



POSITION

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PROVINCES SHOULD NOT FUND *Private* ABORTION CLINICS

The Canada Health Act has no legal bearing on provincial health care decisions

In order to understand the influence of the *Canada Health Act* on abortion funding, it is important to start with how Canada's health care is regulated and funded. The 1867 Constitution Act gave the provincial governments broad and extensive power to regulate health care.¹ This constitutional setup respects the provinces as being in the best position to understand and address the particular health needs of their residents. As a result, every province has established a unique health care plan under which residents are entitled to receive publicly insured services.

The *Canada Health Act* was passed in 1985 to give the federal government a way to transfer money to provinces whose health care plan met certain conditions. This Act is not a constitutional document nor is it constitutionally required. As this act is often misunderstood, it bears emphasizing: the *Canada Health Act* is not a health care regulation; rather, it lays out the conditions necessary for the provinces to qualify for federal financial assistance.² The *Canada Health Act* cannot interfere with provincial regulation of health care, as that would amount to an unconstitutional encroachment of provincial jurisdiction. This is affirmed in the preamble to the Act.³

The *Canada Health Act* has no bearing on the legal validity of provincial legislation or government action. It cannot be used by the courts to invalidate or strike

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down a province’s decision regarding funding. Rather, “enforcing” the Act is a political and collaborative process between provincial and federal levels of government, with multiple steps laid out in the statute itself.⁴ Manitoba Court of Appeal Justice Scott summarized this process, saying, “The consequences of non-compliance therefore ... **are of a political nature.**”⁵ This process is meant to respect provincial authority over health care, while at the same time opening a dialogue between the provinces and the federal government. Any impact of the *Canada Health Act* is financial pressure rather than legal force.

This is confirmed by court decisions dealing specifically with provincial governments’ choice not to fund private abortion clinics. In British Columbia, the Court summarized it as being up to the provincial government “to assess the risk of losing federal funding and take such other political steps and political responsibility as it may be advised.”⁶ The Manitoba Court of Appeal in a similar case found that “neither the *Canadian Charter of Rights and Freedoms* nor the *Canada Health Act* ...has any application whatsoever.”⁷

PROVINCES FOLLOW THE CANADA HEALTH ACT IN ORDER TO RECEIVE FEDERAL FINANCIAL ASSISTANCE. THE FUNDING CRITERIA DO NOT REQUIRE THE INCLUSION OF PRIVATE ABORTION CLINICS

The financial incentives in the *Canada Health Act* do impact provincial decisions as, understandably, every province seeks the financial assistance offered. The result is that,

while the *Canada Health Act* cannot invalidate provincial health care decisions, provinces do seek to conform their health care programs to the federal government’s requirements. This means that, while legally the *Canada Health Act* has no bearing on provincial health care funding decisions, the federal government can use the withholding of financial assistance to pressure the provinces. Even while voluntarily following the *Canada Health Act*’s requirements, however, a province can choose not to fund abortions done in private clinics by defining these procedures as not “medically necessary” – a term used in the Act.

Under the Act, each province has the responsibility to determine what services are “medically necessary.” Full federal assistance is conditional on each province’s comprehensive coverage of all “medically necessary”⁸ services. The *Canada Health Act* does not define “medically necessary,” leaving each province to define it for their own health care plan. As a result, each province has a unique list of what services they define as “medically necessary.”⁹ Health Canada affirms this diversity in their report, acknowledging that “[i]t is up to the provincial and territorial health insurance plans, in consultation with their respective physician colleges or groups, to determine which services are medically necessary for health insurance purposes.”¹⁰

Canadian governments understand that not all required medical expenses for Canadians are deemed “medically necessary” for the purposes of the *Canada Health Act*. While this may seem counterintuitive, it has been affirmed by the

Supreme Court of Canada, interacting with British Columbia's choice not to fund behavioural therapy for children with autism. That case saw a family challenge the provincial government under the *Charter* Section 15 guarantee of equality. Chief Justice Beverly McLachlin (as she was then) denied the family's challenge, explaining that British Columbia "provides complete funding for services delivered by medical practitioners, referred to as "core" services. This is required by the [*Canada Health Act*]. **Many medically necessary or required services...fall outside this core.**"¹¹ In this decision, McLachlin explicitly recognizes the reality that, while Canada is known for having a universal healthcare system, it does not cover all medical needs.

In fact, a Fraser Institute report outlined that, in 2016, around 30% of health care spending was not funded by the government. This 30% is made up of expenses relating to medications, dentistry, optometry, physiotherapy, and psychiatry, among others.¹² It is not that these services are not necessary, but that the provinces are not required to fund them in order to receive financial grants under the *Canada Health Act*. For those advocating more abortion funding, the question is – why abortion and not other non-funded health needs such as mental health care? There is no reason that abortion, especially abortion performed in private clinics, should be considered as requiring full funding.

Each provincial government needs to consider their own provincial health care legislation when deciding whether to fund private abortion clinics. It is also possible for a provincial government to amend their health care legislation so that such funding is either required or not. This is affirmed in a 1996 Prince Edward Island Supreme Court Appeal Division decision which upheld a regulation that excluded abortions performed at private clinics from government funding.¹³ No provincial health care plan is going to cover every health care need – abortion should not be given preferential treatment in this system.

CONCLUSION

Health care is rightly under the jurisdiction of the provinces. They are in a better place than the federal government to understand how to allocate resources for the health care needs of their residents. The *Canada Health Act* was designed not to interfere with the provinces, but to create a scheme in which federal and provincial governments could dialogue about health care and create financial incentives for provincial governments to create a comprehensive, universal health care system, while understanding that it would never cover 100% of Canadian's health care needs.

For Example:

NEW BRUNSWICK IS NOT OBLIGATED TO FUND PRIVATE ABORTION CLINIC 554

In 2019 Clinic 554, a private health clinic in New Brunswick, garnered attention as they, along with pro-abortion activists, campaigned for the federal government to put pressure on the New Brunswick government to fund abortions in their private clinic. This pressure is political, activist pressure that is not grounded in the *Canada Health Act*, the *Charter*, or any other legal obligation.

New Brunswick regulations provide a list of services that are not insured, which includes "abortion, unless the abortion is performed in a hospital facility approved by the jurisdiction in which the hospital facility is located."¹⁴ Clinic 554 in Fredericton performs abortions, but because they are not a hospital, those abortions are not publicly insured.¹⁵ New Brunswick is not obligated to change this regulation.

The federal government can use the *Canada Health Act* to begin collaborative discussions with the province of New Brunswick about its decisions. But New Brunswick can and should push back against any federal or activist pressure to change this regulation. Abortion should not be prioritized over other health care needs, and the federal government should respect New Brunswick's decision not to fund a private abortion clinic.



Abortion, an elective procedure, should not be prioritized as something to be funded in every situation or at every gestational age.

Legally the *Canada Health Act* has no bearing on whether a provincial government funds abortion in private clinics or not. Should a province cease funding private clinics, the federal government's response would not be to begin a lawsuit, but rather to begin a collaborative process where they can dialogue with the province. However, a decision not to fund a private abortion clinic cannot disqualify a province's financial entitlement under the *Canada Health Act*. Those who argue otherwise need to answer – why

abortion and not mental health care? Canadians have many medical needs that are not covered by our public health care system. Abortion, an elective procedure, should not be prioritized as something to be funded in every situation or at every gestational age. Private abortion clinics should not be a funding priority or requirement.

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[WeNeedALaw.ca/blog](https://www.weneedalaw.ca/blog)

REFERENCES

- ¹ Also called the *British North America Act, Constitution Act 1867*, (U.K.), 30 & 31., c. 3 in R.S.C. 1985, App. II, No. 5. ss 92(7), 92(13), and 92(16) affirmed in *Canada v PHS Community Services Society*, [2011] 3 SCR 134.
- ² Only British Columbia and Ontario have explicitly adopted the principles in the *Canada Health Act*, but all provinces receive federal health grants. *Medicare Protection Act*, R.S.B.C. 1996, c. 286, ss. 5-5.7 and *Commitment to the Future of Medicare Act*, 2004, S.O. 2004, c. 5, Preamble.
- ³ *Canada Health Act*, R.S.C., 1985, c. C-6 in the preamble.
- ⁴ An example of this is set out in *Cambie Surgeries Corp. v. British Columbia (Attorney General)*, [2018] B.C.J. No. 3705 at paras 21-22.
- ⁵ *Lexogest Inc. v. Manitoba (Attorney-General)*, 101 DLR (4th) 523 (1993 – Manitoba Court of Appeal) emphasis added.
- ⁶ *British Columbia Civil Liberties Association v. British Columbia (Attorney General)*, 49 DLR (4th) 493 at pg 6.
- ⁷ *Lexogest Inc. v. Manitoba (Attorney-General)*, 101 DLR (4th) 523 (1993 – Manitoba Court of Appeal)
- ⁸ *Canada Health Act*, R.S.C., 1985, c. C-6 at s 9.
- ⁹ Constitutional expert Peter Hogg summarized the situation in this way: “In practice, each province determines which services are medically required, and only those services become the ‘insured services’ that are covered by the province’s plan.” Peter W Hogg, *Constitutional Law of Canada* 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2018, release 1) ch 32 at 32.5. Manitoba, Prince Edward Island and Saskatchewan give the Minister of Health the power to administer their legislation, choosing what qualifies as medically necessary. British Columbia and Nova Scotia, on the other hand, established commissions in order to facilitate collaboration between the government and health care professionals to determine what is medically necessary.
- ¹⁰ Health Canada. (2019, September 17). *Canada's Health Care System*. <https://www.canada.ca/en/health-canada/services/health-care-system/reports-publications/health-care-system/canada.html#a5>
- ¹¹ *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 SCR 657 at para 21. Emphasis added.
- ¹² Barua, B., Palacios, M., & Emes, J. (2017). *The Sustainability of Health Care Spending in Canada 2017*. Fraser Institute. <https://www.fraserinstitute.org/sites/default/files/sustainability-of-health-care-spending-in-canada-2017.pdf>
- ¹³ The decision deals with the applicability of the *Canada Health Act at P.E.I. (Minister of Health and Social Services) v. Morgentaler*, [1996] PEIJ No 75 at para 6. The decision deals with the British Columbia and Manitoba decisions as not being applicable as they were under different statutes at paras 9 and 11.
- ¹⁴ *Medical Services Payment Act: General Regulation*, NB Reg 84-20, Sched 2, s a.1.
- ¹⁵ “Abortions in clinics are not paid for by medicare in New Brunswick. The cost of an abortion ranges from \$700-\$850, depending on how far along you are.” <http://www.clinic554.ca/reproductivehealth.html>.

