and principled limit to the types of claims which may be brought if such a tortious duty of care were imposed upon pregnant women.[126]

To adopt this standard, Cory argues, would involve far-reaching implications on the rights of individuals capable of pregnancy.[127] As such, he argued it was best to allow the duty of an individual to their fetus to remain a moral obligation without legal implications.[128] Citing the *Royal Commission on New Reproductive Technologies*,[129] which rejected judicial interventions in pregnancy and birth, Cory upheld the principles:

> All individuals have the right to make personal decisions, to control their bodily integrity, and to refuse unwanted medical treatment. These are not mere legal technicalities; they represent some of the most deeply held values in society and form the basis for fundamental and constitutional human rights. A woman has the right to make her own choices, whether they are good or bad, because it is the woman whose body and health are affected, the woman who must live with her decision, and the woman who must bear the consequences of that decision for

[125] *Ibid*, at para 76.
[126] *Dobson*, *supra*, note 50 at paras 27-28.
[127] *Ibid*, at para 51.
[128] *Ibid*, at para 78.
[129] Royal Commission on New Reproductive Technologies. *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, vol. 2 (Ottawa: The Commission, 1993) at page 964.

> the rest of her life. Thus, it was the far-reaching implications for the privacy and autonomy rights of pregnant women which caused the Commission to recommend specifically that civil liability never be imposed upon a woman for harm done to her fetus during pregnancy.[130]

Justice L'Heureux-Dube and McLaughlin asserted that to recognize a 'reasonable pregnant woman' standard and impose liability for fetal injury would run contrary to two of the most fundamental values of the Charter—liberty and equality.[131] They warned that subjecting a pregnant woman to potential legal liability for actions that might affect her fetus would bring every aspect of her life under the scrutiny of the law. They emphasized:

> Virtually every action of a pregnant woman—down to how much sleep she gets, what she eats and drinks, how much she works and where she works—is capable of affecting the health and well-being of her unborn child, and hence carries the potential for legal action against the pregnant woman. Such legal action in turn carries the potential to bring the whole of the pregnant woman's conduct under the scrutiny of the law…Canadians generally enjoy the full right to decide what they will eat or drink, where they will work and other personal matters. Pregnant women, however, would not enjoy that right.[132]

The Court ultimately concluded that imposing a legal duty of care on pregnant women with respect to the fetus is neither warranted nor advisable. It acknowledged the moral and ethical dimensions of pregnancy and the duty a woman may feel toward her unborn child, but it held that this moral obligation should not be converted into a legal one, with the accompanying legal and personal consequences. In this context, the Court recognized that the fundamental rights of women—especially their right to autonomy and privacy—must be safeguarded against undue legal intrusion.

[130] *Dobson*, *supra*, note 50 at paras 32-33.
[131] *Ibid*, at para 84.
[132] *Dobson*, *supra*, note 50 at paras 86-87.

4 BEYOND THE SCOPE OF ABORTION

This section examines how case law has interpreted the scope of Charter protections in other areas. What specific rights the Charter has extended to protect, and what type of laws or government action has been recognized to constitute a breach, will be discussed in an overview of landmark cases. Using case law and other relevant materials, this section examines themes of bodily integrity, health, and safety, and its implications as established Charter rights.

Sex Work

Canada v. Bedford[133] dealt with the constitutionality of Code provisions that restricted and criminalized prostitution. Sections 210, 212(1)(j), and 213(1)(c)[134] were argued to have severely undermined the scope of s. 15(1) and s. 7 Charter protections for individuals who engaged in sex work. By way of these provisions, individuals using sex work as a means of livelihood were limited in their ability to engage in sex work as a legitimate form of employment. As a result, sex workers were restricted from conducting business in safe and public places like restaurants, and could not screen clients in safer environments. This pushed many to conduct business in dangerous, poorly lit areas such as alleyways, increasing the risks to their personal safety.

Writing for the majority, Chief Justice McLaughlin stated that the prohibitions at issue did not merely regulate how sex workers could operate; they instead created dangerous conditions for those engaged in sex work.[135] In their analysis, the Court found that ss. 210, 212(1)(j), and 213(1)(c) hindered individuals from taking reasonable precautions to protect themselves from the inherent risks of engaging in a legal activity.[136]

The Attorneys General of Canada and Ontario argued that the choice of sex workers to engage in an inherently risky activity is the real cause of their injury, not the law itself.[137] They contended that if women wanted to avoid penalization of the law, they should simply not engage in prostitution.[138] However, the SCC did not accept this argument. Justice

[133] *Canada (Attorney General) v Bedford*, 2013 SCC 72.
[134] Section 210 prevented living in, owning, leasing, occupying or being inside of a 'common bawdy house. Subsection 212(1)(j) prevented 'living on the avails' of prostitution. Subsection 213(1)(c) prevented public communication for the purpose of prostitution.
[135] *Bedford*, *supra*, note 133 at para 60.
[136] Ibid.
[137] *Ibid*, at paras 79-80.
[138] *Ibid*, at para 80.

McLachlin stated that the mere choice to engage in an activity does not negate the role of the law in making it riskier:

> An analogy could be drawn to a law preventing a cyclist from wearing a helmet. That the cyclist chooses to ride her bike does not diminish the causal role of the law in making that activity riskier. The challenged laws relating to prostitution are no different.[139]

Having concluded that the Code provisions limited the security of sex workers, the SCC then considered whether the law's effects were a justified limitation under s. 1 of the Charter. The Court examined the harms caused by the provisions and balanced them against the law's objectives. Ultimately, the Court found that the limits imposed by the law were disproportionate to its objective of preventing community disruption.[140] Specifically, the provisions hindered sex workers from taking safety precautions, which directly endangered their health and well-being. The Court expressed that:

> Parliament has the power to regulate against nuisances, but not at the cost of the health and safety and lives of prostitutes. A law which prevents street-prostitutes from resorting to a safe haven, such as Grandma's House while a suspected serial killer prowls the street, is a law that has lost sight of its purpose.[141]

The law was found to punish not only those who exploit prostitution, but everyone who engages in the activity. For example, the provisions captured not only sex workers themselves but also anyone who was involved in the business, such as bodyguards. The court decided that stripping away mechanisms that inherently increase safety in an already risky activity constitutes an infringement of Charter protections which bears an overbroad purpose.[142] Therefore, the Court concluded the law to be of no force and effect.

Bedford is significant for its application of a purposive and pragmatic Charter analysis, which clarified the approach to interpreting s. 7 of the Charter.[143] The Court ruled that laws should not unduly compromise the health and safety of individuals in pursuit of their objectives. Instead of focusing solely on legislative intent, the Court highlighted the importance of evaluating how laws affect individuals' rights. In this case, the SCC clarified

[139] Ibid.
[140] *Ibid*, at para 136.
[141] *Bedford*, *supra*, note 133 at para 136.
[142] *Ibid*, at para 142.
[143] See generally: Wayne Renke, "Bedford, Substantive Rationality, and Participatory Democracy" (2015) 20:1 Review of Constitutional Studies 30; and: Lisa Dufraimont, "Canada (Attorney General) v. Bedford and the Limits on Substantive Criminal Law under Section 7" (2014) 67:15 The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 483.

that when interpreting s. 7, courts must examine causation, effects, and principles of fundamental justice.[144] By doing so, *Bedford* established that the impact of laws on individual rights can, in certain circumstances, take precedence over the objectives of the legislation. This shift has since become the basis under which courts *must* deal with s. 7 Charter rights claims.[145]

Same-Sex Marriage

An example of the SCC's position on the scope of s. 15(1) and s. 2(a) guarantees was illustrated in a Reference to the court discussing the legality of the implementation of a new law on marriage. Specifically, the SCC was asked to assess whether the federal government had the constitutional authority to legalize same-sex marriage. *Reference re Same-Sex Marriage*[146] addresses discrimination based on sexual-orientation, following rulings by lower courts in several provinces that declared the traditional definition of marriage unconstitutional under the Charter.[147]

Interveners argued that the legislative recognition of same-sex marriage would discriminate against religious groups and heterosexual married couples under s. 15(1).[148] Generally, the s. 15(1) claim failed because it was not demonstrated that the law withheld a benefit that is provided to others, or imposed a burden that is not imposed on others. In other words, the Court rejected the notion that the proposed Act drew distinctions between groups of people; rather, it rectified an unjustifiable one.[149]

Interveners also suggested that the proposed Act would infringe s. 2(a) by "imposing a dominant social ethos."[150] They contended that such an Act would inherently infringe against the freedom for individuals to hold religious beliefs by imposing values that went against others' religious beliefs. Yet, the SCC quickly dismissed this argument, affirming that the recognition of one group's rights does not inherently limit or infringe upon the rights of another group. The Court explained:

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[144] See generally: Andrew Lawrence, *Canada (AG) v Bedford: Canada's Prostitution Laws Found Unconstitutional* (Edmonton: Center for Constitutional Studies, 2014), online: <https://www.constitutionalstudies.ca>.
[145] *Ibid*.
[146] *Reference re Same-Sex Marriage*, 2004 SCC 79.
[147] See: Julie C Lloyd, "Case Comment: Halpern v. Canada (A.G.)" (2003) 41-2 Alberta Law Review 643.
[148] *Reference*, *supra*, note 146 at para 45.
[149] Jim Young, *Reference re Same-sex Marriage (2004)* (Edmonton: Center for Constitutional Studies, 2010), online: <https://www.constitutionalstudies.ca>.
[150] *Reference*, supra, note 146 at para 47.

> The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another. The promotion of *Charter* rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the *Charter* was meant to foster.[151]

Where there is a conflict of rights, the Court reiterated that the Charter does not create a hierarchy. Therefore, the process to resolve conflict does not involve a balancing of the rights contained within the Charter, but rather an understanding that all rights should be treated equally.[152] Adam Badari, a sexual violence Prosecutions Coordinator, states that this decision is seen as a "commitment to not tolerate distinctions that treat certain people as second-class citizens, or otherwise offend their fundamental human dignity."[153]

Medical Assistance in Dying

Carter v. Canada (AG)[154] was a s. 7 Charter challenge to s. 241(b) of the Code, which criminalized assisted suicide. It also dealt with s. 14 of the Code, which provided that no person may consent to death being inflicted upon them. The case raised complex issues about the autonomy of individuals facing terminal illness, with a focus on those who have a "grievous and irremediable medical condition"[155] that is likely to result in death.

In assessing the constitutional validity of these provisions, the SCC analyzed the impact of the law on both liberty and security of the person. The Court acknowledged that requiring individuals to live in extreme, unrelieved pain when they desire to end their lives on their own terms could amount to a profound violation of their dignity and security.[156] This was a crucial consideration, as the legal prohibition on assisted suicide was seen to undermine an individual's control over their own body and life, particularly when the person is facing the final stages of a terminal illness.

In considering the right to life, the Court specifically addressed the scenario where individuals, fearing they would lose the capacity to end their suffering at a later time, were effectively forced to take their lives prematurely. These individuals, in some cases, had to choose between enduring unbearable pain or ending their lives before they were physically unable to do so. In this context, the law was found to deprive individuals of their right to life in a meaningful way, as it prevented them from exercising control over the circumstances of

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[151] *Ibid*, at para 46.
[152] *Ibid*, at para 50 (See also: *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at page 877).
[153] Adam Badari, *Egan v. Canada (1995) – Equality Rights and Same-Sex Spousal Benefits* (Edmonton: Center for Constitutional Studies, 2010), online: <https://www.constitutionalstudies.ca>.
[154] *Carter*, *supra*, note 23.
[155] *Ibid*, at para 127.
[156] *Ibid*, at paras 65-66.

their death.[157] By preventing assisted suicide, the law created a tragic dilemma for those suffering from terminal illnesses: they were caught between the suffering of their condition and the legal consequences of taking their own life before they became unable to do so.[158]

The Court's decision emphasized that the legal prohibition on assisted suicide, in certain cases, did not protect life in the way intended by s. 7. Instead, it served to limit the personal autonomy of individuals at a time when they were most vulnerable, and to deny them the right to control their own death. The law, in its current form, was found to be disproportionately restrictive and not in line with the principles of fundamental justice that underpin the Charter.[159] Thus, the SCC ruled that the criminal prohibition on assisted suicide, as applied to individuals suffering from grievous and irremediable medical conditions, violated s. 7 of the Charter. The decision recognized that the right to make decisions regarding one's own life and death, particularly in the context of terminal illness and suffering, is an essential aspect of personal autonomy and dignity.

Other Disadvantaged Groups

The jurisprudence set out in the previously discussed cases underscores the scope of ss. 2(a), 15(1), and 7 protections. However, cases involving other disadvantaged groups under the subset of s. 15(1) guarantees (including, but not limited to, individuals belonging to enumerated grounds such as: race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability), have expanded constitutional rights while underscoring the growing recognition and interpretation of individual freedoms.

For instance, in *Fraser v. Canada*,[160] the Court addressed discrimination faced by mothers in the workforce. In this case, the majority ruled that an RCMP job-sharing program, which did not allow members to buy back full-time pension benefits, disproportionately impacted women. The program perpetuated their disadvantage due to a combination of contextual factors, including economic and gendered constraints influencing the choice to work part-time, persistent gender divisions in domestic labor and childcare, disadvantages faced in balancing professional and domestic duties, historical gender biases in pension plans based on male-pattern employment, and the financial consequences these factors had on women upon retirement.[161]

Fraser highlighted the purpose of a s. 15(1) analysis is to examine the impact of the harm caused to the affected group. The SCC noted that the harm may include economic

[157] *Ibid*, at paras 67-68.
[158] Ibid.
[159] *Ibid*, at para 90.
[160] *Fraser*, *supra*, note 19.
[161] *Ibid*, at paras 86-113.

exclusion or disadvantage, social exclusions, psychological harms, physical harms, and political exclusion.[162] Yet, the Court recognized that whether these harms establish discrimination depends centrally on whether they relate to systemic or historical disadvantages faced by the group in question.[163] They noted that at the core of s. 15(1) is the recognition that certain groups have been historically discriminated against, and the law should seek to curb the perpetuation of such discrimination.[164]

Historically disadvantaged groups, such as Indigenous peoples, have also been the subject of significant s. 15(1) litigation. In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*,[165] the SCC considered the constitutionality of s. 77(1) of the *Indian Act*,[166] which required band members to be "ordinary residents" on their reserve in order to be eligible to vote in band elections. Non-resident band members brought a challenge under s. 15(1), arguing that residency was an irrelevant personal characteristic by which to deprive them of a voice in decisions that could deeply affect them.

Justice L'Heureux-Dubé examined whether "aboriginality-residence" violated human dignity, contributing to harm. The concept of human dignity was deemed central to s. 15(1) because it concerns the way laws affect an individual's sense of self-worth and belonging within society. She referenced the precedent set in *Law v. Canada*,[167] stating: "Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued."[168]

Justice L'Heureux-Dubé also discussed the importance of identifying analogous grounds of discrimination, noting that such grounds are characterized by whether the personal characteristic is "immutable, difficult to change, or changeable only at unacceptable personal cost."[169] In this case, residency was an arbitrary and immutable factor that bore no relevance to an individual's connection to their community. By denying them the right to vote, the *Indian Act* perpetuated an unjust inequality that further marginalized an already disadvantaged group.

Both *Fraser* and *Corbiere* illustrate the evolving understanding of s. 15(1) and the necessity of considering not only the legal texts but also the broader social, economic, and

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[162] *Ibid*, at para 76.
[163] *Ibid*, at paras 76-77.
[164] *Ibid*, at para 78 (See also: *Quebec (Attorney General) v A*, 2013 SCC 5 at para 332; *Taypotat*, *supra*, note 19 at para 20).
[165] *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.
[166] *Indian Act*, R.S.C., 1985, c. I-5.
[167] *Law*, *supra*, note 18 at para 53.
[168] Jim Young, *Corbiere v.Canada (1999)* (Edmonton: Center for Constitutional Studies, 2009), online: <https://www.constitutionalstudies.ca>. (See also: *Corbier*, *supra*, note 165 at para 59).
[169] *Ibid*. (See also: *Corbier*, *supra*, note 165 at para 60).

historical context when assessing discrimination. These decisions highlight that laws that perpetuate inequality or exclude marginalized groups from full participation in society are subject to scrutiny under the Charter, and that the protection of human dignity and equality should be paramount in any legal analysis.

5 ABORTION AND THE CHARTER

Rachael Johnstone, a professor in the Department of Political Science at Dalhousie University, writing on the impact of *Morgentaler*, highlights the transformative effect of the Charter in her work:

> The arrival of the Charter is often described in revolutionary terms, not only in having transformed the judicial and legal system but also in having a significant impact on Canadian political culture…The ensuing "judicialization" of politics has meant that the courts have become a central actor in politics, influencing policies in ways previously thought to be solely the responsibility of the legislature…Charter jurisprudence plays an important role in shaping rights rhetoric, influencing public perceptions of rights and, in turn, impacting the responses of politicians to theses judgments.[170]

Despite the Court's substantial role in Charter interpretation, some continue to deny the significance of the *Morgentaler* decision in establishing a Charter-protected right to abortion. As ARCC has recognized, some anti-choice groups assert there is no established right to abortion, arguing that because the word "abortion" does not appear explicitly in the Charter, it is not a Charter right.[171] However, ARCC acknowledges that the Charter enumerates rights in broad terms, allowing judicial interpretation to extend these rights to various contexts.[172] Through case law, Charter rights are expanded, precedents are set, and these decisions ultimately become part of Charter law.[173]

Another critique is that "the lack of a law, in itself, means that abortion rights cannot be fully realized, or makes our rights vulnerable to attack and subject to the vagaries of politics,"[174] but ARCC disagrees. The SCC constantly reminds us that it is up to the legislature to enact legislation if it so wishes, thereby indicating that regulatory laws on a particular issue such as abortion may not be essential. Importantly, if the legislature does decide to act, any

[170] Racheal Johnstone, *After Morgentaler: the Politics of Abortion in Canada* (Toronto: UBC Press, 2017), pages 51-52.
[171] "Abortion is a Charter Right," *supra* note 55.
[172] Ibid.
[173] *Ibid*, at page 2.
[174] "Why we do NOT need to enshrine abortion rights into law" (Vancouver: Abortion Rights Coalition of Canada, 2023), at page 1, online: <https://www.arcc-cdac.ca>.

laws it wishes to implement must abide by the constitution. In other words, legislation will always be subject to limits imposed by the Charter, while activities not subject to a specific law, such as accessing abortion, are still protected by the Charter.

Others affirm the importance of the *Morgentaler* decision in the growing recognition of abortion rights. Johnstone contends that subsequent litigation has "demonstrated the value the Charter guarantees in shaping abortion access across the country," which further demonstrates "the power of individual rights protections to not only shape legislation but also to influence the manner by which individuals understand their rights."[175] Johnstone specifically argues the recognition of abortion rights becomes evident when considering the action of provincial governments to regulate access.[176] She notes:

> Governments, both provincial and federal, are the only bodies that possess the democratic legitimacy to recognize rights claims, in addition to having the means and ability to create the infrastructure to protect and promote these rights…To be effective, rights also require public understanding and support. Advancing claims to abortion rights, then, not only means demonstrating that women's equality necessitates access to abortion services in court and in the public eye but also requires that the public hold governments accountable for validating these claims…Even though abortion rights have yet to be recognized by either the Court of the House of Commons, the rights protections afforded to citizens through the Charter suggest a path forward toward such recognition.[177]

In fact, many recognize *Morgentaler* as the starting point in establishing a Charter-protected right to abortion.[178] The following sections address the extent to which the rights and principles underlying ss. 2(a), 15(1), and 7 of the Charter have been used—or could be used according to some legal commentators—to protect against undue state interference with abortion access.

Section 2(a): Freedom of Conscience

Freedom of conscience and religion is protected under s. 2(a) of the *Charter*. At its core, this right ensures that individuals can make moral decisions free from state interference. The foundational case of *R. v. Big M. Drug Mart*[179] defined the scope of s. 2(a) protections in the context of religion. The SCC stated that the purpose of freedom of religion is to allow every person to be free to hold and express the beliefs and opinions their

[175] Rachael Johnstone, *supra*, note 170 at page 11.
[176] *Ibid*, pages 13-14.
[177] Ibid.
[178] See, for example: Rachael Johnstone, *ibid*.
[179] *Big M*, *supra*, note 6.

conscience dictates, as long as those manifestations do not harm or restrict the rights of others.[180] Freedom of religion entails that no one is forced to act in a way contrary to their beliefs or conscience.

These concepts were further clarified in *R v. Edwards Books and Art Ltd.*,[181] where Chief Justice Dickson stated that the purpose of s. 2(a) is to prevent societal interference with deeply personal beliefs that shape one's understanding of themselves, humanity, and the world.[182] To establish an infringement of s. 2(a), there must be evidence that an individual's freedom to hold or express their beliefs has been unduly restricted by the state.[183]

In *Morgentaler*, Justice Wilson considered freedom of conscience and religion broadly. She held that it is necessary for s. 2(a) to be broadly construed to extend to all conscientiously-held beliefs, including secular and non-secular beliefs not always needing to be founded in religion.[184] In this context, Wilson recognized that *personal morality* is also protected by s. 2(a). In her broad interpretation, Wilson found that restrictive abortion laws do, in fact, violate these rights:

> [T]he decision whether or not to terminate a pregnancy is essentially a moral decision, a matter of conscience…The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.[185]

The legal right under s. 2(a) to make personal moral decisions has been further considered, and expanded on, in the context of abortion rights within Canadian legal discourse. Supporting Wilson's analysis, the Court in *Dobson* briefly highlighted the policy implications of restricting the lifestyle choices of women. Such restrictions would severely undermine the ability of one to pursue their own autonomy in their capacity to make their own decisions.[186] Additionally, in *Reference re Same-Sex Marriage*, the SCC stated that any statute requiring compulsion would certainly be contrary to the Charter.[187] In other words,

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[180] *Big M*, *supra*, note 6.
[181] *Edwards*, *supra*, note 6.
[182] *Ibid*, at para 97.
[183] See: *Hutterian Brethren, supra*, note 6 at para 32; *Amselem, supra*, note 6 at paras 56-57; *Marguerite-Bourgeoys*, *supra*, note 12 at para 34; *Trinity Western*, *supra*, note 12 at para 63.
[184] *Morgentaler*, *supra*, note 8 at pages 165-166.
[185] *Ibid*, at pages 176-177.
[186] *Dobson*, *supra*, note 50 at para 80.
[187] *Ibid*, at para 56.

laws that force a person to act against their will inherently violates their individual freedom and autonomy.

Drawing from the precedents established by case law, Carlos Del Rio, an alumnus of Southern Illinois University Carbondale, argues that laws restricting abortion access could additionally be seen as imposing a particular moral or religious viewpoint on the entire population, which s. 2(a) aims to prevent.[188] Specifically, case law has established that the Charter protects individuals from having others' religious or moral beliefs legislated into their own lives.[189] This protection ensures that individuals retain the freedom to make personal decisions without being subject to the moral or religious beliefs of others, particularly in matters as personal as abortion.

Considerations have also been made regarding the potential conflict between s. 2(a) rights of pregnant individuals and healthcare providers. Because courts may invoke s. 1 of the Charter to determine reasonable limits on the exercise of freedom of conscience and religion of healthcare providers, ARCC believes that healthcare providers who refuse to perform an abortion due to religious or moral grounds may be required to refer patients to alternative providers to ensure access.[190]

This position specifically stems from the *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*[191] decision, where the Ontario Court of Appeal ruled that healthcare professionals who refuse to provide certain services, like abortion, must fulfill their obligations by effectively referring patients to another provider who can deliver the necessary care.[192] This decision reinforced the notion that healthcare providers cannot use personal religious or moral beliefs to deny patients access to essential medical services.[193]

To summarize, the right to abortion under s. 2(a) can be argued from the perspective that abortion decisions are deeply personal, moral, and a matter of conscience. Laws that restrict access to abortion could infringe on this right, as they prevent individuals from making decisions in line with their conscience and moral beliefs, which s. 2(a) is intended to

[188] Carlos M. Del Rio, Freedom of Conscience is Freedom of Choice: Women's Reproductive Needs, Rights, and their Therapeutic Implications (2012) Vol.2, No.3, Advs in App Soc 214.
[189] See generally: *Big M*, *supra*, note 6; *Edwards*, *supra*, note 6.
[190] "Canadian Policies and Laws on 'Conscientious Objection' in Health Care" (Vancouver: Abortion Rights Coalition of Canada, 2023), online: <https://www.arcc-cdac.ca>.
[191] *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 (CanLII).
[192] *Ibid*, at paras 18 & 23.
[193] *Ibid*, at para 100.

protect. Correspondingly, laws that force individuals to act against their conscience will also violate this individual freedom.

Section 15(1): Equality and Non-Discrimination

Subsection 15(1) emphasizes equality before the law. The provision seeks to prevent discriminatory practices that marginalize individuals based on factors such as race, religion, sex, disability, and age. It is intended to promote a society where all individuals are treated with equal respect and dignity, regardless of personal characteristics or circumstances. It emphasizes substantive equality rather than formal equality, meaning it focuses on addressing systemic disadvantages and ensuring equitable outcomes, rather than simply treating everyone the same.[194]

To establish a violation of s. 15(1), a court must: (1) determine if there has been differential treatment based on an enumerated or analogous ground; and (2) determine whether this distinction amounts to discrimination.[195] Whether a distinction amounts to discrimination was accentuated in *Law v. Canada (Minister of Employment and Immigration)*,[196] where the SCC explained that the harm must perpetuate disadvantage, stereotyping, or marginalization of the group in question.[197]

While Wilson's reasoning in *Morgentaler* was primarily grounded in s. 7, she addressed issues of reproductive decision-making being inextricably tied to the biology of women, as pregnancy is "outside the realm" of a man's personal experience.[198] In fact, the SCC has consistently supported the view that *pregnancy discrimination* is a form of sex discrimination, recognizing the profound inequality it creates for women.[199]

For example, in *Brooks v. Canada Safeway Ltd.*,[200] the Court emphasized how pregnancy is a condition unique to women, and addressed how marginalized groups, such as low-income women, women of colour, and rural women, can also be disproportionately affected by restrictive abortion laws. In this light, *Brooks* has been seen to underscore the need for broader societal changes to ensure reproductive freedom for all women, regardless of class, race, ability, or sexuality. Yet, some argue that true reproductive freedom cannot be

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[194] *Kapp*, *supra*, note 15 at para 15 citing *Andrews, supra*, note 15 at para 165. (See also: *Withler v. Canada*, supra, note 19 at para 39; *Taypotat*, supra, note 19 at para 17; and *Fraser*, supra, note 19 at paras 41-42).
[195] *Law*, *supra*, note 18 at page 499.
[196] Ibid.
[197] *Ibid*, at page 529.
[198] *Morgentaler*, *supra*, note 8 at page 171. (See also page 172).
[199] See generally: *Brooks v Canada Safeway Ltd.*, [1989] 1 SCR 1219.
[200] Ibid.

achieved without addressing the systemic inequities that limit women's ability to make informed and autonomous decisions about their reproductive health.[201]

Other cases have further defined the scope of s. 15(1) protections. The court in *Dobson* echoed Wilson's discussion, emphasizing that "[b]iology dictates that only women can become pregnant and bear children," and, with that, "courts should be hesitant to impose additional burdens upon pregnant women."[202] Justice McLachlin added that:

> Pregnancy does not come only to those women who have within their means all that is necessary to effectuate the best possible prenatal environment: any female of child-bearing age may become pregnant. Within this pool of potential defendants are representatives of all socio-economic backgrounds: the well-educated and the ignorant; the rich and the poor; those women who have access to good health care and good prenatal care and those who, for an infinite number of reasons, have not had access to any health care services.[203]

Outside of the court, advocates further examine the discriminatory impact of restrictive abortion laws. In 2007, ARCC stated:

> To say women choose pregnancy is no answer. Pregnancy is essentially related to womanhood. It is an inexorable and essential fact of human history that women and only women become pregnant. Women should not be penalized because it is their sex that bears children…To say that broad legal constraints on the conduct of pregnant women do not constitute unequal treatment because women choose to become pregnant is to reinforce inequality by the fiction of deemed consent and the denial of what it is to be a woman.[204]

Moria McConnell, a professor of law at the Schulich School of Law, similarly addresses the gendered implications of restrictive abortion laws. McConnell states, "[t]he practice…criminalized is one which is uniquely female…[that] ignores the underlying issue of the disparity between men and women regarding decision-making control and autonomy

[201] Joanna Erdman, *Constitutionalizing Abortion Rights in Canada* (2018) Vol.2, Schulich Law Scholars 221 at pages 255-256; and Caroline Egan & Linda Gardner, Race, Class and Reproductive Freedom (1992) Vol.14, No.2, Canadian Women Studies 95, at page 96.
[202] *Dobson*, *supra*, note 50 at para 77.
[203] *Ibid*, at paras 54-55.
[204] Joyce Arthur & Sarah Galeski, *The Case for Repealing Criminal Laws Against Abortion: Lessons from Canada*, pages 8-9, online: <https://www.arcc-cdac.ca>.

over their persons."[205] She emphasizes that "[o]nly women will be subject to this loss of control and the basis for this distinction or differentiation is their gender."[206]

Daphne Gilbert, a professor from the University of Ottawa who specializes in teaching criminal and constitutional law, also observes the inequities inherent in forcing women to carry pregnancies to term. She argues:

> The result of forcing pregnancies to be carried to term is that women bear the physical, emotional and economic cost of being born with a uterus. This cost is not shared equally by men, who can fully participate in public life without fear of being pulled from the workforce or physically altered in profound ways for months because of their male biology. It is inherently unequal to punish one half of the conception partnership with a profound consequence while the other half has none.[207]

With the case law's guiding principles, ARCC has recognized a broader societal responsibility to ensure that reproductive choices and freedoms are not restricted. This includes the need for societal changes such as increased and equalized provincial and territorial health care funding, medical training, the enforcement of effective referrals, exposing harmful propaganda, and, crucially, the right to free and accessible abortion services.[208]

Section 7: Life, Liberty, and Security of the Person

Section 7 of the Charter guarantees the protection of life, liberty, and security of the person. These rights shelter against threats against survival, personal autonomy, and physical or psychological harm. Only in accordance with the principles of fundamental justice can these rights be reasonably restricted.[209] Moreover, laws or state action that violates s. 7 rights must not be arbitrary, overbroad, or grossly disproportionate.[210] To date, the SCC has never found a reasonable limitation for a violation of s. 7 rights.

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[205] Moria McConnell & Lorenne Clark, "Abortion Law in Canada: A Matter of National Concern" (1991) Vol.5, No.1, Dalhousie Law Journal 81 at page 86.
[206] Ibid.
[207] Daphne Gilbert, *Gilbert: We must shift the abortion conversation — it's about equality rights, pure and simple* (Ottawa: Ottawa Citizen, 2022), online: <https://ottawacitizen.com>.
[208] "Why we do NOT need to enshrine abortion rights into law," *supra*, note 174 at pages 3-4.
[209] *Charkaoui*, *supra*, note 21.
[210] *R v Oakes*, *supra*, note 37.

Access to abortion has been characterized as essential for women's autonomy over their own bodies, directly relating to these rights.[211] In *Morgentaler*, the SCC struck down the criminal law provisions regulating abortion as unconstitutional. The Court held that the procedural barriers imposed by these provisions violated women's right to security of the person by subjecting them to unnecessary delays, uncertainty, and psychological stress.

Chief Justice Dickson considered the degree in which s. 251 of the Code deprived individuals of their s. 7 rights, emphasizing the profound impact of security of the person:

> At the most basic, physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations. Not only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. Section 251 clearly interferes with a woman's bodily integrity in both a physical and emotional sense. 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.[212]

Continuing, Dickson stated:

> Section 251 of the Criminal Code…takes the decision away from the woman at all stages of her pregnancy and completely denies, as opposed to limits, her right under s. 7…Accordingly, even if s. 251 were to be amended to remedy the procedural defects in the legislative scheme, it would still not be constitutionally valid.[213]

Dickson further addressed the issue that Parliament cannot create a law that, in pith and substance, is concerned with the health and safety of a pregnant woman because that falls under provincial jurisdiction and would be ultra vires and an invalid exercise of Parliament's criminal law power.[214] Additionally, he recognized that the s.251(4) exception provides that foetal interests are not to be protected where the life or health of the woman

[211] See, for example: Erdman, *supra*, note 201; Egan & Gardner, *supra*, note 201; Arthur & Galeski, *supra*, note 204; and McConnell & Clark, *supra*, note 205.
[212] *Morgentaler*, *supra*, note 8 at pages 55-56.
[213] *Ibid*, at page 38.
[214] *Ibid*, at page 124.

is threatened, therefore implicitly expressing the life and health of the pregnant person to be paramount.[215]

Justices Beetz and Estey added to Justice Dickson's argument by stating if an Act of Parliament denies a woman her right to life and health in times of endangerment, and forces her to choose between crime and life, it is Parliament's act that is unlawful, not her own.[216] According to the Court, the expression "would or would be likely" under the provision "eliminates any requirement that the danger of life or health be certain or immediate at the time the certificate is issued."[217] To elaborate, "[t]he required standard of threat to life or health must necessarily be lesser than that required under the common law defence of necessity [by virtue of the wording of the provision]."[218]

Justice Wilson focused more on the adverse consequences on restrictive abortion laws generally. In fact, some argue that Wilson's decision "went beyond the procedural problems with the law and dealt with the substantive issue of a 'right to abortion.'"[219] In her Judgment, Wilson emphasized that the state's interference with a woman's decision to terminate her pregnancy directly impacts her bodily integrity and autonomy.[220] Yet, instead of focusing solely on the 'security' component of s. 7, Wilson argued that where a woman is forced to carry a pregnancy to term against her will is a profound interference with her liberty.[221] In other words, Wilson argued that failing to deal with the right to liberty depletes the value of the function of s. 7 rights as a whole.[222]

Justice Wilson acknowledged the moral complexity of abortion but nevertheless argued that in a free and democratic society, individuals should have the right to make personal moral decisions without state interference. She proposed that the state's interest in protecting potential life should not override a woman's fundamental rights, particularly in the early stages of pregnancy.[223] In elaboration, Wilson stated:

> The fact that the decision whether a woman will be allowed to terminate her pregnancy is in the hands of a committee is just as great a violation of the woman's right to personal autonomy in decisions of an intimate and private nature as it

[215] *Morgentaler*, *supra*, note 8 at page 74.
[216] *Ibid*, at pages 81 & 245.
[217] *Ibid*, at pages 108-109.
[218] *Ibid*, at page 109.
[219] "The 1988 Morgentaler Decision of the Supreme Court of Canada, which struck down Canada's abortion law" (2024), online: <http://www.morgentalerdecision.ca>.
[220] *Morgentaler*, *supra*, note 8 at pages 165-166.
[221] *Ibid*, at page 172.
[222] *Ibid*, at page 163.
[223] *Ibid*, at page 183.

> would be if a committee were established to decide whether a woman should be allowed to continue her pregnancy. Both these arrangements violate the woman's right to liberty by deciding for her something that she has the right to decide for herself.[224]

Justice Wilson emphasized that liberty encompassed more than just freedom from physical restraint. She framed liberty as including personal autonomy and the ability to make decisions of fundamental importance to one's life and dignity.[225] Specifically, Wilson highlighted that decisions about reproduction and whether to terminate a pregnancy are profoundly personal and go to the core of what it means to enjoy individual dignity and independence.[226] She argued that these decisions must be free from unnecessary state interference and that forcing a woman to carry a pregnancy to term against her will constitutes a profound intrusion on her bodily integrity and personal autonomy.[227] Connecting liberty with a woman's ability to define her role in society and control her reproductive choices, Wilson asserted that the government cannot impose its values on women by dictating their reproductive decisions.[228]

Wilson acknowledged the moral and ethical complexities of abortion but concluded that the rights of the fetus could not outweigh the constitutionally protected rights of women. Wilson reiterated that under Canadian law, a fetus does not possess legal personhood. Therefore, its interests cannot justify the infringement of a woman's rights under s. 7. She argued that decisions about abortion are moral choices that should be made by the woman herself, not imposed by the state.[229]

Supreme Court Justice Sheila Martin asserts in a published article that Wilson "decided that section 7 gives pregnant women a right to choose to terminate their pregnancies."[230] Martin argues that "[t]he decision whether or not to terminate a pregnancy was treated [by Wilson] as a protected aspect of a woman's liberty."[231] Wilson' "explained how the right to make fundamental personal decisions without state interference is a necessary aspect of human dignity, a prerequisite to a full and rewarding life."[232] She continues by stating:

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[224] *Morgentaler*, *supra*, note 8 at page 172.
[225] *Ibid*, at page 172.
[226] Ibid.
[227] Ibid.
[228] *Ibid*, at pages 165-166.
[229] Ibid.
[230] Sheilah L. Martin, "Morgentaler v The Queen in the Supreme Court of Canada," (1988), Vol. 2 Issue 2, *Canadian Journal of Women & the Law* 422 at page 427.
[231] Ibid.
[232] Sheila Martin, *supra*, note 230 at page 427.

> Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life. Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty…[l]iberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them.[233]

According to ARCC, *Morgentaler* and cases that follow show how "the Supreme Court has adopted Wilson's broad approach to Charter rights," and following these legal principles, "abortion must be constitutionally protected."[234] For example, Justice La Forest has affirmed Wilson's definition of a s. 7 right as including autonomy in making decisions of fundamental personal importance.[235] Other legal experts, such as Gilbert, consider it unlikely that new laws regulating abortion could withstand s. 7 scrutiny: "Restrictions in accessing abortion directly impact the full participation of women in public life, forcing them to be mere vessels for childbirth."[236]

Others have recognized Wilson's reasoning in terms of implications stemming from the criminalization of abortion. Joanna Erdman, a professor and the MacBain Chair in Health Law and Policy at the Schulich School of Law, Dalhousie University, claims:

> Working in perfect order, the criminal abortion law takes from a woman a fundamental personal decision of an intimate and private nature, depriving her of the right to develop her full potential, to plan her own life, and to make her own choices. The criminal law decides for a woman something she has the right to decide for Herself.[237]

[233] *Morgentaler*, *supra*, note 8 at pages 165-167.
[234] Arthur & Galeski, *supra*, note 204 at page 7.
[235] Metropolitan Toronto, supra, note 11.
[236] Daphne Gilbert, *supra*, note 207.
[237] Joanna Erdman, *supra*, note 201 at page 245.

6 CANADA HEALTH ACT AND ABORTION ACCESS

Following the *Morgentaler* decision, specifically in its interpretation of s. 7 guarantees, Canada has become the only country in the world without a federal law restricting abortion. Decisions about abortion are now regulated primarily at the provincial level through health care systems, which some consider an important advancement in the recognition of women's rights.[238] In fact, Johnstone argues that the impact of *Morgentaler* had actually identified abortion as a matter of health care.[239] This section considers the evolution of Canadian society regarding the decriminalization of abortion and what this means for the future.

The *Canada Health Act*[240] (CHA) outlines the framework for publicly-funded health care. Its primary purpose is to ensure that all eligible residents of Canada have reasonable access to "medically necessary" hospital and physician services without direct charges. The Act outlines the responsibilities and principles for provincial and territorial governments to adhere to in exchange for deferral funding. Specifically, provinces must adhere to its principles in public administration, comprehensiveness, universality, portability, and accessibility.[241]

Under the Act, provinces are required to fund all physician and hospital services deemed to be a 'medical necessity,' which has been left un-defined by the CHA. Regardless, Erdman has argued that 'medical necessity' extends beyond just preventing bodily harm—it also encompasses justice:

> The…constitutional argument [is raised] beyond mere bodily harm by emphasizing the democratic effects of this harm: that as a principle of fundamental justice, and as full and equal members of Canadian society, the lives and health of women have worth and must be accounted for in the design and delivery of health care under a public system.[242]

Legal experts have also claimed that every province and territory has deemed abortion to be a 'medically required' service under the CHA by virtue of them funding it. Thus, abortion is argued as 'medically necessary' because it has met the definition of 'medically

[238] Rachael Johnstone, *supra*, note 170.
[239] *Ibid*, at page 3.
[240] Canada Health Act, supra, note 47.
[241] Rachael Johnstone, *supra*, note 170 at pages 108-109. (See: *Canada Health Act*, *ibid*, at s.3).
[242] Joanna Erdman, *supra*, note 201 at page 260.

required'—a service that is funded by the province and meets the criteria for essential healthcare under the CHA.[243]

Though health care is primarily a provincial responsibility regulated interprovincially, the government can still pursue action against provinces that fail to adhere to the standards set out under the CHA.[244] Emmett Macfarlane, a political scientist and constitutional expert, says that the trends in Canadian health law suggest a link to the *Morgentaler* decision in upholding Charter rights in the pursuit and enforcement of health care access.[245]

In the context or abortion regulation, others argue that "[t]o provide abortion services, or any other health care service in ways that deny or delay safe access, or otherwise breeds conditions for unsafe access, infringes on the right to security of person."[246] However, Mcfarlane recognizes, despite the ruling in *Morgentaler* and creation of health laws, that "a new pattern of unequal abortion access has emerged."[247] For example, "[w]hile abortion access in many provinces has improved dramatically absent a federal law restricting the procedure…many provincial barriers persist."[248] Specifically, he claims that:

> Under the existing logic of the Supreme Court of Canada's decision, these differences do not necessarily constitute negative rights violations because the barriers to access stem not from state interference but, rather, from state inaction (most notably, decisions not to provide public coverage in certain contexts). From a rights perspective, it is apparent that the logic of limiting abortion to the negative rights context is flawed, particularly in the context of a provincial universal health care system in Canada where publicly funded medical services are expected (and are generally delivered by way of a government monopoly).[249]

[243] See: "Abortion Is a 'Medically Necessary' Service and Cannot be Delisted" (Vancouver: Abortion Rights Coalition of Canada, 2021), online: <https://www.arcc-cdac.ca>.
[244] Joanna Erdman, *supra*, note 201 at pages 5-6.
[245] Emmett Macfarlane, "Public Policy, Rights, and Abortion Access in Canada" (2015) Vol.51, Int Jour of Can Stud 97, at page 111.
[246] Joanna Erdman, *supra*, note 201 at page 260.
[247] Emmett Macfarlane, *supra*, note 245 at page 113.
[248] Ibid.
[249] Ibid.

7 CONCLUSION

Charter interpretation strengthens legal protections and promotes a more comprehensive understanding of individual freedoms in Canada. The previously discussed case law has established several principles that have derived from the interpretation of relevant Charter rights. Personal autonomy, bodily integrity, equality and non-discrimination, and the freedom to make profoundly personal decisions are all important principles underlying ss. 2(a), 15(1), and 7 of the Charter. These principles collectively form the foundation for what many legal commentators argue amounts to a Charter-protected right to abortion. In fact, "[s]ince 1988, all provincial and federal court cases related to abortion have upheld women's rights and denied fetal rights,"[250] citing the various listed principles and other broader public policy concerns.

Other legal principles stemming from Charter interpretation have further correlated to subsequent abortion-related right protections:[251]

1. The right to choose abortion, without approval from the potential father;[252]
2. The right to timely access to abortion services (encompassing reasonable wait-times and delays) without state interference;[253] and
3. The right of medical self-determination, which includes the right to make autonomous decisions about one's own medical treatment.[254]

The parameters of ss. 2(a), 15(1), and 7 protections and principles established in Canadian jurisprudence provides a robust framework for future litigation and interpretation of the Charter in the context of the right to abortion. Most importantly, *Morgentaler* established that restrictive abortion laws significantly interfere with a woman's bodily integrity and personal autonomy and is frequently recognized as a cornerstone in the fight against laws that disproportionately burden or impose undue barriers to reproductive freedom. *Morgentaler* set a foundation for the expansion and protection of women's rights and the rights of those capable of pregnancy in Canada.

The evolving legal framework has consistently upheld women's reproductive rights while rejecting the recognition of fetal rights. This consistency reflects the lasting impact of *Morgentaler* and the courts' commitment to interpreting the Charter in ways that protect

[250] "Abortion is a Charter Right," *supra*, note 55.
[251] Julianne Stevenson & Jennifer Taylor, "Access to Choice: The Legal Framework for Abortion Access in Nova Scotia" (Halifax: Leaf Halifax: Women's Legal Education and Action Fund, 2019), at page 2, online: <https://www.leaf.ca>.
[252] *Tremblay*, *supra*, note 48.
[253] Morgentaler, supra, note 8.
[254] *Carter*, *supra*, note 23.

personal autonomy and equality. Subsequent cases have reinforced principles from *Morgentaler*, particularly around personal autonomy and timely access to healthcare.[255] These rulings demonstrate the broad influence of Morgentaler in shaping not only abortion law but also the broader landscape of healthcare rights in Canada.

Over the nearly 40 years since *Morgentaler*, there has been greater access to reproductive healthcare generally. Barriers to abortion services decreased, with provincial governments and healthcare providers working to make abortion more accessible.[256] For example, the *Canada Health Act* has played a crucial role in ensuring that abortion services are publicly funded and accessible across the country. While disparities still exist in rural and remote areas, urban centers now typically offer safe, legal, and timely abortion services. In fact, most provinces have integrated their abortion services into public healthcare systems under the CHA. The Act's emphasis on accessibility and universality has played a key role in ensuring abortion services are covered by provincial health plans.

Principles highlighted in the *Morgentaler* decision have additionally inspired reproductive rights movements worldwide, particularly in countries grappling with restrictive abortion laws.[257] In fact, Canada's framework has been used as a model for balancing reproductive rights with constitutional protections—the conversation has evolved beyond simply ensuring access to abortion toward a broader reproductive justice framework.[258] This approach considers the social, economic, and political conditions that shape individuals' ability to make reproductive choices freely and safely.

All in all, the legacy of the *Morgentaler* decision has been consistently regarded as profoundly influential. While there are still areas for improvement—such as addressing access gaps for vulnerable populations—provinces and territories have largely embraced the principles of autonomy, equality, and healthcare rights established by the case. Moving forward, ARCC places emphasis on how continued advocacy will be essential to ensure that reproductive rights remain protected and accessible to all Canadians.

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[255] See, for example: *Carter*, *ibid*; and *Chaoulli*, *supra*, note 24.
[256] Ibid.
[257] See, for example: "El Salvador: IACtHR advances reproductive justice with ruling in favor of Beatriz and her family" (Amnesty International, 2024), online: <https://www.amnesty.org>; "Mellet v. Ireland," *Ireland must legalize abortion to end violations of women's human rights* (Switzerland: Center for Reproductive Rights, accessed 2025), online: <https://reproductiverights.org>; "Syed & Others v. Sindh" (Sarjai: Center for Reproductive Rights, 2025), online: <https://reproductiverights.org>; and "Tysiac v. Poland (European Court of Human Rights)" (Poland: Center for Reproductive Rights, 2005), online: <https://reproductiverights.org>
[258] Government of Canada, *Canadian programs around the world bring safe abortion rights and services into focus* (2022), online: <https://www.international.gc.ca>.