Safe Access Zone Laws in Atlantic Canada

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What is safe access zone legislation?

Safe access zone or "bubble zone" legislation prohibits protests within a prescribed radius surrounding facilities that provide abortion services. These zones can extend between 50 to 150 metres from the boundary of a facility's property. Ultimately, such legislation ensures that physicians and other clinic staff are able to provide essential health services free of harassment and intimidation, and those seeking abortion services have access to the health services to which they are entitled.

In accordance with the preambles of existing legislation, the purpose of a safe access zone is to ensure the public's access to the health care system and to uphold the privacy, dignity, and fair treatment of patients, health care providers, and health care workers. Such legislation is in force in British Columbia, Ontario, Alberta, Nova Scotia, and Newfoundland and Labrador. New Brunswick and Prince Edward Island (PEI) do not currently have such legislation.1 Both New Brunswick and PEI have rich histories of advocacy in establishing access to abortion services; however, anti-choice protests continue to impede access in both provinces.

The efficacy of existing safe access zone legislation in Atlantic Canada, coupled with the difficult histories of creating access in New Brunswick and PEI, demonstrate the urgency for safe access zone legislation within these provinces. Establishing safe access zone legislation in New Brunswick and PEI would not only ensure the safety and dignity of service providers, clinic staff, and patients, but such legislation would also support access to abortion services more generally. Such legislation can increase equitable access by supporting physicians in their decision to provide access to medical abortion services within their private practices. Supporting access to medical abortion services is particularly important for physicians practicing in more remote communities where access to freestanding and hospital-based clinics is limited. Medical abortion services are provided by means of prescription medication, and such legislation would safeguard the pharmacies whose work actively upholds access.

[1] In 2016, Quebec enacted safe access zone legislation as part of the *Act respecting health services and social services*. Because of the language difference, Quebec's Act was not considered while drafting this document.

How safe access zone legislation can increase general access

Prior to beginning her current position as the co-medical director of the Women's Choice Clinic situated in the Victoria General site of the QEII Health Sciences Centre in Halifax, Dr. Melissa Brooks provided abortion services in Truro, Nova Scotia. While practicing in Truro, a smaller community in comparison to Halifax, Dr. Brooks noted the complete absence of protesters.[2] Dr. Brooks suggests that because she practiced as a private obstetrician-gynecologist and provided abortion services both in her private clinic and in a hospital, she "flew below the radar".[3] Although Dr. Brooks worked in Truro prior to the enactment of Nova Scotia's legislation, she suggests that such legislation can support physicians who are hesitant to offer abortion services out of fear of negative repercussions from community members. Dr. Brooks suggests that the increased access to abortion services accompanies a decrease in harassment of both providers and patients.[4]

Safe access zone legislation can increase general access by supporting local physicians in their decision to provide medical abortion services, particularly physicians with private family practices in smaller communities. In smaller communities where access to abortion may be more polarizing than in larger cities, the existence of such legislation can play a significant role in a physician's decision to offer access to Mifegymiso. Safe access zone legislation creates the opportunity for providers to establish a zone surrounding their medical offices as well as their residences. As explored below, increased access to medical abortion in private family clinics also increases patients' anonymity.

Nova Scotia

In the wake of International Women's Day 2020, Bill 242, *An Act to Protect Access to Reproductive Health Care* ("Nova Scotia's *Act*") received royal assent. According to legislative documents, during the second reading debates, Bill 242 received unanimous support.[5]

Despite tremendous support from the legislative assembly, Bill 242 (the "Bill") met some resistance before the Law Amendment Committee (the "Committee"). This resistance was led by anti-choice groups and private individuals. Megan Boudreau, a psychology student at Saint Mary's University in Halifax, was the driving force behind the Bill. Speaking before the Committee, Boudreau encapsulated the Bill's energy by quoting Shannon Hardy, a social worker and abortion doula: "telling someone that they can't access health care is violence. You can't peacefully take somebody's rights away, regardless of how you're doing it".[6] Following the Committee meeting, the Bill continued to a third reading, and received royal assent merely four days later.

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[2] Interview of Dr. Melissa Brooks by Isabel Cox (11 January 2022) [*Dr. Brooks*].
[3] Ibid.
[4] Ibid.
[5] "Bill 242, An Act to Protect Access to Reproductive Health Care", 2nd reading, Nova Scotia, Legislative Assembly, 63-2 (4 March 2020) at 5746–5756.
[6] Nova Scotia Legislature, Law Amendment Committee, *Bill 242*, (6 March 2020) at 4 (Megan Boudreau).

Nova Scotia's safe access zone legislation

The following analysis concerning the efficacy of Nova Scotia's *Act* is largely informed by interviews with Dr. Melissa Brooks and Dr. Lianne Yoshida. Both Dr. Brooks and Dr. Yoshida are the co-medical directors of The Women's Choice Clinic in Halifax. Dr. Yoshida trained with Dr. Henry Morgentaler in Toronto and currently provides abortion services in Halifax, NS and Summerside, PEI.[7] Dr. Brooks provides abortion services in Halifax and previously in Truro, NS, both in a hospital-based clinic and at her private obstetrician and gynecologist clinic.[8]

Dr. Yoshida and Dr. Brooks expressed their gratitude for the new legislation, but noted that as service providers in Halifax, they have limited experience with protesters and do not currently plan to apply to establish a safe access zone surrounding their respective residences pursuant to s.8 of Nova Scotia's *Act*.[9] Prior to the enactment of the *Act,* the extent of their collective experience with anti-choice protesters in Nova Scotia was seeing "peaceful" protesters in the hospital's parking lot.[10] Dr. Brooks specified that "peaceful," in this context, refers to those who do not engage with hospital staff, patients, or pedestrians, but silently protest on the sidewalk in front of the hospital's parking lot.[11] Although silent, the presence of protesters inhibits access.

Prior to the enactment of the *Act,* each year, the presence of protesters increased throughout the month of October with the 40 Days for Life campaign.[12] Protesters participating in this "campaign" would demonstrate on the sidewalk outside of the Victoria General Hospital. These demonstrations were the catalyst for Megan Boudreau's campaign to establish safe access zone legislation.[13] Since the enactment of the *Act*, both Dr. Brooks and Dr. Yoshida noted the absence of protesters outside of Victoria General. However, the enactment of Bill 242 coincided with the onset of the Covid-19 pandemic. Accordingly, pandemic restrictions are a factor that may account, at least in part, for the absence of protesters and the lack of challenges to the new *Act*.

What sets Nova Scotia's Act apart from other provincial legislation

Safe access zone legislation is largely similar amongst the provinces. Each act prohibits anti-choice protesters from demonstrating within a prescribed radius of an eligible facility in which abortion services are provided. Each act allows abortion service providers and clinic staff to establish a safe access zone around their residence. In both Nova Scotia and Alberta, service providers and clinic staff must apply to establish such zones around their residences; however, in BC, Ontario, and Newfoundland, these protective zones are created automatically. Every act is concerned with patients' privacy and bodily autonomy and prohibits the recording of patients and clinic staff. British Columbia's *Access to Abortion Services Act* ("BC's *Act*") was the first of its kind. Because it was upheld in the face of

[7] Interview of Dr. Lianne Yoshida by Isabel Cox (20 January 2022) [*Dr. Yoshida*].
[8] Dr. Brooks, supra note 2.
[9] Protecting Access to Reproductive Health Care Act, 2020, NS, c 5, s 8 [Nova Scotia's Act].
[10] Dr. Brooks, supra note 2.
[11] Ibid.
[12] Ibid.
[13] Interview of Megan Boudreau by Isabel Cox (14 January 2021) [*Megan Boudreau*].

repeated *Charter* challenges, it will be treated as the primary reference in exploring the evolution of safe access zone legislation, particularly in relation to Nova Scotia's new *Act*.[14]

Each provincial act contains a list of activities prohibited within the designated safe access zones. BC's *Act* includes the act of "beset[ting]", which it defines as follows: "to continuously or repeatedly observe a service provider […] or (b) to place oneself close to, and to importune a service provider".[15] Unlike Ontario's *Safe Access to Abortion Services Act* ("Ontario's Act") that drops "beset" entirely from its list of prohibited activities, Nova Scotia's *Act* expands the list of prohibited activities contained in BC's *Act*, while preserving and modifying the meaning of "besetting".[16]

The Nova Scotia *Act* defines "besetting" as "plac[ing] oneself close to, and to importune, a […] service provider".[17] By breaking down the definition provided in BC *Act*'s, Nova Scotia's *Act* prohibits "continuously or repeatedly observ[ing] a […] services provider" as a prohibited activity independent from "besetting".[18] Like the Ontario *Act*, the Nova Scotia *Act* continues with a detailed list of specific prohibited activities.[19] This specificity may be an attempt to prevent similar constitutional challenges that followed the enactment of BC's *Act*.[20]

Facilities and clinics

Both Nova Scotia's and Ontario's legislation establish a safe access zone surrounding facilities that provide abortion services. BC's *Act* creates the opportunity for service providers to apply for a protected access zone surrounding their facility.

The definition of "facility" also varies among the existing legislation. The BC *Act* defines "facility" as "a hospital, clinic or doctor's office in which abortion services are provided".[21] Throughout the evolution of such legislation, the definition of "facility" in the Nova Scotia and Ontario *Acts* have expanded to include "health centre[s]", "pharmac[ies]", and other "premises prescribed by regulations, in which abortion services are provided".[22] The inclusion of "pharmac[ies]" is recognized by service providers as an important advancement.[23] Pharmacies are instrumental in actively ensuring access to medical abortion services by fulfilling prescriptions for Mifegymiso, which has played a significant role in increasing general access.

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[14] For more about constitutional challenges to British Columbia's legislation see *R v Spratt,* 2008 BCCA 340*. R v Lewis,* 1996 CanLII 3559 (BCSC), [1996] BCJ No 1254.

[15] Access to Abortion Services Act, RSBC 1996, c 1, s 1 [British Columbia's Act].

[16] Safe Access to Abortion Services Act, SO 2017, c 19, s 1 [Ontario's Act]; Nova Scotia's Act, supra note 6 at s 1.

[17] Nova Scotia's Act, supra note 9 at s 2(c).

[18] *Ibid* at s 3(1)(c).

[19] *Ibid* at s 3(1)(a)–(g).

[20] See note 14. (*R v Spratt,* 2008 BCCA 340*. R v Lewis,* 1996 CanLII 3559 (BCSC), [1996] BCJ No 1254.)

[21] British Columbia's Act, supra note 15 at s 1.

[22] Nova Scotia's Act, supra note 9 at s 2(e); Ontario's Act, supra note 16 at s 2(a).

[23] Although this goes beyond the scope of this analysis, it is important to note that the Manitoba Bill proposing safe access zone legislation includes schools as a protected facility.

What is protected?

Facilities, clinics, and pharmacies

Nova Scotia's *Act* establishes protected access zones extending 50 metres from the property line of clinics, facilities, health centres, and pharmacies that provide abortion services (the "facility").[24] With the approval of the Governor in Council, facilities may apply to extend this protected zone up to 150 metres from the land's boundaries.[25]

Residences of service providers and clinic staff

Nova Scotia's *Act* gives abortion service providers and other clinic staff the opportunity to apply to establish a safe access zone of up to 160 metres surrounding their residences.[26] The zones surrounding residences, facilities, clinics, and pharmacies are subject to limitation.[27]

The protected zones assured by Nova Scotia's *Act* can only be applied to the surrounding public property.[28] According to s.7(3)(a)–(c), should a facility be surrounded by private property, the 50 metre safe access zone would not extend to any surrounding private property that is not owned or otherwise lawfully occupied by the facility.[29] Similarly, should a facility be located within a multi-unit building, the protected access zones would not extend beyond the facilities' boundaries or to any common areas not owned or otherwise lawfully occupied by the facility.[30]

The zones established around residences are subject to the same limitations as facilities. Accordingly, should a residence be surrounded by private property and be granted permission for a 160 metre access zone, the radius of this zone excludes any private property that is not owned or otherwise lawfully occupied by the applicant.[31] Likewise, should a residence be located in a multi-unit building, the protected zone does not extend to any unit that is not owned or otherwise lawfully occupied by the applicant.[32] The zone also excludes any common spaces within the multi-unit building.[33]

The limitations placed on the areas surrounding both facilities and residences attempt to reconcile competing *Charter* rights: an individual's bodily autonomy, and an individual's right to free expression, which were the foci of the unsuccessful challenges to BC's *Act*.[34] As will become apparent in the context of Clinic 554 in Fredericton, such limitations would not solve all the issues Clinic 554 faces in providing safe access to abortion services; however, safe access zone legislation would provide recourse for several issues the Clinic presently faces. Such legislation, despite its limitations, would significantly increase the safety of both clinic staff and patients.

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[24] *Ibid* at ss 7(1), 2(e).
[25] *Ibid* at s 16(1)(d).
[26] *Ibid* at ss 8(1)–(3).
[27] *Ibid* at ss 8(1)–(3)., 7(3)(a)–(c).
[28] *Ibid* at ss 7(3)(a)–(c).
[29] *Ibid* at ss 7(3)(c)(i)–(ii).
[30] Ibid.
[31] *Ibid* at ss 8(4)(a)–(c)(ii).
[32] *Ibid* at ss.8(4)(a)–(c)(ii)).
[33] *Ibid* at ss.8(4)(a)–(c)(ii).
[34] see *R v Lewis,* 1996 CanLII 3559 (BCSC), [1996] BCJ No 1254.

How are hospital-based and freestanding clinics affected differently

Many of the service providers in Atlantic Canada expressed their concern for freestanding clinics in jurisdictions that are unprotected by safe access zone legislation. Nova Scotia's *Act* reflects the enhanced security of hospital-based clinics. Dr. Brooks noted that all clinics have a safety culture, but hospital-based clinics have certain security advantages over freestanding clinics.[35]

Hospitals, by their nature, are places that provide a variety of medical services. Accordingly, they are situated on larger properties, and many are positioned near parks or other recreational facilities like walking trail systems. As noted above, safe access zones extend to the public property surrounding a facility, which includes common gathering areas like parks and other recreational facilities. Although safe access zones begin at the boundary of a facility's property, protesters are also prohibited from demonstrating on the facility's property itself. The sheer size of the property, regardless of the nature of surrounding properties, increases the distance between a clinic's entrance and the nearest plot of privately owned land on which protesters could be permitted to demonstrate.

Hospital-based clinics also provide increased anonymity and deter protesters. Dr. Yoshida notes that the traffic at hospital entrances inhibits protesters from engaging with those seeking abortion services.[36] Because of the sheer number of medical services provided in hospitals, patients' anonymity is preserved. This anonymity is reflected in hospitals' treatment and positioning of these clinics. For example, the Women's Choice Clinic in the Victoria General site of the QEII is completely unmarked. There is no signage, and the clinic is only accessible by approved staffs' key cards.[37] Dr. Brooks lightheartedly suggested, "I'm sure there [are] lots of people who work in the hospital who don't even know what happens behind those doors".[38] Hospital-based clinics also have access to more resources than freestanding clinics, particularly regarding provincial funding. Like the government of New Brunswick, the provincial government of Nova Scotia does not fund freestanding clinics.

Newfoundland and Labrador

History of access in Newfoundland

The Supreme Court of Canada legalized abortion 25 years ago.[39] Henry Morgentaler challenged Canada's anti-abortion law on constitutional grounds and opened a variety of clinics, one of which was in St. John's Newfoundland.[40] The St. John's clinic opened in October of 1990, and in 2010 was taken over by Rolanda Ryan the owner of Athena health centre.[41]

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[35] Dr. Brooks, supra note 2.
[36] Dr. Yoshida, supra note 7.
[37] Dr. Brooks, supra note 2.
[38] Ibid.
[39] Justin Brake. "There aren't women who have children and women who have abortions". *The Independent news*. (24 April 2014), online:< https://theindependent.ca/news/there-arent-women-who-have-children-and-women-who-have-abortions/> [*Brake*].
[40] Pelrine, Eleanor. Morgentaler: *The Doctor Who Couldn't Turn Away*. 2nd edition. (Halifax: Goodread Bibliographies, 1983).
[41] Brake, *supra* note 39.

A 1998 article, in the *Canadian Medical Association Journal*, spoke to the realities of women needing to pay out-of-pocket for abortion services despite being covered by the *Canada Health Act.*[42] In Newfoundland, these costs ranged from $400 to $750.[43] In 1993, the province began paying the salaries of physicians, and the Athena Clinic was able to reduce its fees.[44] In 1995, the Federal government required all provinces to cover the cost of abortions in private clinics, but only if the individual was eligible for provincial health care[45]. By 1998, the Newfoundland government fully funded abortion services.[46]

In 2016, new safe access zone legislation was implemented to ensure the security of patients and clinic staff while safeguarding patients' rights to access to abortion services. Andrew Parsons, Minister of Justice and Public Safety and Attorney General noted,

"The intent of the proposed new *Access to Abortion Services Act* is to balance the rights of individuals to secure, respectful and private access to legal health services, with the rights of others to protest or express dissent. Those who provide services should also be treated with courtesy and respect while those who choose to protest abortion services have the right to do so, but outside of established safe access zones".[47]

The *Access to Abortion Services Act* received royal assent on December 14, 2016. The *Act* creates a safe access zone up to a maximum of 50 metres around health care facilities, 160 metres around a doctor's residence, and 10 metres around a doctor's office. These zones are automatically implemented. Unlike similar legislation in British Columbia, clinics and facilities in Newfoundland and Labrador are not required to apply to the Governor in Council to establish a *safe access* zone (although BC's law provides automatic protection to providers' homes and offices). The activities that are restricted in access zones are as follows:

- Engaging in interference;
- Protesting;
- Besetting;
- Physically interfering with or attempting to interfere with a patient, service provider or doctor who provides abortion services; or
- Intimidating or attempting to intimidate a patient and service provider or doctor who provides abortion services.[48]

Graphic recording in access zones and harassment of any kind is also prohibited.[49] The Minister of Finance and Treasury Board and Minister Responsible for the Status of Women, Cathy Bennett stated that

"This legislation is very important for women. As Minister responsible for women's policy, I am very pleased to support a woman's right to *safe access* to any service she chooses. A woman should not be subject to intimidation or invasion of privacy based on a

[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] Ibid.
[47] Newfoundland Labrador Canada, "Enhancing Safe Access to Health Care Services", Justice and Public Safety Executive Council (17 Nov 2016), online:<https://www.releases.gov.nl.ca/releases/2016/just/1117n03.aspx> at para 2.
[48] Access to Abortion Services Act, 2016, NL, c A-1.02, s3(a)–(e) [Newfoundland's Act].
[49] *Ibid* at s 4–5.

personal choice she is making. This is about safety. I support any action that ensures a woman feels safe and secure in accessing any service she feels is right for her".[50]

Safe access zone legislation is important because it enables access to legal and essential medical services free of fear of harassment, while ensuring service providers and their staff are able to work free from harassment.

Enacting safe access zone legislation in Newfoundland and Labrador

Newfoundland's legislation is largely adopted from British Colombia's law because that law has been upheld by the courts.[51] The BC legislation requires clinics and facilities to apply for a safe access zone to be established,[52] while in Newfoundland the safe access zones are automatically enacted.[53] The legislation is similar because both provide the opportunity to establish safe access zones surrounding homes and offices, and prohibit sidewalk interference, protesting, besetting, physical interference, and intimidation. These zones are critical because they protect doctors, personnel, and patients while entering and exiting the facility.[54] The zones defend patient's rights to health care and protect their health by reducing emotional distress induced by protesters.[55]

Moreover, the Athena Health Centre in St. John's (previously the Ryan Clinic) is the main reason that the legislation was passed. Every year, about 2,000 abortions are performed in St. John's and roughly 70 to 80 percent of those abortions occur at Athena.[56] Like most freestanding clinics, the Athena Clinic has been the site of many anti-choice protests (or a sentence like that to transition). The owner of the clinic, Rolanda Ryan, filed an injunction to prevent demonstrators from occupying the space directly outside the Marchant Road clinic.

During an interview with Ryan, she explained how she had to create change because the protesters were actively engaging with patients and further violating their privacy and physical autonomy by recording them.[57] The clinic installed security cameras inside the waiting room and one staff member worked security. Both staff and patients were stressed and fearful of the protesters' presence. On her own expense, Ryan spent approximately $22,000 on lawyer and court fees to lobbying for this change .[58] She indicated that the provincial government should have been involved from the beginning, and that it is not effective for some provinces to have safe access zone legislation while others do not.[59] In 2015, The Supreme Court of Newfoundland and Labrador granted an injunction stating that

[50] Newfoundland Labrador Canada, supra note 47 at para 5.
[51] Joyce Arthur. "Opinion: Safe access zones at abortion clinics are constitutional" (31 May 2018), online: < https://edmontonjournal.com/opinion/columnists/opinion-safe-access-zones-at-abortion-clinics-are-constitutional>.
[52] British Colombia's Act, supra note 15.
[53] *Newfoundland's Act*, *supra* note 48 s3(a)–(e).
[54] Joyce Arthur, supra note 51.
[55] Ibid.
[56] Brake, supra note 39.
[57] Interview of Rolanda Ryan by Cindy Abreu (25 January 2022) [*Rolanda Ryan*].
[58] Ibid.
[59] Ibid.

protesters could not demonstrate within 50 metres of the clinic.[60] The injunction lasted until the legislation was enacted. Although 50 metres is manageable, Ryan expressed that it should be changed to align with the 150 metres that clinics in other provinces such as Ontario are able to apply for. Since Newfoundland only allows for 50m and does not allow for an increase, Ryan stated in the future she will request an increase.

Has the Newfoundland act been effective?

The interview with Rolanda Ryan demonstrates that safe access zone legislation has been effective. Prior to the enactment, and the Athena Clinic's relocation, protesters would stand in front of the clinic. Staff would use the back entrance to avoid the protesters; however, patients used the front entrance. In order to access the clinic, patients had to navigate through groups of protesters.

In 2015, the Clinic moved across the street. Due to the structure of the property, there was no access through the back of the building without having to go through the driveway where the protesters were.[61] Protesters would attach cameras to their signs, which posed a great concern for patients' safety and privacy. Ryan noted that some of the Clinic's patients experienced abuse, and safeguarding their privacy is an essential element in ensuring access to abortion services. One member of staff was also concerned about the security of her other job because of her connection to the Clinic should her image be circulated. Ryan spoke about her personal experiences with protesters; however, for privacy reasons, they will not be detailed. She did express that protesters have previously collected her personal information and invaded personal matters by showing up to private family events to criticize her resilient advocacy.

After the legislation was passed, protesters were not allowed to be within 50 metres of the Clinic's property line.[62] Clients and staff are more comfortable and are not as afraid now that the protesters have been pushed back. The only negative aspect is that people still have to drive by protesters, and the bus stop is near where they are located; thus, patients and staff remain vulnerable to unwelcomed interaction with protesters. This *Act* helped to bring the community closer. Since the protesters' activity was highly publicized, the public became more aware and demonstrated their support for the Clinic. Ryan shared that some community members approached her and spoke of their support for the new legislation. Ryan's personal experiences have improved as well since the protesters were no longer able to go near her residence and Clinic due to the legislation.

Abortion services in Newfoundland Labrador

The St. John's Hospital also provides abortion procedures, but most women choose to attend the Athena Clinic. In conversation with the Clinic's owner, Ryan shed light on patients' preference by explaining:

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[60] Laura Howells, "Protests banned within 40 metres of St. John's abortion clinic", CBC (28 June 2016) online < https://www.cbc.ca/news/canada/newfoundland-labrador/athena-health-clinic-abortion-protesters-lawsuit-1.3656213>.

[61] *Ibid*.

[62] *Newfoundland's Act*, *supra* note 48, s 3(a)–(e).

"If the [hospital's] counselor feels that the person isn't ready for this, that she's not sure of her decision, then the counselor won't let it progress beyond that [and] she will stop the abortion from happening that day," she explains. "So, in some cases that means the woman leaves, rebooks the appointment and comes back a week or two later when she's given more thought to it, and in some cases, it means the woman leaves and never comes back".[63]

By the latter comment, Ryan meant that many patients end up coming to Athena instead. Freestanding clinics provide support throughout a patient's journey and a welcoming environment.[64] Abortions performed in freestanding clinics are less costly to the province.[65] Patients who receive procedures performed in freestanding clinics are sent home on the same day. Although hospital-based clinics do have advantages in terms of security and anonymity, freestanding clinics are essential to ensure equitable and future access to abortion services.

Individuals living on Newfoundland's West Coast, Northern Peninsula, and other remote areas including Labrador, do not have access to abortion services. The Athena clinic does, however, provide abortion services through their satellite clinics, which are only available once per month according to Ryan.[66] This presents barriers to access by requiring individuals seeking abortion services to travel long hours at their own expense. Since the Morgentaler Clinic in Fredericton closed in 2014, the Athena clinic is the only private, freestanding abortion clinic in Atlantic Canada.

Creating access in Newfoundland and Labrador

The major barrier to access in Newfoundland is geography itself. Once per month, Athena Clinic's staff provide satellite clinics to ensure access to all the clinic's services including abortion. The satellite clinic provides education surrounding abortion services, particularly regarding the increased access to Mifegymiso. This is a combination medication that contains two chemicals (mifepristone and misoprostol), which are administered in a specific order for medical abortion.[67]

Suggestions for future amendments

Ryan notes the troubling effects of anti-choice protesters demonstrating outside of Newfoundland schools.[68] June 12, 2017, the high school west of St. John's was crowded with protestors and students walking to and from their exams. They were faced with graphic posters.[69] Three protesters stood at the entrance to Waterford Valley High School on Topsail Road. Their posters advertised a website that the group claimed contains accurate information about abortion procedures. Jenny Wright, the executive director of the St. John's

[63] *Brake*, *supra,* note 39.
[64] *Ibid*.
[65] Interview of Dr. Adrian Edgar by Isabel Cox and Cindy Abreu (14 January 2022) [*Dr. Edgar*].
[66] *Ibid*.
[67] Government of Canada, "Health Canada approves update to Mifegymiso prescribing information", (16 April 2019) < https://recalls-rappels.canada.ca/en/alert-recall/health-canada-approves-updates-mifegymiso-prescribing-information-ultrasound-no-longer>.
[68] Rolanda Ryan, supra note 57.
[69] Ibid.

Status of Women, is concerned about the mental wellbeing of the students.[70] She states that "they're developing minds and when they're not old enough or experienced enough in terms of their own values and ethics, to digest this kind of biased and exploitative messaging without context — it can be quite harmful".[71] The legislation does not include schools and although this is not a current concern to the school district, Wright urges the school should act on moving the protestors away from school zones as this kind of lobbying is very pervasive.[72]

Anti-choice protesters throughout the country are gathering around school grounds. This incident at Waterford Valley High School is reminiscent of similar events that occurred outside of a Calgary high school in 2019, which sparked the city to enact a bylaw that echoes safe access zone legislation. The bylaw prevents signs expressing opinions that exceed 3.5" x 5" in size from being displayed within 150 metres of a school on a school day.[73] Manitoba is currently engaged in legislative debates surrounding a proposed bill to enact safe access zone legislation, which proposes to include school yards as areas eligible for safe access zones.[74]

New Brunswick

History of access in New Brunswick

Even before the Morgentaler case reached the Supreme Court of Canada in 1988, anti-choice legislators in New Brunswick were active in their efforts to constrain abortion access. In 1985, following a proposal by Dr. Morgentaler to open an abortion clinic in the province, Progressive Conservative Premier Richard Hatfield (1970-1987) pushed to modify the province's *Medical Act*.[75] Physicians who are found to be "involved in performing an abortion elsewhere than in a hospital approved by the Minister of Health" are in violation of the amendment and face a charge of professional misconduct.[76] While abortions remained illegal, unless authorized by a Therapeutic Abortion Committee, this change would have permitted Morgentaler's licence to be revoked if he tried to open and operate a private clinic in the province.[77] After the enactment of this amendment, the Supreme Court decriminalised abortion in *R. v. Morgentaler* (1988), and, as a matter of health care, delegated jurisdiction over the procedure to the provinces.[78] Hatfield's 1985 amendment, which prohibited abortions outside of licensed hospital centers, was the only law in effect.

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[70] *Ibid* at para 8.
[71] *Ibid*. at para 8.
[72] *Ibid*. at para 23.
[73] Sarah Rieger, "Bylaw amendment bans graphic anti-abortion posters, other advocacy signs near Calgary Schools", CBC News (6 October 2020), online: < https://www.cbc.ca/news/canada/calgary/advocacy-sign-bylaw-calgary-schools 1.5751698#:~:text=The%20bylaw%20prevents%20anyone%20from,be%20fined%20upward %20of%20%24500>.
[74] Bill 207, *The Abortion Protest Buffer Zone Act,* 3rd Sess, 42nd Leg, Manitoba, 2021.
[75] Lianne Mctavish, *Abortion in New Brunswick*, Acadiensis: Journal of the History of the Atlantic Region, 44 (2), 2015 [*Lianne Mctavish*].
[76] Mollie Dunsmuir, *Abortion: Constitutional and Legal Developments*, in Current Issue Review 89-10E. Ottawa: Library of Parliament, 1990 [*Mollie Dunsmuir*].
[77] Rachael Johnstone, "Explaining Abortion Policy Developments in New Brunswick and Prince Edward Island", Journal of Canadian Studies, 52 (3) 774, 2018 [*Rachael Johnstone*].
[78] *R v Morgentaler* [1988] 1 SCR 30, 1988 CanLii 90 [*R v Morgentaler*].

Morgentaler brought the first lawsuit against New Brunswick's abortion rules in 1989, when he sued the province for compensation for three abortions he performed for New Brunswick residents at his Quebec clinic.[79] At the time, there was no specific rule regulating abortions performed by doctors outside of the province. Morgentaler argued before the New Brunswick Court of Queen's Bench that he should be compensated for his operations under New Brunswick Medicare since the regulations limiting abortion access did not specifically extend to services provided outside the province.[80] The New Brunswick government outlined the required criteria to be eligible for payment of abortion claims, which were purported to align with the 1988 Supreme Court of Canada judgement. To be eligible for reimbursement by Medicare, ”two physicians must affirm that the abortion is medically necessary, and the procedure must be performed in an accredited hospital by an Obstetrics/Gynecology expert. Outside of New Brunswick, abortions must likewise follow the same standards”.[81] Morgentaler was seeking a declaration that the policy of Medicare New Brunswick, which states that no abortion will be recognised as an entitled service unless two physicians state that the abortion is medically necessary and the procedure is performed in an approved hospital by a specialist in gynaecology and obstetrics, is ultra vires with respect to abortions performed outside the Province because it is not authorised by the Act or the Regulations under the [*Medical Services Payment*] Act.[82]

In his letter to Dr. Morgentaler, the Minister of Health and Community Services said a "policy [above] has been adopted by the Government of New Brunswick".[83] The Minister’s letter explains that *Medical Services Payment Act*, is “a private Act governing the medical profession, [and] has no application to members of the profession in other provinces”.[84] The court determined that a doctor who provides such services, as well as the patient who undergo them, should not be denied Medicare coverage just because something that is allowed in another jurisdiction is inconsistent with New Brunswick legislation. The court found in favour of Morgentaler, and he was awarded costs totalling $750. Instead of challenging the verdict, the province took steps to close the policy's legal gap concerning the discrepancy between the provinces. A declaration that the government's policy that no abortion performed outside the New Brunswick would be recognized as an entitled service unless approved by two physicians and performed in an approved hospital by a specialist was found invalid with respect to abortions performed outside of New Brunswick. [85]

In 1994, Morgentaler opened a free-standing clinic in New Brunswick. Six years after abortion was decriminalised, Premier McKenna had threatened him with “the fight of his life”.[86] On the day the Morgentaler clinic opened in 1994, the McKenna administration invoked Hatfield's 1985 amendment, closing the clinic and pressing the New Brunswick College of Physicians and Surgeons to withhold Morgentaler's licence.[87] Morgentaler brought

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[79] Mollie Dunsmuir, supra note 74.
[80] Ibid.
[81] Morgentaler v New Brunswick (Attorney General) [1989] 98 NBR (2d) 45, 1989 CanLii 8086 at 4 [Morgentaler v New Brunswick].
[82] *Ibid,* at 5.
[83] Ibid, at 8.
[84] *Ibid*, at 8.
[85] Lianne Mctavish, supra note 73.
[86] Hansard Parliamentary Debates. Legislative Assembly of New Brunswick. (22 February 1994).
[87] Donalee Moulton, *New Brunswick assailed over “sexist” abortion laws.* Canadian Medical Association Journal 169(7): 700, 2003 [*Donalee Moulton*].

the New Brunswick government to the Court of Queen's Bench again, this time to have Hatfield's amendment struck down.[88] Morgentaler was successful. The court noted that the amendment was created to "prohibit the formation of freestanding abortion clinics, specifically the opening of such a clinic by Dr. Morgentaler," rather than to "provide the finest quality care for women in the province."[89] The decision was "upheld on appeal to the New Brunswick Court of Appeal and leave to appeal to the Supreme Court of Canada was denied". [90] Morgentaler's licence was restored by the New Brunswick College of Physicians and Surgeons, and his clinic was allowed to remain open.

In 2003, Morgentaler filed another lawsuit against the New Brunswick government, this time contesting the province's financing limitations. According to his petition, he sued because the government's change to the *Medical Services Payment Act* was unconstitutional because it "erects a barrier to abortion services that violates rights guaranteed to women under s. 7 and 15 of *the Canadian Charter of Rights and Freedom*s.[91] He went on to say that the amendment was incompatible with, and in breach of, the Canada Health Act since the province was not offering services that were a crucial component of women's reproductive health care.[92]

In 2004, the Coalition for Life submitted an application for intervenor status in the Morgentaler case.[93] This was rejected on the basis that the institution had no more direct stake in the concerns raised than any taxpayer and had established no unique knowledge not accessible elsewhere.[94] In 2005, the Coalition filed an appeal, but the verdict was upheld, and it was denied leave to appeal to the Supreme Court of Canada.[95]

Morgentaler's status was challenged in 2008, with the province suggesting that a woman would be better equipped to move the case forward.[96] Morgentaler replied by claiming that, while there are people who are more affected negatively by the legislation than he is, these people are unlikely or are unable to dispute it for a number of reasons, and therefore he should be awarded interests of the public standing in the case.[97] The Court of Queen's Bench of New Brunswick based its decision on Morgentaler meeting the requirements of the following three branches:

- First, is there a serious issue raised as to the invalidity of legislation in question?
- Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity?
- Third, is there another reasonable and effective way to bring the issue before the court?[98]

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[88] Johnstone, supra note 75.
[89] Morgentaler v New Brunswick, supra note 79, at 44.
[90] Karine Richer, Abortion in Canada: Twenty Years After R. v. Morgentaler. Ottawa: Library of Parliament, 2008 at para 8.
[91] *Morgentaler v New Brunswick.* [2004] 49 CPC (5th) 134. (Can) note 79, at 27.
[92] Ibid.
[93] Ibid.
[94] *Ibid.* at para 17.
[95] Ibid.
[96] *Morgentaler v New Brunswick.* [2008] 295 DLR (4th) 694. (Can) at 18.
[97] *Ibid.* at para 19.
[98] Ibid, note 9.

In regard to the validity of the legislation, the Court did not need to evaluate whether the plaintiff will succeed; rather, the court was required to determine whether Morgentaler being granted public interest status was of serious concern or merely vexatious.[99] The issue of Morgentaler being granted status in this case was found to be substantial and justifiable because of his role as a physician, so the first question was satisfied. The court also found that due to Morgentaler's position, he met the standard of having a "genuine interest in the [legislation's] validity".[100] Because of the "intimate and private nature" of the decision to terminate a pregnancy, Justice Jenkins decided that "it [was] unreasonable to expect a woman seeking access to abortion to carry out a court challenge".[101] The court decided in favour of Morgentaler. Although Morgentaler was granted public interest standing, he would be unable to mount a *Charter* challenge regarding his individual rights. The province of New Brunswick was ordered to pay costs quantified at $5,000.

In 2010, Morgentaler did not have the financial capabilities to continue with the lawsuit battle. Many advocates believed that the province was engaging in deliberate delaying tactics. In 2013, Morgentaler passed away and his family dropped the lawsuit the following year.[102], [103]

In 2015, a new medical centre called Clinic 554 reopened inside the former Morgentaler clinic in Fredericton. It was the only private clinic in the province that provided abortion services.[104] In 2017, the province began fully funding Mifegymiso, including clinic 554. However, aspiration and surgical abortions performed outside of the hospital are still not covered by Medicare. Accordingly, the province does not fund aspiration and surgical abortions performed at Clinic 554. These abortions can cost a patient between $750 and $800 if the clinic does not reduce or waive the fee.[105] The province's *Medical Services Payment Act* Regulation 84-20 excludes abortions[106] performed outside of hospitals from reimbursement.[107] Medicare only covers abortions that are performed at the three designated hospitals in the province, two of which are in Moncton and one is in Bathurst. According to Dr. Edgar, Clinic 554 has performed more than 1,000 abortions.[108] Each month, patients were referred to Clinic 554 from New Brunswick hospitals. Abortions performed in hospital are available to those whose pregnancy is under 13 weeks and 6 days, whilst Clinic

[99] New Brunswick v Morgentaler, 2009 NBCA 26.
[100] Morgentaler v New Brunswick, supra note 101, at 26.
[101] *Ibid* at para 21, 18.
[102] Johnstone, supra note 75.
[103] CBC News, "Morgentaler lawsuit against New Brunswick to be dropped" (15 April 2014), online: < https://www.cbc.ca/news/canada/new-brunswick/morgentaler-lawsuit-against-new-brunswick-to-be-dropped-1.2611164 >
[104] Ibid.
[105] Hadeel Ibrahim, "Clinic 554 and abortion access: 5 key questions answered", CBC News (10 Sept 2020), online: <https://www.cbc.ca/news/canada/new-brunswick/clinic-554-abortion-access-new-brunswick-election-1.5713098>.
[106] The rest of this paragraph refers only to aspiration and surgical abortions, as Mifegymiso abortions are fully covered by Medicare regardless of where they are done.
[107] Ibid.
[108] Lindsay Jones, "Clinic 554 for sale as N.B government refuses to cover cost of abortions outside hospitals", MacLean's Journal (13 April 2020), online: <https://www.macleans.ca/society/health/clinic-554-for-sale-as-n-b-government-refuses-to-cover-cost-of-abortions-outside-hospitals/>.

554 can provide abortion services up to 15 weeks and 6 days pregnant and allow same-day admission.[109]

In 2021, a new lawsuit was launched against New Brunswick by Clinic 554, together with the Canadian Civil Liberties Association.[110] Their suit claims the province is violating the *Canada Health Act* and the *Charter of Rights and Freedoms* by not funding abortions outside hospitals.

Chaleur Hospital Injunction (Bathurst, NB)

Regional Health Authority A, operating as Vitalité Health Network ("Vitalité"), was granted an interlocutory injunction in October 2012, prohibiting the defendant anti-choice protester from moving about or occupying the Chaleur Regional Hospital grounds.[111] The evidence reveals that the defendants identified in the Notice of Motion filed by Vitalité were promoting their anti-choice agenda as part of the annual "40 Days for Life" event on Chaleur Regional hospital property.[112] Several safety concerns arose as a result of the demonstrators' presence on the hospital's access route. The facts of the case explain that due to demonstrators blocking the road, one ambulance driver was forced to brake unexpectedly twice, endangering a patient. Following the incident, a hospital official requested that the protesters relocate away from the entrance and off the hospital grounds.[113] The hospital filed an interim injunction, which was granted in October 2012.[114] The issues identified by Justice Léger were as follows:

a) Was Vitalité the appropriate party to seek the permanent injunction?
b) Should the Court order a permanent injunction?
c) What would be the appropriate terms of the injunction under the circumstances?[115]

To begin, Justice Léger concluded that Vitalité was the party to seek the injunction. Vitalité was accountable for managing and administering the hospital, as well as assuring the safety of all hospital users. Justice Léger decided that a permanent injunction should be issued because Vitalité had a lawful right to sue for a permanent injunction and had demonstrated that a permanent injunction was an appropriate remedy.

Vitalité claimed that it had the legal authority to sue for a court injunction because its legal obligation was to guarantee the safety, privacy and well-being of all hospital users.[116] It claimed that the protesters' presence on hospital grounds conflicted with this obligation by disrupting the hospital environment, obstructing unlimited access to the hospital's various services, and posing a safety risk to hospital visitors. As a result, Vitalité claimed that the

[109] Ibid.
[110] Hadeel Ibrahim, "Judge gives civil liberties group green light to sue N.B. over abortion access", CBC News (1 June 2021), online: < https://www.cbc.ca/news/canada/new-brunswick/ccla-abortion-access-new-brunswick-1.6048563 >
[111] Regional Health Authority A (Vitalité Health Network) v Godin, [2017] NBQB 93 (Can), note 98.
[112] *Ibid* at para 1.
[113] *Ibid* at para 16.
[114] *Ibid* at para 2.
[115] *Ibid.* at para 38.
[116] *Ibid* at para 14.

injunction would be justifiable, despite the protesters' rights being violated. The purpose of Vitalité, according to the organisation, was not to ban anti-choice protests, but rather to mandate that all protests be placed outside of hospital grounds for the protection of its patients.

The defendant claimed that under the *Canadian Charter of Rights and Freedoms,* his freedoms of expression, assembly, and religion allowed him to protest on hospital grounds, and that the restraining order would violate these rights.[117] He further claimed that because the protests were mostly quiet prayer, they were nonviolent and presented no threat to public safety.[118]

Vitalité had a legal right to sue for a permanent injunction, according to Justice Léger. The injunction would violate the defendant's *Charter* rights to freedom of expression, religion, and peaceful assembly, which are all crucial in a free and democratic society.[119] Justice Léger emphasized that individuals' rights must be compatible with the normal operating conditions of the specific place where the defendant wanted to protest. The defendant's exercise of his rights was inconsistent with Vitalité's obligation to preserve the safety of its hospital users, and Vitalité's safety-related responsibilities to hospital users warranted the encroachment on the defendant *Charter* rights. As a result, Vitalité had the right to take any measures it saw appropriate against the protesters, including filing a permanent injunction lawsuit. Despite the unusual character of the case, Justice Léger ruled that a permanent injunction was a suitable remedy. Justice Léger concluded that the protesters' attendance, whether non-violent or not, presented an obvious and considerable threat to hospital patients. As a result, he found that a permanent injunction must be imposed to resolve the second issue pertaining to the court ordering a permanent injunction.

Justice Léger concluded that the appropriate scope of the injunction should include all of the hospital's premises.[120] Justice Léger approved Vitalité's application for a permanent injunction, prohibiting the defendant and anyone else who was aware of the order from protesting on hospital grounds.

Previous attempts to enact safe access zone legislation

Many health care providers and members of the public have been harassed or intimidated by the protesters. Clinic staff, volunteers, patients, and others affected by the protestors sent testimonial letters to Minister Burke, the premier of New Brunswick and the Minister of Justice in 2007.[121] The first letter sent to Minister Burke was regarding the doctor at the Morgentaler Clinic, who also had a practice at another office. They were forced to leave their practice because of interference by members of Right to Life New Brunswick,[122] who were undermining the doctor's ability to provide essential medical services to patients. This created "concern and anxiety [among] other health care workers" at the practice who feared being targeted.[123] This means a group of people with no medical expertise were able

[117] *Ibid* at para 7.
[118] *Ibid* at para 7.
[119] *Ibid* at para 35.
[120] *Ibid* at para 73.
[121] Abortion Rights Coalition Letters (2007).
[122] Abortion Rights Coalition Letters (2006).
[123] Abortion Rights Coalition Letter (03 July 2007).

to profoundly affect a doctor's ability to practice, essentially forcing them out. The province is in need of medical professionals and this situation only led to a loss of a qualified doctor.

Patients seeking abortion services, and those accompanying them, have voiced their personal experiences with protesters in letters submitted to the Premier Shawn Graham or the Minister of Justice. For instance, Right to Life purchased the house next door to the Morgentaler clinic,[124] which they called the Mother and Child Welcome House. The facility tries to entice patients away from Clinic 554 and provide them with misinformation.[125] Many people offered to volunteer as clinic escorts to try to eliminate protesters from being close to the patients. One letter recalled "one aggressive protestor who would run out into traffic to get a women across the street that she thinks may be coming to the clinic".[126] This caused safety concerns to the escorts as they have to position themselves at the entrance of the public parking garage and cross the street to meet some patients. Because of the escorts, potential violent situations have been avoided.[127]

Another incident expressed in the testimonial letters involved a school. The George Street school called police with complaints concerning the well-being of the children seeing graphic and disturbing signs.[128] Barrack Lane runs beside the clinic where the protesters are, and since it is near the school, protesters held signs on the road. This caused a perceived risk to the well-being of children as a result of viewing disturbing graphic signs and being told false information.[129]

Although the Morgentaler clinic was denied funding by the provincial government, Judy Burwell the former manager of the clinic, stated that the clinic was still running due to volunteers and donations from Dr. Morgentaler.[130] He anticipated that if his current case reached the Supreme Court of Canada, his legal fees would be close to a million dollars, and while the government has not disclosed the amount it has spent on litigation to protect its regressive policies, it likely cost substantially more than simply funding abortion services .[131] The Morgentaler clinic closed its doors in 2014, creating a significant change to access.[132] In 2014 a group called Reproductive Justice New Brunswick (RJNB) joined the Fredericton Youth Feminists to launch a campaign to raise money to purchase the building where the Morgentaler clinic used to be and to reopen it as Clinic 554.[133] The organization was able to raise $125,000 from over 1,500 donors.[134] Jessie Taylor, a member of the RJNB, discussed the reasons for the founding of the group:

"There were a lot of people who really wanted to do something and were desperate. What had already been a sorry situation became that much more deadly. The Fredericton Youth Feminists, who are a big group of mostly high school youth, came together and were instrumental in the formation of RJNB, as well as a number of local activists who have been

[124] Ibid.
[125] Abortion Rights Coalition Letters (2006), *supra* note 116.
[126] Ibid.
[127] Ibid.
[128] Ibid.
[129] Ibid.
[130] Johnstone, supra, note 75.
[131] Tracey Thorne, NB, Morgentaler head to court over abortion payments, Canadian Medical Association Journal 167(11): 1277, 2002.
[132] Ibid.
[133] Ibid.
[134] Mctavish, supra, note 73.

working in various capacities for access to reproductive health services for decades, and some who are newer, like myself".[135]

The RJNB created pressure during the provincial election, which influenced the amendment of regulation 84-20 in 2015.[136] The requirement that a woman obtain written approval from two doctors declaring that an abortion is medically required or that the procedure be performed by a specialist has been removed from the rule.[137] However, the restriction that the operation be performed in an accredited hospital in order for it be covered by Medicare remains in effect, which means that (surgical and aspiration) abortions at Clinic 554 are still not reimbursed.

The drive for safe access zone legislation in New Brunswick

Many of the service providers who contributed to this memorandum have worked or conducted research at Clinic 554, previously the Morgentaler Clinic in Fredericton. Each noted that Fredericton was the place where they encountered the most hostile protest activity.[138]

Over the years, Clinic 554 implemented numerous initiatives to ensure patients' safety in the absence of provincial safe access zone legislation. In speaking with Clinic 554's Medical Director, Dr. Adrian Edgar, it became clear that many of these initiatives and clinic features have become so entrenched that they are now afterthoughts, essential and normal clinic practices. Such initiatives and precautions include the installation of bullet proof glass, skylights as the source of natural light in treatment rooms as opposed to windows, a buzzer system in lieu of an open and unlocked door, among others.[139]

Clinic 554 was the sole free-standing abortion clinic in New Brunswick. Clinic 554 provided services to New Brunswickers as well as those who traveled from out of province to obtain abortion services, largely those from PEI. The New Brunswick government continues to withhold funding for abortion services provided outside of hospitals, but the dedicated group at Clinic 554, with the help of pro-choice activists throughout Canada, subsidized the clinic's abortion services. This practice was unsustainable, and in September 2020, Clinic 554 was forced to close its doors. However, Dr. Edgar opened a family practice in the same location, maintains the name Clinic 554, and continues to provide abortions there.

Safe access zone legislation, including the existing acts in Nova Scotia and Newfoundland, prohibits the recording of patients and providers within the established zones.[140] Dr. Edgar expressed that this is a palpable concern for Clinic 554. Unfortunately, a crisis pregnancy centre (CPC) called Women's Care Centre (previously the Mother and Child Welcome House), neighbours Clinic 554. The CPC installed a security camera that is angled to capture the entrance to Clinic 554. To preserve patients' privacy, Clinic 554 constructed a covered ramp with vertical panels that obstructs the camera's view of those entering and exiting the clinic. Safe access zone legislation has the potential to preserve patient's safety, dignity, and autonomy by prohibiting such activities.

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[135] Johnstone, supra, note 75.
[136] Ibid.
[137] Ibid.
[138] Dr. Brook, supra note 2; Dr. Yoshida, supra note 7.
[139] Dr. Edgar, supra note 65.
[140] Nova Scotia's Act, supra note 6 at ss 4–5.

Dr. Edgar's concerns are grounded in histories of violence towards abortion service providers as well as his own experience during his time at Clinic 554 in Fredericton. Dr. Edgar recounted numerous events of varying degrees of violence all of which occurred at the hands of anti-choice "advocates" in response to Clinic 554's resilience. Dr. Edgar is nearly always the last person to leave the clinic to ensure his staff are able to begin their journeys home unimpeded.[141] On numerous occasions, vehicles have attempted to follow Dr. Edgar home. The passengers of these trailing vehicles gestured towards him with their fingers positioned to resemble a gun.[142] Clinic 554 has been the repeated target of transphobia, homophobia, and anti-Semitism.[143]

The absence of safe access zone legislation inhibits Dr. Edgar's freedom from navigating within his community. Dr. Edgar will not have packages delivered to his home. All packages are addressed to Clinic 554. Dr. Edgar and his spouse have a pet pit bull and rottweiler. Although they are sweet and well-trained dogs, they are intimidating because of the stigmas attached to their breeds. The decision to have pets that are perceived to be intimidating was a strategic choice because of the violence towards Clinic 554. Safe access zone legislation would allow Dr. Edgar and other clinic staff to have a safe access zone around their residences and help eliminate some of the onerous restrictions and safeguards they have had to implement because of the historical and continued violence towards abortion services providers in New Brunswick.

Prince Edward Island

History of access in PEI

In *R v Morgentaler* (1988), the Supreme Court of Canada struck down Canada's abortion law; however, as Megan Leslie writes, "giving women the *right* to abortions is not the same thing as providing women with *access* to abortion".[144] This was palpable in PEI. Between the 1970s and 2017, abortion services were completely absent throughout PEI. Access to abortion services on the Island was extremely polarizing, and, historically, pro-choice advocates were socially ostracized from their small Island communities.[145]

The Island's pro-choice and anti-choice movements have a uniquely tumultuous history. In *No Choice: The 30-Year Fight for Abortion on Prince Edward Island,* Kate Mckenna explains the prominence of the Catholic Church and the Island's Right to Life chapter. In the 1970s, pursuant to federal legislation, the PEI Hospital had a therapeutic abortion committee (TAC).[146] As practiced in other provinces, the TAC evaluated requests for abortion and determined which patients would be granted permission to receive this essential medical service.[147] The PEI Hospital served the Protestant population, whereas the Charlottetown

[141] Dr. Edgar, supra note 65.
[142] Ibid.
[143] Ibid.
[144] Megan Leslie, "Foreword" in Kate McKenna, *No Choice: The 30-Year Fight for Abortion on Prince Edward Island* (Black Point, Nova Scotia: Fernwood Publishing, 2018) ix at x (emphasis in original).
[145] Kate McKenna, *No Choice: The 30-Year Fight for Abortion on Prince Edward Island* (Black Point, Nova Scotia: Fernwood Publishing, 2018) at 18 [*No Choice*].
[146] *Ibid* at 12.
[147] Ibid.

Hospital served the Island's Catholic population. The religious divide between the hospitals is crucial to understanding the history of access to abortion on PEI.

In 1980, the province announced a new $32 million hospital that would merge the religious divide between the two Island hospitals.[148] The Island's Right to Life chapter, funded by the "deep pockets" of the Catholic Church began their intense campaign to prevent the new hospital from establishing a TAC and, ultimately, providing abortion services.[149] For one dollar, a member of the public could join the new hospital's membership "and thus get [to] vote on bylaws when they were presented at annual general meetings".[150] In 1981, the new hospital held their annual general meeting to determine whether the new hospital would offer a TAC. The Island's Right to Life chapter provided buses for members to attend and vote against the TAC.[151] They succeeded with 1,796 votes.[152] To illustrate the extent of Right to Life's influence on the Island, Mckenna notes that in the early 1980's the "local media sent reporters to cover their meetings".[153]

Once the Island's Right to Life chapter was successful in preventing abortion services from being offered in Charlottetown, the group transferred their efforts on abolishing the TAC at the Prince County Hospital in Summerside. The Island's anti-choice group implemented similar strategies that led to their success in preventing a TAC from being established in the new Charlottetown hospital. They encouraged members to pay ten dollars for a Prince County Hospital membership in a prolonged attempt to replace the hospital board with a majority that represented the anti-choice agenda.[154] In Summerside, the hospital board fervently resisted these changes, but in 1986, the Island's anti-choice group was successful, and the TAC at Prince County Hospital was abolished. Abortion services would not be offered on the Island for another 31 years.

In 1995, the PEI government "entered into an agreement with a hospital in Halifax to provide PEI [residents with] abortions there".[155] The PEI government funded the procedures performed in Halifax, but PEI residents had to organize and finance their own travel and accommodations.[156] In 1995, the Confederation Bridge had yet to be constructed. Not only was the ferry the only way to leave PEI, but the provincial government did not announce the agreement, and PEI residents remained unaware that, if they could afford the costs of travel, accommodation, and time, they had options.[157]

In 2016, two years following the launch of a lawsuit against the province, the PEI government announced that "for the first time since 1986, there would be abortion access on PEI […] at the Prince County Hospital" in Summerside.[158]

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[148] *Ibid* at 13.
[149] *Ibid* at 14.
[150] *Ibid* at 16.
[151] *Ibid* at 17.
[152] Ibid.
[153] *Ibid* at 20.
[154] *Ibid* at 20.
[155] *Ibid* at 56.
[156] Ibid.
[157] Ibid.
[158] *Ibid* at 103–107.

Abortion Access Now PEI v. Government of PEI (2016)

In 2015, Premier Wade MacLauchlan announced a new agreement that enabled PEI residents to receive abortion services at a hospital in Moncton, New Brunswick.[159] Despite this new agreement expanding off-Island access, the province of PEI was still violating the *Canada Health Act*. This announcement was the catalyst for Abortion Access Now PEI's ("AAN PEI) 2016 lawsuit, which challenged the province's policies.

A hypothetical discussion at the 2014 abortion conference at UPEI sparked the decision to challenge the province's policies.[160] Initially, the case began as a human right's challenge, which required a complainant who was comfortable publicly sharing their abortion experience (99). Colleen MacQuarrie, a founding member of AAN PEI and a UPEI professor recalls "driving all over the island […with] a list of women who were willing to be a part of the human rights case".[161]

To begin the process, AAN PEI partnered with a young Halifax-based law firm headed by Kelly McMillan and Nasha Nijhawan. After months of research, McMillan and Nijhawan reframed the initial approach to focus on a section 15 *Charter* challenge.[162]

Although the case was never heard, McMillan and Nijhawan published their approach. They would have argued that the province's policy to only allow access to abortion services off the Island, discriminated against individuals capable of becoming pregnant, and that this discrimination created "secondary discriminatory effects" by reinforcing the stigma surrounding abortion.[163] Ultimately, McMillan and Nijhawan would have argued that the province violated its own Provincial Health Plan, which ensured that

General and gynecological surgery and obstetrical services are provided at the QEH and PCH" [and only …] 'highly specialized in-patient and out-patient treatments, procedures, and consultations would be provided out of province, such as 'neurosurgery, brain injuries, specialized cancer treatments, specialized psychiatric treatments, and specialized children's treatments. Abortion, by contrast, is a non-specialized procedure, and can be performed safely outside of a hospital by a primary care physician.[164]

According to Women's Legal Education and Action Fund ("LEAF"), after announcing the repatriation of abortion services to the Island, Premier Wade MacLauchlan conceded that the court would likely have found that the province's policy violated section 15 of the *Charter*.[165]

In March 2016, two years following AAN PEI's decision to launch a lawsuit against the province, the PEI government announced that "for the first time since 1986, there would be abortion access on PEI […] at the Prince County Hospital" in Summerside.[166]

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[159] *No Choice, supra* note 143 at 96.
[160] *Ibid* at 99.
[161] *Ibid* at 100.
[162] *Ibid* at 101.
[163] *Ibid* at 102
[164] Nasha Nijhawan & Kelly McMillan, "Threatened Litigation Returns Abortion Access to Prince Edward Island after 34 Years" (2016) 37:1 2 at 6.
[165] Women's Legal Educational & Action Fund, "Abortion Access Now PEI v Government of PEI (2016)", case brief < https://www.leaf.ca/case_summary/abortion-access-now-pei-v-government-of-pei-2016/>.
[166] *Ibid* at 103–107.

Current situation in PEI

Over Dr. Yoshida's 22-year career, she has experienced little interaction with anti-choice protesters. She trained with Dr. Morgentaler in Toronto and remembers the scorched sign from the Harbord Street clinic prominently displayed in the nurses' office at the new and present Toronto clinic. In the early 2000s, during her time training under Dr. Morgentaler, Dr. Yoshida was told that the risk of violence was a lot less than it had previously been.[167] However, one of Dr. Morgentaler's reference points in evaluating violence was the bombing of his Harbord Street clinic in 1992.[168] Although this supposed decrease in violence may be true in some larger cities like Toronto and Halifax, as evidenced above, the story is different in smaller cities like Fredericton, NB and Summerside, PEI.

Dr. Yoshida provides abortion services in both Nova Scotia and PEI. Although she has not been to the Island as regularly since the start of the Covid-19 pandemic in March 2020, in 2017, she worked the opening shift at the new Women's Wellness Centre in the Prince County Hospital. Prior to the Clinic's opening and following Premier Wade MacLauchlan's announcement of the new clinic, protesters adamantly demonstrated outside of the Prince County Hospital.[169] However, when Dr. Yoshida drove into the Prince County Hospital parking lot on the Clinic's opening day, not a single protester was present.[170] Dr. Yoshida and clinic staff prepared themselves for large demonstrations, but to their surprise, not a single protester arrived.[171] Since abortion services have been repatriated on the Island, anti-choice groups have focused their attentions elsewhere.[172]

In May 2019, anti-choice protesters demonstrated outside three high schools located in North Wiltshire and Summerside.[173] The protesters displayed graphic images during the school's lunch hour. In PEI and elsewhere, we are seeing a movement towards anti-choice demonstrations outside of educational facilities and institutions.

Despite the current absence of anti-choice protesters interfering with individuals' right to access abortion, safe access zone legislation would help to protect access in the future. The Island's anti-choice groups remain active, even though they have been demonstrating outside of school grounds rather than outside the hospital in Summerside. This could change at any time and the Summerside hospital and its patients and staff deserve protection in this event.

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[167] Dr. Yoshida, supra note 7.

[168] William Claiborne, "Clinic Bombing Rekindles Canadian Abortion Debate", *Washington Post* (21 May 1992), online: <https://www.washingtonpost.com/archive/politics/1992/05/21/clinic-bombing-rekindles-canadian-abortion-debate/f1f99d42-e58b-4fab-9721-dceb505be896/>.

[169] Shane Ross, "Abortion services not needed on PEI, protesters say", *CBC News* (3 December 2016), online: <https://www.cbc.ca/news/canada/prince-edward-island/pei-abortion-prince-county-hospital-1.3880384>.

[170] Dr. Yoshida, supra note 7.

[171] Ibid.

[172] Please note, many people including clinic staff and local activists were contacted to provide insight; however, few responded. We suggest that this could reflect the continued difficulties and complicated history of access advocacy on the Island.

[173] Tony Davis, "Anti-Abortion Group Protesting at PEI Schools", *CBC News* (15 May 2019), online: < https://www.cbc.ca/news/canada/prince-edward-island/pei-anti-abortion-protest-high-school-colonel-gray-1.5137416>.

The resilience of PEI activists and potential expansions to safe access zone legislation

Becka Viau is the current "public face" of the Island's pro-choice movement.[174] In 2019, Viau received several death threats and threats of violence against her family for sharing an online petition calling for Liberal Leader Robert Mitchell's resignation.[175] In May 2019, Mitchell attended an anti-choice demonstration.[176] This was the catalyst for Viau's campaign.

Existing safe access zone legislation in force in Nova Scotia and Newfoundland do not create the opportunity for activists who do not work in a facility that provides abortion services to apply to establish a safe access zone surrounding their residence. As discussed above in relation to concerns for Dr. Edgar's family, this is one of the shortfalls of these important provincial acts.

Recent federal amendments

With the rise of the Covid-19 pandemic, Canada has witnessed increased violence against medical professionals and health care workers from anti-vaccine protesters. This violence parallels what abortion service providers and clinic staff have faced and continue to face from anti-choice protesters. This increased violence towards health care workers sparked the passing of Bill C-3, *An Act to Amend the Criminal Code and the Canada Labour Code.* Sponsored by the Minister of Labour, Seamus O'Regan, Bill C-3 proposed an amendment to the *Criminal Code* to ensure that medical professionals are able to "work in an environment free from violence and threats".[177] On December 17, 2021 Bill C-3 received royal assent.

It is now a criminal offence to intimidate, obstruct, interfere, or impede both an individual from "obtaining health services" and a healthcare worker's ability to provide healthcare services.[178] Although Bill C-3 echoes the principles of safe access zone legislation, it does not capture the same range of conduct as the provincial legislation. Bill C-3 is primarily concerned with preventing the intimidation of healthcare workers and obstructing patients' access. Because Bill C-3 is primarily focused on active attempts to prevent access and induce fear; it does not capture less physically intrusive protest activities like a protester silently present with a sign, nor does it work to ensure both providers' and patients' privacy by making it an offence to record or take photos of those accessing facilities. These activities are, however, captured under provincial legislation for abortion facilities.

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[174] Sarah MacMillan, "Pro-choice activists show support for PEI woman who receives death threats", *CBC News* (2 June 2019), online: <https://www.cbc.ca/news/canada/prince-edward-island/pei-pro-choice-rally-1.5159413> [Sarah MacMillan].

[175] Ibid.

[176] Nicole Williams, "Police Investigating Threats Against Charlottetown Woman", *CBC News* (29 May 2019), online: <https://www.cbc.ca/news/canada/prince-edward-island/pei-becka-viau-threats-police-investigate-1.5154561> [Nicole Williams].

[177] Employment and Social Development Canada, News Release, "Government of Canada introduces legislation to support workers with ten days of paid sick leave, protect health care workers and finish the fight against COVID-19" (26 November 2021) <https://www.canada.ca/en/employment-social-development/news/2021/11/healthcare-workers-and-sick-days-news-release.html>.

[178] Bill C-3, "An Act to amend the Criminal Code and the Canada Labour Code", 1st Sess, 44th Parl, 2021 (assented to 17 December 2021).

Unlike the provincial laws, Bill C-3 creates a federal criminal offence. However, this only appears to apply to health care workers while at venues providing health care services. This does not extend to their private homes, whereas safe access zone legislation does, or creates the option to do so. The laws in BC, Ontario, and Newfoundland/Labrador provide automatic protections to provider homes and offices, while the Alberta and Nova Scotia laws require providers to apply for such zones. Although Bill C-3 is an important advancement that reflects existing safe access zone legislation to some extent, provinces like New Brunswick and PEI that do not currently have such legislation need more assistance.

The criminalization of the intimidation of health care workers and the obstruction of access to health services is reflective of the public's social values. Like safe access zone legislation, Bill C-3 is a positive advancement, but enactment is only the first hurdle, and enforcement is essential.

Enactment & enforcement

Despite the relative ease of establishing safe access zone legislation in Nova Scotia and the absence of protesters noted by both Dr. Brooks and Dr. Yoshida, enacting legislation and enforcing it are two surprisingly independent issues.

On October 3, 2021, Megan Boudreau, the driving force behind Nova Scotia's *Act*, embarked on her annual counter-protest.[179] In 2021, she held her counter-protest outside of the Aberdeen Hospital in New Glasgow, Nova Scotia. An anti-choice group positioned themselves on the sidewalk across the street from the Hospital. As a medical facility that provides abortion services, Aberdeen Hospital is guaranteed a safe access zone of 50 metres extending from the boundaries of the hospital's property line. According to both Boudreau and CBC News, the protesters positioned themselves on the sidewalk across from the hospital in violation of s.7(2) of Nova Scotia's *Act*.[180] When Boudreau informed the anti-choice group about their unlawful behaviour, they replied that the group received permission from the New Glasgow Police Department. The group proceeded to harass Boudreau.[181] Boudreau recorded parts of her interactions with the protesters, but ultimately learned that enforcement is a significant barrier hindering the efficacy of safe access zone legislation. Upon further inquiry, the New Glasgow Police Department were in fact notified that the anti-choice group planned to protest within 50 metres of Aberdeen Hospital.[182] The police department failed to realize that in doing so, the anti-choice group would violate s.7(2) of Nova Scotia's *Act.* Although an internal investigation is ongoing, this incident highlights the disconnect between the legislature's actions and the actual enforcement of new laws.

[179] Megan Boudreau, supra note 13.
[180] Taryn Grant, "New Glasgow Police Investigate alleged breach of bubble zone law after anti-abortion protest", *CBC News* (20 November 2021), online: <https://www.cbc.ca/news/canada/nova-scotia/new-glasgow-nova-scotia-police-bubble-zone-anti-abortion-1.6255416>
[181] Megan Boudreau, supra note 13.
[182] Ibid.

Conclusion

The tumultuous histories and ongoing struggles to guarantee access to abortion services in New Brunswick and PEI demonstrate the urgent need for safe access zone legislation. Such legislation has been instrumental in ensuring access in Nova Scotia and Newfoundland. It is also a tool that can help support physicians serving smaller communities in their decision to provide access to medical abortion services and the pharmacies whose work upholds access. Although safe access zone legislation is an effective and essential means to support access to abortion services, there is room for future legislation to respond to the shortcomings of existing legislation.

Future legislation may want to respond to the increased presence of protesters around schools and expanding the classifications of persons who can apply to establish a zone around their residence. For example, in conversation with Dr. Edgar of Fredericton's Clinic 554, he noted that his work has induced fear of retaliation in both his family members. Pro-choice advocates like Becka Viau of PEI have also been subject to violent threats. Although service providers, clinic staff, and patients are of utmost importance, perhaps expanding the definitions of the types of spaces and persons whose safety and dignity can be supported by safe access zone legislation will help ensure safe and equitable access to abortion services throughout Atlantic Canada.

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