



The Case for Repealing Anti-Abortion Laws

**No country needs to regulate abortion via criminal or civil law.
Only when abortion has the same legal status as any other health procedure
can it be fully integrated into women's reproductive healthcare.**

The repeal of abortion laws is supported by evidence from Canada, the only democratic country in the world with no laws restricting abortion since 1988. Abortions have since become earlier and safer, and the number of abortions has become moderate and stable. Current abortion care reflects what most Canadians are comfortable with, and women and doctors act in a timely and responsible manner, with no need for regulation.

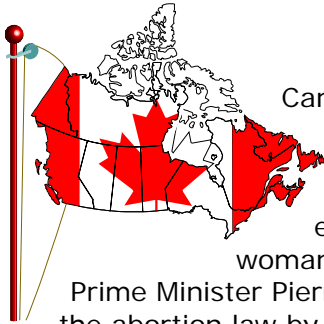
Several legal arguments help build the case for abortion law repeal. A constitutional

guarantee of women's equality can be used to overturn abortion laws, and ensure that abortion is funded by the healthcare system as a medically-required service. Freedom of religion, the right to privacy, and the right to self-defense can also be used to strike down laws. All anti-abortion restrictions are unjust, harmful, and useless because they rest on traditional religious and patriarchal foundations. Laws kill and injure women, violate their human rights and dignity, impede access to abortion, and obstruct healthcare professionals.

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Abortion Politics and Practice in Canada



History

Canada implemented a strict anti-abortion law in 1869, prohibiting abortions except to save the woman's life. In 1969, then-Prime Minister Pierre Trudeau liberalized the abortion law by allowing a committee of doctors to approve hospital abortions if the woman's life or health was in danger. However, abortion was still not a woman's decision, and was often unavailable unless a woman lived in a big city. Most hospitals didn't have abortion committees and many that did refused permission for most abortions. Abortion clinics were illegal. The law resulted in poor and unequal access for women, unnecessary obstacles, and delays.

From 1968 to 1988, Dr. Henry Morgentaler of Montreal performed illegal abortions, opened several illegal clinics across Canada, and was arrested many times. He was acquitted by juries four times, but a judge sentenced him to jail anyway. Dr. Morgentaler was a brave individual who almost single-handedly gave women the right to abortion on request. Eventually, his case made it all the way to the Supreme Court of Canada.

The Morgentaler Decision

On January 28, 1988, the Supreme Court of Canada repealed the abortion law in its entirety, a ruling now known as the "Morgentaler decision."¹ The judges said that enforcement of the law resulted in inequitable access and arbitrary obstacles for women, thereby violating their constitutional rights under Canada's *Charter of Rights and Freedoms* (the "Charter"). In particular, the law discriminated against disadvantaged women—such as poor, young, and rural women—many of whom were unable to access abortion services. The Supreme Court also found that the law's unreasonable

requirements substantially increased the risks to the health of pregnant women, both physically and psychologically, especially in certain locations.¹ This was found to violate women's "security of the person" (bodily integrity) by a majority of the judges.

In a concurring opinion, one judge, Bertha Wilson, also said that abortion is a Charter right based on women's "right to life," personal "liberty," and "freedom of conscience." Justice Wilson said:

"The right to liberty...guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives. ... The decision whether or not to terminate a pregnancy is essentially a moral decision, and in a free and democratic society, the conscience of the individual must be paramount to that of the state."

Wilson also said:

"Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them. A woman's decision to terminate her pregnancy falls within this class of protected decisions. It is one that will have profound psychological, economic, and social consequences for her. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well."¹

In the Morgentaler decision, the court actually invited Parliament to pass a new law against abortion, one that would pass constitutional muster. So in 1990, the Canadian government tried to pass a law that would put doctors in jail for two years for performing abortions. There were massive protests by women across the country, and the new law failed to pass. The government said it would not try to legislate abortion again. Today, even though Canada currently

has a conservative government, the Prime Minister has vowed not to re-open the abortion debate.

Abortion Access Improves After 1988

With no legal restrictions in place, abortion services began to be managed under the *Canada Health Act* as a “medically required” service. This federal law guarantees fully-funded healthcare to Canadians. Under the Act, abortion must be provided in the same way as any other necessary health service. For example, it must be performed by a doctor, it must be accessible to all Canadians in all areas of Canada, and it must be funded.² The quality of abortion care is adequately monitored through the provincial Colleges of Physicians and Surgeons, the same as any other healthcare procedure.

As a result, abortion services have become less isolated from mainstream medicine. Many doctors have integrated abortion into their general practice, and many new abortion clinics have been established. Today, about 45% of abortions are done in clinics.

There is also strong public support for abortion rights, and this support has been growing since 1988. A survey in 2002 found that 78% of Canadians agree that: “Women should have complete freedom to decide to have an abortion.”³ It’s reasonable to assume that such high support for abortion rights is at least partly a consequence of the Morgentaler decision. When laws and social policies change, public opinion often follows (but sometimes very slowly).

Abortion Availability and Statistics in Canada

After the Morgentaler decision in 1988, the Canadian Medical Association recommended abortion on request up to 20 weeks after conception.⁴ The Association chose that timeframe because the fetus might be viable after 20 weeks. However doctors are free to perform any later terminations that “may be

indicated under exceptional circumstances.” Today, abortions on request are performed up to 22 weeks LMP (last menstrual period). In practice, abortions are available up to 24 weeks LMP for genetic abnormalities, desperate social circumstances, and to protect maternal health. After 24 weeks LMP, abortions are available for lethal genetic abnormalities.⁵

Here are some Canadian statistics that indicate responsible abortion practice by women and doctors, in the absence of any regulations:^{6,7,8}

- 97,254 abortions in 2005.
- 14.1 abortions per 1000 women (15-44).
- 28 abortions per 100 live births.
- 90% by 12 weeks gestation.
- 98% by 16 weeks.
- Less than 2% between 17 and 20 weeks.
- 0.4% after 20 weeks gestation.
- About 25% of all Canadian women have at least one abortion in their lifetime.
- About 75% of all women use contraception (not counting abstinence).
- Maternal mortality rate of 0.1% per 100,000 legal abortions.

Canada's abortion rate compares favourably to western Europe's rate of 12, the lowest abortion rate in the world. In contrast, the American rate is 20, and U.S. women must navigate through a thicket of abortion restrictions. (The global average rate is 29 per 1,000 women⁹, with the highest number of abortions occurring in countries where it's illegal, and in countries with poor access to contraception.) Canada's abortion rates increased after the old law was thrown out in 1988, but that was due to better access and less stigma. Rates began to decline in 1998, and have declined steadily every year since¹⁰.

Almost all abortions in Canada are performed early because there are no legal barriers to quick access (even though Canada has not yet approved mifepristone). In the United States, many states have waiting period laws and parental consent laws. This simply delays

the procedure, causes unnecessary stress to the patient, and increases the medical risk. Ironically, anti-abortionists say that because Canada has no laws against abortion, women are having them right up to the point of delivery. But hardly any abortions occur after 22 weeks gestation, and none on healthy fetuses or women. The natural limiting factors for late abortions are very low need, and the tiny number of providers trained and willing to do such procedures.

Canada enjoys one of the lowest maternal mortality rates for abortion in the world.¹¹ Canada also has a very low complication rate for abortion, about 1-2%, and these are mostly minor complications.¹² This shows we don't need laws to force doctors to practice good medicine. In fact, such laws are more likely to foster *bad* medical practice. For example, a law prohibiting a particular abortion technique means that the doctor may have to use a procedure that's riskier for that patient.

Still Some Access Problems

Some women still have problems accessing abortion in Canada, because abortion remains politicized. For example, about 80% of hospitals don't perform abortions. In addition, some hospitals have long waiting lists, a requirement for doctor referrals or approvals, quotas or gestational limits, and anti-abortion staff who misinform or judge patients seeking abortions.¹³

It's harder for rural women to access abortion services than it is for city women. Many women must travel long distances to find an abortion provider. Access is also poor in more conservative areas, especially the Atlantic provinces in eastern Canada.

One private abortion clinic (in New Brunswick) receives no funding from government Medicare, forcing women to pay for their own abortions. However, this is after a successful 20-year political battle that forced several provincial governments to obey the *Canada Health Act* and fully fund

private abortion clinics across Canada.¹⁴ (Because abortions have been deemed medically required, the federal government says they must be fully funded regardless where they are done, public hospitals or private clinics.)

Canada has experienced its share of anti-abortion harassment and violence, most of it imported from the United States. The worst of the violence has subsided since 2000, however. Only a few clinics experience picketing, with the level of picketing and harassment generally far lower than in the United States. For the most part, Canada's anti-abortion movement focuses on lobbying efforts, such as trying to stop taxpayer funding of abortion, and restrict late abortions (unsuccessfully so far).¹⁵

Having no laws against abortion helps, but it's important to have active government support to improve services. However, Canada's current problems are gradually being solved—they are *not* caused by having no laws against abortion. Progress would be much slower if Canada had abortion restrictions.

Judicial and Constitutional Protections

Protecting Equality Rights

Women are different than men because of their capacity to bear children. Childbearing has a much more profound effect on women's lives, than for men. To truly achieve equality with men, women must not be disadvantaged under the law because of pregnancy. There should be no laws regulating pregnancy, because that puts a special obligation on women that is not placed on men.

In Canada, women's equality is guaranteed under the *Charter of Rights and Freedoms* (our constitution). In today's climate, it's unlikely that any anti-abortion law would withstand a constitutional challenge. Canadian courts have consistently protected

women's right to abortion. Subsequent court cases since 1988 have cited and built on the Morgentaler decision, thereby strengthening it. For example, in 1989 the Supreme Court ruled that a male partner cannot force a woman to have a baby.¹⁶

Many court cases by anti-choice activists have failed to give rights to fetuses. Under Canada's federal Criminal Code, fetuses are not legal persons until they completely exit from the birth canal, alive. This requirement, together with the women's equality clause in the Charter, has effectively tied judges' hands when it comes to considering fetal rights cases. Women are legal persons and fetuses are not, so judges cannot restrict women's established constitutional rights in favour of the hypothetical rights of fetuses. For example, one court decision ruled that a woman and her fetus are considered "physically one" person under the law. "The legal unity of pregnant woman and fetus precludes the finding of a duty of care" to her fetus, because that "would amount to a profound compromise of her privacy and autonomy."¹⁷ This finding essentially gives a woman the right to defend her life and health by having an abortion.

It's the uniquely important role of courts to uphold peoples' constitutional rights by striking down laws that infringe on those rights. Since any restriction on abortion unacceptably limits women's rights, abortion restrictions can (theoretically) be struck down in a constitutional democracy that protects women's equality.

Likewise, abortion rights should never be subject to a vote by the electorate, and anti-choice laws should never be enacted based on public referendums. We cannot trust citizens to fairly protect the constitutional rights of minorities and disadvantaged groups. In the case of abortion, social opinions are often rooted in stereotypical assumptions about women's "proper" role as child-bearers, and in religious beliefs about the value of fetal life, at the expense of pregnant women's lives.

Even in national constitutions that do not have an explicit guarantee of equality for women, there are usually other clauses that will support the repeal of abortion laws. For example, in the U.S. Constitution, the 14th Amendment says no state can "deny to any person within its jurisdiction the equal protection of the laws." This clause, and similar clauses in other national constitutions, should require the repeal of abortion laws because they unfairly apply only to women.

An essential element of a democracy is that legislators who pass laws must be subject to those laws, just like any other citizen. However, every abortion restriction in every country was passed by legislatures made up mostly of men. Further, all men in a society are automatically exempt from anti-abortion laws. Basic human rights are violated when half the population is given a privileged legal status with more freedom and power, simply due to their gender.¹⁸

Protecting Abortion Funding



Currently, abortion services are fully funded by Canada's universal medical insurance system as a "medically required" service. The Morgentaler decision did not address the issue of taxpayer funding of abortions, but even this would probably be deemed a constitutional equality right for women, if a court challenge was made.

In 1991, the Canadian province of Saskatchewan held a referendum on abortion funding during its provincial election. 63% of citizens voted to stop insuring abortion services.¹⁹ However, the reigning conservative government lost the election, and when the new government stepped in, it commissioned lawyers to review the referendum results and offer advice. The lawyers decided that de-insuring abortion would probably not survive a Charter challenge because it would discriminate on the basis of sex. The Saskatchewan government never acted on the referendum.²⁰

In any jurisdiction with a national health insurance system, the costs of medically required services are generally covered, depending on how the determination of "medically required" (or similar criteria) is made. All abortions should be taxpayer-funded as medically required, because forcing women to pay for their abortions hampers their ability to get one, and thereby discriminates against poor women especially. Ultimately, whether an abortion is "medically required" or not is a decision that only the pregnant woman has the right to make (with the assent of her doctor), not a medical organization and certainly not the government.

What if a government wants to pay only for those few abortions that are truly required to save a woman's life or physical health? The problem then becomes: who decides which abortions meet those criteria? In Canada, medical organizations have refused to do so, saying it's up to the medical discretion of individual doctors²¹. Also, the World Health Organization's definition of health includes "mental health". This really fits all abortions, since if a woman wants an abortion, that is proof enough that having a baby would be psychologically stressful for her. The call to fund only some abortions is based on the myth that women have abortions for reasons of "convenience" and that such abortions are a "lifestyle choice" unrelated to medical necessity.

However, childbirth costs are funded by governments even though women choose to have a baby for socio-economic reasons, not medical reasons. No pregnancy outcome is "elective" of course—women's reproductive capacities are an inalienable part of their personhood and human rights, more so than for men. If women's unique reproductive healthcare needs are not fully funded, women are made subordinate to men. And if all pregnancy outcomes are not equally funded, the government holds the "right to choose" instead of women—poor women in particular. That's discrimination, and a violation of women's equality rights.

Protecting Religious Freedom

Although largely untested in court, it can be argued that women's right to abortion should be protected under constitutional religious freedom guarantees (including freedom of conscience). This works in two ways.

First, the decision-making process a woman goes through when considering an abortion relies on her religious and philosophical values, and her personal morality. Therefore, the decision itself should be protected as an exercise of religious freedom, as well as the ability to carry out that decision.

Second, the anti-abortion viewpoint is primarily based on fundamentalist religious beliefs about the proper role of women, and the value of fetuses.²² Anti-choice people believe that motherhood is women's primary, sacred role, and that embryos and fetuses are full human beings specially created by God, complete with souls. Anti-choice protesters and terrorists argue in court that their religious beliefs about the immorality of abortion compel them to break the law. In effect, they say that "God's law is higher than man's law". But if abortion is supposedly wrong on religious grounds, any laws restricting abortion must be based on religious doctrine, making them unconstitutional. Judges must prevent a minority from imposing its beliefs on all of secular society, because that would be a violation of everyone else's freedom of religion.

Protecting Right to Privacy

The Morgentaler decision also cited a woman's right of privacy in making a decision to terminate her pregnancy. This is not an explicit constitutional right, either in Canada or the U.S. However, the right to privacy is found in the "security of the person" clause in Canada's Charter, which "protects the dignity and privacy of individuals with respect to decisions concerning their own bodies."²³

In the United States, abortion rights are founded on a right to privacy derived from

the 14th and 9th Amendments (which respectively, protect personal liberty, and other rights not mentioned in the Constitution²⁴), and from two court decisions in 1965 and 1972 that legalized birth control.²⁵ The latter precedents made the 1973 *Roe v. Wade* ruling possible.

The right to privacy does not have to be an explicit constitutional right because it's self-evident that personal privacy underlies our most fundamental human rights. If we don't have the freedom to choose our lifestyle, our friends, and our jobs, then we're not free at all. The most sacred realms of privacy are our family life and sexual life. Private activities such as enjoying sex with those we are attracted to, choosing who to marry, and deciding whether we want children and when, are absolutely integral to our identities and liberty in a democratic society.

Protecting Right to Self-Defense

The constitutional right to "security of the person" also encompasses a person's right to obtain or refuse medical treatment, and to physically defend oneself from attacks by another. Democratic countries generally recognize and uphold these rights, at least on a common-law basis.

A fetus is not a legal person in Canada, but it may have rights in other jurisdictions to some extent. However, it can be argued that women have the right to abortion *even if* the fetus is a person with legal rights—because abortion rights can be advocated from a self-defense framework, instead of "choice."²⁶

A fetus is not innocent, as anti-choice people claim. Although an unwanted fetus has no ill intent, it is exploiting the woman's body and endangering her life and health against her will. Bringing a pregnancy to term is far riskier than having an abortion, and any pregnancy has a profound effect on a woman's whole being, mentally and physically. Therefore, a woman has the right to defend her life and health with an abortion.

A woman with a born child is under no legal obligation to donate a kidney or blood to save her child's life, so how can a fetus have even *more* rights over the woman's body than her born child? It can't. Even if a fetus has a right to life, a pregnant woman cannot be required to save it by loaning out her body for nine months against her will. Once a woman is pregnant, she must give her consent for the pregnancy to continue.²⁷ In response, anti-choice people say that because the woman chose to have sex, she must accept the risk of pregnancy. But sex is not a contract for pregnancy. People have a constitutional right to non-procreative sex because of legalized birth control, which implicitly provides the right to have sex without reproducing. Regardless, consent to sex does not entail consent to pregnancy, any more than consent to swimming implies consent to drown.

The Trouble with Laws



Laws against abortion do nothing to stop abortion, or even reduce them. A recent study by the World Health Organization²⁸ found that overall abortion rates in the world are similar, regardless of whether

abortion is illegal in a country or not. In other words, restrictive abortion laws are not associated with a low abortion rate. In fact, in countries where abortion is widely available (including Canada) there has typically been a decline in abortion rates over time, especially when contraception use rises.

In countries that have banned safe abortion, about 19 million desperate women seek illegal abortions every year. 68,000 women die every year as a result, and at least five million are hospitalized due to complications.²⁹ Countries with strict abortion bans (mostly in the developing world) usually allow an exception to save the woman's life. Ironically, such bans result in many times

more maternal deaths than in countries with more liberal abortion laws.³⁰ The hypocrisy of laws that pretend to save women's lives, but which actually slaughter them by the thousands, demands their immediate repeal.

While some countries ban abortion totally, others have few or no laws, and many enforce statutes regulating various aspects of the abortion decision and procedure. Such laws are generally not required for any other medical treatment. Examples include mandatory waiting periods, parental consent laws, obligatory counseling, and early gestational limits. Differing legal frameworks also lead to "abortion tourism," forcing women to travel out-of-country to obtain the care they need, and discriminating against women without the resources to travel.

In practice, many abortion restrictions actually impede good medical care, such as delaying treatment unnecessarily and providing false information to patients. This increases the medical risks of abortion and causes psychological and physical distress to women.³¹ Also, when abortion is illegal, there can be no medical research and no progress made to improve abortion care and protect women's health.

The sheer diversity of legal situations around the world is proof that abortion laws have nothing to do with quality healthcare, and instead are politically-motivated. Abortion laws are unrelated to women's real medical needs and concerns, and divorced from the best practices of medical professionals. They are simply holdovers from the days of criminal abortion, or recent products of religious ideology.

Anti-abortion laws institutionalize the stigma of abortion. Laws imply that abortion must be restricted because it is wrong and bad, and people who need or perform abortions are also wrong and bad. But no law will change the fact that a woman desperately needs an abortion, and a doctor wants to help her. As a result, abortion restrictions foster hypocrisy and disrespect for the law because they often force women and doctors to skirt the laws or disobey them.

Abortion laws are frequently hollow anyway, because it's assumed they reduce abortion when they don't. For example, very few abortions occur in the third trimester except in dire circumstances, so passing a law that prohibits late abortions except for health reasons is pointless, as well as insulting to women and doctors.

The way to reduce abortion is to make contraception universally accessible, teach responsible sex education, and give people positive incentives to raise kids, such as financial bonuses and family support programs.

Laws Reduce Access and Obstruct Doctors

Laws reduce access not only by creating arbitrary obstacles and delays, but by marginalizing abortion services outside the healthcare system, shifting the focus away from basic healthcare, and turning abortion into a political target for legislators and extremists.

As a result, laws hurt abortion providers by isolating them outside the medical mainstream, disrespecting professional medical judgments made in the patient's best interests, and interfering in the confidential doctor/patient relationship. The imposition of anti-abortion laws says, in effect, that legislators can make better medical decisions than doctors. Even worse, anti-abortion laws threaten health workers with prosecution. No other medical procedure carries with it the threat of criminal punishment—abortion is singled out for special treatment. But physicians should never work under the shadow of prosecution simply for providing medical care.

Laws Hurt Women

Besides violating women's equality rights, and discriminating against disadvantaged women the most, anti-abortion laws also hurt women by:

- Turning them into criminals, or state-controlled baby-making machines.
- Fostering prejudice against women who need one.
- Rejecting women's moral reasoning.
- Distrusting women to make their own decisions about their lives.
- Protecting fetuses instead of pregnant women.
- Punishing women for having sex for pleasure.
- Punishing women for "shirking" motherhood.

The state has no legitimate interest in protecting the fetus at any stage, except to provide social and medical resources to pregnant women to ensure good outcomes for their pregnancies. (And a good outcome can be an abortion.) Pregnant women are in the best position to take care of their fetuses, so we should trust women to make decisions on behalf of their fetuses, not the state.



Further, the question of when life begins, or whether abortion is murder, are matters of personal opinion. These issues cannot be agreed upon by society or legislated. Only the pregnant woman has the right to decide the moral value and status of her fetus, because it's no-one else's

business. The fetus becomes a person when the woman carrying it decides it does.³²

Laws Rest on Patriarchal Assumptions

The following patriarchal beliefs are the root cause of all abortion restrictions, and form the basis of the anti-abortion viewpoint. The main anti-abortion goal is not to "save babies," it's to keep women in their traditional roles.

- Motherhood is a woman's highest calling.
- All women should be (and want to be) mothers.
- Women must sacrifice themselves to raise kids.
- Women must endure the discomfort and pain of pregnancy and childbirth as their natural duty.
- Women who have abortions are "bad" or "victims."
- Women who have abortions suffer psychologically (at least they should).
- Women are irresponsible or too emotional, and need direction and guidance.
- To "protect" women, we must restrict abortion.

Laws Rest on Outdated Traditions

Laws against abortion also rely on tradition, for example:

- Pro-natalism—societies have a preference for birth over abortion.
- The right to have babies is unquestioned and unrestricted, but abortion is frowned upon.
- Children are treated like possessions of parents, instead of individuals with rights.
- The Church, God, and Bible are anti-abortion.

This traditional thinking no longer works for our modern society with its focus on human rights. Why should we favour birth over abortion when we live in an overpopulated world; when society will never reach agreement on the moral status of the fetus; when we know that unwilling mothers and unwanted children tend to suffer; and when becoming a parent should be the private decision of the woman and her family?

Many people may not be ready or able to provide properly for a child. But children have rights, and they deserve respect, love, and the best chance at a good life. Of course, the right to have a child is fundamental and should not be restricted, but abortion is also a fundamental right *on an equal basis*.

Churches and religious doctrines should never dictate how we live our lives in a secular society with secular laws. Besides, the Bible is pro-choice. Several passages say it is better to die in the womb than live an unhappy or wicked life.³³

Anti-abortion laws violate various human rights precisely *because* they rest on patriarchal traditions and religious doctrines that are antithetical to modern notions of social justice and equality. This means we can point to anti-choice views and arguments themselves as proof of the harm and injustice of abortion restrictions.

Solutions for Repealing Anti-abortion Laws

Here's some suggested solutions to get rid of harmful anti-abortion laws:

- Elect pro-choice politicians.
- Lobby the government against existing or proposed abortion restrictions.
- Build strong networks with women's groups, medical organizations, human rights organizations, and other progressive groups to support legal abortion as a basic human right.
- Collect evidence of laws' harms, find plaintiffs, and challenge laws in court.
- Publish studies on abortion practice to help prove that laws do not reduce abortion or make it safer.
- Educate the media, government, health professionals, and public about the harm and futility of abortion restrictions.
- Engage in positive rhetoric about the ethics of abortion: Abortion is a moral and positive choice that liberates women, saves lives, and protects families.
- Guarantee women's equality in countries' constitutions.
- Empower women in society by changing public policies.
- Prioritize childcare and child-rearing as a universal concern, not a "woman's issue."
- Challenge the religious basis of anti-abortion laws, and keep church and state separate.

It's also important to be confident of victory, and not to compromise unless absolutely necessary. The pro-choice lobby can win the debate, because at the end of the day, anti-choice beliefs and strategies are usually less influential with the government and public than it might seem. The opposition is often over-confident and unrealistic in their expectations.

To conclude, no country needs any laws against abortion whatsoever. Canada has shown that women and doctors act in a timely and responsible manner, without punitive criminal laws to control them. This gives Canada a special responsibility to the world – to be an ambassador for the proven concept that abortion practice can be successfully managed as part of standard healthcare, and that having no law is better for women.

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