



Abortion Rights
Coalition of Canada

*Your
Voice for Choice*

Coalition pour le droit à
l'avortement au Canada

Canada's only national political pro-choice advocacy group

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Abortion Law and Policy: Comparisons Between the U.S. and Canada

Abortion is currently legal upon request in both Canada and the United States, but the right to abortion has very different foundations in the two countries. Laws and circumstances have diverged to the point where the legal right to abortion is strong in Canada but vulnerable in the USA.

Canada's Legal Situation

Canada first liberalized its criminal abortion law in 1969, allowing it to be performed in hospitals with the approval of a “therapeutic abortion committee.” But the law resulted in unequal access so the Canadian Supreme Court threw out the entire law in 1988. Although the Canadian legislature soon tried to re-criminalize abortion, the bill failed to pass. Governments have said repeatedly over the years that they do not intend to re-legislate against abortion. This leaves Canada as the only democratic, industrialized nation in the world with no legal restrictions on abortion. (Only one other country has no laws: China). Yet Canada has a relatively low rate of abortion compared to other industrialized countries and one of the lowest rates of abortion-related complications and maternal mortality in the world. About 90% of abortions are performed before 12 weeks gestation, and 99.3% by 20 weeks gestation.¹ These statistics prove that no laws are needed to regulate or reduce abortions, and that women and doctors can be trusted to exercise the right responsibly.

The Supreme Court justices grounded the right to abortion in Canada's constitution, where the primary protection cited was women's right to “security of the person.” One of the judges also found that the abortion law violated women's rights to “freedom of conscience” and “liberty.”² Unlike in the USA, women's equality rights are enshrined in Canada's constitution, so courts have been very reluctant to confer any rights on fetuses—to do so would interfere with women's established constitutional rights. Various court rulings since 1988 have denied fetuses any legal recognition in Canada, and upheld women's right to legal abortion.³ The last serious attempt to reopen the abortion debate in Canada occurred in 2012 during the Harper government. Conservative MP Stephen Woodworth put forward a motion to create a Parliamentary committee to discuss the definition of fetal personhood. Motion 312 was defeated in the House of Commons in a vote of 203 to 91. No abortion restrictions have been passed since the 1988 ruling.⁴

Recent years have seen additional successes, with courts countering anti-abortion activism across the country. The Court of the Queen's Bench of Alberta ruled in 2016 in favour of the city of Grand Prairie, which had refused to run an offensive anti-abortion ad on the back of its buses⁵ (although this

decision is being appealed). Similarly, the Ontario Superior Court ruled in support of the Ryerson Students' Union decision to deny an anti-abortion student group's club status the same year.⁶ In both cases, we can see the Canadian courts beginning to view anti-abortion advertisements and displays as anti-women. Despite vocal protests from anti-abortion groups that refusing to provide them public space violates their freedom of expression, Canadian courts are generally beginning to realize that anti-abortion organizations promote misogynist views towards women and pregnant people's right to bodily autonomy.

Surgical abortion is funded by Medicare in Canada, except in New Brunswick, which continues to refuse to fund surgical abortions performed in private clinics as required by the *Canada Health Act*.⁷ New Brunswick enforces the only piece of legislation directly aimed at abortion – a payment regulation that restricts funded abortions to hospitals. But in 1995, Health Canada directed provinces to fund private clinics that are providing medically required services normally done in hospitals.

Health Canada approved Mifegymiso (better known as the abortion pill) for use in Canada in July 2015. The combination of mifepristone and misoprostol has been on the World Health Organization's list of essential drugs since 2005 and is the recommended method for medical abortion. It took another two years, but abortion clinics finally began receiving Mifegymiso in early 2017. Initially, Health Canada placed several unnecessary restrictions on the medication's use. These restrictions were not legal requirements, but doctors were expected to dispense the medication themselves, take special training to be able to prescribe it, and limit the drug's use up to seven weeks in a pregnancy. Most of the initial restrictions were lifted in 2017, except for the requirement that people seeking a prescription for Mifegymiso first get an ultrasound.⁸ This continues to create barriers for people living in rural or remote communities.

U.S. Legal Situation

In the United States, abortion was legalized in all 50 states by the Supreme Court in 1973, in the famous *Roe v. Wade* decision. The court grounded abortion rights in a constitutionally-derived right to privacy. Although there is no explicit right to privacy in the American Bill of Rights, it was enshrined as a constitutional right in two prior court decisions that legalized birth control (*Griswold v. Connecticut* in 1965, and *Eisenstadt v. Baird* in 1972). These precedents made the *Roe v. Wade* ruling possible.⁹

The *Roe v. Wade* decision led to onerous restrictions on abortion in the USA. Although the ruling freed doctors to perform abortions for any reason during the first trimester (the court did not recognize a woman's right to choose), the court tried to balance women's and fetal rights with a "trimester framework." States could regulate abortion during the second trimester only to protect the woman's health, but during the third trimester (i.e., after "viability"), states could protect fetal life except when abortion was "necessary to preserve the life or health of the mother." Today, 43 states have laws that restrict post-viability abortion.¹⁰

In *Roe v. Wade*, the Supreme Court gave abortion the highest degree of constitutional protection with its "strict scrutiny" standard. This says that any limitation on a right must be the least restrictive way possible to achieve a "compelling state interest." But the Court dropped this standard in 1992 (*Planned Parenthood of Southeastern Pennsylvania v. Casey*) in favour of the much less protective "undue burden" standard—in other words, restrictions that hamper abortion access are constitutional as long as they're not *too* onerous. In the same decision, the Supreme Court eliminated the trimester framework by allowing states to protect "potential life" and maternal health throughout pregnancy.¹¹

The trimester framework, plus the 1992 Casey decision and other subsequent Supreme Court cases that weakened Roe v. Wade, provided a basis on which to craft anti-choice laws. Every year in the USA, dozens of anti-abortion bills are introduced in state legislatures. Beginning in 2010, anti-choice lawmakers in state legislatures passed an unprecedented number of targeted regulation of abortion providers (TRAP) laws. Their aim was to shut down reproductive health-care clinics and limit access to abortion. These excessive, unnecessary, and costly regulations resulted in 90 percent of U.S. counties having no abortion clinic.¹² In June 2016, the U.S. Supreme Court struck down some of the most burdensome restrictions in Texas. However, the partisan judicial system in the United States has meant that pro-choice activists cannot rely on the courts to apply the law evenly on the issue of abortion.

Some courts have proved willing to limit the right to abortion because they don't attach great importance to privacy rights. A few pro-choice legal scholars have lamented the right-to-privacy basis for Roe v. Wade, arguing instead that women's right to abortion should be guaranteed under the Constitution's 14th Amendment "equal protection" clause. This clause could be used to invalidate legal restrictions against abortion on the basis that they penalize only women, not men.¹³

The first major abortion restriction in the USA occurred in 1976, when Congress passed the Hyde amendment prohibiting the use of Medicaid funds to pay for poor women's abortions. It's estimated that up to one-third of poor women are forced to carry to term in the USA because they can't afford an abortion. For those poor women who do manage to get one, almost half delay their procedure by 2-3 weeks while trying to find money.¹⁴

Further Supreme Court decisions allowed states to require parental consent for teenagers' abortions, prohibit the use of public funds and facilities for abortion, and require viability tests after 20 weeks. Many states also mandate waiting periods for abortion, forcing women to visit the clinic at least twice. Others have passed "informed consent" laws that compel abortion providers to give anti-choice propaganda to their patients. The latest strategy is to pass fetal protection laws, such as laws requiring doctors to tell patients that the fetus will suffer "pain" during an abortion, even though the scientific evidence does not support that.¹⁵

In June 2018, the U.S. Supreme Court issued its ruling on *NIFLA v Becerra*. The case addressed whether fake women's health centers should be required to post notices letting clients know about their right to affordable, low-cost reproductive health services, and to be transparent about their status as a licensed medical facility (or not). The court ruling allows anti-choice "crisis pregnancy centers to continue misleading their patients, on the grounds that California's law violated the First Amendment because these notices represented state-compelled speech."¹⁶ With the current make-up of the Supreme Court, and the recent confirmation of right-wing Justice Brett Kavanaugh to a lifetime appointment in October 2018, more anti-choice rulings can be expected in coming years.

Conclusion

Both Canada and the United States have learned that legal victories for abortion rights can be hollow without extensive social and government support to back them up. But living without any laws against abortion does put Canada a step ahead of the United States. While many anti-abortion groups in Canada are trying to get governments of all levels to pass laws restricting abortion access like those in the United States, pro-choice activists ensured this did not happen during the Harper years by remaining vigilant and vocal.

At the most recent Conservative Party of Canada convention, a motion to remove their policy that says any Conservative government will not support legislation to regulate abortion failed to pass, but just barely.¹⁷ Abortion access in Canada is currently expanding, as are regulations to protect abortion providers. Over the past two years, Newfoundland & Labrador, Quebec, Ontario, and Alberta joined British Columbia by enacting safe zones around abortion clinics in their provinces.^{18, 19} These zones limit the presence of anti-abortion protestors and ensure people accessing abortion can do so free from harassment.

However, with the election of Premier Doug Ford in Ontario and the possibility of Jason Kenney becoming Premier of Alberta next year, it is important that Canada's pro-choice community recognizes that this progress can only continue if we remain vigilant and actively work to oppose anti-abortion politicians. Ford promised to bring in parental consent laws during his run for leadership of the PC Party to gain the support of social conservatives. Anti-abortion groups like Campaign Life Coalition, RightNow, and We Need a Law are actively trying to bring American-style anti-abortion politics to Canada as well as pass new laws against abortion, and we cannot let that happen.²⁰

In the United States, the legal right to an abortion looks to be in the most precarious position since *Roe v. Wade* became law in 1973. President Donald Trump promised evangelical supporters that if elected, he would appoint Conservative justices to the Supreme Court. With the 2017 appointment of Neil Gorsuch, and more recent appointment of Brett Kavanaugh, Republicans continue to show they are willing to do anything to gain control of the American judiciary. After weeks of protests, Senate Republicans chose to ignore the testimony of Dr. Christine Blasey Ford and the sexual assault allegations against Kavanaugh, in favour of securing a Conservative majority on the court.²¹ These two appointments will most likely lead to *Roe v. Wade* being overturned or severely gutted. If *Roe* is overturned, the legality of abortion will revert back to individual states. Although the situation is dire, the resilient and battle-hardened pro-choice community in the USA is mobilizing like never before to defeat barriers to the reproductive rights of women and transgender people.

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