



# The Brief

Vol. 5 No. 8

A publication of the NB Media Co-op

May 2014

nbmediacoop.org

## Closure of the Morgentaler Clinic and the rule of law in New Brunswick



**Around 600 people rallied for accessible abortions at the New Brunswick Legislature on April 17. The rally, organized by Fredericton Youth Feminists, included calls for the creation of publicly-funded reproductive health clinics, as well as the repeal of the regulation requiring written approval from two doctors in order to get a publicly-funded hospital abortion. Photo by Judy Burwell.**

By JULA HUGHES

A student came to my office angry and in tears during my first year of teaching at the University of New Brunswick in 2006. Her distress was caused, not by a poor grade, but a doctor's refusal to issue a prescription for birth control because she was not married. Having organized a panel on reproductive rights at the law school, my office was known as a "safe space" for reproductive health. Such spaces are much needed in New Brunswick where too many doctors judge women instead of helping them. Since then, I have heard from many women who were refused routine medical care including pap smears and abortion referrals, and treated punitively by their doctors after seeking out such services.

This is what I brought to a press conference on April 10, where the Morgentaler Clinic in Fredericton announced that it will be closing by the end of July. The closure will leave the women of New Brunswick and PEI without access to clinic-based abortions and reliable information about reproductive health. Two New Brunswick hospitals provide about 400 procedures annually. But women wait three weeks or more – on top of the wait for a referral from a family doctor (assuming the doctor is not anti-choice). The Morgentaler Clinic has provided about 600 procedures a year, about 60 for women from PEI.

Without changes to the law and resources, New Brunswick women will lose 60% of the current capacity for abortion care. The loss of capacity will chiefly affect the most vulnerable women.

Women in New Brunswick, like other Canadian women, have a right to access abortions and to have those abortions funded. So why have we had 20 years of clinic abortions without funding? Why are New Brunswick women second-class Canadian citizens?

The struggle for publicly funded abortions began in 1989, a year after the Supreme Court of Canada (SCC)'s landmark decision in *R. v. Morgentaler* striking down Canada's abortion laws. The New Brunswick courts required the province to pay for abortions for New Brunswick women performed at the Montreal Morgentaler Clinic. In response, the province enacted new legislation prohibiting abortions outside hospitals and excluded them from Medicare. In 1993, the SCC held that an analogous Nova Scotia law and regulation were in pith and substance criminal law and ultra vires the province (in other words, the court found that the law was in its true nature criminal law – which falls under federal jurisdiction – and was therefore beyond the powers of the province). In 1995, the New Brunswick Court of Appeal agreed that the prohibition of clinic abortions was unconstitutional as it was the federal government, not the provincial governments, who could prohibit "socially undesirable" conduct as criminal law. But the decision

did not deal with the exclusion of abortion from insured services.

In New Brunswick, the combined effect of these developments was that an abortion would not be funded by Medicare unless it is performed in a hospital by an OB-GYN after two doctors certify that the abortion is medically necessary.

New Brunswick's aim in passing this legislation was clearly not medical. The legislation neither protected patients (it did not prohibit clinic abortions—just refused to pay for them) nor the taxpayer (clinic abortions are about \$1,000 cheaper than hospital abortions).

New Brunswick's goal has always been to create a serious impediment to women accessing abortions. Hospital abortions are funded by Medicare, but many women are not eligible. Thousands of New Brunswick women are currently on waiting lists for a family physician. They lack timely access to a doctor to make the necessary referral and certifications. So, they must pay out of pocket for clinic-based abortions.

In 2002, Dr. Morgentaler challenged the law excluding abortion from insured

services. The provincial government's response was to delay a hearing on the merits. Dr. Morgentaler was 79 at the time. First, his standing to bring the case was challenged. When the province lost, they appealed. Then, anti-choice organizations sought intervener status and when they lost, sought to appeal. Not until seven years later, in 2009, did the Court of Appeal finally rule that Dr. Morgentaler had standing, relying on his extensive experience as a litigant and his financial wherewithal. But by the time the Court of Appeal ruled, Dr. Morgentaler had spent roughly one million dollars on the litigation. In 2008, the Clinic sustained \$100,000 in flood damage. Other downtown businesses were reimbursed by the City. Not the Clinic. Dr. Morgentaler died in 2013, and no further action was taken on the lawsuit.

Using the less costly human rights process, another New Brunswick physician sought to challenge the discriminatory laws. Again, the province sought to delay through procedural barriers. Again, this tactic was successful as the courts took over a year to decide the standing issue, and then held the physician to strict timelines, effectively barring the appeal.

When the closure of the Clinic was announced, the Minister of Health refused to comment because the matter was before the courts. Ultimately, despite clear law on the right to access funded abortions, New Brunswick has made plain its intent to continue its discrimination against women. Who is able to hold it to account? There is no litigant who can match the litigation power of the government, no court willing to step in to preserve the rights of the most vulnerable women in the province and no administrative entity willing or able to protect women from doctors who believe their licence to practice medicine includes the licence to coerce a woman to carry a pregnancy to term. This failure makes a mockery of the rule of law. It creates a crisis for women – poor, rural, immigrant, and raising children – in a small province far away from the power centres of the country. They cannot afford to leave the province to get abortion care and so they go without the fundamental freedom of choice that other Canadian women have relied on for decades. There are many justice failures in this country, but this one sits in my office, crying with fear and rage.

*Jula Hughes is an associate professor of law at the University of New Brunswick.*

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## 500 youth gather to strategize for a just climate future

By TRACY GLYNN

K'jipuktuk/Halifax – About 500 youth interested in climate justice from across unceded Wabanaki territory of Atlantic Canada and beyond gathered in Halifax/ K'jipuktuk, Mi'kmaqi territory on the weekend of March 28-30 to listen to stories and advice from elders and seasoned organizers, strategize about a more just future and make friendships that will likely last a lifetime.

PowerShift Atlantic situated its gathering in the moment of local struggles against a push to frack for shale gas, drill in offshore waters and develop a pipeline to pump diluted bitumen from the Alberta tar sands across the country to Saint John.

Participants listened attentively to a stellar force of speakers including Crystal Lameman, Suzanne Patles, Winona LaDuke, Vanessa Gray, Jasmine Thomas and Amanda Lickers, all indigenous women on the frontlines of resistance to dirty fossil fuel development on the Friday and Saturday nights of the gathering.

Crystal Lameman, a mother of two from Beaver Lake Cree Nation and energy campaigner with the Sierra Club of Canada, Alberta, spoke of her community's court case against the Canadian government for failing to follow through with the duty to consult with her Cree Nation on over 17,000 permits and leases granted to big oil.

Suzanne Patles, a member of the Mi'kmaq Warriors Society, was one of many attacked during the Oct. 17 raid on those resisting shale gas near Elsipogtog. She was arrested three times but never charged during the summer and fall of shale gas resistance near Elsipogtog. Patles argued for the normalizing of resistance and encouraged the audience "to find something that you are good at and do it."

Mi'kmaq women and other indigenous women across Turtle Island surrounded Vanessa Gray, a 20 year old activist from Aamjiwnaang First Nations in Sarnia, Ontario, when she was overcome with emotion while speaking. The Trent University student spoke through the tears to describe her home community and her work with ASAP–Aamjiwnaang + Sarnia Against Pipelines. "I will never leave my homeland because Shell Oil says I should. I will never give up," said Gray whose community is surrounded by more than 60 refineries and chemical plants.

Sarnia's air is the most polluted in Canada, according to a 2011 World Health Organization. More toxic air pollutants billow out of Sarnia's smokestacks than in all of the provinces of New Brunswick or Manitoba. The stench in Chemical Valley, about 100 city blocks in Sarnia, is likened to a mixture of gasoline and melting asphalt with sometimes a hint of rotten egg.

Sarnia and Aamjiwnaang residents blame cancer, learning disabilities and other health problems on the surrounding industries. The Aamjiwnaang First Nation is the first community in the world to have a birth rate of two girls to every boy.

"I've gotta give a shout out to this monolith of destruction," said Amanda... *(continued on page 2)*



**A PowerShift participant paints a banner against the Energy East pipeline. Photo by Robin Tress.**