



POSITION

WRITTEN BY: **We Need a Law**



CANADA HAS *no* ABORTION LAWS

A 2013 poll showed that 77% of Canadians were unaware that we have no abortion laws.

In Canada, there is no law restricting abortion for any reason, at any stage in pregnancy. Put another way, there are no legal repercussions for performing a successful abortion at any stage of pregnancy, for any reason.

In 2018, We Need a Law put this simple fact on billboards across the country: Canada has no abortion laws. This billboard campaign was an advertising initiative to educate the general public on this legal reality. This education is necessary as a 2013 poll showed that 77% of Canadians were unaware of this fact.¹ More recently, a 2020 poll showed that, while 70% of Canadians think abortion should be illegal in the last trimester, 75% of Canadians said they were satisfied with Canada's current policy.² That disconnect is revealing: 75% percent say they are satisfied with Canada's current abortion law, but do not seem to know that Canada's current law permits third trimester abortions for any reason.

The reason for Canada's unique position is not public opinion, which supports some legal restrictions on abortion, but is more likely due to how this status quo developed.

Much of our political discourse is marred by misinformation and rhetoric. When we debate specific abortion policies – whether it's banning late-term abortions, sex selective abortions, or any other initiative – we must first understand the current legal reality. And the current legal reality is that Canada has no abortion laws.

THE HISTORY OF CANADA'S ABORTION LAWS

Canada is the only democratic country in the world with no abortion laws. Most western European countries have a gestational limit on abortion, require a waiting period after an abortion is requested, and provide counseling to support women going through an unplanned pregnancy.³ The reason for Canada's unique position is not public opinion, which supports some legal restrictions on abortion, but is more likely due to how this status quo developed. Unlike most countries, Canada's lack of an abortion law is not the result of a specific piece of legislation or a clear-cut court decision. Rather, it is a combination of a court decision that was limited in scope and Parliament's subsequent inaction on this issue.

While Canada's lack of abortion law can be traced to 1988 when the Supreme Court of Canada struck down the existing abortion law in *R v Morgentaler*, it was neither the intent nor the expectation of the justices who wrote that

decision to leave Canada without a law. In contrast to the American *Roe v. Wade* decision, Canada's Supreme Court did not find a Charter guarantee to abortion,⁴ nor did they even grapple with what one justice termed "the abortion issue."⁵ Rather, they were concerned with the specific requirements of the previous law, under which any abortion needed to be approved by a "therapeutic abortion committee." The court found that these committees created uncertainty and arbitrariness when it came to whether an abortion could proceed. This specific defect in the old law led the majority of the court to declare it unconstitutional.

While striking down the old law, the Supreme Court was clear in their expectation that Parliament could and would respond with a new, less arbitrary, abortion law. The sole female judge on the case, Justice Bertha Wilson, stated that Parliament has a "compelling interest in the protection of the foetus [that] would justify it in prescribing conditions."⁶ Chief Justice Dickson (as he was then) agreed "that protection of foetal interests by Parliament is also a valid governmental objective. It follows that balancing these interests, with the lives and health of women a major factor, is clearly an important governmental objective."⁷ All seven justices who wrote the four separate reasons that make up the *Morgentaler* decision agreed that Parliament has legal justification to pass an abortion law.

Since that 1988 decision, however, there has been no federal or provincial law restricting abortion.⁸ One attempt

by Parliament to pass a new abortion law failed on a tie vote in the Senate in 1991,⁹ and since then legislating abortion has been a subject confined to private member's bills. The fact that no government bill has been put forward on abortion is not of legal necessity, but due to the controversial nature of the subject. As one scholar puts it: "The three opinions [that make up the Supreme Court of Canada's Morgentaler majority decision] did not establish an explicit right to abortion, but left it up to Parliament to draft fairer, less arbitrary abortion legislation...In the end, Canada was left with abortion on request and for women's own reasons, not because the court required this but because Parliament failed to enact a new abortion law."¹⁰

MORE THAN A LEGAL ISSUE: ACCESS TO ABORTION

Despite Canada having no abortion laws, pro-abortion activists are quick to decry the lack of "access" to abortion. Organizations fully devoted to expanding abortion in Canada will claim that women face barriers when it comes to accessing abortion. The identified barriers are not legal barriers, but rather barriers of logistics and cost. Not every community has an abortion clinic and individual hospitals may have self-imposed gestational limits, or they may refer to the Canadian Medical Association Guidelines, but these limitations have no force of law and often include exceptions.

For example, a Montreal woman had an abortion at 35 weeks gestation (a full-term pregnancy is 40 weeks) after her pre-born child was diagnosed with a non-life-threatening genetic condition.¹¹ While two hospitals refused to perform the abortion on this viable child, a third hospital agreed. The Health Minister of Quebec expressed disapproval, not to the hospital who performed the abortion, but to the two hospitals who refused. Not only was there no law preventing that abortion, there was also pressure from the government to perform such abortions in the future.

An abortion performed that late in the pregnancy involves injecting the pre-born child with drugs that initiate cardiac arrest. Several days afterwards the woman gives birth to a dead child.¹² In this case, had they just induced labour, the child would likely have survived. We may be grateful for hospitals like the first two who have policies in place that prevent late-term abortions. But the legal reality is that there are no legal consequences for performing such abortions. When we say Canada has no abortion laws, we are saying that abortions can be performed at any point



during pregnancy, for any reason, and there will be no legal repercussions. Canada has no abortion laws.

APPENDIX 1: PROVINCIAL LAWS

There are provincial laws that mention abortion as it relates to how they are facilitated. None of these provincial statutes restrict abortion within their province. The Alberta College of Physicians and Surgeons policy does impose a gestational limit on abortion clinics, but this limit does not apply to hospitals. The following is a comprehensive list of provincial laws mentioning abortion.

- All provinces pay for abortions performed in hospitals. However, they are legally able to refuse to fund private abortion clinics.¹³ Currently, only New Brunswick does so.¹⁴
- British Columbia's *Hospital Act* includes a list of hospitals that "must provide the facilities and services, and be operated and maintained, as necessary to allow a qualified person to receive abortion services at that hospital."¹⁵
- Both British Columbia and Ontario's freedom of information statutes state that information about abortion that might identify an individual or a facility must not be disclosed.¹⁶



- British Columbia, Alberta, Ontario, Quebec, Newfoundland and Labrador and Nova Scotia all have “bubble zone” or “safe access zone” laws that prohibit pro-life speech or attempting to persuade a woman not to have an abortion in a prescribed geographic area outside of abortion clinics.¹⁷
- Prince Edward Island and Saskatchewan exclude a decision maker from choosing an abortion on behalf of an incapable person unless the person’s life or health are endangered.¹⁸
- The College of Physicians and Surgeons of Alberta’s Non-Hospital Surgical Facility’s Termination of Pregnancy Standards includes a gestational limit of 20 weeks. This applies only at abortion clinics and not to hospitals.¹⁹

APPENDIX 2: JOURNAL ARTICLES

The following is a bibliography of academic journal articles that confirm the fact that Canada has no abortion laws. It is not only pro-life groups making this claim, but everyone from top legal experts (Peter W. Hogg) to pro-abortion academics arguing for increased access. It is a claim that

is made in legal and medical journals and included in this appendix are sources as recent as 2020.

1. “In *Morgentaler*, the restrictions on abortion in the Criminal Code were struck down as unduly depriving pregnant women of liberty or security of the person, contrary to section 7 of the Charter. In obiter, the Court added that a less restrictive abortion law could possibly be upheld. In 1990, a bill which would have implemented a less restrictive abortion law was introduced into Parliament. However that law was defeated on a tied vote in the Senate, and the divisive issue of abortion has never been revisited, either in terms of a new law, or even in terms of the formal repeal of the law that was declared unconstitutional in 1988. While neither the Charter nor the Court precluded a legislative response to the *Morgentaler* decision, the abortion issue is so politically explosive that it eludes democratic consensus.”

Hogg, P. W., & Bushell, A. A. (1997). The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All). *Osgoode Hall Law Journal*, 35, 75-124.

2. “Canada is the sole Western nation without any criminal (or direct governmental) control over the

provision of abortion services. Under current Canadian law, a woman may have an abortion at any time, for any reason.”

Nelson, E. (2011). Regulating Reproduction. In J. Downie, T. Caulfield, & C. Flood, *Canadian Health Law and Policy* (4th ed., pp. 295-340). LexisNexis Canada Inc.

3. “Other than the above-referenced restrictions on public funding for abortion in some provinces, no provincial legislation in Canada currently expressly restricts access to abortion.”
Burningham, S. (2019). Provincial Jurisdiction over Abortion. *Queen’s Law Journal*, 45(1), 37-80.
4. “All attempts to address this lacuna that arose after the SCC struck down the Criminal Code sections that governed abortion have ended in failure. Abortion remains widely accessible throughout Canada without restriction.”
Bussey, B. W. (2019). The Canada Summer Jobs Debate and the Democratic Decline. *The Supreme Court Law Review*, 91(2), 245-296.
5. “Canada is one of the few countries worldwide without a specific piece of legislation directly regulating abortion.”
Deckha, M. (2012). Legislating Respect: A Pro-Choice Feminist Analysis of Embryo Research Restrictions in Canada. *McGill Law Journal*, 58(1), 199-236.
6. “After a Supreme Court challenge in 1988 and a subsequent failed attempt to reinstate criminal law controlling abortion in 1991, Canada is currently among only four countries²⁰ in the world that have no restriction in law.”
Shaw, D., & Norman, W. V. (2020). When there are no abortion laws: A case study of Canada. *Best Practice & Research Clinical Obstetrics & Gynaecology*, 62, 49-62.
7. “In Canada today, there is no prohibitive regulation of abortion.”
Fegan, E. (2002). Recovering Women: Intimate Images and Legal Strategy. *Social & Legal Studies*, 11(2), 155-184.
8. “On Jan. 28, 1988, the Supreme Court struck down the Criminal Code section that made it a criminal activity to perform an abortion, a section that had been used repeatedly to charge Dr. Henry Morgentaler. Three years later, a bill passed in the House of Commons to recriminalize abortion but was defeated in the Senate. Since then, there has been no federal abortion law and no legal restrictions against the procedure.”
Eggertson, L. (2001). Abortion services in Canada: a patchwork quilt with many holes. *Canadian Medical Association Journal*, 164(6), 847-849.
9. “This left Canada with no federal abortion law – no gatekeeping, no restrictions on clinics, and no gestational limits. After the Morgentaler decision, most provinces banned public funding of clinic abortions, and Nova Scotia banned clinics entirely. Courts struck down the clinic ban and most of the funding bans.”
Halfmann, D. (2011). *Doctors and Demonstrators*. London: The University of Chicago Press.
10. “As abortion is unrestricted by criminal law in Canada, access is limited by geographic barriers and by a shortage of providers.”
Paynter, M., Norman, W., & Martin-Misener, R. (2019). Nurses are Key Members of the Abortion Care Team: Why aren’t Schools of Nursing Teaching Abortion Care? *Witness: The Canadian Journal of Critical Nursing Discourse*, 1(2), 17-29 in abstract.
11. “Despite the fact that no law in Canada currently limits the provision of abortion services in publicly funded hospitals, abortion remains a

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discretionary procedure subject to local hospital policy and the availability of physicians.”

Powell, M. (1997). Ensuring access to abortion in an era of cutbacks. *Canadian Medical Association Journal*, 156(11), 1545-1547.

APPENDIX 3: NEWS ARTICLES

The following is a list of news articles that also reference the fact that Canada has no abortion law. The quotes are from a broad spectrum of news sources including Macleans, CBC, Globe & Mail, and the National Post.

1. “But for most people, it’s about abortion. In honouring him, we are honouring it, normalizing it, stamping it with the seal of approval. Or rather not abortion, as such, but the legal void that surrounds it, which Morgentaler did so much to bring about: the extraordinary fact that, 20 years after the Supreme Court ruling that bears his name, this country still has no abortion law of any kind. It isn’t that abortion--at any stage of a pregnancy, for any reason, and at public expense--is lawful in Canada. It is merely not unlawful. When it comes to abortion, we are literally a lawless society: the only country in the developed world that does not regulate the practice in any way.”

Coyne, A. (2008, July 21). It’s time to talk about abortion: alone among developed countries, Canada has no abortion law. Is ‘settling’ for a non-decision any way for a democracy to

behave? *Maclean’s*. Retrieved from <https://archive.macleans.ca/article/2008/7/21/its-time-to-talk-about-abortion>

2. “Despite its progressive bona fides, Canada doesn’t have a liberal abortion policy. In fact, it in effect has no policy or law at all — just a 1988 Supreme Court judgment rendering the old law unenforceable. When it comes to one of the most divisive issues of our time, we have lived in a legal vacuum for 30 years. The issue endures as a result.”

Patriquin, M. (2018, August 29). Canada needs a new abortion law. *Montreal Gazette*. Retrieved from <https://montrealgazette.com/opinion/columnists/martin-patriquin-canada-needs-a-new-abortion-law>

3. “Canada has no restrictions on abortion. Although late-term abortions — typically defined as occurring after 20 weeks of pregnancy— are reportedly performed only rarely in Canada, their incidence is determined by medical professionals, not the law (such as where a pregnancy is determined to be medically non-viable or where an emergency requires a pregnancy be terminated for the survival of the mother). Still, it’s generally understood that within approximately the first 20 weeks of her pregnancy, a woman in Canada can abort a pregnancy for any reason, and need not provide a reason at all.”

National Post View. (2018, January 19). Trudeau uses ‘alternative facts’ on abortion to discriminate against people of faith. *National Post*. Retrieved from <https://nationalpost.com/opinion/np-view->

trudeau-uses-alternative-facts-on-abortion-to-discriminate-against-people-of-faith

4. “Thirty two years after the Supreme Court of Canada struck down Canada’s abortion law, 32 years after a triumphant Dr. Henry Morgentaler stood outside his Toronto abortion clinic and told a cheering crowd, “every child a wanted child, every mother a willing mother,” a DART & Maru/Blue poll conducted for the National Post finds seven in 10 Canadians consider the current situation on abortion – no legal restrictions on abortion, at any stage of pregnancy – acceptable.”

Kirkey, S. (2020, January 31). As abortion debate becomes increasingly polarized, poll shows the views of many Canadians are more complicated. *National Post*. Retrieved from <https://nationalpost.com/news/as-abortion-debate-becomes-increasingly-polarized-poll-shows-the-views-of-many-canadians-are-more-complicated>

5. “While abortion remains legal in Canada, some abortion rights advocates say women continue to face hurdles in accessing the procedure.”

Gollom, M. (2019, May 21). Abortion barriers in Canada are back in spotlight following passage of abortion bans in U.S. *CBC News*. Retrieved from <https://www.cbc.ca/news/health/abortion-access-canada-us-bans-1.5140345>

6. “As a result, Canada today is one of the few nations with no laws governing abortion.”

Tromp, S. (2013, November 17). Mulrone-era documents reveal detailed debate of Canada’s abortion laws. *The Globe and Mail*. Retrieved from <https://www.theglobeandmail.com/news/national/mulrone-era-documents-reveal-detailed-debate-of-canadas-abortion-laws/article15476897/>

APPENDIX 4: ABORTION RIGHTS COALITION OF CANADA

The Abortion Rights Coalition of Canada – one of Canada’s most prominent pro-abortion organizations – touts the fact that Canada has no abortion law repeatedly. This includes a PowerPoint titled “Canada: Proof that no country needs abortion laws,”²¹ a thesis they link to which begins with the line “Abortion is legal in Canada. In fact, Canada has no abortion law,”²² and an article by their executive director Joyce Arthur stating, “Canada has had no legal restrictions on abortion whatsoever.”²³

Read more from We Need A Law at

[WeNeedALaw.ca/resources/position-papers](https://www.weneedalaw.ca/resources/position-papers)



REFERENCES

- ¹ Angus Reid Public Opinion. (2013). *Canadians Have Mixed Feelings on Abortion, But Shun a New Debate*.
- ² DART & Maru/Blue. (2020). *Abortion: A Canadian Public Perspective after Three Decades*.
- ³ For example, in Germany abortion is available up to 12 weeks with exceptions for sexual assault or if there is grave danger to the woman's health. Before the abortion can occur, she is given counseling and must wait three days after initial consultation. See Criminal Code in the version published on 13 November 1998 (Federal Law Gazette I, p. 3322), as last amended by Article 2 of the Act of 19 June 2019 (Federal Law Gazette I, p. 844) at s 218. Retrieved from https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1816.
- ⁴ We Need a Law. (2019). *Under Section 7 Abortion is not a Charter Right*. Retrieved from <https://weneedalaw.ca/wp-content/uploads/sites/6/2019/07/WNAL-PostitionPaper2019-Charter.pdf>.
- ⁵ *R. v. Morgentaler*, [1988] 1 SCR 30 at p. 46.
- ⁶ *R. v. Morgentaler*, [1988] 1 SCR 30 at p. 183.
- ⁷ *R. v. Morgentaler*, [1988] 1 SCR 30 at p. 75.
- ⁸ There have been no statutes passed by any legislature nor any regulations that restrict abortion. Nor has there been any policy passed by any of the provincial colleges of physicians and surgeons that restrict abortion – with a limited exception for Alberta. See Appendix 1.
- ⁹ Tromp, S. (2013, November 17). Mulroney-era documents reveal detailed debate of Canada's abortion laws. *The Globe and Mail*. Retrieved from <https://www.theglobeandmail.com/news/national/mulroney-era-documents-reveal-detailed-debate-of-canadas-abortion-laws/article15476897/>.
- ¹⁰ Halfmann, D. (2011). *Doctors and Demonstrators*. London: The University of Chicago Press.
- ¹¹ Fidelman, C. (2016, December 23). Montreal woman who had late abortion says she made the right decision. *Montreal Gazette*. Retrieved from <https://montrealgazette.com/news/local-news/montreal-woman-who-had-late-abortion-says-she-made-the-right-decision>.
- ¹² See the Boulder Abortion Clinic's description of a third trimester abortion at <https://www.drhern.com/third-trimester-abortion/>.
- ¹³ We Need a Law. (2019). *Provinces Should Not Fund Private Abortion Clinics*. Retrieved from <https://weneedalaw.ca/wp-content/uploads/sites/6/2020/01/WNAL-PostitionPaper2020-AbClinics-WEB.pdf>.
- ¹⁴ *General Regulation*, NB Reg 84-20 Schedule 2 (a.1).
- ¹⁵ *Hospital Act*, [RSBC 1996] Chapter 200 at s. 24.1.
- ¹⁶ *Freedom of Information and Protection of Privacy Act*, [RSBC 1996] c. 165 at 22.1. *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 at 65(13).
- ¹⁷ *Access to Abortion Services Act*, [RSBC 1996] c. 1. *Access to Abortion Services Act*, SNL 2016, c. A-1.02. *Protecting Access to Reproductive Health Care Act*, S.N.S. 2020, c. 5. *Protecting Choice for Women Accessing Health Care Act*, SA 2018, c. P-26.83. *Safe Access to Abortion Services Act*, 2017, S.O. 2017, c. 19.
- ¹⁸ *Consent to Treatment and Health Care Directives Act*, R.S.P.E.I. 1988, c. C-17.2, s. 12 (c). *The Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, s. 22 (4)(d).
- ¹⁹ Advisory Committee on Non-Hospital Surgical Facilities. (2014 - v7). *Termination of Pregnancy Standards*. College of Physicians & Surgeons of Alberta at 6.1.
- ²⁰ The other three countries that are reported to have no abortion law are China, Vietnam, and North Korea.

China bans sex selective abortions. See Nie, J.-B. (2010). Limits of State Intervention in Sex-Selective Abortion: the Case of China. *Culture, Health & Sexuality*, 12(2), 205-219.

Vietnam has no criminal abortion law, but it is regulated by their Ministry of Health and restricted to the first 22 weeks of pregnancy. See Hoang, T. T., Phan, T., & Huynh, T. N. (2008). Second Trimester Abortion in Viet Nam: Changing to Recommended Methods and Improving Service Delivery. *Reproductive Health Matters*, 16(31), 145-150.

North Korea does have a criminal code provision relating to abortion that requires "an important reason". See Women on Waves. *Abortion Law North Korea*. Retrieved from <https://www.womenonwaves.org/en/page/4888/abortion-law-north-korea>.
- ²¹ Linked here <http://www.arcc-cdac.ca/publications.html>.
- ²² <http://www.arcc-cdac.ca/presentations/Ross-thesis-abortionlaw.pdf>.
- ²³ "Why the UK doesn't need an abortion law at all" <https://www.discussrh.com/topic/commentary-why-uk-doesnt-need-abortion-law-all> See Appendix 4.

