

**CASE COMMENT:**

**DOBBS: REMOVING A CONSTITUTIONAL RIGHT TO ABORTION: NOT IN  
CANADA**

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The Supreme Court of the United States (“SCOTUS”) released the final version of *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. \_\_ (2022) on June 24, 2022 overruling *Roe v. Wade*. *Dobbs* is a wrong-headed political decision 50 years in the making.

Canadians are concerned about its possible impact on Canadian abortion rights. Canadians need not be overly concerned. This case is a political reaction to American circumstances and it likely will have little if any impact in Canada. This is due to its political nature, its lack of persuasive impact and Canadian Constitutional structure and precedent.

In Canada, abortion was effectively decriminalized in 1988 in the case of *R. v. Morgentaler*, [1988] S.C.J. No. 1. The Plurality, made of three separate judgements of the Supreme Court of Canada (“SCC”), reveals three discrete sets of reasons such that there is no clear majority except to say that section 7 *Charter* interests are engaged and that the criminal provision creates unfair procedural hurdles that render the offence unconstitutional. Canada’s continued acceptance of abortion is as much a result of a lack of political will to revisit a divisive issue as it is a result of *Morgentaler*. However, in the decades since *Morgentaler*, Canada has developed a clear body of precedent similar to the cases upon which *Roe* was founded: a substantive due process (in Canada: fundamental justice) right to control one’s body and make important life decisions without government interference.

The first consideration is what impact SCOTUS constitutional cases have on Canadian SCC constitutional decision-making. Early on in *Charter* litigation, U.S. cases were often referenced because of the long history of constitutional litigation and extensive discussion of similar issues in the U.S. Accordingly, while a SCOTUS case can be relevant to Canadian constitutional

adjudication, SCOTUS cases are not adopted unless they are persuasive and fit into the Canadian Constitutional structure.

Unlike the United States, where substantive due process is mistrusted because of the historic misuse of the doctrine (the *Lochner* line of cases), in Canada, substantive fundamental justice has been a part of the Constitution from near the outset of constitutional interpretation by the SCC (*BC Motor Vehicle Reference*, [1985] S.C.J. No. 73).

It is clear that the *Dobbs* decision is a political one, arising out of the American political landscape over the last several decades. As a result, unless its logic is compelling and that logic is easily transferable to Canada, it is likely that the case will not find fertile ground in Canada.

Some of the issues in *Dobbs* that are relevant in assessing whether it is persuasive, include the discussion of viability, the approach to history and the all or nothing approach in *Dobbs*. All of these issues contribute to the conclusion that *Dobbs* will not be seen as persuasive in Canada.

One of the points is the *Dobbs* majority's criticism of the concept of viability of the fetus discussed in *Roe*. This was and is a principled basis to draw a line. In *Roe*, the Court said:

With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the womb.

The majority and Roberts, CJ, in *Dobbs* reject this as a legitimate line to draw. They do not explain why. They merely insist that it is illogical. It is not. Its simplicity and logic are unassailable. Viability as a place to draw a line is based on the fact that a pregnant woman wishing to terminate a pregnancy does so by terminating a fetus, when the pregnancy could be terminated by birth of a viable child. In other words, at the point of viability there is a way short of abortion to terminate a pregnancy: birth. This is a point that accommodates the woman's wish to terminate a pregnancy and the State's interest in potential life. Prior to viability outside the womb, termination of a pregnancy would not result in potential life. By choosing this point, the invasion

of the woman's right to terminate a pregnancy is minimally intrusive because it can be terminated by birth instead of abortion.

The SCOTUS majority in *Dobbs* focuses on the absence of any right to abortion prior to *Roe* as an indication that the right is not a fundamental principle deeply rooted in history. However, the right to abortion in *Roe* has existed for the last 50 years. Why is that not of sufficiently long to be considered “deeply rooted” as a fundamental principle? Why should long outdated notions of liberty limit the approach to liberty in the 21st century? In Canada, we have a principle of constitutional law that the Constitution is to be interpreted as “a living tree”, adjusting to developments in technology and values. In *Edwards v. Canada*, [1930] A.C. 124 (P.C.), the English Judicial Committee of the Privy Council (the highest appeal court for Commonwealth cases) rejected a narrow interpretation of what was a “person” based on old history and law that would have excluded a woman from serving as a Canadian Senator. Modern principles of rights (in the early Twentieth Century) recognized women as persons. Perhaps the SCOTUS should reject undue deference to old concepts and embrace the English and Canadian concept of the Constitution as a living tree. The dissent in *Dobbs* expressly adopted this thinking when it said:

**“The Founders,” we recently wrote, “knew they were writing a document designed to apply to ever-changing circumstances over centuries.”** *NLRB v. Noel Canning*, 573 U. S. 513, 533–534 (2014). Or in the words of the great Chief Justice John Marshall, our Constitution is “intended to endure for ages to come,” and must adapt itself to a future “seen dimly,” if at all. *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819). That is indeed why our Constitution is written as it is. **The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers’ invitation.** It has kept true to the Framers’ principles by applying them in new ways, responsive to new societal understandings and conditions.

Some of these thoughts are also reflected in the dissent's rejection of 19th century values as being a product of male dominated society. To judge constitutional law purely from the perspectives of past repression is to demean and undermine the progress and enlightenment of modern values that we all take for granted now. It is a myopic and regressive attempt to make America great again: great like it was in the 1700s or 1800s.

The fundamental problem with the majority decision in *Dobbs* is that it is an all of nothing approach. There are legitimate reasons to be concerned about the definition or unworkability of viability under *Roe* or the “undue burden” test under *Casey*. However, these concerns do not justify throwing the baby out with the bathwater. They may warrant a better and more principled and functional approach: a return to *Roe* and rejection of the *Casey* tinkering. These concerns do not demand the elimination of the right. Even Chief Justice Roberts rejects this all or nothing rule.

Further: (a) the clear recognition in Canada of constitutional principles of autonomy; (b) the different approach to equal protection; and (c) Canadian Constitutional structure, all dictate that *Dobbs* is not readily transferable to Canada.

As indicated above, the main case in Canada on abortion was *Morgentaler*. *Morgentaler* involved four different judgements and its plurality rationale (from three separate judgements) is unclear. Essentially, it is a procedural constitutional decision that struck the *Criminal Code* offence of procuring an abortion. This means that, based on that reasoning, Parliament could have fashioned a law that could have passed procedural constitutional muster. Chief Justice Dickson and Justice Lamer decided based on security of the person interests in respect of a criminal provisions that forced a woman to carry a fetus to full term and delay of the abortion process that was not fundamentally just because of an illusory defence. Justices Beetz and Estey found that denial of access to medical treatment through a criminal provision that had unfair procedural aspects was a violation of security of the person interests that was not in accordance with fundamental justice. Justice Wilson decided on the basis that there was a liberty right to abortion founded on personal autonomy and that the removal of this right was not in accordance with procedural fundamental justice because of the violation of freedom of conscience. Since the SCC in *Morgentaler* struck the criminal provision as violating section 7 of the *Charter* and found that it was not a reasonable limit under section 1 of the *Charter*, no new criminal law banning abortion has been introduced.

There is also the civil case in the SCC of *Tremblay v. Daigle*, [1989] S.C.J. No. 79, which indicates that the law in Quebec (and Ontario) does not recognize a fetus as a person under Quebec civil law (paras 60-61), under Anglo-Canadian civil law (paras 67-69), in respect of tort (para 70) or under

child welfare law (para 71). However, the case did not deal with or decide constitutional issues. However, the fact that Canadian law does not recognize that a fetus is a person is relevant to constitutional adjudication.

The rationale of Justice Wilson in *Morgentaler* (that there is a section 7 liberty interest engaged in respect of abortion derived from control of privacy that protects personal autonomy) has gained support in the last few decades. This rationale is closest to *Roe*. Autonomy as principle of security of the person engaging life choices was recognized by the majority of the SCC in *Rodriguez v. B.C.*, [1994] S.C.J. No. 94, at para 198 in the context of assisted suicide citing *Morgentaler*. In that case although the section 7 *Charter* security of the person interest was recognized, the SCC did not find a violation of fundamental justice and upheld the assisted suicide criminal provision.

The majority affirmed the point that there must be personal autonomy in respect of medical treatment in *Cuthbertson v. Rasouli*, [2013] S.C.J. No. 53, at para 18 citing an Ontario Court of Appeal case: *Fleming v. Reid* (1991), 4 O.R (3d) 74. Although this case did not deal with constitutional principles, the case relied upon on for this point (*Fleming*) was a constitutional case based on section 7 of the *Charter*.

Recently, the SCC reconsidered the result in *Rodriguez* and the majority again asserted a constitutional right under section 7 of the *Charter* to personal autonomy in life and death decisions in respect of assisted suicide in *Carter v. Canada*, 2015 SCC 5. At paragraph 67, the SCC said:

[67] ... competent individuals are — and should be — free to make decisions about their bodily integrity” (para. 39). This **right to “decide one’s own fate”** entitles **adults to direct the course of their own medical care** (para. 40): it is this principle that underlies the concept of “informed consent” and **is protected by s. 7’s guarantee of liberty and security of the person** (para. 100; see also *R. v. Parker* (2000), [2000 CanLII 5762 \(ON CA\)](#), 49 O.R. (3d) 481 (C.A.))...

Accordingly, while the thrust of the *Morgentaler* decision was procedural and the rationale of the was unclear when it was decided, the rationale of Justice Wilson, that almost mirrored *Roe*, has since gained acceptance by the majority of the SCC. It is also significant that this arose in the SCC’s decision recognizing the right to assisted suicide. The SCOTUS majority in *Dobbs*

distinguished the other autonomy cases from abortion because the other cases did not involve potential life. In *Carter*, the SCC made it clear that this principle applies even when this will involve, not just potential life, but the actual death of a living adult. There is no doubt that the basis for *Dobbs* would be rejected by the SCC.

The majority in *Dobbs* says that previous cases have already concluded that abortion laws do not create a distinction based on gender. This is nonsense. The fact that only women can be pregnant makes laws that preclude termination of pregnancy a law that impacts women differently than men. It interferes with a woman's personal autonomy and does not do so for a man. A law precluding abortion is not any more neutral than a law that precludes all people equally from sleeping under bridges. The law may not make an explicit distinction based on gender, but it clearly is as much a distinction based on gender as a law that precludes people with ovaries from voting.

The American approach to equality is different in Canada because of the structure of the Canadian Constitution.

In the *US Bill of Rights*, there is no limitation provision. However, no rights are absolute. Accordingly, limits in scope and purpose, have created exceptions and limits for each right through constitutional litigation and adjudication in the U.S. There is nothing in the 14<sup>th</sup> Amendment that dictates different levels of scrutiny for different kinds of distinctions. This was created by the Courts as a means of recognizing that there are likely to be distinctions made in respect of age that will usually be more justifiable than distinctions based on race or gender. The limits are built into the approach to and definition of the rights themselves.

In the *Canadian Charter of Rights and Freedoms*, section 1 says that all rights in the *Charter* are protected subject to reasonable limits. This does two things: (1) it guarantees all rights in the *Charter*; (2) it provides an approach to limitation of the rights. In Canada, once a law violates a right, the burden shifts to the Government to prove that the violation is a "reasonable limit, prescribed by law in a free and democratic society". This requires that the government show, with evidence, that there is: (1) a pressing and substantial objective served by the law that limits the right;

and (2) that the right is proportional. This approach precluded the SCC from adopting the differential scrutiny approach used in respect of Equal Protection clause under the 14<sup>th</sup> Amendment.

The SCC in *L.S.B.C. v. Andrews*, [1989] S.C.J. No. 143, the Court said:

**40 In determining the extent of the guarantee of equality in s. 15(1) of the Charter, special consideration must be given to the relationship between s. 15(1) and s. 1 ...**

It may be noted as well that **the 14th Amendment** to the American Constitution, which provides that no State shall deny to any person within its jurisdiction the "**equal protection of the laws**", **contains no limiting provisions similar to s. 1** of the Charter. **As a result, judicial consideration has led to the development of varying standards of scrutiny of alleged violations of the equal protection provision which restrict or limit the equality guarantee within the concept of equal protection itself...**

This led to a rejection of the US approach to equal protection in Canada.

The Canadian approach would dictate that the Mississippi law considered in *Dobbs* was a violation of section 15 of the *Charter* and would not likely be a reasonable limit under section 1.

- (1) The law creates a distinction in that, based on biology, it applies to women and not to men;
- (2) This is a distinction on an enumerated ground (sex (gender));
- (3) This creates a disadvantage by design and effect (either of which is discrimination);
- (4) This would not be a reasonable limit:
  - a) It would be a legitimate and compelling state interest to protect potential life;
  - b) It would not be proportional:
    - (i) It does rationally advance the objective of preserving potential life in that by prohibiting abortions after 15 weeks, potential life is preserved;
    - (ii) It does **not** minimally impair potential life. After 15 weeks but before viability, fetuses that are aborted would not be viable and therefore could not live outside the womb. If the law precluded pregnancy after viability, then the pregnancy could be terminated by birth. This would preserve the potential life and allow the woman to end her pregnancy. Termination prior to viability is not minimally intrusive of the woman's rights.

- (iii) The effects are **not** proportional. The woman's right to control her body would be violated, forcing her to carry a fetus she does not wish to carry, potentially risking her life or health and forcing her to be a biological parent. It provides for no exception based on the woman's health or on the basis of pregnancy from rape or incest. There are emotional harms that flow from the restrictions and indignities thrust upon her. On the other hand, a life **may** result that otherwise, might not.

In *Dobbs*, equal protection was not factor for the majority. I would suggest that even according to American law this is incorrect. However, even assuming that it is correct, equality rights under section 15 of the *Charter* would preclude *Dobbs* even aside from autonomy rights under section 7 of the *Charter*.

The majority in *Dobbs* (other than Justice Thomas) recognizes autonomy rights but distinguishes them on the basis that these rights are not absolute and are different than abortion because of the potential termination of life. This is not a persuasive or logical basis to distinguish abortion. However, even if it was, the approach of the SCOTUS is an all or nothing approach: since the right is not absolute and engages the termination of potential life no constitutional right to abortion founded in control of dignity and personal choices should extend to abortion. This approach is structurally inapplicable in Canada.

In Canada, the section 7 *Charter* right to autonomy in respect of bodily integrity and life choices would be violated by any law that restricts abortion. The burden would then shift to the government to determine whether the concerns of the majority constitute a reasonable limit. The same section 1 analysis set out in the context of equal protection suggests that the government could not establish a section 1 limit. However, concerns about a workable definition and variability of locations would be considered in this context. The fundamental problem would be that the protection of potential life could not be minimally intrusive insofar as it precludes abortion when the fetus is not viable.

Accordingly, since the majority in *Dobbs* is not persuasive and the structure of the *Charter*, equality principles, the clear recognition of substantive due process (fundamental justice) that

includes decisions about personal and body autonomy, it is clear that *Dobbs* would have no impact in Canada if someone sought to use it here.

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