

# A Survey of Anti-Choice Protesting Activity at Canadian Abortion Clinics



By Fanda Wu and Joyce Arthur \*

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Abortion Rights  
Coalition of Canada

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POB 2663, Station Main, Vancouver, BC, V6B 3W3  
Web: [www.arcc-cdac.ca](http://www.arcc-cdac.ca) • Email: [info@arcc-cdac.ca](mailto:info@arcc-cdac.ca)

\* Fanda Wu: Student, UBC Faculty of Law.

\* Joyce Arthur: Coordinator, Abortion Rights Coalition of Canada

# Table of Contents

<b>Executive Summary</b> .....	<b>3</b>
<b>Background</b> .....	<b>4</b>
<b>Objective</b> .....	<b>5</b>
<b>Methodology</b> .....	<b>5</b>
<b>Results</b> .....	<b>7</b>
Question 1: Is the clinic stand-alone, in a multi-tenant building, or part of a hospital?.....	7
Question 2: Has the clinic experienced protesting activity? .....	7
Question 3: Details of the protesting activity including size, frequency, and aggressiveness .....	8
Question 4: Have there been changes during “40 Days for Life” campaign?.....	8
Question 5: What is the impact of protesting activity on staff and patients? .....	9
Question 6: Has the clinic gathered patient feedback regarding protestor activity? .....	10
Question 7: Has the clinic taken actions against protestors? .....	10
Question 8a: Have the measures taken against protestors been effective? .....	11
Question 8b: What is the quality of the relationship between the clinic and law enforcement?.....	12
Question 9: Does the clinic have an injunction? .....	13
Question 10: Is legislation similar to BC’s desirable elsewhere?.....	13
Question 11: Is legislation similar to BC’s feasible elsewhere?.....	14
<b>Discussion</b> .....	<b>15</b>
Differences between clinics without an injunction and with an injunction.....	15
Differences for clinics pre-injunction and post-injunction .....	15
Differences between clinics without bubble zone legislation and with bubble zone legislation .....	15
<b>Recommendations</b> .....	<b>16</b>
Benefits of legal protection.....	16
Clinics in need of a bubble zone .....	16
Feasibility of federal bubble zone law.....	17
Conclusion .....	18

## Executive Summary

British Columbia is the only province in Canada to have legislation limiting anti-choice protesting activity at abortion service providers. BC's *Access to Abortion Services Act* protects abortion service providers from protesting activity, creating a "bubble zone" free of protesting activity around clinics, hospitals, and the offices and homes of providers. This study undertook a quantitative and qualitative analysis of the differences between abortion clinics within BC that are protected by the *Act*, and abortion clinics in other provinces in Canada. The latter either have no protection against protestors or have private injunctions obtained in court that create protected bubble zones around the clinic).

The study surveyed clinics on their protest activity and history, measures taken to protect patients and staff, and the effectiveness of those measures. Clinic staff were also asked to express their views on the desirability of access zone legislation and the likelihood of such legislation being passed in their jurisdiction. The paper comments on the feasibility and desirability of the *Act* or similar legislation in other provinces or Canada-wide, and sets out a legal analysis on the viability of such legislation.

### **Highlights:**

- Every clinic in Canada participated – a total of 33.
- 64% of clinics (21) currently experience some degree of protest activity.
- 15% (5) have had protest activity in the past.
- 21% of clinics (7) have never experienced any protest activity.
- 27% of clinics (9) have either private court injunctions to protect staff and patients from protestors, or are protected by the *Access to Abortion Services Act*. 73% of clinics (24) have no protection.
- Injunctions and bubble zone laws have significantly reduced protest activity at every clinic that uses them, sometimes completely eliminating it.
- Although protest activity has been relatively low and sporadic at most clinics since the mid-1990's, it is on the rise again with the anti-choice "40 Days for Life" campaign that stages ongoing demonstrations outside abortion clinics.

## Background

This study was completed by the Abortion Rights Coalition of Canada (ARCC) and compiles information on anti-choice protestors at abortion clinics across Canada.

British Columbia is one of the few jurisdictions in the world that has legislation protecting abortion service providers from anti-choice activity. The *Access to Abortion Services Act*<sup>1</sup> (the “Act”) came into force in British Columbia in September of 1995. Abortion service providers are protected from anti-abortion protestors by the *Act*, which creates “access zones” (also known as “buffer zones” or “bubble zones”) where protest activities may not take place. No other province in Canada has a similar provision.

The *Act* automatically protects the homes of providers (including all clinic staff) and doctor’s offices, but clinics and hospitals that experience protestors must apply to the government for a bubble zone. If warranted, a zone will be customized to their site via a Regulation under the *Act*. Zones are calculated from the edge of the lot on which the facility is located at and extend up to a maximum of 50 metres. Zones extend 160 metres for a doctor or staff member’s home, and 10 to 20 metres for a doctor’s office.<sup>2</sup> Within these zones, the *Act* prohibits: sidewalk interference, protesting, besetting<sup>3</sup>, physical interference or attempted interference with a patient, doctor, or service provider, and intimidation of a patient, doctor, or service provider.

Engaging in these prohibited activities may result in arrest with bail conditions that may include prohibition from entering the access zone, fines up to \$5,000 for the first offence and \$10,000 for subsequent offences, and imprisonment for up to six months for the first offence and up to one year for subsequent offences. Finally, either the Attorney General or other persons may apply for an injunction to prevent a person from contravening the *Act*.

Protesters convicted under the *Act* have challenged its constitutionality several times. However, the *Act* was ultimately upheld as constitutional in September 2008 by the BC Court of Appeal,<sup>4</sup> and the Supreme Court of Canada has declined to hear the appeal of protestors convicted under the *Act*.

The United States is another country that has legislation in regard to abortion clinics. The US Congress passed the *Freedom of Access to Clinic Entrances (FACE) Act*<sup>5</sup> in 1994, which is a federal law that prohibits physical obstruction of any reproductive

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<sup>1</sup> Access to Abortion Services Act, RSBC 1996, c 1.

<sup>2</sup> Don Crane, “Synopsis – Access to Abortion Services Act”, *Pro-Choice Press* (Winter 1995/1996), online: Pro-Choice Action Network <<http://www.prochoiceactionnetwork-canada.org/prochoicepress/9596win.shtml#legalopinion>>.

<sup>3</sup> ‘Besetting’ includes continuous and repeated observation of service providers, doctors, patients, or any of their homes, as well as standing close to them with the objective of impeding the provision of abortion services.

<sup>4</sup> *R. v. Spratt*, 2008 BCCA 340.  
<[www.canlii.org/en/bc/bcca/doc/2008/2008bcca340/2008bcca340.html](http://www.canlii.org/en/bc/bcca/doc/2008/2008bcca340/2008bcca340.html)>

<sup>5</sup> Freedom of Access to Clinic Entrances Act, USC 18 1994, § 248 (1994).

healthcare centre, including abortion clinics. The *FACE Act* also allows providers, the state attorney general, and/or the federal government to bring actions and obtain injunctions or monetary damages.<sup>6</sup> However, the *FACE Act* differs from the *Access to Abortion Services Act* in that it is not a buffer zone law that prohibits protesters. In addition to the *FACE Act*, at least fifteen different buffer zone laws exist at the state or municipal level in the U.S. One such example is Pittsburgh, which has a municipal-level bubble zone law that covers three clinics.<sup>7</sup>

A few other countries are also making progress towards implementing bubble zone laws. In France, Article 17 of *Act n° 2001-588 on the voluntary interruption of pregnancy and contraception*<sup>8</sup> criminalizes the impairment of access to an institution performing abortion as well as exerting moral or psychological pressure, including threats and intimidation, on staff and patients. Offenders face a fine of €30,000 and two years imprisonment. Both Australia and Austria have made attempts at passing legislation similar to BC's *Act*, but have been so far unsuccessful.<sup>9</sup>

## Objective

The purpose of this study was to assess anti-choice activity in clinics across Canada and determine the need for and the feasibility of bubble zone legislation in provinces other than British Columbia. Data was collected in order to compare and contrast the service providers that were protected by the Act, those protected by private injunctions, and those with no legislation.

## Methodology

ARCC compiled a list of all abortion service providers across Canada, which included clinics associated with a hospital, located within a multi-tenant building, and stand-alone clinics. The ARCC Coordinator identified the clinics that would participate in the survey and contacted the clinics to introduce the project and get approval for a law student to call, who was recruited through the Pro Bono Students Canada program at

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<sup>6</sup> "Freedom of Access to Clinic Entrances (FACE) Act", online: National Abortion Federation (NAF) <[http://www.prochoice.org/pubs\\_research/publications/downloads/about\\_abortion/face\\_act.pdf](http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/face_act.pdf)>.

<sup>7</sup> "Safe Spaces: Activist's Guide to Clinic Buffer Zones", (Pittsburgh, PA: Woman's Law Project, 2010).

<sup>8</sup> Loi n° 2001-588 du 4 juillet 2001 relative à l'interruption volontaire de grossesse et à la contraception, JO, 7 July 2001, 10823.

<sup>9</sup> Rebecca Dean, "Abortion in Australia: Access versus Protest", online: Department of Health <[http://www.health.vic.gov.au/phwa/downloads/fertility\\_contol\\_clinic\\_attachment1.pdf](http://www.health.vic.gov.au/phwa/downloads/fertility_contol_clinic_attachment1.pdf)>. **And:** Paul Heinrichs, "Democrats push for clinic law" *The Age* (28 August 2005), online: The Age <<http://www.theage.com.au/news/national/democrats-push-for-cliniclaw/2005/08/27/1124563067484.html>>. **And:** Letter from Dr. Christian Fiala (2009).

the University of British Columbia. The student collected survey answers primarily over the phone, with a few answers collected via e-mail.

A total of 33 abortion service providers were surveyed. To protect the clinics' confidentiality and security, no clinics are identified in this paper.

Clinic Breakdown	
Prairies (P)	5
British Columbia (B)	6
Ontario (O)	11
Maritimes (M)	3
Quebec (Q)	8
TOTAL	33

Surveying of the Quebec clinics was done by the Fédération du Québec pour le planning des naissances (FQPN), who translated the survey into French. We translated the survey results back into English for the purposes of this study. The FQPN also chose to send a written survey to an additional 51 abortion service providers (mostly hospitals and *Centres local de services communautaires*), which this study does not analyze.

The survey asked eleven questions, as follows:

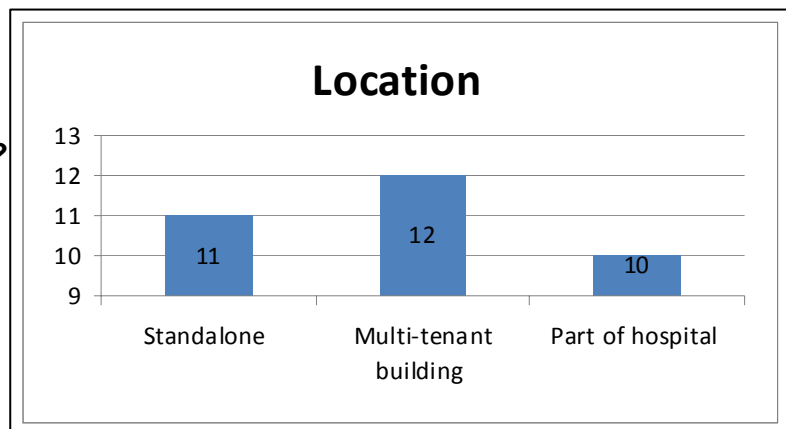
1. Is your clinic stand-alone, in a multi-tenant building, or part of a hospital?
2. Have you ever experienced protestors at your site?
3. Please explain in detail the size of protesting activity, frequency, aggressiveness, violent incidents, if any; and frequency of new protestors.
4. Have you noticed any recent changes in protesting activity due to the "40 Days for Life" campaign (September 1, 2009 to November 1, 2009)?
5. To what extent does their presence intrude upon daily activities? How does the protesting activity affect the doctors, nurses, and other staff members? How does it affect patients?
6. Has your clinic ever asked patients to anonymously complete a survey or written description on how protestors interacted with them if at all, and what effect the protestors had on them if any (e.g., for possible use as evidence in court to support an injunction)?
7. What actions have you taken against protestors? This may include calling in law enforcement, using clinic escorts or building security, or getting a court injunction against protestors.
8. Have the measures you've taken been effective? Are they sufficient? Has police response generally been adequate? Has it helped to reduce protest activity? Do you have a good relationship with local law enforcement?

9. If you have an injunction or law in place, what are the terms of the injunction? How difficult is it to enforce? How do you enforce it? Can we receive a copy of it?
10. BC passed an Access to Abortion Services Act in 1995 which creates zones of protection for abortion clinics. Do you believe a bubble zone would be desirable to have for your clinic? How effective do you think such legislation would be (compared to an injunction, if you have one)?
11. In your current political climate, do you feel a bubble zone law would be feasible? That is, given the current political party in power and their platform on abortion, would such a law be likely to be passed, whether municipally, provincially, or federally?

## Results

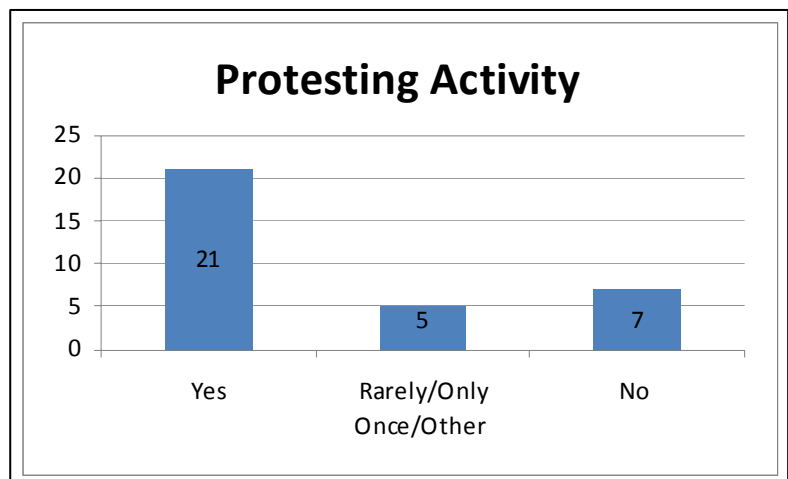
**Question 1: Is the clinic stand-alone, in a multi-tenant building, or part of a hospital?**

Location	
Stand-alone	11
Multi-tenant building	12
Part of hospital	10



**Question 2: Has the clinic experienced protesting activity?**

Protesting Activity	
Yes	21
Rarely/Only Once/Other	5
No	7



### **Question 3: Details of the protesting activity including size, frequency, and aggressiveness**

Of the 21 providers that experienced protesting activity, the size and frequency of protesting varied across clinics. Protestors ranged in number from as little as one protestor to hundreds of protestors, although usually it was groups of two to twelve. The frequency ranged from daily to weekly to only two or three times a year. Some clinics experienced protestors that were fairly quiet to ones that were more aggressive. The types of activities protestors engaged in included: signage such as “adoption”, “mommy does it hurt”, and “save the baby”; handing out pamphlets and brochures about negative effects of abortion and graphic photographs; and luring patients away from the clinic. A few clinics experienced protestors who blocked entry to clinics and followed patients around, but these activities ceased to occur after the clinics got court injunctions.

*“Some [protestors] will occasionally lure patients over [to the anti-choice house across the street] or patients end up over there. It can affect [patients], but generally it’s pretty quiet.”*

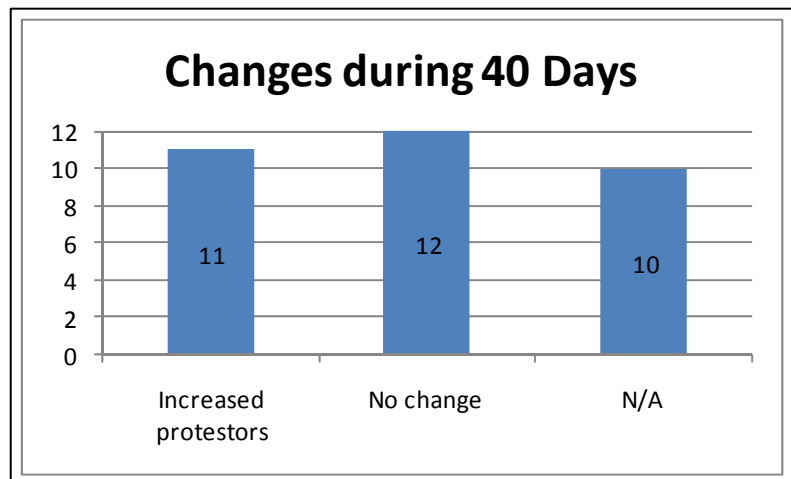
*“Occasionally one of the protestors will get overly enthusiastic and will hand out gross literature to people on the street.”*

*“[There was a] crazy man at the door wanting to call police to close us down.”*

*“There are organized groups – the same for a long time but there are new people. They come twice a year, at Lent and 40 Days for Life.”*

### **Question 4: Have there been changes during “40 Days for Life” campaign?**

Changes During 40 Days	
Increased protestors	11
No change	12
N/A	10



“40 Days for Life” is an anti-choice campaign that places protestors in front of clinics on a 24-hour basis for 40 days straight, once or twice a year. The campaign was imported to Canada from the U.S. in 2009, and has targeted 8 to 10 Canadian clinics each time.



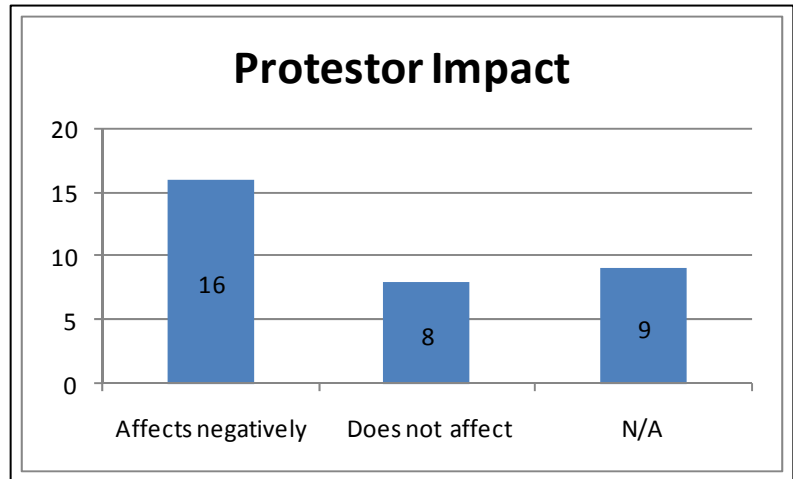
The ten clinics that responded as "N/A" were unable to comment due to a number of reasons, such as not having ever had protesting activity or not being on the 40 Days campaign list.

*"Yes, the 40 Days campaign was our first experience with a protest. We had led a very private existence previously."*

*"There was an increase of pressure. I would say they are more aggressive, with their huge photos of fetuses."*

**Question 5: What is the impact of protesting activity on staff and patients?**

Protestor Impact	
Affects negatively	16
Does not affect	8
N/A	9



One clinic responded by saying that both staff and patients were frightened by the aggressiveness of protestors. Another clinic also said that both staff and patients are bothered and fearful.

A number of clinics responded by saying that patients were affected negatively and upset by the presence of protestors, but that staff were more used to the protesting activity and not as bothered by it. These clinics were coded as being affected negatively by protestor presence. One clinic mentioned that the staff noticed the protestors but the patients were not bothered. This clinic coded as being negatively affected.

*"Sometimes patients don't even notice that protestors are there. Occasionally signs are hurtful and increase stress for patients coming in for abortion. They're already stressed out, someone having claim on what you do is pretty hard for them."*

*"There is more effect on the patients than staff. It depends on patients – some patients aren't bothered at all, but if they are having qualms about coming in the first place, they are bothered. It changes the atmosphere here."*

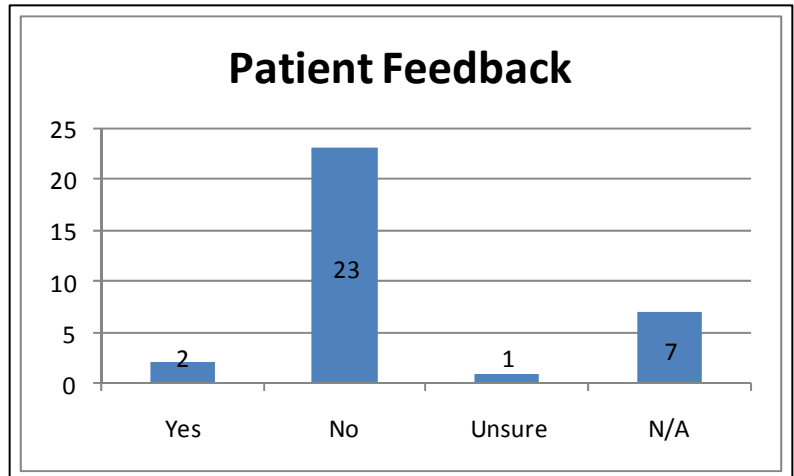
*"[It] doesn't affect the staff at all because all of the staff are older, so they've been here for years, so [they] kind of get used to it."*

*“Generally not. Some women say they feel intimidated. For staff, it’s more a feeling of disgust.”*

*“Before the injunction, it affected everyone who worked at the clinic and all the women who came for an abortion. It was bullying!”*

**Question 6: Has the clinic gathered patient feedback regarding protestor activity?**

Patient Feedback	
Yes	2
No	23
Unsure	1
N/A	7



This question was asked to determine if clinics gathered any data on protesters from patients themselves, in terms of how protester presence affected patients. Such data could be valuable to use as evidence in court to support an injunction or bubble zone law. Only two clinics had ever done so. (Although not asked in this survey, some clinics have used staff or volunteers to collect data directly, such as recording protester presence and taking photographs).

**Question 7: Has the clinic taken actions against protestors?**

Of the 33 clinics surveyed, 21 clinics took measures to reduce protesting activity. Of these 21 clinics, 17 were clinics that had experienced protesting, 3 were clinics that had rarely experienced protesting, and one was a clinic that had never experienced protesting. Thus of the 21 clinics that had experienced protestors, 4 clinics did not take any measures to reduce the protesting activity.

The clinics that tried to reduce protesting activity took measures such as obtaining private injunctions, recruiting clinic escorts (usually volunteers) for the patients and staff, calling in local law enforcement, and training staff on how to respond to protestors. Some clinics hired private security guards or, if they were in a multi-tenant building, had building security. Clinics located within hospitals also may have hospital security patrolling the area. One clinic contacted the National Abortion Federation to monitor the protesting situation. Another clinic increased its video

surveillance of the clinic entrance, and implemented a door alarm system and entrance swipe cards.

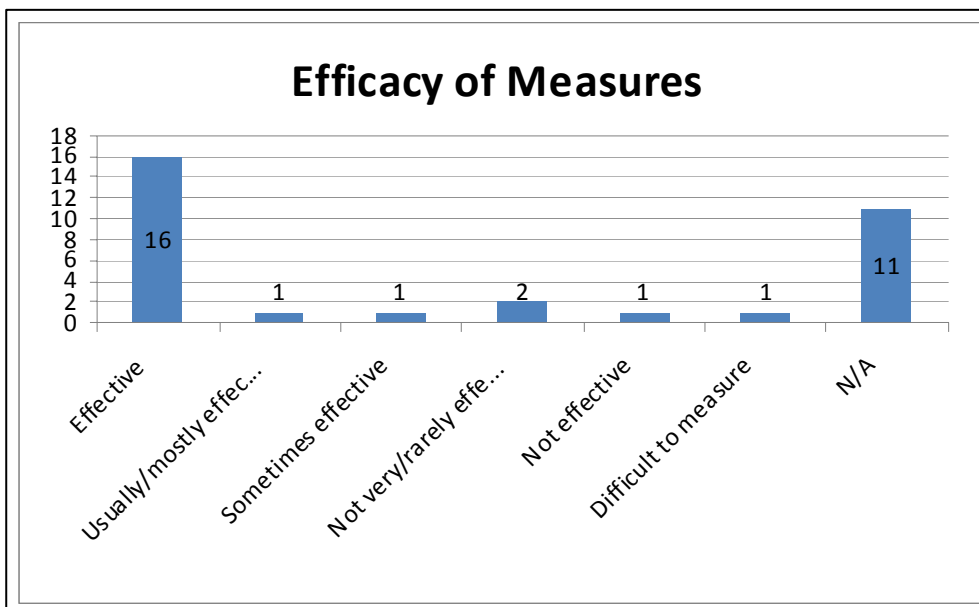
For the six BC clinics, two have the *Act* in effect. One clinic tried to apply for an access zone at one point but was unable to get one, while another clinic decided not to apply as it did not have a need for the *Act*.

*“Besides the security guard, we make staff aware of how they should act if approached, teach staff not to engage them [protestors], and train staff to be mindful of their comfort level.”*

*“During the protest, we took extra precautions to ensure the safety of staff and patients. These included upgrading the security at the entrance to the clinic. Arrangements were made for clinic staff to be given an escort by security as needed. Patients were provided information about the protest and a phone number to call to request an escort.”*

**Question 8a: Have the measures taken against protestors been effective?**

Efficacy of Measures	
Effective	16
Usually/mostly effective	1
Sometimes effective	1
Not very/rarely effective	2
Not effective	1
Difficult to measure	1
N/A	11



One clinic stated that while the measures taken did reduce picketing, it was not effective in a larger sense. The police regarded dealing with the protestors as a nuisance and there was a lot of anti-choice sentiment amongst police. Some clinics had difficulties getting a response from the police at all, particularly when individual officers have anti-choice beliefs.

One clinic was unsure if the police response at the scene was effective as the police did not contact the clinic afterwards to discuss the measures they took. Additionally, the clinic believed that the protesting activity would have settled down anyway, regardless of the police response, after the 40 Days campaign ended.

One clinic mentioned that the measures were mostly ineffective because the protestors would respond to police by leaving, then returning as soon as the police presence was gone.

*“The police respond. There is not much they can do. The protestors are on the sidewalks and the sidewalks are next to the clinic. They have a right to be on the sidewalk.”*

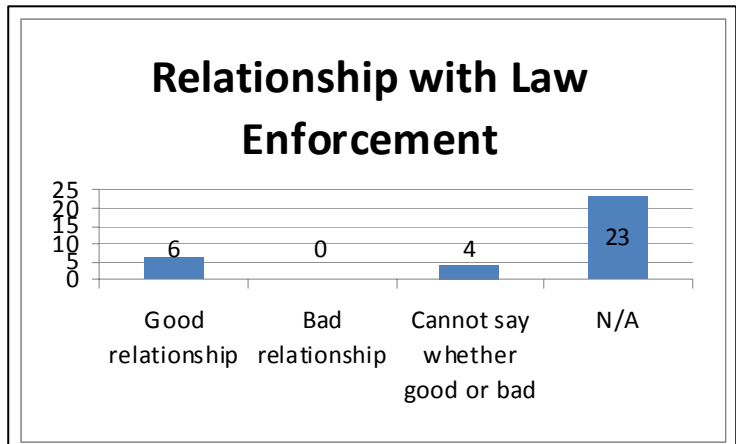
*“We have been satisfied with the results. We have had police at the table and understand that they are available to us as needed.”*

*“The injunction has been effective in the sense that as soon as it came into force, it cut down on picketing a lot... There are not a lot of people that are willing to go to jail, so it is effective. We have to call the sheriff and then the police, and they come when we call them.”*

*“Police are not always aware that the clinic has an injunction. One or two times a year, we explain to police about the injunction – they have to read it. It is a little more cumbersome because it is a privately held injunction, so police officers aren’t always aware of the situation. Once they are aware and understand, they are responsive and deal with violators.”*

**Question 8b: What is the quality of the relationship between the clinic and law enforcement?**

Relationship with Law Enforcement	
Good relationship	6
Bad relationship	0
Cannot say whether good or bad	4
N/A	23

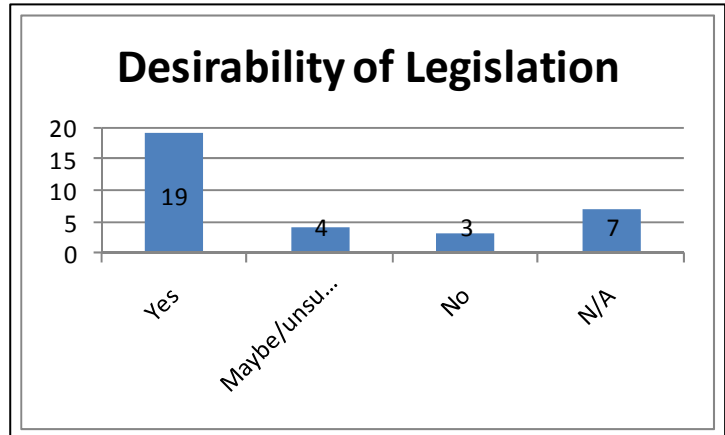


### Question 9: Does the clinic have an injunction?

A total of seven clinics have court injunctions: two in the Prairies, three in Ontario, and two in Quebec. Injunctions create a bubble zone area around the clinic that prohibits or controls the presence of protesters.

### Question 10: Is legislation similar to BC's desirable elsewhere?

Desirability of Legislation	
Yes	19
Maybe/unsure	4
No	3
N/A	7



One clinic mentioned that it would be desirable to have bubble zone legislation because it would be more effective than the measures taken by individual clinics, which can only keep protestors off private property in accordance with trespass laws. Legislation would be more effective because it could keep protestors outside a greater radius around the clinic.

*"A private injunction is not subject to the Charter of Rights and Freedoms, so it can't be challenged like in BC, but we had to get [the injunction] ourselves and it was expensive. Now that we have this injunction, we have it. ... The thing about a private injunction is that you have to show harm, so until clinics open up and protestors bother the clinics, you can't go to court."*

*"Yes, they should have it for all of the clinics because what other medical procedure allows for people to be bullied when they get the procedure? It is frightening for people and seems so third world that people can't get access to their healthcare. The large majority of protestors are middle-aged men, and it can be frightening for people. A bubble zone would help to even the playing field for the patients."*

*"Yes, despite our peaceful experience, it would be ideal not to have the protests across the street."*

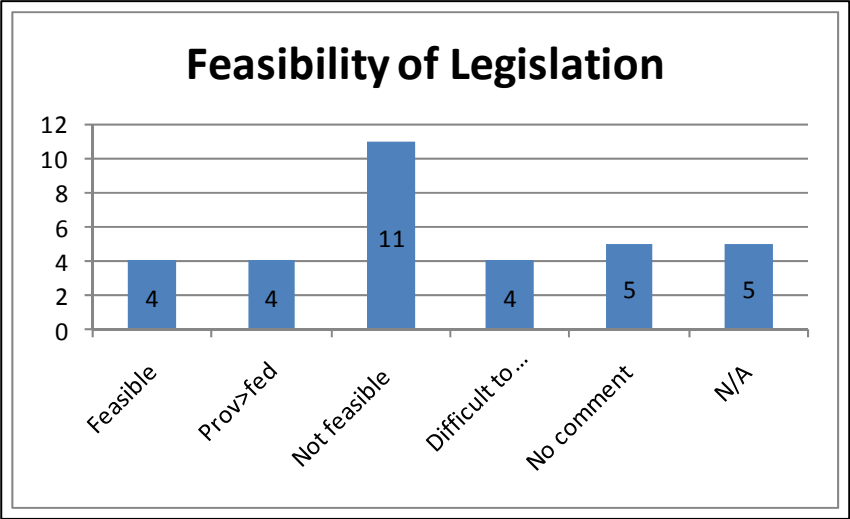
*"It's not needed for this clinic. [Protestors] can't come in the hospital. They can use the public sidewalk outside if they need it, and that's a distance from the hospital."*

*“Yes, a law would make a huge difference in reducing the size of protestors. It would remove individual clinic obligations to respond to protestors. They wouldn’t have to incur the cost of obtaining and enforcing an injunction, and police respond better to a law.”*

*“Absolutely. We would be protected regardless of where we would be. Such a law would be preferable for everyone. Also, we must focus on prevention. We should not wait until the situation is dramatic. We are noticing an increase in pressure from demonstrators opposed to abortion. We must act now.”*

**Question 11: Is legislation similar to BC’s feasible elsewhere?**

Feasibility of Legislation	
Feasible	4
Provincial > federal	4
Not feasible	11
Difficult to say/unsure	4
No comment	5
N/A	5



In general, there was quite a negative tone for the feasibility of bubble zone legislation similar to BC’s being passed either municipally, provincially, or federally. Most clinics thought the likelihood of a bubble zone law being passed provincially was greater than the likelihood of a federal law. One clinic stated that even if the federal government was pro-choice and desired such legislation, it would be difficult to pass federally because access zone governs health and not criminal law.

*“[In regards to] blanket legislation, I don’t think it would be passed. Certainly provinces would find it beneficial – for certain provinces that are more conservative than others and struggle with protestors, and are constantly running up against opposition. It would probably help them to provide quicker and better access.”*

*“A federal law would be best, but a provincial law might be easier to pass. Maybe since the Conservatives are about ‘law and order’ we could take advantage of that to try and pass a federal criminal law.”*

## Discussion

### ***Differences between clinics without an injunction and with an injunction***

There were minimal differences between clinics with injunctions and without injunctions, since protesting activity varied so much across clinics and across provinces. However, for the clinics with injunctions, they experienced a far greater amount of protesting prior to obtaining their injunctions when compared to clinics without injunctions.

### ***Differences for clinics pre-injunction and post-injunction***

The seven clinics that obtained injunctions were all experiencing heavy protesting activity prior to obtaining an injunction. These results may be skewed due to the fact that the only clinics that can obtain injunctions are those with heavy protesting activity in the first place. Once the clinics obtained injunctions, they experienced significant decreases in protesting activity, sometimes to the point where protesting activity was no longer an issue.

Two clinics saw a drop of hundreds of protestors pre-injunction to only a few protestors post-injunction. One clinic experienced harassment and property damage pre-injunction, but post-injunction, the protestors no longer approach the building or patients and staff entering the clinic.

One of the benefits of procuring an injunction rather than passing a bubble zone law is that private injunctions are not subject to the Charter and thus cannot be challenged in court. However, an injunction sets up the matter as a private dispute between two parties, thus legitimizing the protestors and trivializing the situation of clinic staff and patients. This can turn police into arbitrators rather than enforcers, and attempts at compromise may be more likely. The clinic itself must monitor the situation and explain the injunction to local law enforcement when they have an issue; thus enforcement can be inconsistent. In addition, procuring an injunction is a laborious and lengthy process, and clinics must satisfy a heavy burden of proof before they can get an injunction.

### ***Differences between clinics without bubble zone legislation and with bubble zone legislation***

Of the six BC clinics, two had the *Act* in place. These two clinics experienced reduced protesting activity after the legislation came into effect. One clinic no longer has any protestors at all, while the other clinic still experiences regular protests outside the bubble zone across the street, and the occasional rare intrusion of protestors into the zone. However, staff and patients at these two clinics do not feel threatened by the protestors, in contrast to some other clinics that do not have bubble zone legislation.

It appears in general, bubble zone legislation is desired by most survey respondents, if not for their particular clinic, at least for abortion facilities overall.

One of the benefits of bubble zone legislation is the ease of enforcement of law as compared to a private injunction, which requires the clinic itself to monitor the

situation and explain to local law enforcement the injunction before police will take action. Bubble zone legislation is also desirable in that it would provide for a uniform set of terms across abortion clinics that all protestors could be made aware of, and provisions in the legislation can protect doctors' offices and homes. In addition, the application process for an injunction is quite laborious and lengthy, and clinics have a heavy burden of proof to satisfy before they can acquire a private injunction. However, even with BC's bubble zone law, clinics must apply individually and show a pattern of ongoing protest activity in order to acquire an access zone. Furthermore, bubble zone legislation can be challenged in court on constitutional grounds.

## Recommendations

### ***Benefits of legal protection***

Today, it appears that there are minimal differences in protesting activity for clinics with injunctions or legislation and those without any sort of legal protection. However, the benefits of having legal protection in place, whether it be an injunction or a law, are manifold. They include:

- Protecting the safety and privacy of providers, staff, and patients
- Protecting the right to access healthcare services
- Protecting women's health by reducing the risk of complications
- Protecting the clinic and property from destruction and vandalism
- Fostering community peace by reducing neighbourhood nuisance and noise
- Reducing traffic problems, hazards, and accident risk
- Potentially reducing anti-choice violence and harassment
- Potentially lowering the levels and impact of anti-choice activism in general

Finally, bubble zone legislation and injunctions minimally impact the protestors' freedom of speech, as they are free to protest elsewhere, outside of the bubble zone or away from the clinic.

### ***Clinics in need of a bubble zone***

Two clinics – one in Ontario and one in the Maritimes – were identified in our analysis as most in need of legislation similar to BC. Neither of them have an injunction and both experience regular and sometimes aggressive protests. For political reasons, the possibility of enacting a provincial bubble zone law in Ontario appears more feasible than anywhere in the Maritimes.



## ***Feasibility of federal bubble zone law***

The most beneficial and long-term solution would be to petition Parliament to pass a federal law that would create access zones for clinics and the homes of providers. Provincial laws may be more pragmatic in terms of feasibility and may also become available more immediately; however, a blanket federal legislation would take the greatest step towards protecting women's constitutional rights, codified in section 15 of the *Canadian Charter of Rights and Freedoms*<sup>10</sup> (the "*Charter*"). Other *Charter* rights that may also be included are section 2(a) freedom of conscience and section 7 life, liberty, and security of the person.

A federal law would also create uniform legislation across Canadian abortion clinics. In addition, while each clinic must apply individually for a bubble zone under BC's *Access to Abortion Services Act*, a federal criminal law would not necessarily require clinics to do so, allowing them to be protected automatically. Further, a government that passes bubble zone legislation would be seen to publicly support unobstructed access to abortion services, and this would help advance women's rights and bring public attention to the cause. Although such a law would not be feasible under the current Conservative government, a long-term strategy could be pursued with the hope of success under a different government.

Another challenge in passing a law similar to BC's *Act* is the reduction in protestor activity within the last ten to twenty years. This will make it difficult to prove a need for new laws and injunctions. On the other hand, since 2009, the anti-choice "40 Days for Life" campaign has caused a marked increase in protest activity at many clinics.

Another issue that one clinic mentioned is that the *Access to Abortion Services Act* is health legislation within the meaning of section 92(7) of the 1867 *Constitution Act*<sup>11</sup>, which is a provincial head of power. Thus the federal government would be unable to pass such a law, as health legislation is provincial jurisdiction.

Although the federal government could try to amend the *Criminal Code*<sup>12</sup> to include such a provision, such an act would only be constitutionally valid if the government could classify the legislation as falling within the meaning of section 91(27) of the 1867 *Constitution Act*. Valid criminal law must usually take the form of a prohibition and a penalty, and must have a valid public purpose.<sup>13</sup> The form test would be met in legislation that prohibits protesting within a certain radius of clinics, and penalties that include fines and imprisonment. In terms of a valid public purpose test, jurisprudence has dictated that Parliament has broad and plenary powers when it comes to criminalizing activities, and while criminal law is usually morality-based, it is not frozen in time.<sup>14</sup> One could classify the purpose of the *Access to Abortion*

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<sup>10</sup> *Canada Act, 1982*, (UK) 1982 c 11, Schedule B.

<sup>11</sup> *The Constitution Act, 1867*, 30 & 31 Victoria, c 3 (UK).

<sup>12</sup> *Criminal Code*, RSC 1985, c C-46.

<sup>13</sup> Reference re Validity of s 5(a) of the Dairy Industry Act, [1949] SCR 1.

<sup>14</sup> *RJR MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199.

*Services Act* as protecting the security and liberty of patients, doctors, and staff, and criminalizing the protesting activity because it is fear-inducing and harmful – an arguably valid public purpose. In addition, the pith and substance of the legislation must be characterized as having an evil or injurious effect in order to be valid criminal law.<sup>15</sup> The evil or injurious effects of protesting would be on patients and staff, who fear for their personal safety when approached by protestors.

Health is a double aspect matter that can fall under both provincial and federal jurisdiction.<sup>16</sup> As long as Parliament can classify bubble zone legislation as mostly criminal in nature and protecting public health, it is likely to be constitutionally valid. However, Parliament would have to be careful to avoid allegations of colourability,<sup>17</sup> as the opposition may try to characterize Parliament as attempting to pass a law that falls under provincial jurisdiction. However, if the federal government could justify bubble zone legislation as being criminal law in nature and show that the health aspects of it fall within federal jurisdiction due to its double aspect nature, bubble zone law could be validly legislated.

Finally, in regards to a possible constitutional challenge to bubble zone legislation due to infringement of section 2(b) of the *Charter*, freedom of expression, BC courts have ruled that bubble zone legislation is justified as reasonably and demonstrably justified in a free and democratic society, in accordance with section 1 of the *Charter*.<sup>18</sup> While a protestor's right to freedom of expression may be limited, a balancing interest is the safety of female patients, doctors, and staff and to ensure women's access to abortion services, which are all very important interests. Furthermore, where legislation is enacted to protect a vulnerable group (which patients often are) and an interest that is already constitutionally recognized (such as women's rights), it is often upheld as constitutionally valid.<sup>19</sup>

## **Conclusion**

The results of this study show the merits and necessity of bubble zone legislation in many jurisdictions in Canada, since most clinics experience at least occasional protestors, and at several clinics not currently protected by an injunction or bubble zone law would benefit from one. BC's *Access to Abortion Services Act* serves as a functional model for the federal government or other provinces to take into consideration if and when they implement similar laws.

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<sup>15</sup> RJR MacDonald Inc, *ibid*.

<sup>16</sup> RJR MacDonald, *ibid*.

<sup>17</sup> RJR MacDonald, *ibid*.

<sup>18</sup> R. v. Spratt, *ibid*.

<sup>19</sup> For further discussion of the constitutionality of bubble zone legislation, refer to Joel Bakan, "Legal Opinions on Act's Constitutionality", *Pro-Choice Press* (Winter 1995/1996), online: Pro-Choice Action Network <<http://www.prochoiceactionnetwork-canada.org/prochoicepress/9596win.shtml>>.