

The Politics of Abortion in New Brunswick

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Abstract

This paper examines one of the most notorious, yet largely overlooked, provinces in terms of abortion access in Canada: New Brunswick. Through an exploration of the provincial government's activities and litigation in the province, this article traces the history of abortion regulation in New Brunswick, with particular attention paid to the manner in which social movement activism has shaped policy. It argues for the need to reframe abortion as a matter of equal citizenship. Specifically, it suggests that such a rethinking could generate political pressure for recognition and improved services, and stimulate a public discourse that has the potential to begin breaking down the more complex, extra-legal barriers faced by women in Canada.
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Résumé

Cet article examine l'une des provinces les plus notoires, mais pourtant grandement négligée, en termes d'accès à l'avortement au Canada, c'est-à-dire le Nouveau-Brunswick. À travers un examen des activités du gouvernement provincial et des litiges dans la province, cet article explore l'histoire de la réglementation de l'avortement au Nouveau-Brunswick, en portant une attention particulière à la façon dont l'activisme du mouvement social a contribué à façonner les politiques. Il fait valoir la nécessité de resituer le contexte de l'avortement comme une question d'égalité des citoyens. Plus spécifiquement, il suggère qu'une nouvelle façon de penser pourrait créer des pressions politiques pour la reconnaissance et l'amélioration des services et stimuler une discussion publique qui pourrait peut-être commencer à éliminer les obstacles plus complexes et extrajudiciaires auxquels les femmes font face au Canada.

The Politics of Abortion in New Brunswick*

On 28 January 1988, the Supreme Court decision, *R. v. Morgentaler* (1988), struck down Canada's existing abortion law on the grounds that uneven access to the procedure violated women's Charter rights to life, liberty, and security of the person. In the years that followed, no new federal law was enacted. The resulting policy vacuum forced a shift in jurisdiction from the federal *Criminal Code* to provincial health policy. All of the provinces responded differently to their new powers, with some trying to effectively recriminalize abortion by blocking access. A wave of provincial litigation and activism followed, creating a patchwork of policies across the provinces. While significant improvements in access have been instituted in much of the country since 1988, there are standout exceptions. This paper focuses on one of the most notable, yet largely overlooked, provinces in terms of abortion access in Canada: New Brunswick.

In the past twenty-six years, the government of New Brunswick has created barriers reminiscent of
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* Since this paper was completed, there have been a number of significant changes to the regulation of abortion in New Brunswick. Under Liberal Premier Brian Gallant, Regulation 84-20 of the Medical Services Payment Act has been amended; the provision requiring two doctors to approve a woman's decision in writing and the requirement that a specialist perform the abortion have been removed. These changes were the result of the concerted efforts of Reproductive Justice New Brunswick (RJNB), an organization that worked tirelessly to raise awareness about New Brunswick's problematic abortion policies prior to the 2014 provincial election. Despite some alterations to the policies, significant issues remain. For example, no changes to the reciprocal billing arrangements have been implemented and funded abortions must still be performed in hospitals. While a crowdfunding campaign raised the funds to re-open the former Morgentaler clinic (now Clinic 554) as a family health centre, the province continues to refuse funding for abortions performed at this facility. With only a few hospitals now offering the procedure in the province and the twelve-week limitation still in place, more work still needs to be done in New Brunswick. I regret not being able to address these developments in the paper, but I believe it offers the social and political context for these changes.

therapeutic abortion committees (1969-1988), which governed the legality of the procedure while it was regulated under the *Criminal Code*.¹ In order to qualify for an abortion covered under the provincial health insurance scheme today, residents of New Brunswick require written certification from two doctors stating that the procedure is *medically necessary*; the definition of this term is left to the discretion of individual physicians. If a woman is successful in obtaining these permissions, she must then secure an appointment with a registered gynecologist to schedule the procedure. The abortion must then be completed by the twelfth week of gestation. Before July 2014, women who had the financial means also had the option of paying out of pocket for an abortion at the Morgentaler Clinic in Fredericton, as the government would not reimburse the \$700 to \$850 cost of the service (Morgentaler Clinic 2007).² The clinic is set to close on 30 July 2014 due to a lack of government funding, leaving women with two options: leave the province in search of a private clinic elsewhere (an impossibility for many women); or navigate the public system.³ Unfortunately, for many women, the complex bureaucratic process and short time frame allotted to secure access to safe, legal, and funded abortion services in New Brunswick can be insurmountable.⁴

New Brunswick is a small province and is rarely seen as a leader in the development of social policy. Some critics would cite Prince Edward Island as the least progressive province with respect to abortion rights. Women on the Island have no access to abortion services, although the government allows residents, under highly restrictive circumstances, to seek hospital abortions outside the province. The fact that there is limited access to abortion in New Brunswick means the province is not seen as having the worst access and is therefore not the subject of intense study; however, the unique treatment of abortion in the province merits attention. Unlike other locations with low levels of access in Canada (including the Territories, Northern Ontario, and Prince Edward Island), New Brunswick has been the site of continual legal and political activity since 1988 and the province has had to defend its abortion policies in several prominent court cases. For those seeking to secure positive change to the abortion policies in New Brunswick (and elsewhere), it is important to understand the context of the development and defense of the existing policies.

In this article, I aim to trace the history of abortion regulation in New Brunswick, with particular attention paid to the manner in which social movement activism has shaped policy. The rhetorical power of the anti-abortion movement, and its success in de-politicizing and silencing those in opposition to it, despite its relatively small numbers, has been central to the maintenance of existing policies. Rather than suggesting that abortion is either a straightforward medical issue or a moral question, I argue for the need to reframe abortion as a matter of equal citizenship. This reframing would generate political pressure for recognition and improved services, and could stimulate a public discourse that has the potential to break down the more complex, practical barriers to access that frustrate women in Canada.

By situating abortion in the larger theoretical context of citizenship, with a particular focus on the federal government's treatment of abortion between 1988 and the present, I seek to establish the value of understanding abortion access as a right that is necessary, though not sufficient, to realizing the equality of Canadian women. This argument is further developed through a brief exploration of the rhetorical campaigns of anti-abortion groups that continue to shape provincial access. Using this framework, I go on to explore the implications of the current abortion regulation for New Brunswick women, while mapping out the province's legal and political responses to abortion access issues immediately preceding 1988 to the present. In analyzing these events, I draw on legal and legislative documents, as well as a number of semi-structured interviews with local provincial actors undertaken in 2011, to assess the nature of access and the strategies employed by politicians and activists to shape policy. Ultimately, this paper aims to demonstrate that the failure to acknowledge women's rights to choose whether or not to carry a pregnancy to term challenges the status of women as equal Canadian citizens.

Abortion in Canada since 1988

When abortion services were decriminalized on the grounds that they violated women's rights to security of the person, the ruling was widely interpreted as a validation of a positive right to abortion care in Canada. The language of equality rights continue to dominate discussions of abortion in Canada today, even though the equality guarantee in the Charter was not taken into

account by the Justices in their ruling. Justice Wilson's 1988 ruling did hint at such a framing when she highlighted the "profound psychological, economic and social consequences" that ensued when a woman decided to terminate an unwanted pregnancy, presenting it as a "decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large"; however, the Justice did not go so far as to question the right of the federal government to create a new law restricting access, which it promptly attempted (*R v Morgentaler* 1988, 172). While no new law was successfully passed, and no government has since attempted to legislate the procedure, there have been more than forty bills designed to restrict or re-criminalize abortion introduced by backbenchers since 1988 (ARCC 2010). None of these bills have passed, but their content demonstrates not only the fragility of access, but also federal legislators' deeply problematic views about women.

Many backbencher bills have overtly challenged the decriminalization of abortion, while carefully avoiding the language of women's rights. In April 2002, Conservative MP Garry Breitkreuz called for a new definition of "human being" in the *Criminal Code* to see if the law needs to be amended to provide protection to fetuses and to designate a fetus/embryo as a human being" (Bennett 2008, 58). A new version of this bill made its way into Parliament in 2012, when Conservative MP Stephen Woodworth introduced a motion calling for a committee to assess "what medical evidence exists to demonstrate that a child is or is not a human being before the moment of complete birth?" (Woodworth 2012, n.p.). Other bills have attempted to criminalize the behaviour of pregnant women. In 1997, Reform MP Keith Martin proposed a bill that would have allowed criminal charges to be laid against pregnant women for fetal endangerment if their lifestyle choices had a negative impact on their fetus (Bennett 2008, 58). Also in 2012, Conservative MP Mark Warawa put forward a motion to criminalize sex-selective abortion (*Huffington Post* 2012). All of these bills have failed to engage with the real choices of women or the consequences of monitoring their behaviour during pregnancy. The consistency of such attacks on the legality of abortion access in Canada helps to showcase the fragility of access in the country and the need to rethink the way abortion is framed. Moreover, the fact that these bills continue to surface

and, as in the case of Mr. Warawa's bill, that they are often presented as "pro-woman," demonstrates a continued lack of recognition of women's Charter rights.

Even when women's reproductive rights are discussed in politics, women are rarely treated as anything other than a homogenous group, and the unique nature of individual women's experiences as socio-political beings is neglected. With regard to abortion access, the experiences of individual women attempting to access services are inextricably linked to factors including their class, race, sexuality, age, language, and geographic location, which determine not only when and how they access services, but what kind of care they receive.

In New Brunswick, the ability of women to exercise their choices is restricted by significant barriers to access if they attempt to work within the public system. These barriers impact women in unique ways. Given the rural makeup of the province, and the small number of sites where services can be accessed, many women must travel to obtain services. This is one of the most serious extra-legal barriers, as "the further a woman must travel to access abortion services, the less likely she is to have the procedure" (Sethna et al 2013, 31). Traveling to access services may require that a woman justify her trip to others, make arrangements to miss work, and arrange for childcare, not to mention needing to have access to transportation and the funds to travel. This leaves poor, rural, and young women particularly vulnerable. As Canada's only officially bilingual province, with a large francophone population, women may also encounter difficulties in accessing help in their own language. Physicians are not required to be bilingual to practice in the province. Race and sexuality can also play a significant role in the type of services women receive or may expect to receive, as well as the barriers they encounter. These issues are further exacerbated by the fact that New Brunswick does not have an easily accessible guide for women in need of abortion services who may not be able to anticipate and address these challenges in a timely manner.

In addition to institutional barriers, the New Brunswick political climate has been hostile to groups who support access to abortion, as well as women seeking access, creating a potentially dangerous environment in which to seek services. In 2011, for example, the government withdrew funding from the New Brunswick Advisory Council on the Status of Women,

the only *arms-length* agency able to criticize government policies on women's issues, including abortion (CBC News 2011). Since abortion was decriminalized in 1988, successive provincial governments have participated in the creation and defense of restrictive policies, including the refusal to fund private clinics, the creation of complex bureaucratic roadblocks for women to claim provincial health care coverage, and delay tactics when these issues have been challenged in court. In so doing, many of these governments have utilized language that recognizes private moral belief systems or fetal rights claims, while simultaneously de-politicizing the issue by ignoring the rights of women.⁵ Repeated attempts to silence dialogue on the issue have exacerbated the inability of women in New Brunswick to negotiate institutionalized barriers.

Citizenship and Social Movement Activism

Citizenship is classically defined as a theoretical, political, legal, and social construct that includes the civil, political, and social rights necessary for full community membership (Marshall and Bottomore 1992); it is also a foundational category of state recognition from which women have been historically excluded. While women are now considered equal Canadian citizens, and discrimination rooted in sex or gender differences is unconstitutional according to the Charter of Rights and Freedoms, their unique reproductive abilities are still treated as exceptional to their participation as community members. In effect, women have been recognized as citizens only insofar as they are the same as men. The deeply gendered implications of abortion access issues thus provide an important challenge to current conceptions of citizenship, as abortion is the only human right to date that "does not involve the expansion of a right previously granted only to males" (Asal et al 2008, 280).

Of course, citizenship is classically conceived in narrow terms, even more so than human rights, and may ignore the rights of women without formal citizenship status. Despite this shortcoming, my intention is to suggest that all women should have access to abortion services and that the framework of citizenship rights provides an important tool to secure them. By recognizing the role of the state, in this instance the Canadian state, in realizing women's equality, more onus is placed on the state to ensure the availability of services and a climate in which all women can exercise their rights to

access them. Moreover, while legal recognition is crucial to citizenship, citizenship is not reducible to legal status alone. Modern conceptions of citizenship have attempted to move beyond a static, legal category to recognize the fluidity of the category. Bakan and Stasiulus treat citizenship as a negotiated category, which "exists on a spectrum, involving a pool of rights that are variously offered, denied, or challenged, as well as a set of obligations that are unequally demanded" (2005, 2). This definition recognizes the realities of the unique rights and responsibilities with which apparently equal citizens must contend. Moreover, by acknowledging the pressures of a globalizing world on individuals and states, the authors further trouble the use of simplistic legal categories to understand procedures like abortion.

The power of the citizenship paradigm in Canadian politics, and its influence in multiple spheres, including political, legal, and social life, makes it a useful framework through which to advance my claims that women require access to abortion services in order to be equal citizens. Recognition of a universal right in strictly legal terms does not, of course, mean its immediate realization, neither does it mean all individuals will be able to exercise their rights, or at least do so in the same ways. Pushing for recognition of abortion as a citizenship right is one step in a more complex process of women's emancipation and is meant to advance a more complete understanding of the significance of access to abortion care in women's lives. While this recognition alone does not resolve all of the issues pregnancy and birthing create for women's equality, it gives women some protections and a foothold to push for further change. Respect for the Charter and rights claims in Canadian society also means that such an acknowledgment of the importance of abortion access could lead to a reevaluation of negative attitudes toward abortion in Canada, as it did when a 2005 Supreme Court Reference case validated the right of Canadians to marry their same-sex partners (Matthews 2005).

This understanding is rooted not only in questions of bodily autonomy and control, but also in the socio-political realities of pregnancy, birthing, and parenting. After all, the oppressive nature of traditional gender roles to which pregnancy and motherhood are still tied have a significant impact on women's relationship to their communities. Even those who cannot or choose not to become pregnant are subject to patriar-

chal expectations still apparent in Canadian society and politics. Indeed, attempts to depoliticize women's citizenship struggles by reducing women's rights claims to moral considerations have continued to pose a significant threat to a larger project of women's equality. These struggles, embodied by the pro-choice and anti-abortion movements respectively, can be reduced to a fundamental disagreement about the status of women as citizens, as evidenced by the power of social movement rhetoric in shaping access.

The way in which women experience abortion access is determined not only by its legal status and provincial regulation of the procedure, but also by the social attitudes attached to it. These attitudes, which are not limited to considerations of sex and gender, but encompass class, race, geographical location, age, and sexuality, all impact the ways in which women experience access. Informal barriers to access, including harassment of women and abortion providers, further shape these experiences and the way abortion is treated in formal settings, such as medical facilities and legislatures. Both pro-choice and anti-abortion social movement activists continue to shape the dominant views of abortion and the nature of access in Canada today, so it is important to briefly explore their values and motivations.

Classically, the pro-choice movement has focused on the need for safe and legal abortion services. While the language of *R. v. Morgentaler* (1988) is "consistent with the emphasis on abortion as a private and individual matter," Gavigan explains that this "has *not* been the characterization of Canadian pro-choice and feminist activists, who have consistently framed abortion as an issue of equality and access" (1992, 127; emphasis original). Nonetheless, the movement's focus on abortion access has been characterized by some as reductive and in keeping with individualistic understandings of reproductive health (Zakiya and Luker 2013). In response to these "perceived limitations of the pro-choice movement," the reproductive justice movement was created (329). The movement recognizes the rights of women to abortion access, but it does so in addition to "women's right to have children and to parent the children that they have" (Price 2010, 43). The movement's approach is deeply intersectional, attempting to link "reproductive health and rights to other social justice issues such as poverty, economic injustice, welfare reform, housing, prisoners' rights, environmental justice, immigration

policy, drug policies, and violence" (43). It is also wary of rights as a tool to bring about these changes, fearing the strict parameters of a rights discourse will obscure certain oppressions, furthering marginalizing vulnerable populations (Schwartzman 2002; Zakiya and Luker 2013, 343).

Noting the potential tension between these views—the push both for women's control over pregnancy and the need for greater shared responsibility in pregnancy and childrearing—Petchesky advocates an approach that is neither purely biological nor social: a "woman's reproductive situation is never the result of biology alone, but of biology mediated by social and cultural organization" (2008, 107). She highlights the need for social transformation to fundamentally reshape the material and relational nature of reproduction (107). While the realities of intersecting oppressions and experiences mean any changes to abortion rights will necessarily fall short without broader restructuring, I take the stance that recognizing women's equality claims through citizenship rights is a necessary and important step towards women's liberation, despite not providing an end point.

When abortion was still a criminal offense in Canada, the pro-choice movement focused its energies on decriminalization. Following abortion's decriminalization, the pro-choice movement broadened its sights. Securing women's bodily autonomy during pregnancy is considered part of the larger project of women's emancipation, which includes a challenge to the social and political restrictions that enforce and naturalize traditional understandings of women as "a patient and a future mother first, and an individual with constitutional rights second" (Nossiff 2007, 62). Concerns regarding the diverse experiences of women have also gained strength within the movement over time. What was traditionally seen as a white, middle-class movement has grown into a more inclusive organization, concerned with the realities of abortion access rather than its legal status. Despite this evolution, both the pro-choice and anti-abortion movements have been accused of merely paying lip service to the multiplicity of issues and oppression women contend with, and as failing to fundamentally challenge the racist and sexist social structures in which they are realized (Smith 2005). Moreover, the narrow focus of the pro-choice movement on the push for negative rights ("freedom from") that does not rec-

ognize the complex relationship of pregnant women to their communities is a serious issue (West 2009).

Such important critiques challenge the notion that the pro-choice movement, through legal and political channels, can secure women's equality. However, I would argue that they are not inconsistent with the citizenship framework I have proposed. I agree that a recognition of women's equal citizenship would require its treatment as a positive right ("freedom to"), lest reproductive freedom continue to be simply accessible to a privileged few. While such recognition of a positive right does not create true equality for women in access while other oppressions exist, it nonetheless provides a valuable degree of protection under which women can continue to advance all of these perspectives. If substantive access covered under provincial medical insurance is available to all women, and provinces are required to provide a certain minimum level of facility access, a significant financial barrier to access would be removed. Moreover, political recognition of the value of abortion to women's lives may well influence the nature of abortion discourse and begin to de-stigmatize the procedure. While the recognition I propose does not necessarily eliminate all barriers, it undercuts many of those that weigh most heavily on women who are financially disadvantaged; it could also potentially shift views not only on abortion, but related issues of care and unequal treatment that make abortion so central to women's rights claims.

The Canadian anti-abortion movement has historically opposed abortion on both legal and social grounds, seeing it as an immoral practice requiring criminal sanctions. The historical portrayal of abortion as murder, which targets the perceived immorality of women who might seek the procedure, is still present in the mandates of many groups. The naturalization of women's roles as wives and mothers is central to this frame because it is seen as necessary to maintain a socially traditional order in which women cannot opt out of their perceived reproductive duties. The maintenance of this order is foundational to the anti-abortion movement, but since abortion laws have been liberalized, the "centre of their rhetorical campaign [has shifted]... to a positive campaign to protect life" (Brodie 1992, 77). Initially, this campaign was centred on the fetus in an attempt to remove women from discussions of pregnancy. A woman could not choose abortion, the argument

went, because her body was no longer hers once she became pregnant; rather, "it belong[ed] to the foetus" (82). The fetus was portrayed as an innocent with no defenses, in need of protection against immoral, selfish women (81, 83). The traditional discourse of the anti-abortion movement is still present, but a recent study by Saurette and Gordon has documented a new strategy. Rather than attempting to recriminalize abortion, the focus of the Canadian anti-abortion movement has shifted to challenging cultural perceptions, though activities in the federal government suggest that legislation is still an important concern (Saurette and Gordon 2013). This new approach is rooted in an assertion that "abortion harms women," an argument that has overshadowed the fetal-centric discourse produced by the movement (173). This view holds that the acceptance of abortion as "essentially harmless wreaks profound changes to our collective understanding of motherhood, sexuality, [and] the obligations of mothers and fathers to each other and their children" (qtd. in Saurette and Gordon 2013, 171). While its strategies have changed, the movement's goals have remained the same: to demonize abortion and prevent the practice of the procedure. The continued focus on its social implications, rather than its legal status, is demonstrative of what Faludi calls anti-feminist backlash; that is, working towards the ultimate goal of rescinding women's bodily autonomy, while appearing politically neutral (Faludi 1981). Cultural shifts influence not only the realities of access for women, but the views of individuals responsible for its regulation. Creating a social climate in which abortion is demonized means creating barriers to accessing services and limiting the ability of women to exercise their rights to access safe, legal medical services.

The most notable aspect of this campaign is its avoidance of discussions of the lived realities of women, or any perspective that sees women as equal citizens with intrinsic value beyond their reproductive roles. Where anti-abortion politicians have taken office, they have avoided justifying their attempts to limit women's reproductive rights in political terms, relying instead on a rhetoric of personal, moral beliefs. Dr. Julia Hughes, professor of law at the University of New Brunswick, discussed the political climate in the province during an interview, explaining that, "When people come from a place that is so personally convicted, I think it becomes hard to appreciate the boundaries of your convictions"

(Hughes 2011). Nowhere is this reality more evident than New Brunswick.

New Brunswick

Anti-abortion politicians in the New Brunswick Legislature were active in their attempts to restrict abortion access even before the Morgentaler case reached the Supreme Court in 1988. Progressive Conservative Premier Richard Hatfield (1970-1987) moved to amend the province's Medical Act in 1985, following a request by Dr. Henry Morgentaler to set up an abortion clinic in the province. The amendment created a charge of professional misconduct for physicians found to be "involved in performing an abortion elsewhere than in a hospital approved by the Minister of Health, and provid[ed] for the disciplining of physicians in such circumstances" (Dunsmuir 1998, n.p.). While abortions at this time were still illegal, unless first approved by a Therapeutic Abortion Committee, this change would have allowed the provincial government to remove Morgentaler's license if he attempted to open and practice in a private clinic in the province. The government could thus interrupt Morgentaler's practice, rather than having to wait for a hearing on his breach of the *Criminal Code*, which provincial precedents in Ontario and Quebec suggested would only legitimize his attempts to challenge the provision. In so doing, MLAs attempted to avoid engaging with any rights discourse on abortion.

Shortly after the enactment of this amendment, the Supreme Court in *R. v. Morgentaler* (1988) decriminalized abortion and jurisdiction over the procedure was shifted to the provinces as a matter of health care. The way in which the provincial government dealt with their new power over the regulation of abortion access, through both policy and a number of legal challenges, demonstrates resistance to recognizing women's reproductive rights in New Brunswick politics. Indeed, since 1988, New Brunswick has been a centre of legal and political activity on abortion issues in Canada. The clear use of avoidance and delay tactics has characterized the province's responses to legal challenges to the constitutionality of their policies. Notably, when vocalizing views on abortion policy in the Legislative Assembly, politicians have consistently utilized rhetoric of the anti-abortion movement. This social movement rhetoric continues to guide policy, a reality that has denied the political nature of reproductive rights, while creating

significant access barriers for women.

Morgentaler initiated the first legal challenge to New Brunswick's abortion policies in 1989 when he sued the New Brunswick government, seeking reimbursement for three abortions performed on New Brunswick women at his clinic in Quebec. At the time, there was no formal regulation governing the provision of abortions by doctors outside of the province. The only legislation in place was Hatfield's 1985 amendment, restricting the performance of abortions outside registered hospital facilities. In the New Brunswick Court of Queen's Bench, Morgentaler argued that he should be reimbursed under New Brunswick Medicare for his services because the policies in place restricting abortion access did not explicitly apply to services rendered outside the province (*Morgentaler v. New Brunswick (Attorney General)* 1989).

In response, the government argued that it did have a policy in place that restricted the classification of abortion as an entitled service under Medicare, "unless it is determined by two doctors to be medically required and is performed by a specialist in an approved hospital" (*Morgentaler v. New Brunswick (Attorney General)* 1989, para. 5). The government, however, was forced to concede that the policy was not legally defensible, because it was never "expressly or formally adopted" as a regulation (para. 9). The court explained that "[w]hether such a regulation would be valid cannot be determined unless and until it is made" (para. 9). Moreover, the existing regulation in the Medical Act was found to have "no application to members of the profession in other provinces" (para. 10). As such, the policy was declared invalid for doctors practicing outside of the province. Notably, according to Julia Hughes, "[d]espite the court order, the procedures were never paid" (Hughes 2014).

Rather than appealing the decision, the government moved to fill the legal loophole in its policy. In 1989, the McKenna government (1987-1997) amended the Medical Services Payment Act, which mimicked the policy successfully challenged by Morgentaler. Abortion was included in Regulation 84-20 under the Act as an unentitled service, save under certain circumstances. Abortion was not covered under provincial health insurance schemes,

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. (Government of New Brunswick 1984, 38)

This amendment gave the province “regulatory authority” over the policy found insufficient by the New Brunswick Court of Queen’s Bench. MLA James Lockyer (Liberal) argued in 1989 that, “These regulations will ensure that the conditions under which payment is made for services provided within New Brunswick will be the same as for payment for service provided to New Brunswick residents outside the province” (Hansard, 1989) This statement was, however, misleading. New Brunswick continues to consider abortion an “excluded service” on reciprocal billing agreements between the provinces, meaning that the province cannot be billed for abortion services performed for its residents while in other provinces (Canadians for Choice, forthcoming).

When Morgentaler did eventually set up a free-standing clinic in the province in 1994, six years following the decriminalization of the procedure, Premier McKenna threatened him with “the fight of his life.” Other MLAs supported this sentiment. Progressive Conservative MLA Brent Taylor, for example, spoke about his participation in an anti-abortion protest:

We who did go to that march were there to tell all of New Brunswick about our attachment to the rights of the unborn child. We quietly marched in front of the proposed site of the clinic, of the abortuary, and we then dispersed peacefully (Hansard 1994).

Other members of the Legislative Assembly made no attempts to conceal their personal opposition to abortion and the denial of women’s citizenship claims. MLA George Jenkins (Liberal) was clear that he would oppose abortion even if he was alone in holding this viewpoint. He explained that, “[t]o me, abortion involves an absolute moral value” and that “it is in debate on moral issues that judgment supersedes interests, be they political or otherwise” (Hansard, 1993). He saw his personal convictions as outweighing the interests of women. Considerations of women’s rights did not factor into these arguments and, as a result, political efforts to create barriers to abortion access were de-politicized.

The McKenna government invoked Hatfield’s 1985 amendment the day the Morgentaler clinic opened in 1994, shutting the clinic down and encouraging the New Brunswick College of Physicians and Surgeons to suspend Morgentaler’s license. Later that same year, Morgentaler took the New Brunswick government back to the Court of Queen’s Bench, this time in an effort to strike down Hatfield’s amendment (*Morgentaler v. New Brunswick (Attorney General)* 1994). Again, Morgentaler was successful. The ruling stated that the creation of the amendment was not in the interest of ensuring the highest quality care for women in the province; rather, it was designed to “prohibit the establishment of free-standing abortion clinics and, particularly, the establishment of such a clinic by Dr. Morgentaler” (para. 44). The decision was “upheld on appeal to the New Brunswick Court of Appeal, and leave to appeal to the Supreme Court of Canada was denied” (Richer 2008, 8.). The New Brunswick College of Physicians and Surgeons reinstated Morgentaler’s license and his clinic was permitted to remain open. The regulation was removed, but as far as the government was concerned, it was not the only avenue available to them.

On 16 July 2003, Morgentaler again sued the New Brunswick government, this time challenging its provincial funding restrictions. His filing stated that he was suing on the grounds that the government’s amendment to the Medical Services Payment Act was unconstitutional, because it “erects a barrier to abortion services that violates rights guaranteed to women under s. 7 (“Life, Liberty and Security of Person”) and s. 15 (“Equality”) of the *Canadian Charter of Rights and Freedoms*” (*Morgentaler v New Brunswick* 2009, para. 1). He further argued that the amendment was “inconsistent with, and in violation of the *Canada Health Act*,” because the province was not providing services, which were “an integral component of women’s necessary reproductive-related health care” (*Morgentaler v New Brunswick* 2009, para. 1 and 14). Morgentaler’s focus on women’s rights claims was the basis of his legal challenge, and was apparent in statements he made prior to initiating the case. In a 2002 public statement, for example, he accused the New Brunswick government “of being sexist, male chauvinists [and] of victimizing and oppressing women.” By failing to pay for all abortion services, he argued, “the New Brunswick government has been saving money on the misery of women.”

This critique fell on deaf ears, however. In response, then Justice Minister Brad Green expressed his confidence in the government's position and articulated his willingness to defend it "as far as the Supreme Court of Canada" (qtd. in Moulton 2003, 700). In the years after Morgentaler filed his lawsuit, anti-abortion groups and the government continued to work to ensure that the substance of his critiques - that the government was ignoring women's Charter rights and, in so doing, treating women as second-class citizens - would not make it to court. Attempts to delay Morgentaler's opportunity to voice his challenge in court formed a central pillar of this strategy, apparent in the approaches of both the government and social movement activists.

In 2004, the Coalition for Life applied for intervenor status in the Morgentaler case (*Morgentaler v New Brunswick* 2004). This was denied on the grounds that the organization had "no more direct interest in issues pleaded than any other taxpayer and demonstrated no special expertise not otherwise available" (para. xx). The Coalition appealed the case in 2005, but the verdict held and it was subsequently denied leave to appeal to the Supreme Court.

Similar tactics of delay were also apparent in the actions of the New Brunswick government. In 2007, the province challenged Morgentaler's standing, arguing that a woman would be better suited to bring the case forward (*Morgentaler v New Brunswick* 2008). Morgentaler responded by arguing that, "although there are persons who are more directly affected by the legislation than he, these persons for a variety of reasons are unlikely or unable to challenge it," and moved to be granted public interest standing in the case (para. 19). The New Brunswick Court of Queen's Bench looked to precedents set in other cases involving vulnerable populations, and stated in its ruling that, "[t]here are many valid reasons why women who have had abortions at the Fredericton Clinic would not or could not bring this challenge. Dr. Morgentaler is therefore a suitable alternative person to do so" (para. 26). Morgentaler was subsequently granted public interest standing. The government appealed this decision in 2009, but the verdict was upheld (*Morgentaler v New Brunswick* 2009).

In subsequent years, the New Brunswick government took no further action on this case, likely due to Morgentaler's advanced age and failing health. When asked about the government's approach to the most re-

cent Morgentaler case, many of the individuals I interviewed suggested that the government employed these delaying tactics in order to drag the case out until Morgentaler was too ill to continue. On 29 May 2013, Morgentaler suffered a heart attack in his home and died at the age of 90. Following his death, the New Brunswick Justice Department initially claimed that the lawsuit would be "considered null and void in light of Morgentaler's death," but later opted not to comment (CBC News 2013b). The case has since been officially dropped (*Globe and Mail* 2014).

Of course, attempts to challenge New Brunswick's policies on abortion have not been relegated solely to the legal sphere. As the above case was playing out in court, the federal government also tried to influence the province's abortion policy. In 2005, for example, then Federal Health Minister Ujjal Dosanjh (Liberal) initiated a dispute avoidance resolution (DAR) action against the province, which focused on its refusal to "reimburse the cost of abortions carried out in private clinics" (Eggertson 2005, 862). DAR is a process created in 2002 and is meant to resolve "disputes related to the interpretation of the principles of the *Canada Health Act*" (Health Canada 2010, 169). In the event that the two levels of government cannot come to an agreement, the non-compliance provisions of the Act can come into effect, resulting in a "deduction from federal transfer payments under the CHA (Canada Health Act]" proportional to the "gravity of the default" (6).

The response from the New Brunswick government, then under the leadership of Bernard Lord (Progressive Conservative), was not conducive to productive negotiations. Indeed, during an interview, Judy Burwell, former Director of the Fredericton Morgentaler Clinic, recalls the difficulties the federal government encountered in its dealings with the province, explaining that "the New Brunswick government was just the most arrogant...they wouldn't return calls, they just ignored them, because they know they can" (Burwell, 2011). The New Brunswick Minister of Health Elvy Robichaud (Progressive Conservative) publicly stated in 2001 that the provincial government would not "bow to pressure" from the federal Liberals (Richardson 2011). Unfortunately, before any resolution could be achieved, a federal election took place and the federal Liberals lost to Harper's Conservatives. The new Conservative Minister of Health, Tony Clement, appeared "reluctant to con-

tinue the dispute resolution process with New Brunswick.” In 2006, he announced that “the federal government does not intend to pursue the matter of abortion funding at the NB clinic,” stating that the “issue is ‘off the radar’” (ARCC 2007, 3). Since then, the incumbent Conservatives have not used DAR to sanction any province restricting abortion access services.

As indicated in the above example, the province’s attempts to avoid engaging in a rights debate on abortion are noteworthy, as is the Conservative federal government’s silence on the situation in New Brunswick in the years that followed. In other words, women’s rights to equality and security of the person, as well as their right to access safe and legal medical services within the parameters laid out by the Canada Health Act, have been raised time and time again, but no discussion of their significance has taken place in the New Brunswick courts, in the provincial legislature, or between the province and the federal government.

Another attempt to force government accountability for the clear violations of women’s rights created by the province’s regulations on abortion involved a female doctor, referred to only as A.A., who in October 2008, filed a complaint with the New Brunswick Human Rights Commission (New Brunswick Labour and Employment Board 2011). The basis of the complaint was twofold. First, it alleged sex discrimination with respect to her ability to provide patient care as a female physician, “who regularly provides primary care services for adolescents and young adults, including sexual health services” (para. 2). The discrimination she alleged was the result of the “procedural hoops” she had to contend with, when seeking to help her patients access funded care (para. 14.1). Regulation 84-20 forces physicians to provide services which are not in keeping with the Canadian Medical Association’s position on abortion, which suggests that there “be no delay in the provision of abortion services” and, most importantly, that “[i]nduced abortion should be uniformly available to all women in Canada” (Canadian Medical Association 1988, 1-2). Central to her claim was her perception that, as a female doctor providing sexual healthcare, she was subject to uniquely negative treatment as a result of the regulation. The second claim centered on the province’s discrimination against women seeking pregnancy termination services on the basis of sex. A.A. argued that women were “being denied a service on the basis of sex”

(New Brunswick Labour and Employment Board 2011, para. 5), as pregnancy is an inherently gendered issue, and that the provincial regulations caused “psychological harm” (para. 8.2).

A preliminary hearing found that A.A. could only proceed on the first complaint, because the Human Rights Act only allows individuals from a discriminated group to bring forward a claim. On 2 August 2011, the province of New Brunswick filed an action against the New Brunswick Labour and Employment Board, the New Brunswick Human Rights Commission, and A.A. in an effort to challenge the Labour and Employment Board’s authority to render a decision on A.A.’s complaints. The judge upheld the Board’s right to hear the case in a preliminary ruling (New Brunswick Labour and Employment Board 2011), but the government appealed the decision and won. While the Appeal Court Justice found the complainant to be an aggrieved party, the Justice also found that the standard of evidence had not been met. Specifically, the case fell outside the purview of the Board, because A.A. “wasn’t directly affected by the abortion policy” and “lacked sufficient information to show the problems with accessibility” (CBC News 2013a). As Julia Hughes has pointed out,

The complainant physician [A.A.] was not able to appeal the Court of Queen’s Bench decision before the expiry of the appeal period, fearing reprisal if her identity became known. A motions judge of the Court of Appeal refused to extend time. In the course of so doing, he ridiculed the difficulty of the complainant in finding legal assistance to appeal by stating that ‘other than expressions of discouragement and an unwillingness to pay a large retainer, A.A. offers no explanation for her failure to respect the time limits.’ (Hughes 2014)

In sum, because the Board lacked the same rights to grant special interest standing, the second part of A.A.’s claim would have to be brought forward by a woman who had attempted to access abortion services in the province. The first claim could still be brought forward by a physician, but only if they are able to gather the necessary evidentiary support.

In an interview, Julia Hughes explained that, if the above case had been successful and the regulation was found to be in contravention of the Human Rights Act, “that would be the end of that regulation,” though the

government would still have had the ability to create new restrictions (Hughes 2011). Hughes indicated that the major difference between using the courts and the Human Rights Commission is that a publicly-funded body would be responsible to ensure that the government complied with the ruling, rather than placing this burden on a private citizen to bring a case forward. Even though this particular case was not successful in removing provincial regulations on abortion, it did draw attention to another venue through which women could challenge the province's abortion policy without risking their privacy, as evidenced by the careful concealment of A.A.'s identity. Overall, this case further demonstrated the province's goal of avoiding the rights debate where possible and choosing to justify its activities using jurisdictional and anti-abortion rhetoric in the legislature and in public statements.

The Future of Women's Citizenship

The New Brunswick government has been successful in implementing and maintaining anti-abortion policies, which deny recognition of women as full Canadian citizens with the right to make their own reproductive choices. These policies are endorsed by members of the legislature utilizing the rhetorical tools of the anti-abortion movement, and have survived despite multiple rights-based challenges. The comfort that MLAs have demonstrated in expressing anti-abortion views has not changed in the years following the *Morgentaler* decision of 1988. In December 2004, Liberal MLA Stuart Jamieson asked his fellow legislators: "Why are we allowing the rights of mothers to outweigh the rights of that human life inside a womb?" (Hansard 2004). The normalization of such rhetoric indicates the dismissal of women's rights as human rights, let alone citizenship rights, in the province. Personal belief systems have been allowed to supersede women's citizenship rights. Rhetoric that depoliticizes women's rights is used to ignore the realities of access issues for women, while an anti-abortion discourse continues to guide policy. Without recognition, either by courts, the federal government, or the provincial legislature, that abortion is a right fundamental to the equal participation of women in society, these policies have persisted.

The decriminalization of abortion was not the final battle for women's reproductive rights, as provincial actions to restrict women's right to choose make

clear. Understanding the limitations of the current treatment of abortion as a healthcare issue is necessary to create positive change. In the case of New Brunswick, the anti-abortion movement has maintained a strong presence in the legislature, calling for the maintenance of restrictions on abortion access that are divorced from women's lived realities and do not respect their reproductive lives and choices. Extensive bureaucratic restrictions preventing women from accessing abortion care covered under provincial health insurance is a case in point. It is evident that these roadblocks are not motivated by a desire to create improved health care for women, but to block access to what is portrayed as an immoral and undesirable procedure. Recognition of the rights of the fetus above those of the pregnant woman, or, as new campaigns suggest, attempts to protect women from themselves, suggest that reproduction is not a citizenship question, but a moral issue. The only women who can avoid the anti-abortion movement's views are those financially stable enough to find alternate means to terminate unwanted pregnancies, and even these women are subject to cultural stigma that can impact their choices. The failure to acknowledge reproduction as a women's rights issue, and to recognize the powerful cultural norms entrenched in law and policy that regulate it, implies that women are not understood to be equal citizens in New Brunswick.

To date, the government has been able to maintain its unconstitutional regulations through the denial of rights-based access to abortion services. It has consistently employed strategies of avoidance, dragging out challenges and questioning the validity of anyone who questions its policies, rather than engaging with the critiques leveled against it. This strategy has worked to date largely due to the timing of the cases, changes in the federal government, and the death of Dr. Morgentaler. How, then, do we move forward, particularly when a lack of abortion regulations has allowed other provinces, like Quebec, the space to create innovative and progressive policy that might have otherwise been stifled?

The history of abortion access in New Brunswick since 1988 showcases the problem with framing abortion as a health care issue. The treatment of abortion by the province, and the federal government, demonstrates the limitations of this view. In order to begin to create real protections for women in the province, I

have argued that governments must recognize abortion as an equality right or, more specifically, a citizenship right. Bearing the limitations of any rights framework in mind, its immediate power in reshaping socio-political landscapes and legitimizing the power struggles inherent in attempts to secure abortion access makes such a framework valuable. Moreover, the conceptualization of citizenship I employ is not limited to formal rights, but includes notions of community membership and belonging. Perceptions of abortion and the place of women in society will, of course, continue to evolve and change, but the state has a responsibility to ensure that Canadian women are not denied certain equal status protections along the way.

Abortion access must be understood as a positive right if women are to be recognized as equal citizens. This means not only the provision of services, but also a safe social climate in which women can exercise these choices openly. After all, a right to abortion means little to a woman in rural New Brunswick living under the poverty line, who is afraid of disclosing her situation for fear of harassment and attack. It is also important to note that this recognition need not conflict with the federal distribution of powers in Canada. If a minimum level of access were federally mandated to protect women's citizenship rights, differences between the provinces would be expected, but acceptable. Different populations require a different range of services in all areas of healthcare. While abortion provides a unique example, given its inherently gendered implications and the rights consequences of being denied access, it can be provided within the existing infrastructure.

While the issue of abortion has largely fallen off the radar because it is seen as resolved, the continued denial of bodily control necessary to women's citizenship should be met with disbelief. The anti-feminist backlash apparent in New Brunswick has gained strength from the failure of citizens, and governments, to react to the citizenship hierarchy that this backlash creates. The treatment of abortion as a taboo topic has contributed to the power of anti-abortion groups to reclassify the procedure and effectively recriminalize it by blocking access. Open discussion of the meaning of safe access to abortion for women is once again necessary, in a time when the horrors of botched back alley abortions have begun to fade from the collective memory. There are still activists working on the front

lines in New Brunswick attempting to draw attention to the government's indefensible policies, but national recognition is also important, as these views are not unique to one province. Backlash against women's hard won reproductive rights is a deeply political issue, and recognition of this new anti-abortion approach to challenging rights should inspire action. A formal recognition of abortion as necessary to the realization of women's citizenship rights is crucial to guaranteeing women's future equality, and to prevent the creation of regulations like those currently in effect in New Brunswick.

Endnotes

¹ In 1969, the Trudeau administration made significant changes to the *Criminal Code* in an omnibus bill. While abortions were previously prohibited, the 1969 amendment allowed for legal abortions, provided they were "performed in an accredited or approved hospital and approved by a three-physician therapeutic abortion committee (TAC) from that hospital as necessary to protect the woman's life or health" (Brown and Sullivan 2005, 287).

² On 10 April 2014, the Fredericton Morgentaler clinic announced that it would be closing its doors at the end of July 2014 because of a lack of funding. The clinic has long run on a deficit, offset by Dr. Morgentaler's contributions, but is no longer able to remain open without assistance from the New Brunswick government (CBC News 2014). New Brunswick women will now have no option but to attempt to jump through the bureaucratic hoops in the province, or pay out of pocket to travel and access an abortion clinic elsewhere in Canada. The closing of the clinic also further limits the options of women from Prince Edward Island, who made up nearly 10% of the clinic's patient base.

³ Reproductive Justice New Brunswick, "a collective of individuals from across New Brunswick dedicated to ensuring publicly funded and self-referred abortion is available in the province," has started an online crowd-funding campaign in the hopes of taking over the lease of the Morgentaler clinic so that it can remain open (Reproductive Justice Network 2014).

⁴ These regulations are set against the backdrop of regressive abortion policies in the United States where, in 2013 alone, over forty state-level restrictions on abortion were created (Eilperin 2013). Most famously, Texas won a Supreme Court case upholding its right to require abortion providers to have admitting privileges at a hospital within thirty miles of where they perform the procedure, as well as enacting a ban on abortion after the twentieth week of

pregnancy. These changes, which have no medical basis, are “forcing a third of the state’s 36 abortion clinics to stop performing the procedure, preventing some 20,000 a year from access to safe abortions” (Liptak 2013, A13).

⁵ These private belief systems are often religious in origin. For a discussion of the role of religion in New Brunswick’s abortion debate, see Ackerman 2012.

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