ACCESS TO CHOICE:

THE LEGAL FRAMEWORK FOR ABORTION ACCESS IN NOVA SCOTIA

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ABORTION ACCESS IN NOVA SCOTIA: STATEMENT OF PRINCIPLES

1. **This is a feminist project.** Our feminism strives to be intersectional and recognizes that barriers to abortion access can have disproportionate effects on some communities. We believe in reproductive justice that includes, but goes far beyond, the right to choose to terminate a pregnancy. We believe in an inclusive approach to talking about abortion. Our broader work seeks to ensure Nova Scotians have adequate legal, medical and other resources to support them in establishing their families, including families of friendship and community, with or without children, according to their own priorities and aspirations.

2. **This is a constitutional argument.** Our legal position is that there is a right to abortion in Canada. Sections 7 and 15(1) of the *Canadian Charter of Rights and Freedoms*, and the case law interpreting those provisions, protect the right to autonomy, security, and equality in making fundamental health care decisions, including decisions related to abortion.

3. **This is a political act.** We view it as positive and necessary that abortion (surgical and medical) is an insured medical service offered through the public health care system. But abortion is not just a medical service; as Prof. Joanna Erdman and others have argued, abortion rights are democratic rights, which involve claims against the state and claims to full and equal participation in public life. We hope this project will help hold the state accountable, while remaining vigilant about the risk that future governments could seek to interfere with the right to abortion access.

4. **This is a rule of law service.** The legal framework for abortion is hard to piece together, which is one reason why it is often misunderstood. Writing down the scheme in one document will, we hope, play a small part in making the law more available and transparent. In setting out the existing legal framework for abortion access in Nova Scotia, we also hope to highlight recent progress in increasing access, and the gaps that remain.

5. **This is an advocacy tool.** We hope that this framework will be an advocacy and resource tool within Nova Scotia and a model for similar projects elsewhere in Canada. We have drafted it from a legal perspective, but we hope a wider audience will find the document useful and supportive.

ABORTION ACCESS IN NOVA SCOTIA: THE LEGAL FRAMEWORK

LEGAL ENTITLEMENT TO ABORTION SERVICES

This framework lays out the bases for legal entitlement to abortion services in Nova Scotia, including: international human rights law; Canadian constitutional law; federal legislation; provincial legislation and regulations; and common law (decisions of the courts).

International Human Rights Law

A number of international human rights instruments protect and guarantee abortion rights for Nova Scotians. Canada is bound to comply with the obligations laid out in the international instruments that it has ratified.[1]

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

The *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) was ratified by Canada in 1981. The Convention lays out social, economic and, in particular, health care-related rights for women worldwide.[2]

The Convention sets out the right to reproductive choice (although it does not specifically refer to abortion) in Article 12, which addresses health care, as follows:

> States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.[3]

United Nations Convention against Torture (UNCAT)

Canada signed the United Nations Convention against Torture (UNCAT) in 1985; it was ratified in 1987. The Convention lays out the rights of individuals to be protected from torture and other acts of cruel, inhumane, or degrading treatment or punishment.[4,5] According to a July 2017 Guideline by the CEDAW Committee, the delay or denial of abortion services may amount to torture or cruel, inhuman or degrading treatment, in contravention of UNCAT:

> Violations of women's sexual and reproductive health and rights, such as forced sterilizations, forced abortion, forced pregnancy, criminalisation of abortion, denial or delay of safe abortion and post-abortion care, forced continuation of pregnancy, abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, are

> forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.[6]

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[7] applies with respect to the health care rights of Indigenous peoples in Nova Scotia. While Canada has not yet ratified UNDRIP, the federal government "adopted" the Declaration in 2016.[8]

Article 24(1) of UNDRIP guarantees Indigenous peoples the right to traditional medicines and health practices, and states: "Indigenous individuals also have the right to access, without any discrimination, to all social and health services."[9] Article 24(2) of UNDRIP declares that Indigenous peoples have an equal right "to the enjoyment of the highest attainable standard of physical and mental health."[10]

Additionally, with respect to the health care rights of Indigenous peoples in Canada, the Truth and Reconciliation Commission of Canada (TRC) made recommendations specific to the provision of health care services, which the federal government has committed to implementing.[11]

Constitutional Law

The *Canadian Charter of Rights and Freedoms* ("*Charter*") is Part I of the *Constitution Act, 1982*. The *Charter* guarantees the rights and freedoms set out in it, subject to reasonable limits prescribed by law, and applies to government action.[12]

Section 7 of the *Charter* states:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.[13]

Section 7 forms the basis for many health care-related rights in Canada, including rights related to abortion access. Case law about these rights is discussed below.

Canada Health Act, RSC 1985, c C-6

Generally, health care falls within the jurisdiction of provincial and territorial governments. The *Canada Health Act* is a piece of federal legislation that lays out "criteria and conditions in respect of insured health services and extended health care services provided under provincial law that must be met before" provinces may receive federal funding for those services.[14]

The Act lays out the primary objective of Canadian health care policy: "to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers."[15]

While the federal government does not have the jurisdiction to enact abortion laws that apply nationwide,[16] it can set out the criteria and conditions that provinces must meet in order to receive funding for services, pursuant to the *Canada Health Act*.[17]

Common Law

Canadian case law establishes the following health care-related rights applicable to abortion:

- The right to liberty, which includes the right to make fundamental personal decisions pertaining to one's bodily integrity;[18]
- The right to choose abortion, without approval from the potential father;[19]
- The right to make informed personal health care decisions (and, relatedly, the right to be free from subjection to medical treatment without informed consent);[20]
- The right to security of the person, which includes physical security of the person (including with respect to wait times and delay) and psychological security of the person;[21]
- The right to timely access to abortion services without state interference;[22]
- The right to life, when threat of death is apparent;[23] and
- The right of medical self-determination, which includes the right to make autonomous decisions about one's own medical treatment.[24]

R v Morgentaler, [1988] 1 SCR 30, 1988 CanLII 90 (SCC)

In *R v Morgentaler,* a majority of the Supreme Court of Canada (SCC) held that the criminal prohibition on abortion in force at the time infringed section 7 of the *Charter*, and that the infringement was not justified under section 1. The law at the time prohibited all abortions, except therapeutic abortions performed in a hospital and authorized by therapeutic abortion committees.

The SCC decision includes four sets of reasons (three concurring sets of reasons, and one dissent). Five of the seven judges held that the law was unconstitutional. Writing for the majority, two of the justices, Dickson and Lamer, held that the criminal prohibition on

abortion was unconstitutional because the delay involved in accessing the service violated the section 7 right to security of the person. The majority held that section 7 was violated by the threat to physical health and safety associated with the delay in accessing abortion services, as well as by the psychological toll of both the waiting period and the stigma associated with the criminal prohibition.

Beetz J (joined by Estey J) also held that section 7 was breached on the basis of security of the person, although he took a narrower view of "security of the person" than the majority, focusing purely on physical harms. Wilson J would have found that the criminal prohibition on abortion infringed security of the person, as well as the section 7 right to liberty, based on the loss of autonomy experienced by pregnant persons whose choices are constrained by the inability to access abortion services.

Tremblay v Daigle, [1989] 2 SCR 530, 1989 CanLII 33 (SCC)

In *Tremblay v Daigle,* the SCC considered a case in which a woman sought an abortion, and her sexual partner sought and was granted an injunction to prevent the abortion. The Court held that the injunction must be set aside, on the basis that a potential father does not have a right to veto the decision of a person seeking an abortion and that a fetus is not a separate legal person.

R v Sullivan, [1991] 1 SCR 489, 1991 CanLII 85 (SCC)

In 1986, two midwives in British Columbia were found guilty of criminal negligence in the death of a fetus after a stillbirth. They appealed to the British Columbia Court of Appeal (BCCA), which overturned their conviction on the basis that a fetus is not a legal person under the *Criminal Code.* The SCC upheld the decision of the BCCA in 1991. The decision stands for the principle that there are no independent "foetal rights" in Canadian law; the legal status of the mother and fetus are inextricable until the child is fully born.[25]

R v Morgentaler, [1993] 3 SCR 463, 1993 CanLII 74 (SCC)

In this case, Dr. Morgentaler was challenging the Nova Scotia *Medical Services Act,* a piece of provincial legislation prohibiting certain medical services from being performed outside a hospital, including abortion. The SCC held that such restrictions on abortion are outside of provincial jurisdiction, on the basis that Nova Scotia's attempt to limit access to abortion services through restrictions on private clinics (and by imposing fines on those who contravened of the Act) was an unlawful attempt to create criminal law.

Although the Nova Scotia government claimed that the *Medical Services Act* was aimed at preserving access to health care by combatting privatization, the SCC considered external evidence of lawmakers' intentions to stop Dr. Henry Morgentaler from opening an abortion clinic in the province. The case represents an important limit on provincial power to restrict

abortion services (although the authors of this framework take the position that abortion should not be conceptualized as a matter of criminal law).

Chaoulli v Quebec (Attorney General), [2005] 1 SCR 791, 2005 SCC 35 (CanLII)

In *Chaoulli v Quebec,* a patient in Quebec who waited over a year for a surgery claimed that his section 7 right to security of the person had been violated by the delay, and that the ban on private insurance in Quebec's health care laws had impeded his access to alternative forms of care in the private sector. His doctor, Chaoulli, claimed that the ban and the restrictions on doctors who choose to leave the public system were discriminatory under the Quebec *Charter of Human Rights and Freedoms*.

A majority of the SCC held that the ban on private insurance for publicly-insured health care services violated the Quebec *Charter.* McLachlin CJ, Major J, and Bastarache also held that the prohibition on private insurance was a violation of section 7 and was not justified under section 1 of the Canadian *Charter*. Binnie J, Lebel J and Fish J, in dissent, disagreed. Deschamps J declined to decide the issue with respect to the Canadian *Charter*.

Nonetheless, *Chaoulli* has been interpreted in the years since to stand for the principle that the Canadian *Charter* section 7 right to security of the person may be endangered by unreasonable delays in the provision of medical care. The concurring justices held that "Canadian jurisprudence shows support for interpreting the right to security of the person generously in relation to delays."[26]

Carter v Canada (Attorney General), [2015] 1 SCR 331, 2015 SCC 5 (CanLII)

In *Carter,* the SCC held that the criminal prohibition on medical assistance in dying was unconstitutional, on the basis that it unjustifiably infringed section 7 of the *Charter*. The SCC affirmed that the section 7 liberty interest "is engaged 'where state compulsions or prohibitions affect important and fundamental life choices.'"[27]

With respect to access to health care services, the Court held that the right to life is engaged where a law or state action imposes death or an increased risk of death on a person, either directly or indirectly. It also confirmed that Canadian law protects patient autonomy in medical decision making, including the right of medical self-determination.[28]

Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario, 2019 ONCA 393

In this case, the Ontario Court of Appeal (ONCA) confirmed that in situations in which a doctor holds a religious objection to a medical procedure that a patient is seeking (for example: abortion, gender confirmation surgery, or medical assistance in dying), that doctor must refer the patient to another doctor or medical professional in order to facilitate the patient's access to their chosen care. The Court explained that simply handing a patient

a brochure, a phone number or a website address is not an adequate substitution for a referral. In its decision, the Court emphasized that physicians, as members of a regulated and publicly-funded profession, are subject to requirements that focus on the public interest, rather than simply their own interests.[29]

ABORTION POLICIES & PRACTICE IN NOVA SCOTIA

Medical abortion is a type of abortion that is induced by taking prescribed medication in the early weeks of pregnancy. Medical abortions allow patients to end their pregnancies without surgery or hospitalization.

Surgical abortion is a type of abortion performed by a doctor inside a medical facility such as a hospital. Surgical abortions are available beyond the early weeks of pregnancy.

The following table from 811.NovaScotia.ca provides a helpful reference on the differences between medical and surgical abortion:

What are the differences between medical and surgical abortions?

	Medical abortion	Surgical abortion
How it works	• You take two medications. The pregnancy will end and the uterus will push out the tissue (like a miscarriage). • The first pill stops the pregnancy. The second pills are taken 24-48 hours (1-2 days) later, at a convenient time for you.	• A doctor will gently open your cervix (the opening to the uterus or womb) with dilators that gradually get bigger. • A cannula (straw-like tube) is inserted through the cervix into the uterus. • Suction (like a vacuum) is used to remove the pregnancy from the uterus. • The procedure usually takes 3-10 minutes.
Advantages	• High success rate (95-98%). • The pregnancy is expelled (pushed out of the body) within 24 hours of using misoprostol in 90% of women. • It is more private, since it is done at home. • You can choose to have someone with you for support. • Can be used very early in pregnancy. • Similar to a natural miscarriage or a heavy menstrual period.	• Very low risk of continuing pregnancy (less than 1 in 100). • High success rate (about 99%). • Only needs one clinic visit. • Procedure is finished within minutes. • Sedation can be used if you wish. • Can be used early or later in pregnancy.
Disadvantages	• Uterine cramping may be very painful. • About 2-5% of women will need a uterine aspiration procedure (D&C) after medical abortion. • Bleeding after medical abortion may last longer than after uterine aspiration. • You may see blood clots and pregnancy tissue. • Needs 2 clinic visits. • You may not know if the abortion was successful until the follow-up appointment 1-2 weeks later. • Risk of continued pregnancy is 1 in 20.	• Medical instruments enter the uterus. • May feel less private. • You can't have someone with you for support, as partners and loved ones are not allowed in the clinic.

Preliminary Procedures

Subject to normal considerations of capacity to consent, there is no minimum age requirement to access abortion services, and parental consent is not required.

Nova Scotians can **self-refer** for an abortion, meaning that patients do not require a physician referral to schedule an abortion. The Nova Scotia Health Authority operates a toll-free line (**1-833-352-0719**) that helps people seeking to terminate a pregnancy access information, arrange testing, and set up an appointment for either a medical or surgical abortion. The Women's Choice Clinic in Halifax (located at the QEII hospital) offers both surgical and medical abortions and can refer patients to a province-wide network of health professionals who prescribe Mifegymiso. (Family physicians, community Obstetrician/Gynecologists and other health care professionals can still prescribe Mifegymiso, even if they are not part of the referral network.)[30,31] Alternatively, patients may obtain a referral from their family physician.[32]

Patients seeking abortions in the province must undergo blood testing to confirm the existence and stage of the pregnancy and the patient's blood type, and may be required to undergo ultrasound testing to date the pregnancy and to ensure that the pregnancy is not ectopic (occurring outside of the uterus).[33] Health Canada does not require that an ultrasound be performed before Mifegymiso is prescribed.[34] However, most prescribers will prefer to see ultrasound results before prescribing (in order to date the pregnancy and confirm that it is not ectopic). Dating ultrasounds for abortion take about 10 minutes if done after six weeks. Certain of our reviewers advised that dating ultrasounds performed before six weeks take about 30 minutes and may require extra resources.

The Women's Choice Clinic can book six ultrasound appointments per day at the Victoria General Hospital. Every ultrasound department in Nova Scotia can provide dating ultrasounds for people seeking abortions; within the Central Zone, the Women's Choice Clinic refers people seeking abortions to the Victoria General Hospital, the Dartmouth General, the Cobequid Community Health Centre, and Hants Community Hospital. People who are seeking abortion services in urgent situations can sometimes be seen within a day or two; however, the average wait time for an ultrasound is one week.[35]

Medical Abortion: Policies & Requirements

Medical abortion is available in Nova Scotia to people who are **9 weeks (63 days) or less** pregnant with an intra-uterine pregnancy, counting from the first day of the person's last normal menstrual period.[36]

The standard medical abortion pills are often referred to collectively by their trade name in Canada, Mifegymiso. The standard medical abortion regimen in Canada contains two medications: mifepristone (1 tablet) and misoprostol (4 tablets). Mifepristone destabilizes the

lining of the uterus and ends the pregnancy; misoprostol causes cervical ripening and uterine contractions.

If, following the blood and ultrasound testing (ultrasound testing is not mandatory but may be advisable),[37] it is confirmed that a patient is less than 9 weeks pregnant (and the pregnancy is not ectopic), the patient must meet with a health care provider to discuss the procedure.[38] The health care provider is typically a nurse, who reviews the patient's history and provides the patient with information related to the procedure or the medications. This discussion is often called a counselling session or consultation.

Immediately following, the patient will meet with a doctor or nurse practitioner, who will take the patient's medical history and give them a prescription for Mifegymiso, if appropriate and elected by the patient. The prescription for Mifegymiso can be filled at a pharmacy. All pharmacies in Nova Scotia can stock Mifegymiso. Health Canada's Guideline on prescribing and dispensing Mifegymiso states that Mifegymiso may be dispensed directly to patients "by a pharmacist or a prescribing health professional."[39] In Nova Scotia, "prescribing health professional" has been interpreted to include nurse practitioners.[40]

One to two weeks after taking Mifegymiso, patients must obtain a blood test to ensure that the pregnancy has been interrupted and completely evacuated.[41] Individuals seeking medical abortions must be able to follow through with the whole process, including appointments, calls and lab tests, and must be able to access the emergency room in case of emergency.[42]

The process is irreversible once the first pill (mifepristone) is taken. Patients seeking medical abortion must take the second pill after taking the first or obtain surgical intervention.[43] Individuals seeking medical abortions must be willing and able to have a surgical abortion in the event that the medication is not effective.[44]

No person in Canada can legally sell a prescription drug, including Mifegymiso, to a member of the general public, unless they are licensed by a province to dispense prescription drugs.[45] Persons who are licensed to dispense drugs must meet the provincial practice requirements.[46] Some advocates have raised concerns that this restriction may limit Indigenous patients' access to traditional abortive medicines.

In Nova Scotia, all health practitioners dispensing drugs are required to provide in-person consultations to patients before the first fill of each prescription.[47] This means that it is unlikely that any individual in Nova Scotia would be able to legally order Mifegymiso online. However, the legislative requirement is relaxed where it is not "practicable" for a patient to have in-person consultations, meaning that in some situations it may be possible for the consultation requirement to be met over the phone or online.[48]

Neither the applicable legislation nor the Nova Scotia College of Pharmacists (the regulatory body for pharmacists) require that all pharmacies carry and dispense Mifegymiso. However, the Nova Scotia College of Pharmacists policy document, "Practice Guidance: Dispensing Mifegymiso,"[49] outlines the importance of enabling access to the drug. It guides pharmacists to collaborate with physicians to ensure that care "is patient-centered, does not create unnecessary barriers to access, and provides appropriate safeguards for patient safety."[50] The document also guides pharmacies to have a plan in place that protects patients' rights to access health services, including Mifegymiso, "while also upholding individual providers' rights to conscientious objection."[51,52]

Surgical Abortion: Policies & Requirements

Surgical abortion services are available in Nova Scotia for people seeking elective abortions whose pregnancies are **up to 15 weeks and 6 days** from the first day of their last menstrual period.[53] Surgical abortions occur in Nova Scotia at any gestational age where there is a health risk to the fetus or to the individual carrying the fetus.[54,55]

Surgical termination of pregnancy is currently provided in Nova Scotia at:

- the Queen Elizabeth II Health Sciences Centre (QEII) in Halifax (where the Nova Scotia Women's Choice Clinic is located);[56]
- the South Shore Regional Hospital in Bridgewater;
- the Valley Regional Hospital in Kentville; and
- the Colchester East Hants Health Centre in Truro.

At this time, surgical abortion is not provided anywhere in Cape Breton.[57] Most abortions in the province are performed at the Nova Scotia Women's Choice Clinic, in the QEII.[58] There are no private, free-standing clinics in Nova Scotia that provide surgical abortions.[59]

As with most surgeries, patients undergoing surgical abortion must have a support person with them to sign them out, and to take them home from the appointment.[60] If a patient does not have someone with them, their appointment will be rescheduled.[61] However, support persons are not allowed in the clinic area.[62]

Surgical abortions are medical procedures in which a doctor uses suction to remove pregnancy tissue. If a pregnancy is between 13 weeks and 15 weeks and 6 days, the patient will be given a medication called misoprostol before the procedure, to soften the cervix and make dilation easier.[63,64] The physician will use a loop-shaped tool with a long handle called a "curette" to remove remaining tissue from the walls of the uterus. The procedures are very brief, usually taking 3-10 minutes.

Patients undergoing surgical abortion have the option of conscious sedation during the procedure, similar to the type of sedation one may experience at the dentist. This is optional, and available at the patient's request.[65]

Following the procedure, the Nova Scotia Health Authority (NSHA) recommends that patients visit their family doctor 2 weeks after the procedure, for a check-up. Patients have the option (but are not required) to speak with an NSHA Counsellor to discuss their mental and emotional health following the procedure. This counselling service is free and may be accessed via telephone at 902-472-4078.[66,67,68]

Abortion as an Insured Health Service

In order to comply with the *Canada Health Act* (and, thus, receive funding from the federal government for health services), provinces and territories must provide universal coverage for all insured persons for all "medically necessary" hospital and physician services.

Abortion services are insured in all provinces and territories.[69]

Provincial funding for Mifegymiso

Mifegymiso is available by prescription at pharmacies in Nova Scotia. The drug cost ($350) is covered by the province; it is free for anyone with a Nova Scotia health card, with a prescription, and has been since November 1, 2017.[70]

If a Nova Scotia resident seeks a medical abortion in another province (for example, because they are in another province studying), Nova Scotia will still provide coverage for the cost of the medical abortion.[71]

Patients must bring their health cards to appointments with any medical service providers, including abortion care providers.[72]

Provincial coverage for Surgical Abortion

The provincial health plan covers the cost of abortions performed at hospitals in Nova Scotia for all individuals registered with MSI (Medical Services Insurance) in the province.

To be eligible for MSI benefits, a patient must be either a Canadian citizen or Permanent Resident or a resident who makes their permanent home in Nova Scotia; must be present in the province 183 days of every calendar year; and must be registered with MSI.[73]

Tourists and visitors to the province are not eligible for provincial health coverage. Students from other provinces may access abortion services, but coverage will be provided through their home province's health plan.[74] Abortion is covered by the Interim Federal Health

Program (IFHP) under "Basic Coverage" for protected persons, including resettled refugees, refugee claimants, and other persons who are eligible for the IFHP.[75]

There is no provincial coverage provided for travel expenses, accommodation and child care costs incurred in the course of accessing abortion services.

Federal coverage for Abortion Services

The Non-Insured Health Benefits (NIHB) Program, administered by the Department of Indigenous Services Canada, provides registered First Nations and recognized Inuit people seeking abortion services with coverage for transportation and accommodations. Those seeking coverage under this program will be required to provide proof of an appointment.[76] The NIHB primarily refers Indigenous peoples to mainstream service providers for abortion. The NIHB also covers the cost of Mifegymiso.[77]

MSI Billing Codes

Physician billing codes in Nova Scotia are publicly available online in the MSI Physician's Manual, on the MSI website.

The billing code for **Medical Abortion** has been effective since May 17, 2018. It is **03.03V**.[78,79] Follow-up visits for medical abortion are billed as regular office visits.

The billing codes commonly used for **Surgical Abortion** are **87.1** (Vacuum Aspiration for Termination of Pregnancy) and **87.21** (Dilation and Curettage for Termination of Pregnancy).

Some patients may require subsequent aspiration or dilation and curettage **following an abortion procedure**. The billing code for Dilation and Curettage Following Delivery or Abortion is **81.01**, and the code for Aspiration Curettage Following Delivery or Abortion is **81.61.**[80,81]

The Nova Scotia Pharmacare codes for Mifegymiso for use by dispensing pharmacists are also available publicly online in Nova Scotia Pharmacare Programs: Pharmacists' Guide.[82]

REFERENCES & NOTES

[1] When considering the application of international human rights instruments in the domestic context, it is important to note the Nova Scotia Court of Appeal (NSCA)'s recent comments in *Sparks v Nova Scotia (Assistance Appeal Board)*, in which the Court stated: "[W]e should interpret ambiguous legislation in a manner that is consistent with Canada's (more specifically Nova Scotia's) international human rights obligations" (*Sparks v Nova Scotia (Assistance Appeal Board)*, 2017 NSCA 82 at para 50).

[2] Convention on the Elimination on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 13, (entered into force 3 September 1981), online: http://www.un.org/womenwatch/daw/cedaw/.

[3] CEDAW at article 12, online: http://www.un.org/womenwatch/daw/cedaw/.

[4] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 85 UNTS 1465, (entered into force 26 June 1987), online: https://www.ohchr.org/Documents/ProfessionalInterest/cat.pdf.

[5] The Canadian *Charter* also guarantees Canadians the right not to be subjected to any cruel and unusual treatment or punishment (*Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 12).

[6] CEDAW, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, online: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf

[7] Declaration on the Rights of Indigenous Peoples (adopted by the United Nations General Assembly 13 September 2007), online: https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf [UNDRIP].

[8] Brandi Morin, "Where does Canada sit 10 years after the UN Declaration on the Rights of Indigenous Peoples?" *CBC News* (13 September 2017), online: https://www.cbc.ca/news/indigenous/where-does-canada-sit-10-years-after-undrip-1.4288480.

[9] UNDRIP at art 24(1), online: https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

[10] UNDRIP at art 24(2), online: https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

[11] Those recommendations call upon all levels of Canadian government to "[i]ncrease the number of Aboriginal professionals working in the health-care field"; to "[e]nsure the retention of Aboriginal providers in Aboriginal communities"; and to "[p]rovide cultural competency training for all health-care professionals" (Recommendation #23). In addition, the TRC called upon medical and nursing schools in Canada to educate their students on Aboriginal health issues, including "skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism" (Recommendation #24) (Truth and Reconciliation Commission of Canada, "Truth and Reconciliation Commission of Canada: Calls to Action" (Winnipeg: 2015) online: http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf).

The Government of Canada has undertaken to "fully implement the Calls to Action of the Truth and Reconciliation Commission, starting with the implementation of the United Nations Declaration on the Rights of Indigenous Peoples" (Office of the Prime Minister of Canada, "Statement by Prime Minister on release of the Final Report of the Truth and Reconciliation Commission" (15 December 2015), online: https://pm.gc.ca/eng/news/2015/12/15/statement-prime-minister-release-final-report-truth-and-reconciliation-commission).

[12] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[13] *Charter*, s 7.

[14] *Canada Health Act,* RSC 1985, c C-6, s 4 [*Canada Health Act*].

[15] *Canada Health Act,* s 3.

[16] This is on the assumption that abortion is properly treated as a health service, and not as an activity to be regulated by the criminal law.

[17] Isabel Dávila, "Access to Abortion: an International Human Rights Perspective on Canadian Law," online: http://claihr.ca/2018/01/10/access-to-abortionan-international-human-rights-perspective-on-canadian-law/.

[18] *Carter v Canada (Attorney General),* [2015] 1 SCR 331, 2015 SCC 5 (CanLII) at para 68.

[19] *Tremblay v Daigle,* [1989] 2 SCR 530, 1989 CanLII 33 (SCC).

[20] *R v Parker*, 2000 CanLII 5762 (ON CA) at para 135; *Malette v Shulman* (1990), 1990 CanLII 6868 (ON CA), 72 OR (2d) 417 at p 424, 67 DLR (4th) 321 at p 328 (CA); *Reibl v Hughes,* [1980] 2 SCR 880, 1980 CanLII 23 (SCC).

[21] *Chaoulli v Quebec (Attorney General),* [2005] 1 SCR 791, 2005 SCC 35 (CanLII); *New Brunswick (Minister of Health and Community Services v G(J),* [1999] 3 SCR 46, 1999 CanLII 653 (SCC).

[22] *R v Morgentaler,* [1988] 1 SCR 30, 1988 CanLII 90 (SCC).

[23] *Ibid.*

[24] *Carter v Canada (Attorney General),* [2015] 1 SCR 331, 2015 SCC 5 at para 67.

[25] See also: *R v Drummond,* 143 DLR (4th) 368; *Winnipeg Child & Family Services (Northwest. Area) v G(DF),* 1997 3 SCR 925; *Dobson v Dobson,* [1999] 2 SCR 753. Since this line of case law, there have been a series of Conservative bills before Parliament seeking to enhance the rights of the fetus using the criminal law, notably: Bill C-484 ("Cassie and Molly's law") and Bill C-291. No such bill has become law, and it remains a "general proposition that the law of Canada does not recognize the unborn child as a legal or judicial person" (*Winnipeg Child and Family Services (Northwest Area) v G (DF),* [1997] 3 SCR 925, 1997 CanLII 336 (SCC) at para 11.)

[26] *Chaoulli v Quebec (Attorney General),* [2005] 1 SCR 791, 2005 SCC 35 at para 43.

[27] *Carter v Canada (Attorney General),* [2015] 1 SCR 331, 2015 SCC 5 (CanLII) at para 68, citing *Blencoe v British Columbia (Human Rights Commission),* [2000] 2 SCR 307, 2000 SCC 44 (CanLII) at para 49.

[28] The SCC described the rights to patient autonomy in decision-making and medical self-determination in detail in *Carter v Canada (Attorney General)* at paragraph 67 as follows:

> The law has long protected patient autonomy in medical decision-making. In *A.C. v. Manitoba (Director of Child and Family Services),* 2009 SCC 30 (CanLII), [2009] 2 S.C.R. 181, a majority […] endorsed the "tenacious relevance in our legal system of the principle that competent individuals are—and should be—free to make decisions about their bodily integrity" (para. 39). This right to "decide one's own fate" entitles adults to direct the course of their own medical care (para. 40): it is this principle that underlies the concept of "informed consent" and is protected by s. 7's guarantee of liberty and security of the person (para. 100; see also *R. v. Parker* (2000), 2000 CanLII 5762 (ON CA), 49 O.R. (3d) 481 (C.A.)). As noted in *Fleming v. Reid* (1991), 1991 CanLII 2728 (ON CA), 4 O.R. (3d) 74 (C.A.), the right of medical self-determination is not vitiated by the fact that serious risks or consequences, including death, may flow from the patient's decision. It is the same principle that is at work in the cases dealing with the right to refuse consent to medical treatment, or to demand that treatment be withdrawn or discontinued […].

[29] As a decision of the Ontario Court of Appeal, this case is not binding on courts, doctors or regulatory bodies in the province of Nova Scotia. However, as an appellate court decision on a novel issue, this case would likely be persuasive to a court in Nova Scotia considering similar issues.

[30] Of the six university health clinics in Nova Scotia, only St. Francis Xavier University in Antigonish currently prescribes medical abortions as part of its primary care. Students at other universities in the province are referred elsewhere (Brett Bundale, "Access to abortion pill still an issue in Nova Scotia: advocates," *Global News* (22 November 2018), online: https://globalnews.ca/news/4689260/abortion-pill-access-ns/).

[31] The Halifax Sexual Health Centre does not currently prescribe Mifegymiso (Halifax Sexual Health Centre, "Pregnancy Options," online: http://hshc.ca/pregnancy-options/).

[32] Nova Scotia Health Authority, Nova Scotia Women's Choice Clinic Referral Form, online: https://www.nshealth.ca/sites/nshealth.ca/files/cd0599mr_06_2018.pdf.

[33] Province of Nova Scotia, "Medical Abortion," online: https://811.novascotia.ca/health_topics/medical-abortion/.

[34] Government of Canada, "Health Canada approves updates to Mifegymiso prescribing information: Ultrasound no longer mandatory" (16 April 2019), online: https://healthycanadians.gc.ca/recall-alert-rappel-avis/hc-sc/2019/69620a-eng.php.

[35] Carly Weeks, "Nova Scotia says week-long wait acceptable for dating ultrasound before abortion, but experts disagree" *The Globe and Mail* (27 September 2018), online:

https://www.theglobeandmail.com/canada/article-nova-scotia-says-its-abortion-rules-are-reasonable-but-experts/.

[36] Province of Nova Scotia, "Medical Abortion," online: https://811.novascotia.ca/health_topics/medical-abortion/.

[37] CBC News, "Health Canada says ultrasound no longer mandatory before Mifegymiso prescribed for abortion" (16 April 2019), online: https://www.cbc.ca/news/health/mifegymiso-ultrasound-1.5100405.

[38] Province of Nova Scotia, "Medical Abortion," online: https://811.novascotia.ca/health_topics/medical-abortion/.

[39] Government of Canada, "Health Canada updates prescribing and dispensing information for Mifegymiso," online: http://www.healthycanadians.gc.ca/recall-alert-rappel-avis/hc-sc/2017/65034a-eng.php.

[40] College of Registered Nurses of Nova Scotia, NP Bulletin "Changes enable NPs to prescribe Mifegymiso," online: https://crnns.ca/wp-content/uploads/2017/12/NP-Bulletin-Changes-Enable-NPs-to-Prescribe-Mifegymiso.pdf.

[41] Province of Nova Scotia, "Medical Abortion," online: https://811.novascotia.ca/health_topics/medical-abortion/.

[42] *Ibid.*

[43] *Ibid.*

[44] *Ibid.*

[45] *Food and Drugs Act,* RSC 1985, c F-27.

[46] Government of Canada, "Buying drugs over the internet," online: https://www.canada.ca/en/health-canada/services/buying-drugs-over-internet.html.

[47] *Pharmacy Practice Regulations* made under Section 80 of the *Pharmacy Act,* SNS 2011, c 11, NS Reg 258/2013 (November 15, 2012, effective August 6, 2013) as amended to NS Reg 15/2017 (September 16, 2015, effective March 1, 2017), s 13 [*Pharmacy Practice Regulations*].

[48] *Pharmacy Practice Regulations*, s 13(3).

[49] Nova Scotia College of Pharmacists, "Practice Guidance: Dispensing Mifegymiso" (16 November 2017), online: https://www.nspharmacists.ca/wp-content/uploads/2017/06/Guidance_DispensingMifegymiso.pdf.

[50] *Ibid.*

[51] *Ibid*.

[52] While this document does not have the force of law, pharmacy is a self-regulated profession in Canada, and the official Policy Position Guidelines of the Nova Scotia College of Pharmacists (the provincial regulatory body) inform the relevant standard of care for pharmacists practicing in the province of Nova Scotia.

[53] Nova Scotia Health Authority, "Patient & Family Guide: Surgical Abortion," online: http://www.nshealth.ca/sites/nshealth.ca/files/patientinformation/1832.pdf.

[54] Later abortions usually occur via a dilation and evacuation, or an induction of labour, which may be preceded by a fetal intracardiac injection depending on the gestational age and viability of the fetus.

[55] The authors have not been able to locate a written source for the Nova Scotia policies on later abortions.

[56] Later abortions may also be performed at the IWK Health Centre in Halifax.

[57] V. Walker, Cape Breton Centre for Sexual Health, email communication with J. Stevenson, 7 January 2019; Tom Ayers, "Cape Breton women don't have easy access to abortion" *Cape Breton Post* (18 February 2010; updated 2 October 2017), online: https://www.capebretonpost.com/living/cape-breton-women-dont-have-easy-access-to-abortion-18783/).

[58] CBC News, "New policy helps abortion access but barriers remain, advocate says" (27 September 2018), online: https://www.cbc.ca/news/canada/nova-scotia/abortion-access-ultrasound-halifax-1.4839745.

[59] There is no legislative prohibition on the existence of such a clinic in the province; however, there are disincentives to opening a private clinic in Nova Scotia that likely factor into the gap. First, abortion services are only covered by the provincial health plan if performed in a hospital (National Abortion Federation, "National Abortion Coverage by Region," online: http://www.nafcanada.org/access-region.html), meaning that if a private clinic were available in Nova Scotia, patients would have to pay for abortion services out-of-pocket. Second, in Nova Scotia, the financial incentive for physicians to opt-out of billing through the public plan and instead practice in the private sector is diminished by a policy that requires that physicians practicing privately do not "bill more than they would receive if they were working within the public plan" (Flood & Archibald, "The illegality of private health care in Canada" (2001) *Canadian Medical Association Journal*, online: http://www.cmaj.ca/content/164/6/825). Nova Scotia's only private abortion clinic, the Morgentaler Clinic, operated in Halifax from 1990 to 2003 ("Morgentaler closes Halifax abortion clinic" CBC News (29 November 2003), online: https://www.cbc.ca/news/canada/morgentaler-closes-halifax-abortion-clinic-1.376738). The nearest private abortion clinic to Nova Scotia is Clinic 554 in Fredericton, New Brunswick. The cost of abortion services at that clinic range from $700-$850, depending on the gestational age (Clinic 554, "Reproductive Health," online: http://www.clinic554.ca/reproductivehealth.html).

[60] If a patient does not have a support person to accompany them, abortion doulas are available to drive people to appointments and provide emotional support, through Abortion Support Service Atlantic. They may be reached through Facebook at: https://www.facebook.com/abortionsupportatlantic/.

For Indigenous persons in Nova Scotia in need of a support person for their appointment, the Confederacy of Mainland Mi'kmaq has a program called the "Native Hospital Interpreters Liaison Program," which "provides supports and services to all Atlantic First Nations and Inuit community members (and their families) who request support while receiving and/or are about to receive medical

treatment in the Halifax/Dartmouth area" (The Confederacy of Mainland Mi'kmaq, "Health," online: http://cmmns.com/program/health/). These support services include translation services. Additionally, the IWK has Mi'kmaq support staff, to provide cultural support and Mi'kmaq translation services (IWK Health Centre, "Mi'kmaq Information," online: http://www.iwk.nshealth.ca/page/mikmaq-information).

[61] Nova Scotia Health Authority, "Nova Scotia Women's Choice Clinic," online: http://www.nshealth.ca/abortion.

[62] Nova Scotia Health Authority, "Patient & Family Guide: Surgical Abortion," online: http://www.nshealth.ca/sites/nshealth.ca/files/patientinformation/1832.pdf.

[63] *Ibid.*

[64] The timing of dosage of misoprostol is provider-dependent. Some providers will ask that the medication be placed (orally or vaginally) the night before or the morning of the procedure. For patients at less than 12 weeks gestational age, a physician may place a device called a laminaria tent in the cervix on the morning of the procedure. The devices are made from seaweed, and act as an osmotic dilator.

[65] Nova Scotia Health Authority, "Patient & Family Guide: Surgical Abortion," online: http://www.nshealth.ca/sites/nshealth.ca/files/patientinformation/1832.pdf.

[66] Nova Scotia Health Authority, "After Your Procedure" (2016), online: https://www.nshealth.ca/sites/nshealth.ca/files/patientinformation/1509.pdf.

[67] The College of Physicians and Surgeons of Nova Scotia, the regulatory body for the practice of medicine in the province, does not currently have a published Practice Standard specific to induced abortion (College of Physicians & Surgeons of Nova Scotia, "Professional Standards & Guidelines," online: https://cpsns.ns.ca/Standards-Guidelines/). Following the release of Health Canada's revised guidelines for prescribing Mifegymiso in November 2017, the College of Physicians & Surgeons of Nova Scotia announced the retirement of the *Professional Standard Regarding Prescribing Mifegymiso.* In doing so, it stated that such a College Standard is no longer necessary, because the requirements for prescribing and dispensing Mifegymiso "are now quite clear" (College of Physicians & Surgeons of Nova Scotia, "Revised Professional Standards Approved by Council & Retirement of Mifegymiso Prescribing Standard" (18 December 2017), online: https://cpsns.ns.ca/revised-professional-standards-approved-by-council-retirement-of-mifegymiso-prescribing-standard/).

[68] The Canadian Medical Association (CMA) is the national advocacy organization for Canadian physicians; it is not a regulatory body, and its policy statements do not have the force of law. It advocates on behalf of patients and physicians on key issues in health care in Canada. The CMA Policy on Induced Abortion states, in part, that there "should be no delay in the provision of abortion services"; that "[i]nduced abortion should be uniformly available to all women in Canada"; and that "Health care insurance should cover all the costs of providing all medically required services relating to abortion including counselling" (Canadian Medical Association Policy, "Induced Abortion," online: http://policybase.cma.ca/dbtw-wpd/PolicyPDF/PD88-06.pdf).

[69] Government of Canada, "Canada Health Act Annual Report 2016-2017," online: https://www.canada.ca/en/health-canada/services/publications/health-system-services/canada-health-act-annual-report-2016-2017.html. [This is the most recent published Canada Health Act Annual Report.]

[70] Government of Nova Scotia, News Release, "Women to Benefit from Universal Coverage for Mifegymiso" (22 September 2017), online: https://novascotia.ca/news/release/?id=20170922001.

[71] Brett Bundale, "Advocates say access to abortion pill still an issue in Nova Scotia" *The Globe and Mail* (22 November 2018), online: https://www.theglobeandmail.com/canada/article-advocates-say-access-to-abortion-pill-still-an-issue-in-nova-scotia-2/.

[72] Nova Scotia Health Authority, "Nova Scotia Women's Choice Clinic," online: http://www.nshealth.ca/abortion.

[73] Government of Nova Scotia, "MSI Eligibility," online: https://novascotia.ca/dhw/msi/eligibility.asp.

[74] *Ibid.*

[75] Government of Canada, "Interim Federal Health Program: Summary of coverage" online: https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/help-within-canada/health-care/interim-federal-health-program/coverage-summary.html; Medavie Blue Cross, "IFHP Benefit Grid – Basic Coverage," online: https://docs.medaviebc.ca/providers/benefit_grids/IFHP-Benefit-Grid-Basic-Coverage.pdf.

[76] Government of Canada, "Medical Transportation Benefits" online: https://www.canada.ca/en/indigenous-services-canada/services/non-insured-health-benefits-first-nations-inuit/benefits-services-under-non-insured-health-benefits-program/medical-transportation-benefits.html.

[77] Indigenous Services Canada, First Nations and Inuit Health Branch, "Non-Insured Health Benefits: Drug Benefit List" (January 2019) at page 134, online: https://www.canada.ca/content/dam/isc-sac/documents/services/reports-publications/nihb/drug-benefit-list/dbl-2019-eng.pdf.

[78] MSI Physician's Bulletin (17 May 2018) Vol LXI, Issue 14, online: http://msi.medavie.bluecross.ca/wp-content/uploads/sites/3/2018/05/MSI-Physicians-Bulletin-May-2018.pdf; MSI Physician's Bulletin (15 June 2018) Vol LXII, Issue 15, online: http://msi.medavie.bluecross.ca/wp-content/uploads/sites/3/2018/06/MSIPhysiciansBulletin-2008-present.pdf.

[79] Prior to the availability of the medical abortion code, some physicians used **87.29** for medical abortion ("Other termination of pregnancy"), although it is technically a surgical code.

[80] Nova Scotia Medical Services Insurance, "Physician's Manual," online: http://msi.medavie.bluecross.ca/wp-content/uploads/sites/3/2015/07/PhysicianManual.pdf.

[81] The MSI Physician's Manual also lists 87.0 (Intra-Amniotic Injection for Termination of Pregnancy), but that procedure is no longer performed.

[82] Nova Scotia Government, "Pharmacare Programs: Pharmacists' Guide" (June 2018) at page 23, online: https://novascotia.ca/dhw/pharmacare/documents/Pharmacare-Pharmacists-Guide.pdf.

Reviewers

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