Abortion Rights Coalition of Canada

Efficacy of the Canada Health Act in Protecting Reproductive Justice

By Morgan Joan Sims, 1L Student at the University of New Brunswick, Faculty of Law

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Introduction

The Canada Health Act (CHA or the Act) is Canada's federal legislation for publicly funded health care insurance.[1] The Act sets out the primary objective of Canadian health care policy as a whole, namely to "protect, promote and restore the physical and mental well-being of Canadians and to facilitate reasonable access to health services without financial or other barriers."[2] Provincial and territorial governments have primary jurisdiction in regards to the administration and delivery of health care services, including managing and administering health care budgets.[3] In order to fully receive the federal funding provided by the CHA, provinces must fulfill certain criteria for insured and extended health services. This is done with the goal of ensuring all eligible Canadian residents have reasonable access to insured health services on a prepaid basis.

This paper will address the provincial and federal applications of the Canada Health Act as it relates to reproductive health, rights, and access to services, specifically abortion. I will highlight the gaps and discrepancies in the Act's application to reproductive health care and analyze the impact this has on reproductive health and rights in Canada.

I will begin by outlining several key terms relevant to this topic as defined by the Canada Health Act; then I will discuss the five principles of the Act, namely comprehensiveness, universality, portability, accessibility, and public administration; how they are intended to protect Canadian's rights and ensure equitable access to reproductive health care; and how provinces have failed to meet these requirements. I will then describe the history of how the Act has been applied to ensure this access, or has failed to have been applied, by both levels of government across all provinces and territories, with a particular focus on the issue of abortion access in New Brunswick and related lawsuits. This includes the current lawsuit brought by the CCLA against the Government of New Brunswick.

Finally, I will shine a light on the unique issues faced by marginalized populations regarding lack of access to reproductive health care, along with the political dynamics and conservatism contributing to lack of access to abortion services.

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[1] Government of Canada, "Canada Health Act" (10 March 2023), online: <canada.ca/en/health-canada/services/health-care-system/canada-health-care-system-medicare/canada-health-act.html>.
[2] *Canada Health Act,* RSC 1985, c C-6, s 3, online: <https://laws-lois.justice.gc.ca/eng/acts/c-6/>
[3] Canada Health Act Annual Report 2022-2023, (Health Canada, 2023) in Chapter 1 - Canada Health Act Overview, online: <https://www.canada.ca/en/health-canada/services/publications/health-system-services/canada-health-act-annual-report-2022-2023.html>.

Terminology

Several key terms defined by the Canada Health Act are relevant to this discussion:

Hospital: includes any facility or portion of a facility that provides hospital care.[4]

Insured Health Services: means hospital services, and physician services provided to insured persons, but doesn't include any health services that a person is entitled to and eligible for under any other act of Parliament.[5]

Hospital Services: includes any of the following services provided to inpatients or outpatients at a hospital, if medically necessary for maintaining health, preventing disease, or diagnosing or treating an injury, illness, or disability:

- Nursing service
- Laboratory, radiological and other diagnostic procedures
- Drugs
- Use of operating room, case room, and anesthetic facilities
- Medical and surgical equipment and supplies
- Use of radiotherapy and physiotherapy facilities
- Services provided by persons who receive remuneration therefor from the hospital, not including services excluded by the regulations[6]

Abortion Funding Under the Canada Health Act

As per the Canada Health Act Annual Report (2022-2023), abortion services are insured in all provinces and territories.[7] However, access to these services is not equal across the country. While all provinces fund abortions performed in hospitals, not all fund abortion services performed outside the hospital setting.[8] New Brunswick provides no funding to private abortion clinics. In Ontario, there are several private abortion clinics for which OHIP pays only the physician's fee, leaving patients responsible for the facility fees.[9]

Through insuring abortions performed in traditional hospital settings, all provinces have "deemed abortion to be a medically necessary hospital service."[10] Since 1995, the definition of "hospital" under the Canada Health Act has been deemed to include clinics that employ

[4] Canada Health Act, *supra,* note 2 s 2.
[5] *Ibid*.
[6] *Ibid*.
[7] Canada Health Act Annual Report, *supra*, note 3.
[8] Joyce Arthur, "Canada Health Act Violates Abortion Services: Five Basic Principles Not Met," (November 2000), online: <https://www.prochoiceactionnetwork-canada.org/articles/healthact.shtml>.
[9] *Ibid*.
[10] *Ibid*.

physicians who provide medically-necessary hospital services.[11] Therefore, abortion clinics are also defined as "hospitals" under the Canada Health Act and must be fully funded.[12]

Although "hospital services" under the Canada Health Act only include those that are "medically necessary for maintaining health, preventing disease or diagnosing or treating an injury, illness or disability", the act provides no explanation as to what the government views as "medically necessary" to achieve those goals.[13] Although some people argue for abortion to be removed, or delisted, from the list of insured services, it would be illogical to do so. Abortions are widely agreed to be medically necessary in at least some cases, such as when continuing the pregnancy would jeopardize the pregnant person's life or health. This would leave the government to decide what abortions are or are not medically necessary based on the individual's reason for seeking an abortion.[14] However, patients are not required to state a reason when requesting abortion, and it can be inferred that all abortions are medically necessary in light of the World Health Organization's definition of health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[15] All abortions can be said to fall under this definition, "since if a woman wants an abortion, that is proof enough that having a baby would be traumatic for her."[16]

Full-term pregnancy and childbirth carry known risks to life and health, which can be largely averted with a safe early abortion.[17] This makes access to abortion a constitutional right, since not providing this service may force individuals to carry a pregnancy to term and deliver, violating their bodily autonomy and right to life, both fundamental constitutional rights.[18]

A pregnancy is not like an elective procedure as some anti-abortion people claim, because an individual cannot "simply cancel the outcome."[19] They must either give birth or terminate the pregnancy. If pregnancy and antenatal care are seen as medically necessary, the alternative must be as well.[20] Some argue that patients "choose" to have an abortion and that this means it is not medically necessary.[21] However, patients have the freedom to choose to undergo or decline any medical procedure - even those where refusing care places their life at risk.[22]

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[11] Canada Health Act Annual Report, *supra*, note 3.
[12] Joyce Arthur*, supra*, note 8.
[13] Canada Health Act, s*upra,* note 2, s 2; Joyce Arthur, *supra,* note 8.
[14] *Ibid*.
[15] Joyce Arthur, *supra,* note 8; World Health Organization, "Basic documents: forty-ninth edition (including amendments adopted up to 31 May 2019)" (2020), online (pdf): <apps.who.int/gb/bd/pdf_files/BD_49th-en.pdf#page=6>.
[16] Joyce Arthur, *supra,* note 8.
[17] Laura Schummers and Wendy V Norman, "Abortion services in Canada: access and safety" (2019) 191:19 CMAJ 517 at 517.
[18] Joyce Arthur, *supra,* note 8.
[19] *Ibid*.
[20] *Ibid*.
[21] *Ibid*.
[22] *Ibid*.

Further, having a child is also seen as a "choice", but that does not make childbirth any less medically necessary.[23]

Five Principles of the Canada Health Act and Abortion Services

The Canada Health Act consists of five principles or criteria that reflect the country's values of equity and solidarity and govern the Canadian health insurance system: Comprehensiveness, Universality, Portability, Accessibility, and Public Administration[24]. These principles are applicable to aspiration and surgical abortions performed in Canada. Medical abortions, done by prescribing the Mifegymiso medication, are part of pharmacare and are not considered a "hospital service" or "physician service."

Comprehensiveness

The Canada Health Act requires that the health insurance plan for each province and territory covers all the insured health services provided by hospitals, physicians, or dentists.[25] Provinces such as New Brunswick that refuse to fund out-of-hospital procedures are directly defying this requirement and the principle of comprehensiveness. Health Canada considers clinics that provide medically necessary care to be the equivalent of hospitals under the Canada Health Act.[26] In 1995, Health Minister Diane Marleau ordered all provinces and territories to pay the facility fees for medically necessary services at private clinics for which they were already paying physician fees.[27] This included abortion clinics. However, both Manitoba and New Brunswick refused to comply, arguing that these clinics were not approved facilities under their provincial standards.[28]

Today's lack of hospital access is largely a relic from pre-1988, when only hospitals that had "therapeutic abortion committees" performed abortions.[29] This constituted approximately one in five hospitals. Even after these committees were disbanded, very few additional hospitals began providing abortions, which was likely exacerbated by stigma and a lack of provincial efforts.

Universality

Under the Canada Health Act, all insured residences of a province are entitled to the insured health services provided for by that province.[30] This includes abortion, as every province and

[23] *Ibid*.
[24] Canada Health Act Annual Report, *supra*, note 3.
[25] Canada Health Act, *supra,* note 2 s 9.
[26] Joyce Arthur, *supra,* note 8.
[27] *Ibid*.
[28] *Ibid*.
[29] National Abortion Federation, "Celebrating 33 Years of Legal Abortion in Canada" (28 January 2021), online: <prochoice.org/celebrating-33-years-of-legal-abortion-in-canada/>.
[30] Canada Health Act, *supra,* note 2 s 10.

territory provides funded abortions in hospitals and therefore must also fund it in private clinics as discussed earlier.

Some provinces are not meeting this principle, in particular New Brunswick and Ontario. A provincial regulation in New Brunswick restricts funded abortions to hospitals (more details later in this paper). If patients were unable to obtain a surgical abortion at one of the mere three hospitals across the province providing them, they had to pay out of pocket for the procedure at the Morgentaler Clinic in Fredericton until 2014,[31] and then at Clinic 554 until 2024.[32] (Both clinics had to close due to financial unsustainability.[33])

In Ontario, only four out of eight private abortion clinics are fully funded, seven in the GTA and one in Ottawa.[34] This is because the NDP Bob Rae government, through the *Independent Health Facilities Act* of 1990, only funded five Toronto clinics existing at the time and the Ottawa Morgentaler clinic.[35] When Mike Harris's PC government came into power in 1995, new licenses under this Act were restricted, meaning other clinics must charge patients for all fees aside from the doctor's fee, which is covered by OHIP.[36] The *Independent Health Facilities Act* was later repealed in September 2023, as will be discussed later.[37]

Clearly, not all insured residents are covered equally for insured services, within individual provinces as well as province-to-province. The arbitrary hospital regulation in New Brunswick limits access to health care and discriminates against pregnant individuals, who are singled out as a group and forced through unnecessary steps unprecedented for any other medical procedure.

Between 2015 and 2020, 85% of Clinic 554 abortion patients in New Brunswick paid the fee out of pocket.[38] Further demonstrating the gender discrimination against people capable of pregnancy, vasectomies at private clinics are fully funded by the provincial government.[39] In 2020, a spokesperson for the New Brunswick Health Department stated that "smaller medical procedures" such as vasectomies are funded under Medicare when performed in offices, but

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[31] CBC News, "Morgentaler abortion clinic in Fredericton to close," (10 April 2014), online: <cbc.ca/news/canada/new-brunswick/morgentaler-abortion-clinic-in-fredericton-to-close-1.2604535>.
[32] Hadeel Ibrahim, "Clinic 554 and abortion access: 5 key questions answered," *CBC News* (10 September 2020), online: <cbc.ca/news/canada/new-brunswick/clinic-554-abortion-access-new-brunswick-election-1.5713098>.
[33] Laura Brown, "'If the patient couldn't pay, we wouldn't turn them away': N.B.'s only abortion clinic closing," *CTV News Atlantic* (31 January 2024), online: <atlantic.ctvnews.ca/more/if-the-patient-couldn-t-pay-we-wouldn-t-turn-them-away-n-b-s-only-abortion-clinic-closing-1.6750244>.
[34] Canada Health Act Annual Report 2022-2023, (Health Canada, 2023) in Chapter 2 - Administration and Compliance, online: <https://www.canada.ca/en/health-canada/services/publications/health-system-services/canada-health-act-annual-report-2022-2023.html>.
[35] Abortion Rights Coalition of Canada, "Statistics - Abortion in Canada" (18 April 2024), online (pdf): <arcc-cdac.ca/media/2020/07/statistics-abortion-in-canada.pdf> at 5.
[36] Ibid.
[37] *Independent Health Facilities Act,* RSO 1990, c.I.3, as repealed by *Your Health Act, 2023*, SO 2023, c.4 - Bill 60.
[38] Jacques Poitras, "Allow surgical abortions in N.B. clinics, federal report says," *CBC News* (14 November 2023), online: <https://www.cbc.ca/news/canada/new-brunswick/federal-report-calls-on-nb-to-allow-abortions-in-clinics-1.7028034>.
[39] Hadeel Ibrahim, *supra,* note 32.

those requiring general anesthesia or conscious sedation are not funded under Medicare when performed in an office.[40] However, Dr. Adrian Edgar, a family physician who ran Clinic 554 until its closure in January 2024, told CBC News that he used "minimal sedation" when performing first-trimester abortions.[41]

Portability

This criteria requires that residents moving to another province or territory must have any insured health services covered by their home province during any potential waiting periods they may be faced with after registering with the health care insurance plan of their new province or territory.[42] In 2015, the Interprovincial Health Insurance Agreements Coordinating committee removed abortion from the list of services excluded from reciprocal billing, thereby relieving some of the burden previously placed on women and trans persons needing to access abortion services outside their home province.[43]

More insight was provided by the National Abortion Federation (NAF) Canada, who stated that abortions performed in hospitals qualify for reciprocal billing, while typically those performed in clinics do not, save for rare cases where pre-arrangements are made.[44]

For those travelling from the Atlantic provinces to Quebec, procedural abortions outside of hospitals are normally not covered. Medication abortion appointments may be covered, but medication costs are the responsibility of the patient.[44]

In some provinces, abortions provided in clinics may be covered if pre-arranged and approved, though even this only occurs in limited instances. Due to the request and pre-approval process, reimbursements after-the-fact are typically not considered, and if they are, the process can take several months.[44]

Accessibility

The CHA ensures that insured persons have reasonable access to insured hospital, medical, and surgical-dental services on uniform terms and conditions unimpeded by charges or discrimination on the basis of age, health status, or financial circumstances.[45] This is interpreted using the "where and as available rule", meaning "residents […] are entitled to have access on uniform terms and conditions to insured health services at the setting 'where' the services are provided and 'as' the services are available in that setting."[46]

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[40] *Ibid*.
[41] *Ibid*.
[42] Canada Health Act, *supra*, note 2, s 11.
[43] Abortion Rights Coalition of Canada, "Abortion and Reciprocal Billing" (September 2005), online (pdf): <arcc-cdac.ca/media/position-papers/04-Reciprocal-Billing.pdf>.
[44] Email Correspondence with NAF Canada (December 2023).
[45] Canada Health Act, *supra*, note 2, s 12.
[46] Canada Health Act Annual Report, *supra*, note 3.

The fact that funded abortions are only provided at three New Brunswick hospitals, and merely two cities, defies this principle. Women, girls, and trans persons face discrimination when attempting to access abortion services. The limited number of hospitals offering abortions makes it difficult for younger persons to obtain abortions without their families finding out and denies them their right to privacy.[47] Many individuals do not have the financial means to access abortion services. They may be unable to take the necessary time off work, or pay for transportation, accommodation, or childcare, as many of these women are single mothers.[48]

Public Administration

This criterion requires that "provincial and territorial health care insurance plans [are] administered and operated on a non-profit basis by a public authority […]."[49] This applies "only to the administration of provincial and territorial health care insurance plans and does not preclude private facilities or providers from supplying insured health services as long as no insured person is charged in relation to these services."[50]

Despite this, the former Morgentaler Clinic and Clinic 554 in New Brunswick were forced to privately administer the costs of an essential medical service, namely abortion. In 2020, Dr. Adrian Edgar of Clinic 554 told CBC News that he charged approximately $750-800 to perform an abortion, a fee substantially lower than the $1,300 charged to Medicare when an abortion is performed in a hospital.[51] The clinic often subsidized these costs, allowing patients to pay only what they were able to and often performing procedures for free.[52]

Abortion in New Brunswick

History of Abortion Access in New Brunswick

Prior to R v Morgentaler (1988)

In 1985, after Dr. Morgentaler expressed his desire to open an abortion clinic in New Brunswick, the PC Premier Richard Hatfield created Bill 92 to amend the Medical Services Payment Act.[53] This bill allowed physicians who performed abortions outside of accredited hospital settings to be charged with professional misconduct.[54] At this time, abortions remained illegal.

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[47] Demand Letter from the Canadian Civil Liberties Association to the Premier and Minister of Health of New Brunswick (10 October 2020) [Demand Letter].
[48] *Ibid*.
[49] Canada Health Act Annual Report, *supra*, note 3.
[50] *Ibid*.
[51] Hadeel Ibrahim, *supra,* note 32.
[52] *Ibid*.
[53] Rachael Johnstone, "The Policy of Abortion in New Brunswick" (2014) 36.2 Atlantis at 79; An Act to Amend the Medical Services Payment Act, SNB 1994, c 79.
[54] *Ibid*.

R v Morgentaler (1988) and New Brunswick's Response

In 1988, the Supreme Court of Canada decriminalized abortion, as the law prohibiting it was deemed to be unconstitutional, infringing women's right to life, liberty, and security of the person as guaranteed by section 7 of the *Charter*.[55] The provinces were given jurisdiction over abortion, as it was a matter of health care.[56] Nova Scotia and New Brunswick implemented no-pay policy for abortions outside of approved facilities, which only included hospitals.[57]

Morgentaler v New Brunswick (A.G.) (1989)

Morgentaler sued the New Brunswick government for reimbursement for three abortions provided to New Brunswick women at his clinic located in Quebec.[58] Morgentaler argued that he should be reimbursed under New Brunswick Medicare as the policies restricting abortion access in New Brunswick did not apply to out-of-province services.[59] The government's hostility to Dr. Morgentaler led it to amend the Medical Services Payment Act and create the infamous regulation 84-20.[60] This regulation set out that, in order for abortion to be paid by Medicare, two medical doctors must deem the abortion as medically necessary, and the procedure must be performed in a hospital by a specialist in gynecology or obstetrics.[61] This two-doctor requirement was repealed by the province's Liberal government in 2014.[62] The provincial government also began funding abortions performed by non-specialists, though only those performed in-hospital.[63]

Morgentaler v New Brunswick (A.G.) (1994)

In 1994, Dr. Morgentaler opened a clinic in Fredericton, New Brunswick.[64] The provincial government invoked Hatfield's 1985 amendment to the Medical Act, set out above, forcing the clinic to close on the very day it opened, and led to the New Brunswick College of Physicians and Surgeon's suspending the doctor's license.[65] Dr. Morgentaler then challenged the constitutionality of the amendment.[66] The Court of Queen's Bench found these amendments to be unconstitutional, as they went beyond the province's jurisdiction and were seen as an

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[55] R. v. Morgentaler, 1988 CanLII 90 (SCC), [1988] 1 SCR 30.
[56] Abortion Rights Coalition of Canada, "Court Decisions in Canada on Abortion," (April 2024), online (pdf): <arcc-cdac.ca/media/2020/06/court-decisions-laws-abortion-canada.pdf> at 12.
[57] *Ibid*.
[58] Morgentaler v. New Brunswick (Attorney General) et al., 1989 CanLII 8086 (NB KB) at para 3.
[59] *Ibid* at para 5.
[60] *Ibid* at para 19; Jula Hughes, "The closure of the Morgentaler Clinic and the rule of law in New Brunswick," *NB Media Co-op* (18 April 2014), online: <nbmediacoop.org/2014/04/18/the-closure-of-the-morgentaler-clinic-and-the-rule-of-law-in-new-brunswick/>.
[61] Jula Hughes, *supra,* note 60.
[62] CBC News, "New Brunswick abortion restriction lifted by Premier Brian Gallant" (27 November 2014), online: <cbc.ca/news/canada/new-brunswick/new-brunswick-abortion-restriction-lifted-by-premier-brian-gallant-1.2850474>.
[63] Ibid.
[64] Abortion Rights Coalition of Canada, "Court Decisions," *supra*, note 56 at 12-13.
[65] *Ibid*.
[66] *Ibid*.

attempt to prohibit free-standing abortion clinics, particularly Dr. Morgentaler's, rather than as an attempt to ensure the highest quality care for women in the province.[67]

However, Dr. Morgentaler was only successful in having the ban on abortions outside the hospital struck down.[68] There was no change to the regulations that denied provincial funding to clinics.[69]

This relates back to the issues with the Canada Health Act's principles of accessibility and universality. As explained above, the accessibility principle ensures that all insured residents of a province have equal access to medical services unimpeded by charges or discrimination on basis of age, health status, or financial circumstances.[70] Preventing these clinics from operating impedes abortion access and is discriminatory against women and pregnant individuals. Requiring patients to pay for abortions done at private clinics prevents those who do not have the financial ability to pay for the procedure from obtaining timely care, forcing them to wait long periods to be treated in-hospital.[71] The universality principle states that all insured residences of a province are entitled to the insured health services provided for by that province.[72] Many individuals are not able to access abortion services, as few hospitals perform abortions, and those that do often have long waiting periods. Attempting to prevent private clinics from opening, and imposing financial fees onto patients, prevents individuals from accessing the insured health services they are entitled to.

Morgentaler Clinic Opens (1994)

When Dr. Morgentaler opened his Fredericton clinic in 1994,[73] it was not funded by the provincial government and faced many protesters.[74] Following the 2008 flood that impacted the clinic and many other downtown businesses, Dr. Morgentaler was denied compensation as the clinic was "not owned by a New Brunswick resident."[75] The clinic operated for 20 years but subsidized care for many patients. After Dr. Morgentaler's death in 2013, the clinic stated that it had lost about $100,000 in the previous decade.[76] In July 2014, his family closed the Morgentaler Clinic due to financial unsustainability.[77]

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[67] *Ibid*.
[68] *Ibid*.
[69] *Ibid*.
[70] *Canada Health Act*, *supra*, note 2, s 12.
[71] Demand Letter, *supra*, note 47.
[72] *Canada Health Act*, *supra*, note 2, s 10.
[73] Abortion Access in New Brunswick, "The History of the Clinic" (2014), online: <joyce604.wixsite.com/abortionaccessinnb/history-of-the-clinic>.
[74] *Ibid*.
[75] Abortion Access in New Brunswick, "The Closing of the Clinic" (2014), online: <joyce604.wixsite.com/abortionaccessinnb/closing-of-the-clinic>.
[76] Kevin Bissett, "Abortion lawsuit against N.B. being dropped: Morgentaler Clinic," *CTV News* (15 April 2014), online: <atlantic.ctvnews.ca/abortion-lawsuit-against-n-b-being-dropped-morgentaler-clinic-1.1777028>.
[77] Abortion Access in New Brunswick, *supra,* note 75.

Morgentaler v New Brunswick (NB: 2009)

This lawsuit commenced in 2004.[78] Morgentaler challenged section 2.01 of the Medical Services Payment Act and schedule 2 (a.1) of regulation 84-20 as restrictive.[79] New Brunswick challenged his standing on the basis that he was a man who did not need an abortion.[80] This was a strategic ploy to draw out the legal process and avoid the decision that would inevitably be found in Morgentaler's favour.[81] It was not until 2009, seven years later, that the New Brunswick Court of Appeal ruled that Morgentaler, as a physician, had standing.[82] However, at this point Morgentaler had spent approximately one million in legal fees.[83] When he passed away in 2013, his estate was unable to continue to fund the lawsuit, and it was dropped in April 2014.[84]

Abortion Access in New Brunswick Today

Where are Surgical Abortions Provided?

Aspiration and surgical abortions are provided at three hospitals across two cities in New Brunswick. These are the Moncton Family Planning Clinic located in the Moncton Hospital, Dr. Georges-L.-Dumont University Hospital Centre, and the Bathurst Family Planning Clinic located in the Chaleur Regional Hospital.[85] Despite Saint John and Fredericton boasting populations of 69,895 and 63,116 respectively, funded abortions are not provided at hospitals in these two cities[86]. The combined population of these two cities accounts for less than 10% of the province's overall population.[87]

Following the closure of the Morgentaler Clinic, Dr. Adrian Edgar purchased the building in 2015 and opened Clinic 554, a family-medicine clinic that also provides abortions.[88] However, the clinic remained unfunded by the provincial government despite Dr. Edgar's best efforts. As a result, the clinic was closed and the building sold in 2019.[89] Nevertheless, Dr. Edgar continued to rent a portion of the building to perform procedures one day a week,[90] until he finally ended

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[78] Abortion Rights Coalition of Canada, "Court Decisions," *supra*, note 56 at 17.
[79] *Ibid*.
[80] *Ibid*.
[81] *Ibid*.
[82] *Ibid*.
[83] *Ibid*.
[84] *Ibid*.
[85] Abortion Rights Coalition of Canada, "Abortion Clinics and Services in Canada" (13 June 2024), online (pdf): <arcc-cdac.ca/media/2020/08/list-abortion-clinics-canada.pdf> at 11-12.
[86] Statistics Canada, 'Census Profile" (15 November 2023), online (table): <12.statcan.gc.ca/census-recensement/2021/dp-pd/prof/details/page.cfm?Lang=E&GENDERlist=1&STATISTIClist=1&HEADERlist=0&DGUIDlist=2021A00051310032&SearchText=fredericton>.
[87] *Ibid*.
[88] CBC News, "Morgentaler's old Fredericton clinic to reopen as private abortion facility" (16 January 2015), online: <cbc.ca/news/canada/new-brunswick/morgentaler-s-old-fredericton-clinic-to-reopen-as-private-abortion-facility-1.2912283>.
[89] Clinic 554, "Frequently Asked Questions" (2024), online: <clinic554.ca/faq>.
[90] *Ibid*.

these services on January 31, 2024.[91] The fact that this clinic remained non-funded and designated as a "non-approved facility", forcing patients to pay for services out of pocket and the clinic to privately administer the costs of an essential medical service, violated the comprehensiveness, accessibility, public administration, and universality principles of the Canada Health Act.[92] It is notable that Clinic 554 operated as a private doctor's practice and was reimbursed by the province for all services provided *except* surgical abortion.[93]

Current Lawsuit

The Canadian Civil Liberties Association (CCLA) is currently taking New Brunswick to court over the province's abortion restrictions. This was initiated with a formal demand letter on October 14, 2020, written to give the government the opportunity to repeal the laws unjustly limiting abortion access in New Brunswick.[94] The letter argued that the existing statutory framework violates the Canadian Charter of Rights and Freedoms, as Section 2(a.1) of Regulation 84-20 of the Medical Services Payment Act limits the coverage of abortion services to merely three approved hospitals across the entire province.[95] Schedule 2 states that "[t]he following are deemed not to be entitled services: […] (a.1) abortion, unless the abortion is performed in a hospital facility approved by the jurisdiction in which the hospital facility is located […]."[96]

The early gestational limits on abortion make this significantly more concerning, as many women and trans people seeking abortions are not located near these hospitals and must travel significant distances to access abortion services.[97] The law limiting abortions to hospitals interferes with these individuals' right to access abortion.[98]

The CCLA argues the law is a form of sex-based discrimination, defying the Canada Health Act, and the province has already faced penalties from the federal government due to this.[99] The CCLA filed a statement of claim in January of 2021, claiming a declaration that Schedule 2(a.1) of Regulation 84-20 of the Medical Services Payment Act is inconsistent with and in violation of the Canada Health Act; a declaration that Schedule 2(a.1) of Regulation 84-20 is ultra vires the provincial government's powers as it is in pith and substance criminal law; a declaration that Schedule 2(a.1) of Regulation 84-20 violates sections 7 and 15 of the Charter; and a declaration that Section 2.01(b) of the Medical Services Payment Act does not apply to medical offices and clinics.[100] Section 2.01 states that "[n]otwithstanding any other provision of this Act, the

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[91] Aidan Cox, "Clinic 554 to close, bringing clinic-based abortions to end in Fredericton area" *CBC News* (31 January 2024), online: <cbc.ca/news/canada/new-brunswick/clinic-554-fredericton-abortion-1.7100433>.
[92] Abortion Rights Coalition of Canada, "Payment Regulation: A Problem" (August 2014), online: <joyce604.wixsite.com/abortionaccessinnb/problem-payment-regulation>.
[93] Hadeel Ibrahim, *supra*, note 32.
[94] Demand Letter, *supra*, note 47.
[95] *Ibid*.
[96] General Regulation, NB Reg 84-20, Schedule 2(a.1).
[97] Demand Letter, *supra,* note 47.
[98] *Ibid*.
[99] *Ibid*.
[100] *Ibid*.

medical services plan shall not provide payment for […] (b) entitled services furnished in a private facility in the Province".[101]

The CCLA was granted standing to pursue this lawsuit in June 2021.[102] On July 12, 2021, the province of New Brunswick filed a statement of defence, denying that regulation 84-20 is inconsistent with or violates the Canada Health Act.[103] In this statement, the province acknowledges that the Act requires that Canadians have reasonable access to health care, but denies that the Act governs Medicare, stating that the Province holds exclusive legislative authority over health care.[104] As of June 24, 2022, the case remained in the discovery process.[105] Despite the closure of Clinic 554 in early 2024, the case is ongoing.

Abortion Access and Compliance with Canada Health Act in Other Provinces

Nova Scotia

Surgical abortions are offered at four locations across the province. These include the ROSE Clinic (Halifax), South Shore Regional Hospital (Bridgewater), Valley Regional Hospital (Kentville), and Colchester East Hants Health Centre (Truro).[106] There are no external or private clinics offering surgical or aspiration abortions.

Abortions are only offered up to 16 weeks gestation, after which individuals must go out of province to obtain the procedure. Similar to what is occurring in New Brunswick today, abortions are only covered by health insurance if done in a hospital.[107] Previously, the Nova Scotia provincial government attempted to prohibit out-of-hospital abortions entirely through the *Medical Services Act* and *Medical Services Designation Regulation*, leading to the Supreme Court case of *R v Morgentaler* (Nova Scotia) (1993).[108]

The Medical Services Act made performing abortions outside of the hospital setting illegal, and the procedures would not be covered by health insurance. As per the government, the purpose of this act was to prevent the privatization of medical services.[109] The Nova Scotia Government argued that the Medical Services Act fell under section 92(7) of the *Constitution Act*, which sets

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[101] *Medical Services Payment Act*, RSNB 1973, c M-7, s 2.01(b).
[102] Canadian Civil Liberties Association, "CCLA wins first round of abortion challenge in New Brunswick" (1 June 2021), online: <ccla.org/major-cases-reports/nb-abortion-rights/ccla-wins-first-round-of-abortion-challenge-in-new-brunswick/>.
[103] CCLA v PNB, 2021 NBQB 119 (CanLII) (Statement of Defence on behalf of The Province of New Brunswick).
[104] *Ibid*.
[105] Canadian Civil Liberties Association, "CCLA Reacts to Decision in Dobbs v Jackson Women's Health Organization," (24 June 2022), online: <ccla.org/press-release/ccla-reacts-to-decision-in-dobbs-v-jackson-womens-health-organization/>.
[106] Abortion Rights Coalition of Canada, "Abortion Clinics," *supra*, note 85 at 12.
[107] Abortion Rights Coalition of Canada, "Court Decisions," *supra*, note 56 at 6.
[108] *R v Morgentaler*, 1993 3 SCR 463.
[109] Abortion Rights Coalition of Canada, "Court Decisions," *supra*, note 56 at 6.

out the subjects of exclusive Provincial Legislation, namely "The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province […]."[110]

The issue in this case was whether the Nova Scotia Medical Services Act was ultra vires and intruded on criminal law powers.[111] The Supreme Court of Canada ruled that yes, the Act went beyond the province's legal authority as prohibiting abortions outside of hospitals "has an effect on abortions in private clinics virtually indistinguishable from that of the now defunct abortion provision of the Criminal Code."[112] The court also noted that the "central purpose" of the Act and Regulation was not to regulate privatized medical care as the province claimed, but to target abortion and Dr. Morgentaler specifically. The Supreme Court upheld both the trial case and the appeal case in striking down both laws in their entirety.

Prince Edward Island

Surgical abortions are offered in Summerside, at the Prince County Hospital up to 14 weeks gestation.[113] However, if physicians are unavailable, or if the pregnancy is beyond 15 weeks and 6 days, patients must go out of province to the Moncton Hospital in New Brunswick (which goes up to 19 weeks). After 19 weeks gestation, individuals have to pursue alternative out-of-province services, such as in Halifax or Montreal. Residents are responsible for their own travel costs, and abortions at private clinics are not covered by provincial health insurance, arguably violations of the principles of universality and accessibility.

In *PEI v Morgentaler* (PE: 1996), Dr. Morgentaler made an application for a declaration that a PEI Health Services Payment Act regulation stating that abortions were only paid for if done in a hospital and deemed medically necessary by the Health and Community Services agency, was ultra vires.[114] The Act gave the Agency broad discretion to decide what basic health services would be insured and conditions of eligibility.[115] However, it was found that the agency, after including abortion as a basic health service, excluded some abortions on bases inconsistent with the Act's purpose and beyond their authorization.[116]

In 2016, Abortion Access Now PEI (AAN PEI) brought a constitutional challenge against the Government of PEI regarding PEI's abortion policy.[117] Prior to 2016, no induced abortions could be performed in PEI under this policy, forcing those requiring abortions to seek care out of

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[110] *R v Morgentaler*, *supra*, note 108 at 479.
[111] *Ibid* at 480.
[112] *Ibid* at 4.
[113] Prince Edward Island, "Abortion Services" (22 June 2023), online: <princeedwardisland.ca/en/information/health-pei/abortion-services>.
[114] Abortion Rights Coalition of Canada, "Court Decisions," *supra*, note 56 at 14.
[115] *Ibid*.
[116] *Ibid*.
[117] Women's Legal Education and Action Fund, "Case Summary: Abortion Access Now PEI v. Government of PEI (2016)," (n.d.), online: <leaf.ca/case_summary/abortion-access-now-pei-v-government-of-pei-2016/>.

province. AAN PEI argued that this policy violated PEI women's rights to equal access to health services as guaranteed by section 15 of the Charter, as it discriminated against women based on sex and pregnancy. Three months following the announcement of this challenge, the Government of PEI ended this policy.

Newfoundland and Labrador

Abortion services are covered under Newfoundland's Medical Care Plan; however, surgical abortions are generally available only at the Athena Health Centre in St. John's.[118] (Only a small number of abortions are done at hospitals and facilities run by the regional health authority on an emergency basis.) Athena also organizes a monthly mobile clinic that travels between rural Newfoundland, from Corner Brook to Grand Falls-Windsor, providing access to safe abortion care.[119] Although this service is invaluable to those able to access it, more consistent abortion services need to be provided in these rural areas.

Abortion is difficult for those living in rural areas to access, which is arguably contrary to the Canada Health Act principles of universality and accessibility. In particular, one might argue that requiring those living in rural areas to travel far distances to obtain essential health care services is contrary to the Canada Health Act's requirement that "[a]ll insured residents are entitled to the same level of health care".[120]

Quebec

All abortion services in Quebec, at both hospitals and private clinics, are provided free of charge to those with Quebec health insurance and those covered by the Interim Federal Health Program.[121] Abortion is a part of Quebec's primary health care network and there are abortion access points across the province.[122] Each region must have at least two access points, which includes hospitals and community health centres.[123] Quebec offers abortions up to 24 weeks of gestation.[124]

However, there was a lawsuit regarding abortion funding in Quebec, namely *Association pour l'access a l'avortement c. Quebec* (QC: 2006).[125] Under the funding agreement between the Quebec Department of Health and the Federation of General Practitioners of Quebec, the fees paid to doctors working in private clinics were reduced by 75% once they performed a certain

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[118] Abortion Rights Coalition of Canada, "Abortion Clinics," *supra*, note 85 at 12.
[119] Patrick Butler, "The hidden abortions of Newfoundland's 'Bible Belt'," *CBC News* (30 October 2023), online: < https://www.cbc.ca/newsinteractives/features/mobile-abortion-clinic-newfoundland-bible-belt>.
[120] Canada Health Act, *supra*, note 2, s 10.
[121] Quebec, "Access to abortion services" (22 February 2023), online: <quebec.ca/en/health/health-system-and-services/service-organization/abortion-services/access-abortion-services>.
[122] Action Canada for Sexual Health & Rights, "Access at a Glance: Abortion Services in Canada" (19 September 2019), online: <actioncanadashr.org/resources/factsheets-guidelines/2019-09-19-access-glance-abortion-services-canada>.
[123] *Ibid*.
[124] *Ibid*.
[125] Abortion Rights Coalition of Canada, "Court Decisions," *supra*, note 56 at 16.

number of abortions.[126] As a result of this agreement, private clinics were forced to charge patients who underwent abortions $200 to $300 in order to cover the uninsured costs.[127] This was found to be unlawful.[128]

Manitoba

Manitoba offers procedural abortions at three clinics, two of which are located in Winnipeg, with the third located in Brandon.[129] The Brandon Regional Health Centre offers aspiration abortions up to 12 weeks gestation. Winnipeg's Women's Health Clinic and Health Sciences Centre offers aspiration and surgical abortions up to 16 and 20 weeks gestation respectively.

Jane Doe et al. v. Manitoba consists of four cases occurring between 2004 and 2008.[130] Two women underwent abortions and were required to pay for the procedures at the Winnipeg Morgentaler Clinic as the clinic was unfunded.[131] If they opted for an abortion at a funded public hospital, they would have had to wait between four and eight weeks.[132] They initially filed a class-action suit in 2001, with the aim of striking down a law preventing government funding of out-of-hospital abortions as unconstitutional.[133]

The Court of Queen's Bench of Manitoba granted a summary judgement in the women's favour in December 2004.[134] The Court held that the law violated their rights to liberty and security of the person as guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms,* as it "forces women […] to wait for a therapeutic abortion, a procedure that provably must be performed in a timely manner […]."[135] The Court also held that the legislation violated sections 2*(a)* and 15 of the *Charter.* In 2005, the province passed a regulation allowing private clinics to receive government funding for providing abortions.[136]

Saskatchewan

Aspiration and surgical abortions are only available in Saskatoon up to 12 weeks gestation, and in Regina up to 19 weeks and 6 days gestation. After this, patients must seek care outside the province.[137]

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[126] *Ibid*.
[127] *Ibid*.
[128] *Ibid*.
[129] Abortion Rights Coalition of Canada, "Abortion Clinics," *supra*, note 85 at 12.
[130] Abortion Rights Coalition of Canada, "Court Decisions," *supra*, note 56 at 15.
[131] *Ibid*.
[132] *Ibid*.
[133] *Ibid*.
[134] *Ibid*.
[135] *Ibid*.
[136] *Ibid*.
[137] Abortion Rights Coalition of Canada, "Abortion Clinics," *supra*, note 85 at 18.

While Saskatchewan does not have any private clinics offering abortions, the provincial government does pay for such services if a resident must seek care at a clinic out of the province. Saskatchewan residents are covered for abortion services in Edmonton up to 18 weeks gestation, and in Calgary for later gestational ages between 18 to 20 weeks.

Alberta

Aspiration and surgical abortions are available up to 20 weeks gestation at two clinics located in Calgary.[138] The Peter Lougheed Women's Health Clinic is a hospital facility that provides abortions after 20 weeks gestation on a case-by-case basis. The Kensington Clinic is a private abortion clinic that provides care to 20 weeks gestation.

In Edmonton, the Woman's Health Options Clinic offers surgical and aspiration abortions up to 19 weeks 6 days gestation.

Ontario

The Ontario Health Insurance Plan (OHIP) provides coverage for physicians' fees related to abortion services, no matter the setting.[139] However, OHIP additionally covers the facility fees in only four private abortion clinics licensed as Independent Health Facilities (IHF) under the *Independent Health Facilities Act*.[140] Although this Act allowed new facilities to apply for a licence, it appears that none were ever provided.[141] Unable to obtain licenses under this Act, the other four private abortion clinics were forced to charge patients some costs out-of-pocket to access abortion services.

The Ministry of Health began investigating the billing practices of a partially-funded Greater Toronto Area clinic in June 2018,[142] one of the four clinics that had been requesting full funding from the province for years. They found that the clinic was charging patients up to $50 for the use of an aspirator, charging in total, approximately $14,000.[143] Based on patient charges reported by Ontario to Health Canada, the federal government withheld $6,560 from the province's CHT payment in March 2022 for patient charges that occurred in fiscal year 2019–2020.[144]

In December 2021, Ontario submitted a Reimbursement Action Plan (RAP) to Health Canada, in which it committed to revisiting the current framework for the funding of insured surgical

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[138] Abortion Rights Coalition of Canada, "Abortion Clinics," *supra,* note 85 at 9.
[139] Canada Health Act Annual Report, *supra*, note 34.
[140] *Ibid*.
[141] Michael Watts, Susan Newell, and Lauren Hebert, "Ontario proposes new legislation for private health facilities and surgical centres" (23 February 2023), online: *Osler* <osler.com/en/resources/regulations/2023/ontario-proposes-new-legislation-for-private-health-facilities-and-surgical-centres>.
[142] Jasmine Pazzano, "Ontario promised to overhaul abortion care - but clinics say they've been left out," *Global News* (7 December 2022), online: <globalnews.ca/news/9280521/ontario-abortion-overhaul-health-care-clinics/>.
[143] *Ibid*.
[144] Canada Health Act Annual Report, *supra*, note 34.

abortion services in the province.[145] As of February 2023, the province was working on improving the legislative and funding framework for Independent Health Facilities as a whole, after which it planned to review the structural funding model of abortion clinics.[146] The province requested another year to complete this review, meaning they did not receive reimbursement of their March 2021 CHT deduction, and continued to have deductions levied against them in 2022 and 2023.[147]

In May 2023, Bill 60, *Your Health Act*, *2023* received royal assent, repealing the *Independent Health Facilities Act* and replacing it with the *Integrated Community Health Services Act, 2023*.[148] Optimistically, Ontario's partially funded abortion clinics will be able to apply for and receive licenses under the new act, allowing the government to finally comply with the Canada Health Act.

In 2010, 18,402 abortions were provided in non-funded clinics and physicians' offices, none of which were reported to the Canadian Institute for Health Information.[149] In 2014, there were 21,725 unreported abortions done at these facilities, consisting mainly of first-trimester abortions.[150] This occurred because Bob Rae's New Democratic government initially only funded the five Toronto-based private clinics and the Ottawa Morgentaler Clinic that existed in the early 1990's.[151] These are the Independent Health Facilities discussed above.

Since then, additional clinics had opened across the province, which receive the doctor's fee from OHIP, but patients are responsible for all other costs[152] This led to the extra billings discussed above, which occurred because Mike Harris's Progressive Conservative government made significant cuts to health care when it came into power in 1995, including restricting new licenses under the Independent Health Facilities Act – singling out abortion clinics.[153] Today, these partially funded clinics and reproductive rights advocates continue to push for the Ontario government to resolve this issue.[154]

British Columbia

In British Columbia, surgical abortions are free if you are covered under the Medical Services Plan of BC and have a valid BC CareCard. They are provided by hospitals or licensed clinics.[155]

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[145] *Ibid*.
[146] Canada Health Act Annual Report, *supra*, note 34.
[147] *Ibid*.
[148] *Your Health Act, 2023,* SO 2023, c.4 - Bill 60.
[149] Abortion Rights Coalition of Canada, "Statistics," *supra*, note 35 at 5.
[150] *Ibid*.
[151] *Ibid*.
[152] *Ibid*.
[153] *Ibid*.
[154] Jasmine Pazzano, *supra,* note 142.
[155] BC Women's Hospital and Health Centre, "Abortion & Contraception " (2024), online: <bcwomens.ca/our-services/gynecology/abortion-contraception>.

Patients from the Yukon, NWT, Nunavut, and Alberta are also covered.[156] The CARE Program located in Vancouver, and run by BC Women's Hospital + Health Centre, offers access to surgical abortions up to the 24th week of pregnancy.[157] Interior Health provides surgical abortions at three hospitals including the East Kootenay Women's Clinic; Kelowna General Hospital's Women's Services Clinic, which provides abortions up to 13 weeks 6 days gestation;[158] and Kootenay Lake Hospital - West Kootenay Family Planning Services, which provides surgical abortions up to 11 weeks 6 days gestation.[159]

Two private clinics located in Vancouver offer aspiration abortions, the Everywoman's Health Centre, up to 13 weeks 6 days gestation and, the Elizabeth Bagshaw Clinic, up to 17 weeks 6 days gestation.[160] On Vancouver Island, the Vancouver Island Women's Clinic offers surgical abortions up to 23 weeks gestation, although offsite in a hospital.[161] The Fern clinics located in the Comox Valley and Campbell River provide surgical abortions in hospital, up to 12 weeks gestation and are able to recommend alternate locations for those whose pregnancy exceeds this point.[162]

Nunavut

In Nunavut, abortions are free for Inuit beneficiaries as they are covered under Nunavut health care.[163] However, surgical abortions are only offered up to 13 weeks gestation in Iqaluit.[164] Those living in the Qikiqtani region must be flown to Iqaluit, those living in Kiviliq are sent to Winnipeg, and those living in Kitikmeot must go to Yellowknife for the procedure.[165]

Northwest Territories

Surgical abortions are free and provided in Yellowknife at the Stanton Territorial Hospital, up to 18 weeks gestation and arranged through the Northern Options for Women (NOW) program.[166] An individual arriving from outside the community is required to stay in Yellowknife the night prior and after the procedure and may receive medical travel assistance from the Now

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[156] *Ibid*.
[157] *Ibid*.
[158] Interior Health, "Abortion - Locations" (2024), online: <interiorhealth.ca/services/abortion/locations>.
[159] *Ibid*.
[160] Abortion Rights Coalition of Canada, "Abortion Clinics," *supra,* note 85 at 10.
[161] Kelly Grant, "Why the only abortion clinic on Vancouver Island has stopped offering surgical abortions," *The Globe and Mail* (29 March 2019), online: <theglobeandmail.com/canada/article-why-the-only-abortion-clinic-on-vancouver-island-has-stopped-offering/>.
[162] Campbell River and District Division of Family Practice, "Pregnant in Campbell River and District" (2024), online: <pregnantincampbellriverarea.ca/unplanned-pregnancy/>; Comox Valley Division of Family Practice, "Pregnant in the Comox Valley," (2024), online: <https://pregnantinthecomoxvalley.ca/unplanned-pregnancy/>
[163] Emma Tranter, "Women in Nunavut still face barriers to abortion access," *Nunatsiaq News* (29 June 2022), online: <nunatsiaq.com/stories/article/women-in-nunavut-still-face-barriers-to-abortion-access/>.
[164] *Ibid*.
[165] *Ibid*.
[166] Northwest Territories Health and Social Services Authority, "Referral Information" (2024), online: <nthssa.ca/en/services/now/referral-information>.

program.[167] For those who are over 18 weeks, a referral to the closest Southern abortion centre, either in Edmonton or Vancouver will be made, and medical travel costs will be covered.[168]

Yukon

In the Yukon, the independently run Opal Clinic is located inside the Whitehorse General Hospital.[169] It provides aspiration abortion from 6 weeks, up to 15 weeks and 3 days of pregnancy.[170] The Opal Clinic provides culturally sensitive care to Indigenous people and encourages patients to access First Nations Health, which is available at the hospital for additional support during the initial appointment and procedure if desired.[171]

The entire cost of the procedure is covered for those with a valid Yukon Health Care Insurance card.[172] Out-of-province individuals costs will also be covered with a valid health care card, although residents of Quebec are required to pay the physician's fee and ask for reimbursement from the Quebec health care system.[173] If a pregnancy is more than 15 weeks and 3 days and up to 24 weeks, travel to the BC Women's Hospital in Vancouver is necessary.[174] The cost of travel and the surgical abortion is covered for Yukon residents through the Yukon Health Care Insurance Plan.[175]

Lack of Access to Reproductive Care for Marginalized Populations

Although barriers to abortion services exist Canada wide, discrimination within the health care system creates specific access issues for marginalized and minority groups, including members of 2S/LGBTQ+ communities; youth; Black, Indigenous and other people of colour (BIPOC); immigrants; and low socioeconomic individuals.

Indigenous women and girls and two-spirited people face particular challenges accessing reproductive and sexual health care in and outside of their communities, including colonization, poverty, stigma, living in rural areas and needing to travel, loss of privacy, lack of trust in mainstream health care, and limited access to health care from culturally-sensitive and

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[167] *Ibid*.
[168] *Ibid*.
[169] Opal Clinic, "Abortion" (2024), online: <opalyukon.ca/abortion>.
[170] *Ibid*.
[171] *Ibid*.
[172] *Ibid*.
[173] *Ibid*.
[174] *Ibid*.
[175] *Ibid*.

Indigenous focused providers.[176] If required to travel to seek an abortion, there is an increased risk of loss of privacy, as reserves are often tightly knit, with information travelling quickly through social circles.[177] On reserves, registered nurses act as primary care providers, and cannot provide abortions, meaning these patients will most likely have to travel to obtain care.[178]

Transgender individuals in need of abortion services may be hesitant to or delay seeking care due to a prevalence of non-inclusive clinics and previous discriminatory experiences.[179] Abortion is typically seen as a "women's issue", facilities offering such services are referred to as "women's health clinics", non-inclusive language may be used by health care providers, and clinic bathrooms may have gendered labels.[180] Even informational materials on abortion are typically heteronormative and solely use images of cisgender women.[181]

Those who live in rural and remote communities frequently face the need to travel to receive an abortion. Up to 40% of people in Ontario, Alberta, Manitoba, and Saskatchewan reside outside of urban areas.[182] A 2013 study revealed that 18.1 % of those needing an abortion travelled over 100 kilometres, with Indigenous people being three times more likely to travel this distance as compared to a white individual.[183]

Finally, many migrants in Canada are undocumented; have precarious immigration status; are ineligible for public health coverage; or experience financial, language, and information barriers, and therefore have much greater challenges in accessing abortion care in Canada.[184]

Political Dynamics, Conservatism, and Stigma

The history of abortion access in Canada appears to demonstrate the existence of extensive stigma and political conservatism as reflected in provincial government policies across the country.

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[176] Action Canada for Sexual Health and Rights, "Decolonize Abortion Care: Reproductive Justice for Indigenous Communities" (12 May 2020), online (PDF): <actioncanadashr.org/sites/default/files/2020-06/2020_Abortion_Caravan_Decolonize_Abortion_Care_0.pdf>.
[177] *Ibid*.
[178] *Ibid*.
[179] A.J. Lowik, "Trans-Inclusive Abortion Services: A manual for providers on operationalizing trans-inclusive policies and practices in an abortion setting, New Brunswick, *FQPN* and *Clinic 554.*" (2018), online (PDF): <static1.squarespace.com/static/5cef632e66e9b80001f24e05/t/5d410ac6ec492200019e8a4d/1564543719159/FQPN18-Manual-EN-NB-PRESS.pdf>.
[180] Action Canada for Sexual Health and Rights, "Abortion Care Includes Trans and Gender Non-Binary People" (12 May 2020), online (PDF): <actioncanadashr.org/sites/default/files/2020-09/2020_Abortion_Caravan_Trans_Care.pdf>.
[181] *Ibid.*
[182] Kyra Keer, Kayla Benjamin, and Roma Dhamanaskar, "Abortion in Canada is legal for all, but inaccessible for too many" (18 August 2022), online: <policyoptions.irpp.org/magazines/august-2022/abortion-access-canada/>.
[183] *Ibid.*
[184] Action Canada for Sexual Health & Rights, "Status for all, abortion access for all!" (12 July 2022), online: <actioncanadashr.org/news/2022-07-12-status-all-abortion-access-all>.

This was demonstrated when the New Brunswick government refused to compensate Dr. Morgentaler following the 2008 flooding that occurred in downtown Fredericton[185]. It was shown when the Ontario Progressive Conservative government singled out abortion clinics when making cuts to health care and restricting new licenses under the Canada Health Act in 1995[186]. Even today, there are only four fully-funded private clinics across the entire province of Ontario.[187] New Brunswick does not fund surgical abortions provided outside of the hospital setting.[188]

There is also stigma regarding the use of private clinics versus hospitals when seeking an abortion.[189] Canada is well known for having a universal health care system - and there is some negativity associated with the use of private clinics and the term itself, because it evokes the spectre of two-tier medicine.[190] Also: "Journalists and politicians frequently seem bewildered over why abortion clinics are even needed, since 'hospitals already provide this service'."[191] However, abortion is a service where private clinics often deliver superior care than hospitals, and two-tier medicine is not a concern if provinces fully fund abortion at clinics as they are required.[192] Further, the lack of hospitals providing such services combined with extensive wait times make these clinics a necessity.[193]

The federal government has been hesitant to tread on provincial jurisdiction when enforcing the Canada Health Act. Through the division of powers, both the federal and provincial governments have jurisdiction over certain aspects of health care and relevant legislation. Under the *Constitution Act,* 1867, provincial and territorial governments have exclusive authority to make laws regarding: the establishment, management and maintenance of hospitals; all matters of merely local or private nature in the province; property and civil rights in the province; and education.[194] This can be interpreted as meaning that provinces have primary authority over health and relevant matters including hospital and health care services; training and regulation of health care professionals; and hospital and health insurance.[195]

The federal government's authority over health is derived from Parliament's criminal law powers; spending power; and ability to create laws for the peace, order and good government of Canada. They are responsible for providing health services to certain groups such as Indigenous people living on reserves; set and administer national principles for Canada's health

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[185] Abortion Access in New Brunswick, *supra*, note 75.
[186] Abortion Rights Coalition of Canada, "Statistics," *supra*, note 35 at 5.
[187] Canada Health Act Annual Report 2022-2023, *supra*, note 34.
[188] Hadeel Ibrahim, *supra,* note 32.
[189] Joyce Arthur, *supra,* note 8.
[190] Ibid.
[191] *Ibid.*
[192] Ibid.
[193] *Ibid.*
[194] Commission on the Future of Health Care in Canada, *Health and the Distribution of Powers in Canada,* by André Braën, Discussion Paper No. 2 (July 2002) at para 16.
[195] Ibid.

care system through the Canada Health Act; and provide financial support to the provinces.[196] Provincial and territorial health insurance plans must meet the standards set out by the Canada Health Act in order to receive full federal funding.[197] Aside from withholding funding if provincial and territorial governments fail to meet these standards, the federal government tends not to interfere with the implementation of provincial health insurance plans. This is especially demonstrated by the federal government's relative lack of interference in regards to New Brunswick's continued refusal to fund clinic-based surgical abortion services.

Conclusion

The Canada Health Act states that abortion is considered a medically-necessary, insured health service in all provinces and territories.[198] As such, it must be fully funded in both hospitals and external clinics. Two provinces continue to ignore this fact and choose to restrict abortion access by refusing to fully fund abortions provided in clinic settings. As well, there are inconsistencies in the services available across the country, with some provinces having much more accessible abortion care than others. These inconsistencies violate the five principles of the Canada Health Act, namely by: preventing individuals from accessing the insured health services they are entitled to; unequal coverage under provincial health plans, lack of access to abortion services; and requiring patients to pay for services in provinces such as New Brunswick and Ontario.

Historically, the New Brunswick provincial government has enacted and amended several pieces of legislation with the intent to prevent abortion and abortion access, as seen with Bill 92, An Act to Amend the Medical Services Payment Act, and the creation of Regulation 84-20 of the Medical Services Payment Act. This led to a number of cases brought by Dr. Henry Morgentaler against the provincial government until his death in 2013. Despite his efforts, abortions done at private clinics remain unfunded, and are only available in three hospitals across New Brunswick.

The Canadian Civil Liberties Association wants to change this and is currently taking the province to court over its abortion restrictions, arguing that Regulation 84-20 of the Medical Services Payment Act violates both the Canadian Charter of Rights and Freedoms and the Canada Health Act by limiting funded abortions to hospitals only.

Abortion services in other provinces and territories have also fallen short of meeting the standards set out by the Canada Health Act. While abortions that take place outside Manitoba hospitals became fully funded in 2005, the clinic funding battles over the years negatively

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[196] Government of Canada, "Canada's Health Care System" (17 September 2019), online: <canada.ca/en/health-canada/services/health-care-system/reports-publications/health-care-system/canada.html>.
[197] Ibid.
[198] Canada Health Act Annual Report 2022-2023, *supra*, note 3.

affected the ability of private clinics to open and operate. Two provinces lost their private clinics (NB and NS) while two provinces never opened any (SK and PE). Surgical abortions are only available in one hospital in each of Newfoundland and Prince Edward Island, forcing some patients to go out of province for care, arguably a violation of the Canada Health Act principles of universality and accessibility.

Marginalized populations, specifically members of 2S/LGBTQ+ communities, youth, BIPOC, immigrants, and low socioeconomic individuals, face additional issues caused by lack of access to reproductive care. This includes limited access to health care delivered by culturally sensitive and Indigenous-focused providers, a loss of privacy, and negative views of the health care system due to previous discriminatory experiences.

Today, political dynamics, conservatism, and stigma continue to play a role in abortion access and compliance with the Canada Health Act. This was shown when the Ontario Progressive Conservative government singled out abortion clinics when making cuts to health care and restricting new licenses under the recently-repealed Independent Health Facilities Act[199] in 1995, contributing to the fact that there are still only four fully funded abortion clinics in the province today.[200] The stigma associated with the use of private clinics as opposed to hospitals has contributed to the province's failure to meet the Canada Health Act principles.

The five principles of the Canada Health Act are intended to protect Canadian's rights and ensure equitable access to reproductive health care. The gaps and discrepancies in the application of the Canada Health Act negatively impact access to reproductive health care, placing the lives and health of individuals who can experience pregnancy at risk due to excessively long wait times, as well as placing unnecessary burdens on their shoulders, such as travel costs, loss of privacy and facility fees.

[199] Independent Health Facilities Act, *supra*, note 37.
[200] Canada Health Act Annual Report 2022-2023, *supra*, note 34.