



## ***Position Paper # 64***

# **Why Abortion Needs No Legal Restrictions**

Canada's criminal abortion law was struck down by the Supreme Court on January 28, 1988. Since that momentous day, there have been no new laws or other restrictions, even gestational limits (which most countries have). We are the only country in the world without an abortion law of any kind, except for China.

Our country's experience is proof that laws against abortion are unnecessary. A full generation of Canadians has lived without a law and we are better off because of it. We have shown that abortion care can be ethically and effectively managed as part of standard healthcare practice, without being controlled by any civil or criminal law.<sup>1</sup> Not only do abortion rates not increase, those who seek abortion benefit from having no laws, and so do abortion providers. Our success is a role model to the world.

## **Some history**

From Confederation until 1969, abortion was criminalized unless it was to save a woman's life. In 1969, Prime Minister Pierre Trudeau liberalized the abortion law, which, while it was a step forward, resulted in poor and unequal access, arbitrary obstacles, and delays.

Dr. Henry Morgentaler was a public advocate for legal abortion on request since the mid-1960s. Despite legal action, police raids, and arrests, he continued to provide abortions. He was acquitted in every case brought against him, and, when he reached the Supreme Court level, the Court repealed the entire abortion law in 1988, stating that the law violated women's constitutional rights to security of the person, right to life, personal liberty, freedom of conscience, and privacy.<sup>2</sup> The government then tried to pass a new abortion law but it failed in the Senate in 1991.

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<sup>1</sup> We also don't need abortion rights enshrined into law or the Charter: <https://www.arcc-cdac.ca/wp-content/uploads/2022/06/66-dont-enshrine-abortion-rights-into-law.pdf>

<sup>2</sup> <http://www.morgentaler25years.ca/the-struggle-for-abortion-rights/1988-decision/>

In 1999, the Supreme Court of Canada stated in *Dobson vs Dobson*<sup>3</sup> that the physical unity of a woman and her fetus precludes the imposition of a duty of care on her, because that would be a profound compromise of her privacy and autonomy. The Criminal Code<sup>4</sup> says that a fetus does not become a human being until it has completely exited the birth canal, alive. This definition has withstood the test of time and several legal challenges brought by anti-abortionists.

Anti-choice Members of Parliament have introduced dozens of private member bills over the years that would restrict or threaten abortion right in some way, but none have passed.<sup>5</sup> A few attempts to restrict abortion have been made at the provincial level but they have failed too – provinces have been unable to defund abortion<sup>6</sup> or pass a parental consent law.<sup>7</sup>

Anti-abortion activists often point out that the Supreme Court justices who penned the 1988 *Morgentaler* decision “invited” the legislature to pass a new law to regulate abortion. But the only attempt failed in 1990, and every government since then, including by Conservatives, has explicitly stated they would not legislate on abortion. There is no Parliamentary obligation to pass a new law.<sup>8</sup> The interpretation of the *Charter of Rights and Freedoms*, only six years old in 1988, has evolved to the point that it would be extremely difficult for any abortion restriction to pass constitutional muster. We do not live in the same legal world we did over 30 years ago.

Indeed, abortion should now be considered a Charter-protected right – not explicitly, but based on the 1988 *Morgentaler* decision, subsequent court decisions, and international jurisprudence and human rights agreements.<sup>9</sup> If the Supreme Court were to consider an abortion law today, it would likely rule that abortion is a constitutional right under Section 7 of the Charter<sup>10</sup> (life, liberty and security of the person) as well as Section 15 (gender equality), because any restriction on abortion would violate those rights.

## Responsible abortion care

When abortion is not a crime, safety rises for people who can get pregnant. When doctors and medical staff are schooled in abortion procedures and care, patients no longer suffer the consequences of botched abortions (either because a doctor does not have the proper tools, or the pregnant person attempts an abortion on their own using non-medical equipment).

As a result of no legal restrictions on abortion for over 30 years, doctors and pregnant people handle abortion care responsibly, abortion rates are moderate and have declined over time, almost

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3 <https://www.canlii.org/en/ca/scc/doc/1999/1999canlii698/1999canlii698.html>

4 <https://laws-lois.justice.gc.ca/eng/acts/C-46/section-223.html>

5 <https://www.arcc-cdac.ca/presentations-anti-bills/>

6 <https://rabble.ca/columnists/defunding-abortion-non-starter/>

7 <https://rabble.ca/columnists/pro-choice-movement-will-defeat-any-threats-abortion-rights/>

8 <https://www.arcc-cdac.ca/wilson/>

9 <http://www.arcc-cdac.ca/postionpapers/65-abortion-charter-right.pdf>

10 <https://www.cbc.ca/news/canada/abortion-rights-canada-morgentaler-court-1.6439612>

all abortions occur early in pregnancy, maternal deaths and complications from abortion are very low, and public support for abortion rights has increased.<sup>11</sup>

Government funding of abortion is a critical component of responsible abortion provision. Funding helps integrate abortion care into the healthcare system, protects patients from gender discrimination, facilitates earlier access to the procedure, helps ensure acceptable standards of care, and helps prevent the service from being marginalized or further stigmatized, despite vehement anti-choice propaganda.

Far from being unregulated, abortion is governed like any other healthcare procedure – by medical codes of ethics, evidence-based guidelines, and clinical protocols.<sup>12</sup> For example, the *Canada Health Act*<sup>13</sup> guarantees funding and accessibility for medically required treatments, which include abortion. Medical protocols are provided by the Society of Obstetricians and Gynecologists of Canada and the National Abortion Federation, and most provinces have policies or guidelines promoting safe and accessible abortion care.<sup>14</sup>

## **When abortions are illegal, abortion rates remain high**

According to reported numbers, abortion in Canada has steadily declined since 1997.<sup>15</sup> Some of this could be attributable to increased use of contraceptives. However, lower rates in recent years are also a reflection of inadequate reporting of medication abortion, which has significantly increased since 2019. To be clear, use of the abortion pill does not increase abortion rates – rather, it reflects a switch from early aspiration abortion. We believe that Canada’s abortion rate is low to moderate, and comparable to the low rates in many western European countries.

Globally, abortion rates are similar or greater in countries where abortion is illegal or heavily restricted, compared to countries with more liberal laws.<sup>16</sup> One reason is that restrictive countries tend to have poor access to contraception as well, resulting in high rates of unintended pregnancy, and therefore higher rates of both unwanted births and abortions.<sup>17</sup> But the lesson is that many, perhaps most, people with unwanted pregnancies will seek abortion regardless of laws.

The World Health Organization reports that “restricting access to abortions does not reduce the number of abortions; however, it does affect whether the abortions ... are safe and dignified. The proportion of unsafe abortions are significantly higher in countries with highly restrictive abortion

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11 <http://www.morgentaler25years.ca/benefits-of-decriminalization/>

12 <https://www.arcc-cdac.ca/wp-content/uploads/2020/06/61-Canadian-abortion-regulation.pdf>

13 <https://laws-lois.justice.gc.ca/eng/acts/c-6/>

14 <https://prochoice.org/store/clinical-policy-guidelines/>

15 <https://www.arcc-cdac.ca/wp-content/uploads/2020/07/statistics-abortion-in-canada.pdf>

16 [https://www.thelancet.com/journals/langlo/article/PIIS2214-109X\(20\)30315-6/fulltext](https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(20)30315-6/fulltext)

17 <https://www.guttmacher.org/article/2022/03/new-evidence-unintended-pregnancy-and-abortion-150-countries-shows-importance>

laws than in countries with less restrictive laws.”<sup>18</sup> Each year, between 5 to 13% of maternal deaths can be attributed to unsafe abortion, according to the WHO.

## What’s the purpose of abortion laws?

Since virtually every other country has an abortion law, some people presume that Canada should have one too. But this ignores the historical context. Legal restrictions in liberal countries are a relic of patriarchy and religious tradition – they evolved from total abortion bans that were in place earlier in the 20th century. Most are exception-based – abortion is allowed only under certain circumstances but criminalized in all others.

While most countries retain abortion in their criminal codes, even countries that have completely decriminalized abortion, such as Australia, have passed civil laws to regulate abortion practice that introduce criteria for patients to meet.<sup>19</sup> In Sweden, the civil law legalizing abortion allows abortion on request only to 18 weeks, and the law still rests on a threat of criminal prosecution for doctors who go outside the law.<sup>20</sup> Similarly, the UK’s Abortion Act of 1967 requires approval from two doctors for an abortion, and the underlying penal code still criminalizes not just doctors, but also threatens pregnant people with life imprisonment for violating the law.<sup>21</sup>

Canada is lucky, in a sense, that the revised abortion law we had in place from 1969 to 1988, was so bad that our Supreme Court threw it out as unconstitutional. And luckier still that we never passed a new law. Other countries took a different path, with legislatures tinkering with the original criminal abortion law. For most of the 20th century, people could not comprehend the idea that women should or could exercise a right to abortion on request. As a result, existing abortion laws were revised on the unquestioned and false assumption that some kind of abortion law was necessary.

Laws were initially liberalized in most countries for public health reasons, when it became apparent that pregnant people could not be stopped from seeking out abortions, regardless of any law or risk to their lives. Illegal abortions were killing and injuring large numbers every year around the world. It was often doctors who fought hardest for legalization, because they were the ones who witnessed the daily carnage. The anti-choice movement is forced to ignore or discount the death toll of illegal abortion when they advocate re-criminalizing abortion. But overwhelming evidence exists to support the fact that illegal abortion is still widely practiced and that it’s dangerous, especially for poor people in developing countries. Reputable organizations like the Guttmacher Institute and the World Health Organization use a range of methods<sup>22</sup> to carefully calculate and cross-check the rates of illegal abortions in various countries. (Also see this Lancet study.<sup>23</sup>) It’s

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18 <https://www.who.int/news-room/fact-sheets/detail/abortion>

19 <https://www.childrenbychoice.org.au/resources-statistics/legislation/australian-abortion-law-and-practice/>

20 <https://legislationline.org/taxonomy/term/18178>

21 <https://www.bpas.org/get-involved/campaigns/briefings/abortion-law/>

22 <https://www.guttmacher.org/report/abortion-worldwide-2017>

23 <https://www.thelancet.com/journals/langlo/article/PIIS2214-109X%2814%2970227-X/fulltext>

impossible to arrive at a highly accurate number when abortion is illegal, but in most cases, the number is at least somewhat under-reported.

## Conclusion

In 2011, a groundbreaking report<sup>24</sup> to the United Nations called on all states to decriminalize abortion. The UN's Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health described laws restricting abortion as an abuse of state power. Such restrictions "infringe human dignity by restricting the freedoms to which individuals are entitled under the right to health, particularly in respect of decision-making and bodily integrity."

Concerns that other countries may have about eliminating punitive laws on abortion are unfounded. Every Australian state has successfully decriminalized abortion,<sup>25</sup> often citing Canada's example. In recent years, over a dozen countries have decriminalized or liberalized their laws,<sup>26, 27, 28</sup> with only a handful going in the opposite direction, primarily the U.S. and Poland.

Access to safe and legal abortion is a fundamental human right, not something that should even be up for debate, let alone negotiation or compromise. This is not about "a woman's right to choose," which just trivializes the issue and erases transgender people. It's about the *right to life* of anyone who can get pregnant. The right to life means more than just mere physical survival, it must be backed up by democratic rights and freedoms, including the right to pursue happiness on one's own chosen path.

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24 <https://daccessods.un.org/access.nsf/Get?OpenAgent&DS=A/66/254&Lang=E>

25 <https://theconversation.com/abortion-is-no-longer-a-crime-in-australia-but-legal-hurdles-to-access-remain-156215>

26 <https://reproductiverights.org/maps/worlds-abortion-laws/>

27 <https://www.cfr.org/article/abortion-law-global-comparisons>

28 <https://www.dw.com/en/2021-changes-in-abortion-laws-worldwide/a-60280568>