

Universal Periodic Review of Canada – 16th Session – 2014

Joint Submission on Access to Abortion in Canada by:

Canadians for Choice

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The Sexual Rights Initiative

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Introduction

1. This report is jointly submitted by Canadians for Choice (herein CFC) and the Sexual Rights Initiative¹. CFC was established in 2002, and is a national prochoice, non-profit charitable organization dedicated to ensuring reproductive choices for all Canadians. We envisage a world where individuals – regardless of age, ability, race, gender, sexual orientation, place of residence, or socio-economic and other status - have access to the information, resources and services required to make and exercise informed choices on all aspects of their sexual and reproductive health and rights. Since 2006, CFC operates a national toll-free unplanned pregnancy options hotline that receives over 300 calls from all over Canada and since 2008 CFC provides financial support to women in Canada who must travel long distances to access abortion services.

2. This report will focus on Canada’s failure to ensure access to safe abortion services without discrimination to which women living in Canada are legally entitled. The Canadian Government’s continued disregard of its obligations to enforce domestic law provisions requiring universal access to health care, which includes safe abortion care, violates women’s rights to health and non discrimination as set out in the Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of all forms of Discrimination against Women. This report will also demonstrate how the Canadian Government has failed to fulfil commitments to ensure non-discriminatory access to sexual and reproductive health care agreed to under the Beijing Platform for Action and the International Conference on Population and Development and their follow up reviews².

National Legal Framework

3. In accordance with the 1988 Supreme Court of Canada decision R. v. Morgentaler, there are no criminal laws restricting access to abortion in Canada.

4. The 1988 Supreme Court decision found that the existing legislation surrounding the regulation of abortion in Canada violated section 7 of the Canadian Charter of Rights and Freedoms by infringing upon a woman’s right to security of the person.

¹ The Sexual Rights Initiative is a coalition of organizations including Action Canada for Population and Development (Canada), CREA (India), Federation for Women and Family Planning (Poland), Egyptian Initiative for Personal Rights (Egypt), Akahata (Argentina) and the Coalition of African Lesbians (South Africa).

² See for example A/RES/S-21/2 Key Actions for the Further Implementation of the International Conference on Population and Development para 63 section iii which states that “... in circumstances where abortion is not against the law, health systems should train and equip health-service providers and should take other measures to ensure that such abortion is safe and accessible. Additional measures should be taken to safeguard women’s health”.

5. Furthermore, in 1989 the Supreme Court of Canada ruled in the case of Tremblay v. Daigle that the only individual that could make the choice of terminating a pregnancy was the woman in question and that no other individual had a legal say in a woman's choice to either carry the pregnancy to completion or to have an abortion.

6. Canada is a federalist system whereby the federal government, provinces and territories have constitutionally assigned jurisdictions and responsibilities. The provincial governments are responsible for the administration, organization and delivery of health care. The federal government has constitutional "spending power," which enables it to fund the health systems under provincial jurisdiction, subject to provincial compliance with certain requirements set out in the 1984 Canada Health Act.

7. The *Canada Health Act* is federal legislation passed in 1984 that regulates the conditions to which provincial and territorial health insurance programs must adhere in order to receive the full amount of the Canada Health Transfer (herein CHT) cash contribution³. If any of the provinces or territories fails to meet any one of the criteria set out in section 13 of the *Act*, or if the province allows extra billing by medical practitioners or permits user charges for insured health services, the province will face as the penalty a reduction or withholding of the cash contribution. Furthermore the *Canada Health Act* states that provinces and territories must provide universal coverage for all insured persons for all medically necessary hospital and physician services, without co-payments, and as stated in section 7 of the *Act* "the health care insurance plan of the province must, throughout the fiscal year, satisfy the criteria described in sections 8-12 respecting the following matters: (a) public administration, (b) comprehensiveness, (c) universality, (d) portability, and (e) accessibility."⁴

8. In 1995 Diane Marleau, the Canadian Health Minister at the time, deemed that due to the fact that pregnancy and childbirth affects the health and lives of women, abortion is a medically necessary procedure, requiring provincial and territorial health insurance plans to fully cover the costs related to abortion services.⁵ Thus, in line with the provisions of the *Canada Health Act*, abortion services must be fully accessible and financially covered by provincial and territorial health insurance plans when performed both in hospitals and in clinics.

Access to Abortion in Canada

9. Regardless of the fact that as of 1988 there are no legal restrictions to abortion in

³ Canada Health Act Annual Report 2006-2007, online http://www.hc-sc.gc.ca/hcs-sss/pubs/cha-lcs/2006-cha-lcs-ar-ra/chap_2-eng.php

⁴ Canada Health Act (R.S., 1985, c. C-6), online http://laws.justice.gc.ca/en/showdoc/cs/C-6/boga:3::bo-ga:s_4?page=3

⁵ Eggertson, Laura. Abortion services in Canada: A patchwork quilt with many holes. CMAJ. 2001 March 20; 164(6): 847-849. online <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC80888/>

Canada and abortion falls under the Canada Health Act as a medically necessary procedure, lack of accessibility continues to be an obstacle and a barrier for women who choose to terminate their pregnancies.

10. As of 2006, only 15.9% of hospitals offer abortion services in Canada⁶. This means that only one in every six hospitals offers abortion services. Moreover, the majority of facilities are poorly dispersed across Canada since most of them are located in urban areas and within 150 kilometres of the United States border, posing an obstacle to the large number of women who live further north of the border.

11. Women who live in an area where there are no facilities that provide abortion services are required to seek such services outside of their area of residence and thus, face additional barriers. Unexpected travel time is a factor since some of the abortion providers put a gestational limit to the termination of the pregnancy, delaying a woman's right to abortion. In addition, these women face unforeseen monetary expenses such as travel, accommodation, lost wages, childcare, eldercare, and possibly procedural costs (in the case where there is a lack of reciprocal billing within their provincial or territorial health systems), disproportionately impacting low-income women.

12. Reciprocal Billing states that individuals who are not present (either travelling or changing their residence) within their province or territory of residence at the time of needing a specific medically necessary service or procedure are to be either covered or reimbursed in full of the monetary costs by their provincial or territorial health system. In the case that an individual decides to change their provincial or territorial residence, reciprocal billing will cover their costs for up to three months before bureaucratic changes have been completed and the new provincial or territorial healthcare plan comes into function. Hence this allows Canadians to still have full healthcare coverage when they travel or move between provinces or territories. However, currently five provinces and one territory have not yet removed abortion from their lists of services to be excluded from reciprocal billing. As a result, if a woman who comes from such province or territory is travelling or changing her provincial or territorial residence and is in need of an abortion, she will have to incur the expense of paying up-front for the procedure, without an opportunity of being reimbursed. This disproportionately impacts women on low incomes.

13. Another factor that affects women from accessing appropriate information, care, and services in relation to abortion, is unknowledgeable and/or judgmental hospital staff members. In many hospitals, staff members are not properly trained and as a result, are unaware of their institution's policy on abortion, and thus are unable to refer women to a relevant and accurate source of information. Our research has shown that there are instances in which hospital staff are judgmental and treat women who are

⁶ Shaw, Jessica. 2006. Reality Check: A close look at accessing hospital abortion services in Canada.

seeking information on abortion services with disrespect and as a result give them bad referrals, and/or direct them to anti-choice organizations, or in other instances provide no information at all.⁷ This results in delaying women's ability to obtain accurate information about where and how to access abortion services and to the abortion procedure itself.

14. Currently, regulations and accessibility to abortion varies between provinces and territories. Therefore it is important to analyze the accessibility to abortion in each individual province and territory. The following sections will look at the situation within three different provinces as more specific case studies that will demonstrate the lack of accessibility to abortion that women in Canada face.

Prince Edward Island

15. There is a complete lack of accessibility to abortion services in the province of Prince Edward Island (herein PEI); this is the only province in Canada that is still refusing to offer abortion services, therefore violating the obligations set by the *Canada Health Act*.

16. Women who are residents of PEI and choose to terminate their pregnancies must travel to another province in order to obtain access to abortion services. The only province to which they can travel, funded by their provincial government, is Nova Scotia. In order to access a funded abortion the woman must be referred by both a PEI doctor and the Department of Health and Social Services, and the abortion procedure must be done in a hospital. Clinic abortion services are not eligible for funding by PEI. The doctor must first submit a referral to the Department of Health and Social Services deeming the termination of the pregnancy as medically necessary.

17. Due to stigma related to abortion, there is a lack of doctors on PEI who are willing to make the required referrals and requests for funding. In addition, healthcare providers are unwilling to provide accurate information to women who are seeking information on the procedure itself, where to obtain referrals for an abortion, as well as where they can obtain this medical service.⁸

18. Monetary costs are a major barrier for women in PEI because they are forced to incur expensive travel costs, such as transportation and accommodation, and also ultrasound fees, lost wages, childcare, and eldercare. Since the hospital in Halifax, Nova Scotia does not offer abortion services after 16 weeks of gestation, women who are past this time period must self-fund their travel to Montreal, Quebec (which is 12 hours away by automobile) or London, Ontario (which is 21 hours away by automobile) or Toronto, Ontario (which is 19 hours away by automobile), in order to access abortion services.

⁷ Shaw, Jessica. 2006. Reality Check: A close look at accessing hospital abortion services in Canada.

⁸ Shaw, Jessica. 2006. Reality Check: A close look at accessing hospital abortion services in Canada, p. 32.

New Brunswick

19. New Brunswick has an 8% access rate with only two hospitals in the entire province that provide abortion services.⁹

20. In contravention to the *Canada Health Act*, New Brunswick is the only province in Canada that refuses to pay for, or reimburse women for, abortion services performed outside of hospitals; hence, this province refuses to fund clinic abortions. Furthermore, New Brunswick also refuses to provide reciprocal billing for women that require abortion services outside of the province.

21. In addition New Brunswick has the most restrictive abortion policies in the country. In order for a woman to be able to access safe and timely abortion care within the province, she requires the authorization of two doctors as well as the consent of the gynaecologist who will accept to perform the procedure, before she can be fully funded to receive an abortion at any of the two designated (above-mentioned) hospitals in the province.

22. This policy poses an extremely difficult obstacle for women in New Brunswick, since due to negative social attitudes and anti-abortion sentiments by healthcare providers, few medical doctors are either willing to give authorization or provide their services for the procedure.¹⁰ This policy can be especially difficult for women in small towns and for women who do not have a family doctor. If a woman is unable to find the required authorization, she may either be forced to travel out-of-province in order to obtain abortion care, pay over \$700 to have the abortion in the only private clinic in New Brunswick or continue with the pregnancy and birth against her will.

23. In the case that a woman decides to travel out-of-province to terminate the pregnancy, and due to the fact that New Brunswick violates reciprocal billing, she will have to incur all the financial aspects of the procedure; facing a monetary barrier where she is expected to cover the transportation, accommodation, and procedural costs.

Québec

24. Québec also contravenes the *Canada Health Act* by not adopting a reciprocal billing agreement with other provinces and territories in regards to physician services for abortion care. This means that when a Quebec woman with valid Quebec Health Insurance coverage has an abortion in a hospital or clinic in another province or territory, medical services will be covered but she may have to pay for physician services out-of-pocket herself and then apply to be reimbursed by the Quebec Health Insurance Plan. Physician services, up to amounts not exceeding Quebec rates, are covered in most cases.

⁹ Canadians for Choice National Directory of Abortion Providers 2011.

¹⁰ Ibidem.

Actions Taken by the Federal Canadian Government

25. In the last four years, the Government of Canada has not taken any actions to address the discriminatory abortion policies of provinces that contravene the *Canada Health Act*.

26. In 2001, then Federal Health Minister Alan Rock warned four provinces: Quebec, Manitoba, New Brunswick and Prince Edward Island, that their failure to cover fees charged at private abortion clinics constituted violation of the *Canada Health Act*.¹¹ In 2005, then federal Health Minister Ujjal Dosanjh commenced proceedings using a dispute avoidance and resolution process to urge New Brunswick to comply with the *Canada Health Act* by funding abortions carried out in private clinics. In August 2006, the Superior Court of Quebec ordered Quebec to refund fees paid by women for abortions in private clinics between 1999 and 2006.

27. Deductions have been made from cash contributions to Newfoundland and Labrador in 1998 and to Nova Scotia in 2003 based on charges made to patients for facility fees at private abortion clinics.¹²

Responsibilities and Obligations of the Federal Canadian Government

28. The conclusion is inescapable that abortion is therefore considered by the federal government to be an insured service under the *Canada Health Act*. The Federal Canadian government has the necessary power and authority to ensure that abortion services are provided without financial or other barriers in conformance with the *Canada Health Act* and that the principles of comprehensiveness and accessibility are respected by taking whatever means it has to ensure that where abortion services are provided, they are provided without fees, and where unavailable, that reasonable measures be taken to ensure that women do not have to face barriers, including out of province or territory travel, or travel of long distances within provinces or territories, in order to obtain abortion services. No other medically necessary service faces these administrative restrictions.

Recommendations to Canada:

29. Immediately enact penalties, in the form of a reduction or withholding of the CHT cash contribution, against those above-mentioned provinces that do not uphold the criteria set out in section 13 of the *Canada Health Act*.

30. Initiate the Dispute Avoidance and Resolution process provided for by the *Canada Health Act* with provincial governments that contravene the *Canada Health Act* with respect to the availability and accessibility of abortion services.

¹¹ Kondro, W., "Medically necessary" abortions in Canada to be covered by insurance, *The Lancet*, 2001 Ja. 20; 357(9251):208.

¹² Canada Health Act Annual Report 2004-2005, online http://www.hc-sc.gc.ca/hcs-sss/pubs/cha-lcs/2004-cha-lcs-ar-ra/index-eng.php#a6_4