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# Public Policy, Rights, and Abortion Access in Canada

### Abstract

*The Supreme Court of Canada's 1988 decision to invalidate federal criminal law restrictions on abortion is often portrayed as paving the way for unregulated "abortion on demand" in Canada. This depiction belies the patchwork of regulatory barriers to access in place at the provincial level and obscures a host of litigation for improved funding and access across the country. This article explores the policy and legal landscape surrounding abortion access since 1988. Our findings suggest that provincial policies and lower court judgments have shown considerably different interpretations of what the Court's landmark ruling requires. In part, this is a result of a problematic distinction that the Court's reasoning makes between "negative rights," which are protections against state interference, and "positive rights," which would require the state to take action or provide funding to ensure access. We examine the implications of this distinction from both a rights and policy perspective, ultimately arguing that courts are not the only, or best, body through which to realize positive rights. Instead, we argue that legislatures need to take seriously their obligations under the Canadian Charter of Rights and Freedoms.*

**Keywords:** abortion, health policy, rights, Canadian Charter of Rights and Freedoms, equality, reproductive rights, abortion rights in Canada, Morgentaler; abortion law, positive rights

### Résumé

*La décision de la Cour suprême du Canada, en 1988, d'invalider les restrictions sur l'avortement imposées par le droit criminel fédéral est souvent décrite comme une porte ouverte à « l'avortement sur demande » au Canada. Cette idée reçue est démentie par le faisceau de contraintes réglementaires qui existent à l'échelle provinciale et masque les nombreux litiges concernant le financement et l'accessibilité [de ce service] partout au pays. Dans cet article, nous explorons les politiques et le contexte juridique liés à l'accès à l'avortement depuis 1988. Nos résultats montrent que les politiques*

provinciales et les décisions des tribunaux inférieurs proposent des interprétations assez différentes de ce qu'exige la décision de principe de la Cour. Cela résulte en partie d'une distinction problématique faite dans l'argumentaire de la Cour entre les « droits négatifs », qui sont une protection contre l'interférence de l'État, et les « droits positifs », qui exigeraient que l'État prenne des mesures ou fournisse du financement afin de garantir l'accès à ces droits. Nous examinons les conséquences de cette distinction tant dans la perspective des droits que dans celle des politiques et affirmons, en définitive, que les tribunaux ne sont ni la seule instance ni la plus indiquée pour la concrétisation des droits positifs. Nous soutenons plutôt que les instances législatives doivent remplir les obligations que leur impose la Charte canadienne des droits et libertés.

**Mots clés :** avortement, politiques en santé, droits, Charte canadienne des droits et libertés, égalité, droits génésiques, droit à l'avortement au Canada, Morgentaler, loi sur l'avortement, droits positifs

More than a quarter century after the Supreme Court of Canada's decision in *R. v Morgentaler* (1988) declared federal criminal law provisions restricting access to abortion services a violation of the Canadian Charter of Rights and Freedoms,<sup>1</sup> it is common for observers to portray Canada as having established a full-fledged right to abortion and as eliminating legal obstacles to access for women seeking the procedure.<sup>2</sup> The Abortion Rights Coalition of Canada states that *Morgentaler* “gave women the right to abortion on request without restrictions,” while anti-abortion groups routinely suggest that the Court's ruling led to “abortion on demand” (Baklinski; Simoes). While such simplistic and de-contextualized representations of the case may be strategically advantageous for interest groups to realize their goals, the prevalence of similar portrayals in academic scholarship and the news media requires attention. Kent Roach describes *Morgentaler* as “a decision that has left Canada as one of the few countries that has no regulation or restrictions on even late-term abortions” (193). In his authoritative text on constitutional law, Peter Hogg likewise states that the result of the decision was that “Canada no longer has any restrictions on abortion” (981). Newspaper columnists frequently make the same claim (Coyne; Ford).

These depictions of the aftermath of the Court's decision fail to recognize the regulation of abortion at the provincial level, where abortion policy in Canada has fallen under the auspices of the provinces' jurisdiction over health care following the *Morgentaler* decision. Building on studies that examine provincial access to abortion services (Brodie; Erdman; Farid; Haussman; Palley; White), this article demonstrates that there is substantial variation across the country in terms of how abortion services are regulated, delivered, and funded; the absence of regulation so often attributed to the

fallout of the *Morgentaler* case is illusory. While access to abortion has improved dramatically following its decriminalization, significant barriers persist. These include structural barriers that are the result of federalism, the design and funding arrangements of provincial health care systems, and the intransigence of particular provincial governments that persist despite the widespread belief that there is a “right to abortion” under the Canadian Charter. Further, we contend that court-based rights claims have been unsuccessful at the provincial level in part due to a problematic tendency to view the right of access to abortion services as hinging on the question of “state interference” rather than the simple failure of the state to ensure access. This article makes a contribution to the existing literature on abortion access by analyzing the structural, legal, and political impediments to change in light of recent developments.

The article begins by assessing the logic of the 1988 *Morgentaler* decision, particularly its emphasis on state interference. A majority of the Supreme Court of Canada found the impugned criminal law unconstitutional on the basis that it created delays and unequal levels of access that threatened women’s health, thereby violating their right to “security of the person” under section 7 of the Charter. Yet, in the aftermath of the decision, provinces across Canada implemented policies that resulted in delays and unequal levels of access. One of the principal problems presented by the existing Charter jurisprudence is that where unreasonable state interference with access is constitutionally prohibited, the Charter is not generally regarded as requiring state action to help facilitate access. Fundamental to the Court’s reasoning, then, is the distinction between “negative rights,” which prevent governments from enacting laws or regulations that infringe rights, and “positive rights,” which would require governments to take some action to ensure rights are provided through services, as constitutionally mandated entitlements. While the Charter does provide for certain positive rights (minority language education rights, for example), some scholars have argued for the provision of a much broader array of social and economic positive rights (Jackman; Wilke and Gary; Young). Yet the courts have largely approached rights from a negative rights perspective and have been reluctant to impose positive obligations on governments.

This article illustrates how the Court has advanced a logic that does not hold water from the perspective of the rights claimant: why should it matter whether delays or lack of access are the product of state interference or the product of state inaction? Having adopted this lens of analysis, it presents an exploration of the provincial policy landscape post-*Morgentaler* and the realities of abortion access in Canada today. The variation in access between the provinces is stark, with some provinces attempting to deny even women’s negative rights claims, while others have taken strides toward more expansive rights recognitions than those contemplated by the Court. As a result,

the article not only sheds light on the realities of access for women across Canada, but also offers much-needed context for an analysis of post-*Morgentaler* litigation. We uncover significant variation in how lower courts across Canada interpret and apply the Supreme Court of Canada's reasons in *Morgentaler* to rights claims pertaining to access and funding. Some judges' depictions of the case belie the relatively narrow and limited nature of the Court's ruling, in that they appear to imply that *Morgentaler* itself paves the way for a positive right to abortion. Coupled with developments in the Court's own Charter jurisprudence, this judicial willingness to suggest a positive right may give hope to abortion rights advocates' demands for improved public funding and access at the provincial level.

However, despite this potential pathway to improved access, the article concludes by stressing the need to hold provincial governments accountable for the creation and maintenance of rights. The rights responsibilities of the provinces have been obscured by a growing belief that the courts are the only appropriate venue to resolve rights disputes, an issue that is only exacerbated through federalism. Linda White (2014) highlights the problems of policy implementation that emerge from the unique dynamics of Canadian federalism, in which the unwillingness of the federal government to influence provincial policy, coupled with a general reluctance of courts to recognize positive rights, has allowed provinces to stay silent on their decisions to limit access to abortion services (159).<sup>3</sup>

The goal of this article is not to provide a detailed roadmap for provincial governments describing their Charter responsibilities; rather, it is to draw attention to the need to recognize the role of governments in the implementation and maintenance of Charter rights protections. Courts have, and will continue to play, a significant role in shaping rights protections in Canada, but attempting to resolve abortion issues through litigation, with the hope that the judiciary will recognize a positive right, ignores the responsibility of governments to confront their Charter obligations in a more forthright and explicit manner.

### **The Supreme Court of Canada's Decision in *Morgentaler* (1988)**

It is important to understand what the Supreme Court of Canada's groundbreaking decision in *Morgentaler* (1988) does and does not say. The case, brought forward by Dr. Henry Morgentaler, was the culmination of a series of provincial challenges to abortion regulations in Quebec and Ontario. Morgentaler quickly gained recognition across Canada as a supporter of women's abortion rights, opening an abortion clinic in Montreal in 1968 in violation of existing Criminal Code regulations, later expanding his operations to Manitoba and Ontario.<sup>4</sup> The Trudeau government's decision to relax

restrictions on abortion access in 1969 to allow women limited access to legal abortions, provided they receive approval from a “therapeutic abortion committee” and the procedure was performed in an accredited or approved hospital, did not weaken Morgentaler’s resolve that women should be recognized as “full human beings able to make decisions about their own lives” (Martin). It was not until the enactment of the Canadian Charter of Rights and Freedoms in 1982, however, that the legal tools he required to more effectively challenge the existing law became available (Hausman 76). At issue in his 1988 case were the 1969 provisions outlined in section 251 of the Criminal Code, which a 1977 Royal Commission had criticized as making access “illusory for many Canadian women” (Badgley). A majority of the Court found that the regime established by the law created delays and unequal levels of access across the country, and it struck down the provisions as an unconstitutional violation of “life, liberty and security of the person” under section 7 of the Charter.

In media and popular commentary, the Court’s decision is often portrayed in a simplistic fashion as having proclaimed a “right to abortion” under the Charter, with little regard to the specific reasons offered by the justices or a discussion of limits to the right (Macfarlane, “Terms of Entitlement”). Even within the scholarship on abortion access, only a handful of studies examine in substantial terms the implications the decision has for how the right to security of the person translates into a general “right to abortion,” let alone the question of whether it could constitute a positive right to the procedure as part of provincial delivery of health care (Erdman; Farid; Rodgers, “Women’s Reproductive Equality”).

Complicating matters is the fact that the seven justices hearing the case split into four camps (with two justices dissenting). Chief Justice Brian Dickson, with the support of one of his colleagues, wrote a decision that focuses on the system put in place by the impugned criminal law and expressly avoided the question of whether a general “right to abortion” or a “right to life for the foetus” exists under the Charter. By explicitly refusing to explore how far section 7 protections might extend, Dickson limited his finding to a “conclusion that state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person” (*R. v Morgentaler* 1988, 56).

In another opinion, Justice Jean Beetz, supported by another colleague, is in some ways even more narrow, although where Dickson focused on a right against state interference with bodily integrity and serious state-imposed psychological stress, Beetz actually identified a (very limited) right to abortion itself. Beetz wrote that the fact that “abortions are recognized as lawful by Parliament based on a specific standard under its ordinary laws is important,

I think, to a proper understanding of the existence of a right of access to abortion founded on rights guaranteed by s. 7 of the *Charter*” (*R. v Morgentaler* 1988, 88). Like Dickson, Beetz limited his section 7 finding to the criminal law context, noting that the “full ambit of this constitutionally protected right will only be revealed over time. Consequently, the minimum content which I attribute to s. 7 does not preclude, or for that matter assure, the finding of a wider constitutional right when the courts will be faced with this or other issues in other contexts” (89–90). Nevertheless, Beetz went further in his analysis to limit the scope of section 7 guarantees for women who would claim a broader Charter right to abortion services, explaining:

Generally speaking, the constitutional right to security of the person must include some protection from state interference when a person’s life or health is in danger. The *Charter* does not, needless to say, protect men and women from even the most serious misfortunes of nature. Section 7 cannot be invoked simply because a person’s life or health is in danger. The state can obviously not be said to have violated, for example, a pregnant woman’s security of the person simply on the basis that her pregnancy in and of itself represents a danger to her life or health. *There must be state intervention for “security of the person” in s. 7 to be violated.* (90 [emphasis added])

This is a sharp line in the sand that effectively frames section 7 firmly in the negative rights context.

Only Justice Bertha Wilson, notably the sole woman on the Court, declared that section 7 of the Charter encompasses a full-fledged right for women to make the decision to terminate their pregnancy. Wilson’s reasons emphasize the “liberty” component of section 7 and connect the right of women to make the independent decision to terminate their pregnancy to section 2(a) of the Charter, freedom of conscience. She wrote: “This decision is one that will have profound psychological, economic and social consequences for the pregnant woman. . . . It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well” (171).

A close reading of the Supreme Court of Canada’s decision strongly suggests that, while the Charter protects against state interference (and, specifically, state interference in the criminal law context), it does not necessarily provide a positive right of access to abortion, particularly when interpreted primarily using section 7.<sup>5</sup> Nonetheless, governmental responses to the decision in the years that followed reflect a variety of interpretations of the decision, with some provinces seemingly ignoring them entirely.

### Provincial Responses to *R. v. Morgentaler* (1988)

In the immediate wake of the Court's decision, the federal government moved to create a new law. Bill C-43 would have once again banned abortion in the Criminal Code, but with exceptions to allow for medical intervention should a physician determine that a woman's "physical, mental and psychological health" were threatened (Brodie 98). The bill was subsequently defeated in a rare tie vote in the Senate. No federal government has since attempted to draft new legislation, but private members bills designed to recriminalize abortion, in whole or in part, have become commonplace in the House of Commons. To date, there have been at least forty-five such bills (Abortion Rights Coalition of Canada, *Anti-Choice*). In 2013, Conservative Member of Parliament (MP) Stephen Woodworth's motion to have the definition of human being reviewed in the Criminal Code was voted down (Payton, "Motion to Study"). The same year, Conservative MP Mark Warawa's motion to criminalize sex-selective pregnancy was also defeated (Payton, "MPs Motion"). While none of these motions have been successful, their prevalence demonstrates the unsettled nature of rights protection abortion access is afforded in Canada.

Since *R. v. Morgentaler* (1988), no new case seeking to further expand abortions rights under the Charter has reached the Supreme Court of Canada level, although in 1989 the Court dealt with two cases implicating the rights of the fetus.<sup>6</sup> In one case, it declined to determine whether the fetus enjoyed the right to life under section 7 of the Charter (*Borowski* 1989). In the other, which involved a man who sought an injunction to prevent his partner from obtaining an abortion, the Court determined that the fetus does not enjoy any status as a person under Canadian common law or Quebec civil law (*Tremblay* 1989). From a constitutional perspective, the 1988 case remains authoritative when it comes to setting out requirements for abortion access in Canada, but the decriminalization of abortion access led to its reclassification as a health care issue, shifting jurisdiction over the procedure from the federal government to the provinces. Most provinces have not been explicit about how they interpret their obligations following the *Morgentaler* decision, allowing their policies governing abortion access to speak for them. Nevertheless, some, like Prince Edward Island (PEI) and Quebec, have been vocal about how they understand abortion rights. In this section, we examine provincial abortion policy in the immediate aftermath of the *Morgentaler* decision.

With the exception of Ontario and Quebec, all of the provinces implemented regulations or laws in the aftermath of the 1988 decision that were designed to limit access to abortion or even substantively replicate the impugned criminal law under the auspices of their jurisdiction over health care (Erdman 1094). Widespread litigation has since led to the elimination

of many of these regulations, but some persist. The focus of these regulations has tended to limit the conditions under which abortions are publicly insured and the locations in which they can be conducted, often restricting the procedure to registered hospital facilities.

One of the most controversial regulations emanated from Nova Scotia and brought Dr. Morgentaler back to the Supreme Court of Canada. Nova Scotia reacted to the revelation in early 1989 that Morgentaler intended to open a private abortion clinic in Halifax by passing regulations prohibiting the performance of abortions outside hospitals and denying insurance coverage for any procedure that did not take place in a hospital. Three months later, the Nova Scotia legislature passed the Medical Services Act, which codified these regulations for a set of health care services (including abortion) and imposed severe fines on anyone performing such services outside of a hospital.<sup>7</sup> After proceeding to open his Halifax clinic and performing a number of abortions, Morgentaler was charged under the act. This resulted in a division of powers case that reached the Supreme Court of Canada.

The Court determined that the regulations and the act were beyond the authority of the province because they constituted, in pith and substance, an attempt to enact criminal law (a power belonging to the federal government in Canada) rather than to regulate health care, which is a provincial power (*R. v Morgentaler* 1993). Important from the Court's perspective was that the legislators' focus was not the quality and nature of health care delivery but, rather, the suppression of what it viewed to be socially undesirable conduct:

The Morgentaler clinic was viewed, it appears, as a public evil which should be eliminated. The concerns to which the [province] submits the legislation is primarily directed—privatization, cost and quality of health care, and a policy of preventing a two-tier system of access to medical services—were conspicuously absent throughout most of the legislative proceedings (503).

Further, while the provincial legislation was tailored differently than the impugned federal criminal law struck down in 1988, the “overlap of legal effects” between the two “is capable of supporting an inference that the legislation was designed to serve a criminal purpose” (499). It is noteworthy that, despite limiting its ruling to the division of powers issues and expressly refusing to engage with the Canadian Charter of Rights and Freedoms arguments advanced by Morgentaler in this case, the Court did point out that “[o]ne of the reasons that the former s. 251 of the Criminal Code was struck down in *Morgentaler* (1988), *supra*, was that the in-hospital requirement in that section led to unacceptable delays, undue stress and trauma, and a severe practical restriction of access to abortion services” (514). Importantly, while

the legal requirement that abortions be performed only in hospitals was successfully challenged, many provinces, including New Brunswick and Prince Edward Island, continued to refuse coverage of clinic abortions under their provincial health insurance schemes.<sup>8</sup>

Although most provinces enacted policies designed to limit abortion access in the immediate aftermath of the Court's 1988 ruling, PEI was the only one to articulate an explicit anti-abortion stance. A matter of weeks after section 251 of the Criminal Code was struck down, the provincial legislature enacted Resolution 17. Citing the belief of a majority of Islanders that life begins at conception, the province resolved that "any policy that permits abortion is unacceptable," going so far as to call on the three major federal parties (the Progressive Conservatives, the Liberals, and the NDP) to pass "legislation consistent with the intent of this Resolution" (*P.E.I. Abortion Policy*).

Operating with a similar intent, New Brunswick moved to restrict access to abortion services even before the procedure was decriminalized. In 1985, the Hatfield government amended the provincial Medical Act to restrict the performance of abortions to hospitals upon pain of professional misconduct (Dunsmuir).<sup>9</sup> This restriction was effectively redundant, given the force of the 1969 law that allowed for legal abortions only in hospitals with approval from a therapeutic abortion committee, but it would have given the province the ability to revoke the license of Morgentaler, who had stated his intention to open an illegal clinic in the province. When Morgentaler did eventually open a clinic in Fredericton in 1994, the New Brunswick Court of Queen's Bench relied on the Supreme Court of Canada's 1993 ruling to declare the law *ultra vires* (*Morgentaler* 1994, para. 44).

In 1989, the New Brunswick government also amended the Medical Services Payment Act to classify abortion as an unentitled service.<sup>10</sup> Regulation 84–20 removed abortion from the provincial health plan unless it met strict criteria. Abortion would not be funded "unless the abortion is performed by a specialist in the field of obstetrics and gynaecology in a hospital facility approved by the jurisdiction in which the hospital facility is located and two medical practitioners certify in writing that the abortion was medically required."<sup>11</sup> This amendment was the subject of legal proceedings in the province until Morgentaler's death in 2013 brought the case to a close. The regulation was modified in January 2015 to remove the requirement for a second referral and the necessity of a specialist to perform the procedure, but the facility restrictions remain in place (*Morgentaler Clinic*).

The treatment of abortion in Quebec reveals a starkly different interpretation of abortion rights. Abortion was legal and accessible in Quebec long before the Supreme Court of Canada declared the criminal restrictions unconstitutional. Morgentaler opened his first abortion clinic in the province in

1968 and was later taken to court three times for violating the 1969 law, but no jury would convict him (Fédération du Québec pour le planning des naissances and Canadians for Choice 16). In 1976, Justice Minister Marc-André Bédard, under the newly elected Parti Québécois government, responded to these cases by granting “immunity to doctors who were qualified to practice abortion,” effectively legalizing abortion in the province (15).<sup>12</sup> Abortion was also paid for if it was performed in a hospital (32).

The only major change in abortion policy in Quebec after 1988 came about in response to a class action lawsuit (on non-Charter grounds) pressuring the government to cover the procedure in clinics as well as hospitals (*Association pour l'accès à l'avortement* 2006). The province lost the case and amended their regulation. A fund to reimburse women affected by a lack of clinic funding between 1996 and 2005 was also created in accordance with the suit, and a total of \$13 million was set aside for reimbursements (Fédération du Québec pour le planning des naissances and Canadians for Choice 32). The National Assembly of Quebec recently articulated their policy approach when they drafted a response to the Harper government's indecision regarding the inclusion of abortion as a matter of maternal health at the G-8 summit in 2010. The motion, which passed unanimously, read:

THAT the National Assembly reaffirms the rights of women to freedom of choice and to free and accessible abortion services and asks the federal Government and the Prime Minister of Canada to put an end to the ambiguity that persists in relations to this question; and that the National Assembly reaffirms the fact of supporting the rights of women to an abortion must in no way be adduced by the federal Government as a reason to cut subsidies to women's groups.<sup>13</sup>

This motion carried symbolic weight, and, though it did not persuade the federal government to include abortion in their initiative, it reaffirmed their belief that abortion should be treated as a positive right both abroad and in Canada as it is in Quebec.

The provinces reacted in divergent ways to the Court's 1988 decision, resulting in different approaches to the question of a right of access to abortion as well as an asymmetrical policy landscape across the country. While some provinces attempted to impede expanded access to abortion services under the auspices of their health care systems, they were not always successful, as the case of Nova Scotia demonstrates. Nevertheless, as the next section explores, considerable disparities in access remain.

### **The Current Policy Landscape**

Creating a clear map of access to abortion services in the Canadian provinces is surprisingly difficult; abortion is still considered a taboo topic in many

areas of the country, and information about the services each province provides are often not publicly accessible. This problem is only compounded by a general lack of transparency for many health care services. What information is available has largely been compiled by activist groups, including Action Canada for Sexual Health and Rights and the National Abortion Federation.

Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Quebec, and Saskatchewan cover abortions performed in hospitals, and all but Nova Scotia and Saskatchewan (where no clinics are available) cover clinic abortions (though Saskatchewan has made arrangements with the clinics in Alberta to provide services). Newfoundland and Labrador also cover the costs of abortions performed at the St. John's Morgentaler Clinic but not in local hospitals (National Abortion Federation). As facilities open and close, new physicians start work and others retire, and legal and political battles play out, the nature of these services is liable to shift.

Access is also restricted by gestational limits in each province that cut off services between twelve (hospital abortions in New Brunswick) and twenty-four weeks (Ontario) (National Abortion Federation). The gestational age at which abortions are available in each province is not limited by law but, rather, by the discretion of physicians (often influenced by the extent of their training), funding regulations, and the availability of facilities. Nonetheless, the availability of abortion services in the absence of a criminal law has been widely exaggerated. In 2012, Conservative MP Stephen Woodworth expressed his concern that abortion could occur in Canada until "one's little toe pops out of the birth canal" (McParland). Statements such as this one demonstrate a lack of understanding of the realities of access and women's lived experiences of pregnancy and contribute to the dangerous stigma still surrounding abortion in some parts of Canada. The Canadian Medical Association, the body responsible for creating professional and ethical guidelines for Canadian physicians, only recognizes abortions before fetal viability (approximately twenty weeks), excluding "exceptional circumstances" (2). More than 90 percent of abortions are performed during the first trimester and only 9 percent between twelve and twenty weeks of gestation, yet fear mongering about rare late-term abortions often characterizes political debate on the subject (Abortion Rights Coalition of Canada, *Late Term Abortions*). Abortions are rarely performed after a fetus is viable (approximately 0.4 percent of abortions each year), and these typically because of grave or terminal fetal impairments, which "are not detectable until after the 24th week of gestation" and/or a woman's "life or physical health" is threatened (1).

An exploration of access in the provinces is not complete, however, without a discussion of the barriers women continue to experience outside their home province; the portability of health services within Canada remains

a pressing concern. An Interprovincial Reciprocal Billing Agreement enacted in April 1988, which is still in effect today, excluded abortion care (Canadian Institute for Health Information F-1). The portability of abortion services is thus dependent on the agreements a woman's home province has in effect. Where reciprocal agreements between provinces exist, the patient's home province is billed directly by the province where she accesses abortion services (as in Ontario). In some instances, even where there is no such agreement, a patient may be granted reimbursement for a service paid out of pocket outside their home province, but often only with prior approval and even then it may be restricted to particular facilities. Commonly, abortions performed at hospitals may be covered, but clinic abortions are not (as in PEI). Moreover, patients may not be reimbursed the full amount. No abortion services accessed by New Brunswick women outside their home province are reimbursed. It is important to note that a lack of information on these arrangements, as well as difficulty in accessing information about abortions within many provinces, renders these bureaucratic hoops a significant barrier for women. What data is available on these arrangements is not readily accessible, and neither is it comprehensive.

Overall, coverage for abortion services in most provinces has seen dramatic improvement since 1988, but these changes were hard won. Only through extensive litigation across the country, most often championed by Dr. Morgentaler, have many provinces been forced to change their policies. Many provinces now cover the cost of clinic fees for abortion services, but with notable exceptions, including New Brunswick and PEI. Only Ontario, Quebec, Alberta, and British Columbia, however, have formally recognized the continuing barriers faced by women attempting to access services. The former three have a number of temporary injunctions in place to prevent "protesting within a certain distance of clinics and doctors' homes, and from circulating information about abortion providers" (Downie and Nassar 161). More permanent bubble-zone legislation was enacted in British Columbia in 1995.

Today, the barriers women must contend with to access safe, legal abortion services reflect disagreements about the implications of *R. v Morgentaler* (1988). Provincial policies vary widely, with Quebec effectively affirming that abortion is a positive right, while others, notably PEI and New Brunswick, impose significant limits. PEI and New Brunswick have been commonly cited as the most stringent provinces in terms of access. PEI is the only province in Canada where abortions are not available. The province's health care spending is regulated by its Health and Community Services Agency. It was this agency that was responsible for creating the existing restrictions governing abortion access in the province, which require a physician referral and approval by the provincial Medicare medical consultant before a woman can access a hospital abortion (Health PEI). While this policy does not prohibit

the procedure, there are currently no providers, so women must leave the island to access services. Coverage for out of province abortions in hospitals is available with approval, but travel costs are not covered.

New Brunswick women are not able to obtain coverage for services provided outside the province and have had to contend with significant bureaucratic obstacles if they hope to have the procedure covered in their home province. Until January 2015, Regulation 84–20 required women to obtain written approval from two doctors stating that an abortion is “medically necessary,” a term whose definition is left to the discretion of individual physicians, before it can be performed by a gynecologist in an approved hospital prior to their twelfth weeks of gestation. This regulation not only created nearly impossible criteria in which to obtain an abortion covered under the provincial health insurance scheme, particularly when physician wait times are taken into account, but also had no medical rationale. Indeed, the requirement of two doctors’ signatures is reminiscent of the therapeutic abortion committees created by the now defunct 1969 law. While recent changes to provincial policy have eliminated some of these barriers, the facility restrictions, including the failure of the province to fund a private clinic in Fredericton, continue to limit women’s options.

Federalism and the design or structure of the health care system further complicates matters. While Parliament enjoys the power to regulate abortion through criminal law, it has no direct power to dictate to provinces how access to medical services is administered. Instead, the federal government has indirectly influenced the design and structure of the health care system generally through its spending power. Public hospital insurance and medical insurance for physician fees emerged as cost-share programs between the provinces and the federal government (Fierlbeck 18). Parliament enacted the Canada Health Act (CHA) in 1984, replacing legislation protecting the principles of universality, comprehensiveness, portability, and public administration, while adding a fifth: accessibility.<sup>14</sup> The CHA allows the federal government to withhold funds from provinces that do not adhere to the five principles. Critics argue that because all ten provinces and the federal government technically recognize abortion services as “medically necessary,” the federal government should be more willing to penalize provinces financially when they violate principles such as accessibility (Kaposy; Rodgers). Nonetheless, as Gerard Boychuk notes, the federal government has generally refused to exercise its discretion to apply penalties for violations of the five principles—even outside of the context of abortion—aside from penalties relating to extra billing (159).

Federalism has also proven to be a barrier in a political sense. Federal politicians have proven unwilling to invite the perception that they are interfering with the policy decisions of provincial governments. This has also

proven to be the case in the context of intra-party politics. For example, federal Liberal leader Justin Trudeau generated controversy for his hard-line, pro-choice stance within his own caucus, mandating that all Liberal MPs must vote along party lines when it comes to abortion (Payton, “Justin Trudeau”). Yet this pro-choice conviction does not appear to translate to pushing for better access at the provincial level. When Wade MacLauchlin, the leader of the provincial Liberals in PEI, came out in favour of maintaining the status quo of sending women out of the province to obtain abortion services, Trudeau publicly deferred to him (Wright). This suggests a lack of potential that, if the federal Liberals were to form a government, they would place any political pressure on provinces to improve access or use the CHA to sanction those that are not ensuring it, maintaining the precedent set by the Harper government (White 166).

### **Rights Claims Post-*Morgentaler***

Abortion rights advocates have been largely successful in preventing provincial governments from imposing stringent regulations premised on moral considerations (and which, therefore, amount to criminal law, which is a federal responsibility). Nevertheless, these successes have emanated largely in administrative law and the division of powers cases rather than in Charter claims. Litigation challenging provincial restrictions on insurance coverage for abortion services, which would extend this coverage to abortions performed in private clinics, alongside attempts to protect these clinics, including their patients and staff, from harassment, have tended to utilize Charter claims more actively. Such cases have produced mixed results. The Supreme Court of Canada's 1988 Charter decision has played a significant role in judicial reasoning in these cases. Notably, like the provincial government responses, the interpretation of the Court's 1988 decision by the lower courts has also varied, with some judges arguably adopting a simplistic account and others even applying the Court's reasons in a manner that stretches the Charter protection well beyond the parameters contemplated by the justices.

In *Morgentaler v Prince Edward Island (Minister of Health and Social Services)* (1995) a judge relied heavily on *R. v Morgentaler* (1988) to assess PEI regulations that restricted abortions to those conducted in hospitals and deemed medically necessary by the province's Health and Community Services Agency. In finding the regulations *ultra vires* the controlling legislation, the judge cited extensively from the Supreme Court of Canada's 1988 judgment to determine that the conditions placed on funding abortion services “on their face contain all of the trappings and have the practical effect of inhibiting or thwarting access to legal therapeutic abortion based on what the executive perceives to be socially and morally undesirable conduct” (*Morgentaler* 1995, para. 68). This ruling was overturned by the appellate jurisdiction in a two-to-one decision (*Morgentaler* 1996).

In 1994, the Manitoba Court of Appeal upheld a lower court decision that determined that regulations under the province's Health Services Insurance Act were invalid because they limited public coverage (in the form of physician fees) for abortion services to those conducted at hospitals, something not contemplated by the legislation (*Lexogest Inc.* 1993).<sup>15</sup> In response, the provincial government enacted legislation granting Cabinet the authority to exclude clinic abortions from provincial health insurance (for a full discussion of this topic, see Erdman). The new regulations were challenged in *Jane Doe 1 v. Manitoba* (2004), where Judge Jeffrey Oliphant of the Manitoba Court of Queen's Bench granted a summary judgment in favour of the applicants, who argued their right to access abortion services was infringed under sections 2(a), 7, and 15 of the Charter. The *Jane Doe 1* applicants relied heavily on *R. v Morgentaler* (1988) in support of their argument that delays in access to abortion services at hospitals, where the procedure was publicly insured, created delays that necessitated them to obtain the service at clinics, where it was not covered. In reasons that essentially equate the province's decision to not fund abortions performed at private clinics with the procedures that caused delays under the impugned Criminal Code provisions, Oliphant writes that in his view "legislation that forces women to have to stand in line in an overburdened, publicly-funded health care system and to have to wait for a therapeutic abortion, a procedure that provably must be performed in a timely manner, is a gross violation of the right of women to both liberty and security of the person" (*Jane Doe 1* 2004, para. 78). In effect, Oliphant articulated a Charter standard for a positive right to abortion. However, his summary judgment was overturned on appeal on the basis that a trial was needed to properly assess the evidence (*Jane Doe 1* 2005).

A number of cases arise in the context of limits placed on anti-abortion protesters' right to protest. In *Ontario (Attorney General) v Dieleman* (1994), an Ontario Court judge upheld a number of injunctions against anti-abortion protesters, preventing them from engaging with patients entering clinics or doctor's offices or from picketing physicians' homes. The court dealt with submissions that stated flatly that "the Supreme Court of Canada made it clear that a woman's right to seek a safe medical abortion is a constitutional right coming within either the phrase 'security of the person' or the term 'liberty' in s. 7 of the Charter" (para. 29). The judge portrayed Justice Dickson's decision as linking "both the Constitution and a woman's health to accessible abortion services" (para. 113) and, later in the decision, described the Supreme Court of Canada as dealing with "a woman's right to make a decision concerning abortion without governmental intrusion" (para. 199). A number of cases in British Columbia that dealt with challenges to "bubble-zone" legislation similarly portray the 1988 decision in a simplistic fashion. Judges there have written that since "abortion has been accepted by the court in *Morgentaler*, 1988 as a medical service, it follows that the government has

an obligation to provide generally equal access to this controversial service” (*R. v Lewis* 1996, para. 92). A BC Court of Appeal decision in *R. v Demers* notes that “[s]ince the decision of the Supreme Court of Canada . . . abortion has been legal in Canada. Women now have the right to abortion as a medical service” (2003, para. 7).

It should be noted that these depictions of the 1988 case take place in a context of exploring the legitimacy of governmental objectives in seeking injunctions or defending legislation that restricts the free expression of anti-abortion protesters in order to ensure access to abortion as a health service. While the lower courts are correct to note that underlying the infringement of section 7 in the 1988 case were the harms associated with delays to access, these interpretations of the Court’s reasons fail to acknowledge how narrow they actually were when they simply depicted the Court as having pronounced a “right to abortion.” When coupled with Judge Oliphant’s reasons in *Jane Doe 1*, it appears that there is a willingness among some lower court judges to push beyond the scope of the Court’s 1988 reasons and to consider the constitutionality of provincial restrictions on where abortions may be performed and whether they are publicly insured. However, there is at least as much evidence that courts are approaching these issues with caution. Other decisions explored above have avoided dealing with Charter claims entirely and, instead, were limited to dealing with narrow questions of administration and jurisdiction. Further, when confronted with Charter arguments, not all judges equate provincial restrictions on funding and access with the impugned criminal law at issue in *R. v Morgentaler* (1988). In dissent in *Lexogest* (1993), Chief Justice Richard Scott wrote that the Manitoba regulation at issue in this case “merely deals with payment. All women are entitled to a funded abortion if performed in a hospital. The facts before us are therefore significantly different from those considered by the Supreme Court in the criminal proceedings taken against Dr. Morgentaler and others” (20). Similar logic is at play in the appellate court’s overturning of *Jane Doe 1* and the Quebec court’s refusal to entertain arguments specifically relating to Charter rights in *Association pour l’accès à l’avortement* (2006).

Litigation that occurred after *R. v Morgentaler* (1988) reveals divergent understandings of abortion as a free-standing right under the Charter. In many ways, disagreement among judges at the lower court level reflects disparities between provinces about whether there is a positive right to abortion in Canada. Fundamental to this disagreement is the problematic logic underpinning the Supreme Court of Canada’s 1988 decision, which rested on the harms associated with a lack of ready access to the procedure but which simultaneously remained rooted in the context of a negative, rather than a positive, application of the Charter. From a rights perspective, the tension between the harm-based standard of judicial review and limiting the application of the Charter to the negative rights sphere is fundamentally untenable.

## Abortion Rights in Canada: Going Forward

Despite the ruling in *Morgentaler* that “considerable inequity in the distribution and the accessibility of the abortion procedure” resulting from section 251 of the Criminal Code constituted an infringement of women’s security of the person, a new pattern of unequal abortion access has emerged in its wake. While abortion access in many provinces has improved dramatically absent a federal law restricting the procedure, despite the oft-expressed belief that no regulation of abortion exists in Canada, many provincial barriers persist. Under the existing logic of the Supreme Court of Canada’s decision, these differences do not necessarily constitute negative rights violations because the barriers to access stem not from state interference but, rather, from state inaction (most notably, decisions not to provide public coverage in certain contexts). From a rights perspective, it is apparent that the logic of limiting abortion to the negative rights context is flawed, particularly in the context of a provincial universal health care system in Canada where publicly funded medical services are expected (and are generally delivered by way of a government monopoly).

Treating *R. v Morgentaler* (1988) as though it resolved the issue of abortion in Canada neglects the realities of access for women across the country. The barriers imposed by many of the provinces, either through choice or inaction, continue to restrict access to abortion services in many parts of the country. Nevertheless, this article has identified considerable policy diffusion across the provinces over time that has served to improve access. The removal of the two-doctor requirement in New Brunswick is but a recent example of this diffusion. Yet while abortion is no longer criminalized, it is wrong to suggest that it is unregulated; provincial policy continues to limit access to services and the medical profession sets out conditions for performing the procedure. Despite widespread belief that the *Morgentaler* decision affirmed the rights of women to reproductive self-determination, the reality on the ground suggests that women’s rights are tenuous at best. We have also tried to show how little information women seeking services often have. A lack of transparency in health services in Canada is a general problem in health care, but one that is compounded when the taboo nature of abortion services is taken into account.

This analysis also reveals the way both governments and courts across the country have interpreted the *R. v Morgentaler* (1988) decision and the stark divide in beliefs about the nature of the case and what it means from a public policy and rights perspective. Looking at the lower court cases, we see a mixed record of how judges have interpreted Charter rights *vis-à-vis* abortion policy. Some judges have either applied the case or articulated an interpretation in a way that suggests there is a positive right to abortion, while

others have clearly limited it to a negative right. Notably, the Supreme Court of Canada has thus far refused to interpret section 7 of the Charter to include positive rights in any case (*Gosselin* 2002, para. 82). While abortion could one day be read as a positive right, a reliance on Charter litigation has thus far not done much to improve access in the post-*Morgentaler* context.

Therefore, despite the fact that litigation has proven to be an invaluable tool for the advancement of abortion access in Canada, at least insofar as administrative law and division of powers cases have succeeded in preventing certain provinces from imposing criminal-law type barriers, courts are not the best venue to advance a positive right of access. Furthermore, what little political action has been taken on abortion in Canada since *Morgentaler* is of a worrisome nature. Governments and elected representatives do not spend much time explicitly addressing their obligations under the Charter.<sup>16</sup> It has been far too easy for them to leave controversial moral issues to the courts for resolution. Where abortion access is discussed in political debate, it is usually in the context of attempts to further restrict the rights women have already had recognized by the courts. As the last twenty-five years of legal abortion access have shown, the barriers women face are not merely bureaucratic but also financial and emotional. Many anti-abortion groups pushing to re-criminalize abortion services have labelled women who would seek these services as murderers (Brodie 77; Nossiff 61). The stigma surrounding the issue that has arisen from these attitudes has created significant barriers for access, including harassment of women and doctors outside of clinics. Some provinces, such as British Columbia and Ontario, have placed restrictions on protests immediately surrounding medical facilities to address this issue. These actions demonstrate a movement toward greater recognition and respect for women's rights backed up through state action, but they form only one aspect of a larger goal of positive rights to access for women.

The need for recognition of women's equality in the political sphere cannot be overlooked. If women's rights to self-determination are only recognized when they are judicially compelled, can women expect to be treated as equal members of society? Where full access to abortion services is not provided, we argue that elected representatives must articulate a rationale that justifies inaction. This does not have to take place in the context of litigation; rights are not limited to technical legal concepts but, instead, are inherently political. If courts are unable to address the logical inconsistency presented by conceptualizing rights in negative versus positive terms, then governments must be prepared to adequately address both the equality concerns and the policy implications of their existing approaches to abortion policy. The recent improvements in the New Brunswick case are an example of positive political movement. There is obviously much more work to be done.

## Conclusion

*R. v Morgentaler* (1988) was responsible for dramatic changes in the landscape of abortion access in Canada. The case was met with an immediate policy backlash in many provinces after the lack of a criminal law left them with sole responsibility over abortion policy under their jurisdiction over health care. In response, widespread litigation, often relying on the Court's 1988 decision, successfully liberalized abortion regulation in many of the provinces. It is important not to diminish the dramatically improved access to abortion services following from *R. v Morgentaler*. Nonetheless, this article has shown that barriers to access persist across the country, and women's rights to abortion access are by no means guaranteed.

The courts continue to provide a potential avenue to realize women's positive rights claims to abortion services, but we have argued that recognition of women's equality, both for the creation of sound policy and sheer symbolic value, should fall primarily to governments. The Charter recognizes women as equal members of Canadian society who should not be subject to discrimination on the basis of their sex; these are recognitions elected officials need to take seriously. If women are truly equal citizens, guarantees of safe and timely access to abortion services require governmental protection. The barriers women still face in Canada absent such protections showcase the consequences of failing to acknowledge positive rights to abortion care.

Justice Dickson's ruling held that "forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person" (*R. v Morgentaler* 1988, 56–57). We have argued that the erection of regulatory barriers—arguably insurmountable, particularly for poor women—and state inaction with respect to public coverage effectively give rise to the same rights concerns. This is not a matter that ought to be left to the courts; it is an issue that governments must address not only through the provision of effective, consistent health policy but also through their own responsibility to protect—and promote—fundamental rights.

## Notes

1. Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.
2. Section 251 of the Criminal Code required that, in order for a woman to access a legal abortion, she first had to obtain permission from a Therapeutic Abortion Committee. These committees, composed of four physicians, were meant to make their decision based on a woman's health and were afforded a great deal of discretion. So much so that, as a 1977 Royal Commission soon made apparent, this access was, in effect, "illusory for many Canadian women" (Badgley).

- Different decision criteria, irregular meeting schedules, and, in many cases, the absence of these committees, meant that women were not receiving consistent access across the country.
3. White (2014) explains that the desire not to interfere with provincial policy is part of the existing Conservative government's adherence to the principles of open federalism, under which the federal government "has been unwilling to exercise its authority" over the provinces (166). According to Palley (2006), this policy differs from the previous Liberal government, who did make some attempts to ensure that abortion was accessible in the provinces (565).
  4. Criminal Code, RSC 1985, c. C-46.
  5. *Chaoulli v Quebec (Attorney General)* (2005), a Supreme Court of Canada decision that found a provincial prohibition on private medical insurance was a violation of the Quebec Charter, when patients were facing substantial wait times, is important to mention here. This decision, which is limited to Quebec, can be interpreted as suggesting that governments have some obligation to allow access to private facilities when public facility access is not timely, but it has not been treated as a recognition of a positive right to health care.
  6. While no cases actively seeking to expand abortion rights have reached the Supreme Court of Canada, two cases of note nonetheless may have influenced the future of abortion regulation in Canada. In *R. v Morgentaler* (1993), which originated in Nova Scotia, the court found that the creation of regulations outlawing private clinics was tantamount to the province legislating criminal law and was thus outside their jurisdiction. Morgentaler's private clinic in the province (which has since closed) was permitted to operate legally. In *Winnipeg Child and Family Services (Northwest Area) v G. (D.F.)* (1997), the court ruled that a pregnant women could not be forcibly detained in the interests of protecting the health of her fetus.
  7. Medical Services Act, RS, c. 281, s. 1.
  8. The Morgentaler clinic in New Brunswick, the only abortion clinic in the Maritimes, closed its doors in July 2014, citing a lack of government funding (*New Brunswick Abortion*). A new family practice, Clinic 554, has since opened on the same site. The clinic does provide abortion services, but the remaining restrictions in Regulation 84-20 mean these services are not covered under provincial health insurance (*Morgentaler's Old Fredericton Clinic*).
  9. Medical Act, SNB 1981, c. 87; SNB 1985 c. 76.
  10. Medical Services Payment Act, RSNB 1973, c. M-7.
  11. Medical Services Payment Act, 37.
  12. This was made possible due to the fact that, despite federal authority over criminal law, provinces enjoy jurisdiction over the "administration of justice" under section 92(14) of the Constitution Act, 1867.
  13. Hansard Parliamentary Debates, National Assembly of Quebec (19 May 2010).
  14. Canada Health Act, RSC 1985, c. C-6.
  15. Health Services Insurance Act, CCSM, c. H35.
  16. Allegations by federal whistleblower Edgar Schmidt, a lawyer formerly employed in the Department of Justice, that the government only raises a red flag on legislation in development if there is less than a 5 percent chance of it surviving a Charter challenge suggests the government's scrutiny of its Charter obligations is quite thin indeed (Curry).

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