Defending the Freedom of Expression of Manitobans around Abortion Providers

A Submission from the Association for Reformed Political Action (ARPA) Canada

Regarding

Manitoba's Bill 8, The Safe Access to Abortion Services Act

May 27, 2024

Bill 8, The Safe Access to Abortion Services Act, is unnecessary and unconstitutional. It will suppress peaceful speech without advancing the government's stated goal of ensuring unhindered access to abortion. Bill 8 is unnecessary because the type of conduct that the government claims to be concerned about, such as harassment and intimidation, is already illegal under federal law. The government has presented no evidence that such conduct is currently occurring outside of abortion clinics. Rather, the bill impermissibly targets beliefs and opinions that this government does not share, and in doing so violates both the Charter and the constitutional division of powers.

Bill 8 is unnecessary

During the second reading debate on the bill, Ministers Nahanni Fontaine and Lisa Naylor both drew upon personal stories to justify Bill 8, The Safe Access to Abortion Services Act. They depicted pro-life outreach around abortion clinics as violent and obstructive. In the exchanges between Minister Fontaine, Minister Naylor, and MLA Kathleen Cook at second reading, the term "harass" was used 15 times, "intimidate" 9 times, "violent" 7 times, "obstruct" 4 times, and "threat" 3 times. All such activities are already illegal under criminal law. For all the accusations that pro-life activity outside abortion clinics is violent, the only evidence the ministers cited was their memories of volunteering for abortion clinics in the 1980s. They also recounted several instances of violence toward abortion providers in the 1990s that happened outside of Manitoba. Rather than addressing present social problems, the Ministers' motivation for The Safe Access to Abortion Services Act seems to be avenging past crimes.

As a provincial court judge in BC observed of that province's similar law in 1996: "On the evidence, the objective of the Act is far less pressing and substantial in 1996 than it was in 1990." ([1996] B.C.J. 3001, para 32). BC's law was introduced shortly after new abortion clinics opened in Vancouver and were the site of large protests. If in just six years the justification for this law had so diminished, then how much less justification is there for this legislation now?

In 2014, the Supreme Court of the United States, in its unanimous McCullen decision, struck down a Massachusetts "buffer zone" that was much smaller (10 metres) than the 50-metre-plus radius that Bill 8 would create. All nine judges rejected the state's arguments that a buffer zone was needed because enforcing criminal laws of general application was difficult. The court noted that the state had not prosecuted anyone for obstructing abortion access in 17 years. If the state claims there is a record of obstruction and harassment justifying a censorship law, the court pointed out, then surely it could compile evidence to support this claim — but it had not done so.

Similarly, the governments of Manitoba and Winnipeg have authority to direct police to prevent, investigate, and prosecute any illegal activities taking place near abortion facilities or in relation to abortion providers. The way to stop harassment or threatening conduct is to monitor it, collect evidence, lay charges and prosecute, just as police would have to do to enforce Bill 8. But that's not happening in Manitoba, either because clinics and police are uninterested or unwilling to enforce current laws or, more likely, because harassment and intimidation are simply not happening.

Bill 8 suppresses peaceful speech and particular beliefs and opinions

Bill 8 goes far beyond prohibiting harassment, intimidation, or obstruction – which are already illegal. Bill 8 also prohibits attempting to advise, persuade, inform, disapprove of, request, or dissuade. The bill actually uses all of those verbs, making attempted persuasion or attempted sharing of information punishable offenses, no matter how peacefully it is done. Such activities hardly conform to the archetype of violent pro-life activism outside abortion clinics or facilities.

The legislation does not take aim at the manner in which activities are conducted. It does not matter if the activism is silent or audible. It does not matter if it is a single person or a large crowd. It does not matter if the activism is done right beside the clinic door or 49 meters away. It does not matter if a person is holding a very large sign or holding a few pregnancy care centre pamphlets.

Bill 8 targets the content of people's beliefs, opinions, and expression. Pro-life expression is banned but pro-choice expression is not. The bill could send a pregnant woman wearing a "Choose Life" shirt to prison for six months. Framing this bill as being about "access to health care" is absurd. There is no evidence that anyone cannot access abortion because of pro-life messaging in the street.

A democratic country guarantees the "freedom of thought, belief, opinion and expression" (Section 2.a) in the Charter of Rights and Freedoms so that citizens may peacefully debate and arrive at the truth through mutual dialogue. This legislation bans that activity. It makes it illegal for private citizens to present a specific view on a specific topic in a specific area. This sets a dangerous and undemocratic precedent.

Bill 8 violates the constitutional division of powers

If the purpose of The Safe Access to Abortion Services Act were truly to prevent harassment, assault, or intimidation, it would be entirely redundant. The Criminal Code already prohibits interfering with access to health services (s. 423.1 and 423.1), harassment (s. 264), intimidation (s. 423), causing a

disturbance (including by impeding another person s. 175), nuisance (s. 180), mischief (s. 430), assault (including threats, s. 264), and homicide (s. 222). Abortion facilities are also protected by criminal provisions generally related to protecting property. If such offences were actually taking place, law enforcement would already have the necessary tools.

Insofar as Bill 8 prohibits harassment, intimidation, or obstruction, it would prohibit the very same conduct that the Criminal Code already prohibits. But it would lower the threshold for conviction. For instance, Bill 8 forbids harassment. The Criminal Code also prohibits harassment, but a criminal conviction requires proving 1) that the accused engaged in the prohibited conduct (repeated communication, approaching, besetting, etc.); (2) that the complainant was in fact harassed by the prohibited conduct, meaning "tormented, troubled, worried continually or chronically, plagued, bedevilled and badgered"; (3) that the accused knew that the complainant was harassed or was reckless or wilfully blind as to whether the complainant was harassed; (4) that the conduct caused the complainant to fear for her safety or the safety of anyone known to her; and (5) that the complainant's fear was reasonable in the circumstances.

Under Bill 8, however, requirements 2 – 5 are simply absent, meaning that repeated communication to persuade someone to not to have an abortion is an offence regardless of its content, tone, or effect on the recipient. Manitoba's proposed law also effectively broadens the offence of intimidation (Code, s. 423) by removing an exception that permits peaceful protest.

The province cannot broaden criminal offences or tailor them to specific settings in this manner. Doing so violates the division of powers. Criminal law is squarely under federal jurisdiction. Canada's Parliament decided in 2021 that special criminal law provisions were needed for obstruction or intimidation in relation to accessing health services (s. 423.1 and 423.1). But Parliament did not tailor this offence for abortion in particular, nor target certain beliefs or opinions for censorship. It is unconstitutional for provincial governments to unilaterally broaden the application of the Criminal Code as The Safe Access to Abortion Services Act proposes to do.

Bill 8 impermissibly targets a message with which this government disagrees

Bill 8 would not prohibit gathering outside of an abortion clinic, or distributing pamphlets, or holding signs, or speaking, or singing, and so on – unless the message of any of the above is in any way pro-life or anti-abortion. As mentioned earlier in this submission, this legislation takes aim not at the manner of the activism but the content of the action.

Limits on the time, place, and manner of expression are necessary and easy to understand. You may not stage a protest inside of a court room, for example. But imagine if you could hold protests for some points of view but not others. The democratic tradition of respecting free speech means that restrictions on speech are even-handed or neutral in terms of the content of speech or the point of view expressed, short of promoting violence or hatred against any person or group. Canadian law has a long tradition of respecting this principle, which prior to the Charter (1982) was protected through federalism.

Consider Quebec's Act Respecting Communistic Propaganda of the Province of Quebec (1941), a provincial law that prohibited printing or distributing any publication promoting communism – which was considered a threat to peace and order in that day. The punishment was not jail, unlike Bill 8, but the closure of property used for propagating communism. The Supreme Court struck down the law as being ultra vires the province, in Switzman v Ebling, [1957] SCR 285. Justice Nolan wrote: "Clearly [the Act] affects the use of property within the Province, [...] but its true nature and purpose is the suppression of communism by creating a new crime with accompanying penal provisions." Justice Nolan also stated that "whether or not the Dominion Parliament has made communism a crime or forbidden its propagation, it has the exclusive jurisdiction to do so." Similarly, whether or not Parliament has criminalized anti-abortion messaging, it has exclusive jurisdiction to do so.

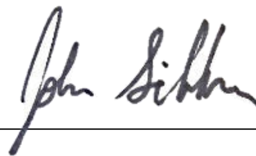
In a concurring judgement, Justice Rand wrote: "The object of the legislation [...] is admittedly to prevent the propagation of communism and bolshevism, but it could just as properly have been the suppression of any other political, economic or social doctrine or theory [...]." Moreover, concern with "local conditions" cannot "extend legislation to matters which lie outside of s. 92 [of the Constitution Act, 1867]." Parliamentary democracy requires "virtually unobstructed access to and diffusion of ideas" and restricting this access is "not a matter within the Regulation of a Province," Justice Rand said.

That only Parliament can prohibit the communication of certain messages protects against local or provincial biases. As Justice Rand explained in Switzman v Ebling: "[F]reedom discussion in Canada [...] has a unity of interest and significance extending equally to every part of the Dominion. With such dimensions it is ipso facto excluded from [provincial jurisdiction] as a local matter."

Recommendation

ARPA Canada recommends that the government of Manitoba withdraw this legislation and that opposition parties vote against this legislation due to its unnecessary and unconstitutional nature.

Respectfully submitted on behalf of ARPA Canada,



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