



Abortion Rights
Coalition of Canada

Your
Voice for Choice

Coalition pour le droit à
l'avortement au Canada

Canada's only national political pro-choice advocacy group

POB 2663, Station Main, Vancouver, BC, V6B 3W3 • info@arcc-cdac.ca • www.arcc-cdac.ca

Position Paper # 63

Fetal Rights in Canada

Introduction

Does the fetus have any rights in Canada? No. In Canada, embryos and fetuses do not gain legal status and rights in our society until they are born alive, as per the *Criminal Code* definition of a “human being”:¹

Section 223 (1) – A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother, whether or not (a) it has breathed; (b) it has an independent circulation; or (c) the navel string is severed.

Further, the Supreme Court has stated that a woman and her fetus are considered “physically one” person under the law.²

History

The claim that fetuses are human beings with rights has long been a cornerstone argument of the anti-choice movement but has been unsuccessful in Canadian courts.

In the 1984 case of *Borowski v. Canada*,³ in which an anti-choice activist was trying to establish legal personhood for fetuses, the Saskatchewan Court of Appeal reviewed the language of the Charter and the history of the fetus at common law, and concluded that the fetus had never been a person or included in the meaning of “everyone” in the Charter.⁴ Although *Borowski* appealed

1 *Criminal Code of Canada*, R.S.C., 1985, c. C-46, s. 223(1). <http://laws-lois.justice.gc.ca/eng/acts/C-46/section-223.html>

2 *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 SCR 753. <http://canliiconnects.org/en/summaries/30814>

3 *Borowski v. Canada (Attorney General)*. [1984] 1 WWR 15

4 *Dunsmuir, Mollie*. 1998. *Abortion: Constitutional and Legal Developments*. www.publications.gc.ca/Collection-R/LoPBdP/CIR/8910-e.htm

to the Supreme Court, his case came up *after* the 1988 Morgentaler decision, and was therefore declared moot by the court in 1989.⁵

Dr. Henry Morgentaler's tireless work and dedication had culminated in the 1988 Supreme Court decision that struck down the current abortion law as unconstitutional because it violated Section 7 of the *Charter*, infringing on women's rights to life, liberty and security of person.⁶ Following this momentous victory, several court cases have helped solidify the right to abortion and the corresponding lack of fetal rights in Canada:⁷

- Tremblay v. Daigle [1989] 2 SCR 530 1989
- R. v. Sullivan [1991] SCR 489
- R. v. Drummond [1996] 143 DLR (4th) 368
- Winnipeg Child and Family Services (Northwest Area) v. DFG [1997] 3 S.C.R. 925
- Dobson v. Dobson [1999] 2 SCR 753

In 2012, Conservative MP Stephen Woodsworth introduced Motion 312 calling for a Parliamentary Committee to examine whether the Criminal Code definition of "human being" should be changed to include fetuses.⁸ The motion was defeated in Sept 2012⁹ but it would have potentially paved the way to give legal personhood to fetuses and allow the re-criminalization of abortion, as well as deny the constitutional rights of all pregnant persons.

In 2014, a Toronto woman received a second acquittal for concealing the remains of her 36-week fetus because the judge said there was a "reasonable possibility" that the woman had self-induced an abortion before concealing it. The judge said that since abortion is legal, the woman could not be found guilty of a crime. In her first acquittal in 2013, the Supreme Court established that the law against secretly disposing of a child's dead body does not apply to miscarried or aborted fetuses, only to stillbirths (which are defined in Canada as after 20 weeks gestation).¹⁰ These decisions mean that a person's right to abortion outweighs any possible legal recognition of fetuses, including even a woman's disposal of her fetal remains. (It also means that self-induced abortion is legal in Canada.)

Over the years, dozens of private member bills and motions have been introduced by anti-choice Members of Parliament, many of which would have given personhood to fetuses or at least some degree of legal recognition. The most recent bills called for separate charges for fetuses injured or killed when a pregnant woman is the victim of a crime. But this would bestow an implicit form of legal personhood to a fetus, endangering women's constitutional rights by opening the

5 Borowski v. Canada (Attorney General) [1989] 1 SCR 342. <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/421/index.do>

6 R. v. Morgentaler 1 SCR 30 1988. <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/288/index.do>

7 Court Decisions and Laws in Canada on Abortion, April 2019: <http://www.arcc-cdac.ca/court-decisions-laws-abortion-canada.pdf>

8 <http://www.arcc-cdac.ca/m312.html>

9 <https://www.cbc.ca/news/politics/motion-to-study-when-life-begins-defeated-in-parliament-1.1214834>

10 https://www.thestar.com/news/gta/2014/09/24/former_gta_stripper_acquitted_of_concealing_dead_babys_body.html

door to more legal rights for fetuses. The most recent bill of this kind was in 2016 – Bill C-225,¹¹ which was nearly identical to a previous bill introduced in 2007 (Bill C-484). Both bills failed, as have all other anti-choice bills and motions.

No Other Laws Recognize Fetal Rights

Fetuses do have a limited form of retroactive rights in Canada via the “born alive” rule. While the fetus has no independent legal status in utero, once born alive, the child can enforce its legal rights retroactively to address events that occurred during its gestation, such as a physical injury. However, a child cannot seek redress from its own mother for any action she took during the pregnancy.¹² The “born alive” rule may be most relevant in estate law – i.e., you can leave an inheritance to a fetus, who is legally entitled to it only once it’s born alive.

The *Criminal Code* calls a fetus a “child” or “unborn child.” These terms have no significance to the fetal personhood issue since the Code’s definition of human being in Section 223(1) excludes fetuses. Even though subsection (2) says: “A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being,” the meaning of “child” here is the same as in the definition – a born-alive human being. Further, the term “before or during its birth” has only been interpreted to mean immediately before being born alive.¹³

Internationally, a 2014 report from the Center for Reproductive Rights titled: *Whose Right to Life? Women's Rights and Prenatal Protections under Human Rights and Comparative Law*¹⁴ demonstrates that various international and regional treaties do not protect fetal rights. These treaties do not define when life begins, but authoritative interpretations have clarified that right-to-life protections do not apply before birth because of the potential for negating human rights protections for women¹⁵ (and transgender people). In fact, treaty-monitoring bodies have consistently stressed the importance of protecting women's rights, calling on states to remove barriers such as the denial of safe and legal abortions, and to ensure that the rights of pregnant women are given priority over an interest in prenatal life.

Conclusion

Even though the anti-choice movement assumes that fetuses are full human beings with rights, they have consistently lost this argument in court. Fetuses are not defined as persons under the *Criminal Code* and they are not included in the word “everyone” in the *Charter of Rights and*

11 <http://www.arcc-cdac.ca/c225.html>

12 Dobson (Litigation Guardian of) v. Dobson, [1999] 2 SCR 753. <http://canliiconnects.org/en/summaries/30814>

13 R. V. Sullivan, Lemay [1991] 1 SCR 489. <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/733/index.do>

14 These include the Universal Declaration of Human Rights, the Convention on the Rights of the Child, the American Convention on Human Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and five others: <https://www.reproductiverights.org/document/whose-right-to-life-womens-rights-and-prenatal-protections-under-human-rights-and-comparati>

15 <http://rabble.ca/columnists/2012/04/motion-312-ignorant-affront-global-human-rights-standards>

Freedoms. Most importantly, fetuses do not have rights because courts have said this would infringe the Charter rights of women (and transgender people).

For related papers, see:

- *Abortion Court Decisions and Laws in Canada*: <http://www.arcc-cdac.ca/court-decisions-laws-abortion-canada.pdf> (includes links to all relevant court decisions)
- ARCC Position Paper #57 – *The Case against a “Fetal Homicide” Law*: <http://www.arcc-cdac.ca/postionpapers/57-Fetal-Homicide-Law.pdf>
- ARCC Position Paper #65 – *Abortion is a Charter Right*: <http://www.arcc-cdac.ca/postionpapers/65-abortion-charter-right.pdf>
- ARCC Position Paper #78 – *Fetal Pain*: <http://www.arcc-cdac.ca/postionpapers/78-fetal-pain.pdf>