



# Reversal of *Roe v Wade*

## Implications for doctors in Canada

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**D**uring the Great Depression, a woman named Jennifer found herself pregnant. She already had 2 children and, like many at that time, she and her husband were struggling to keep food on the table. They decided they simply could not continue with the pregnancy—it would mean catastrophe for their family. Jennifer was desperate, and she had an illegal abortion performed by an unlicensed, untrained provider. She died of complications and left her children without their mother. Her husband was, of course, devastated. His sister, Lena, herself a mother and financially insecure, took in her brother's children and raised them.

Lena happens to be my children's great-great-grandmother, so it was impossible for me to look away from the goings-on in the Supreme Court of the United States (SCOTUS) this summer. On June 24, 2022, SCOTUS overturned *Roe v Wade*, the 1973 decision that guaranteed women in the United States a constitutionally protected right to abortion.<sup>1,2</sup> The decision meant that for the past 5 decades in the United States, whether an individual state liked the idea or not, providers could offer abortion services to women who sought them. The reversal of *Roe v Wade* has ended the federal right to an abortion and given states the authority to set their own abortion policies, meaning that these laws now vary widely; women in some states will have access to abortion care and those in others will not.

As providers and patients across the United States navigate the chaos that the decision to overturn *Roe v Wade* has created for women's health care, many in Canada are wondering whether patients and providers here could face a similar disruption. It is worth thinking about Canadian legislation related to reproductive health, the choices that are actually available to patients and providers, and the consequences of these choices.

### 'Profound interference'

Until 1988 it was considered a crime in Canada for a physician to perform abortion services unless pregnancy threatened the woman's life.<sup>3</sup> But in *R. v Morgentaler*, the Supreme Court of Canada ruled that denying women abortion care violated the Canadian Charter of Rights and Freedoms, because "[f]orcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person."<sup>4</sup>

That reasoning is fundamentally different from that underpinning *Roe v Wade*, in which a woman's right to privacy served as the basis for the court's decision.<sup>1</sup> Even at that time, the court held that the right to abortion needed to be weighed against the government's interests in protecting women's health and fetal life. In reversing *Roe v Wade*, the current court determined that this ruling was wrong and the law had been applied incorrectly.<sup>1</sup>

In Canada, because of the very different legal reasoning applied, we have no specific law concerning abortion. This means that providing abortion care is in the same category as, say, removing a gallbladder. In both cases, physicians have duties of care to their patients, and the rights of women over their bodies supersedes the fate of a fetus. In other words, the government is not responsible for deciding what is best for an individual pregnant person when that decision is best made by that person.

Family doctors are often the first point of contact for people who find themselves unexpectedly pregnant. In fact, the Society of Obstetricians and Gynaecologists of Canada reports that almost half of all pregnancies in our country are unplanned.<sup>5</sup> As family doctors, we have seen the desperation in a woman's face who is already drowning under the weight of caring for her existing children. We might recognize the panic in a transgender man's eyes when he finds himself with a pregnancy that is at odds with who he is. What we do in those visits has profound effects on our patients. We are all trained in the art of listening deeply and trying to parse exactly what is going on with the person in front of us.

I say this with the understanding that for many physicians abortion is hard. It is not something we might choose for ourselves, and it can be contrary to deeply held beliefs about the sanctity of life—it may even be seen as being at odds with the reasons many of us entered medicine in the first place. Nonetheless, our personal objections are irrelevant. We simply are not allowed to object to or avoid the choice of abortion for those who might want it.

### Uncertainty over liability

Even physicians in Canada who support the option of abortion might face ethical dilemmas. In the days following the SCOTUS decision, the Canadian Medical Protective Association (CMPA) released a statement saying it could not provide legal assistance in the United States if Canadian doctors were to face criminal charges there for providing abortions to patients from states

where it is illegal.<sup>6</sup> Physicians were confused. How can we be criminally liable and carry out our duty of care for someone seeking an abortion? In fact, the CMPA has never been able to protect us if we were to run afoul of laws in other countries—it is just that we have not confronted that reality on a broad scale until now. To its credit, the CMPA has since engaged in advocacy efforts directed at the federal government and is working with provincial and territorial governments to protect Canadian providers.<sup>7</sup>

In the meantime, what are physicians supposed to do? It would appear that our malpractice liability and our regulatory responsibilities can indeed be at odds with other countries' laws, and we do not have a straightforward answer. The CMPA would argue we need to weigh our own risk tolerance against the unlikely chance of being charged with a crime in the United States.

But there is another risk that we have been talking about less. We have had a sense that rolling back rights, such as abortion rights, cannot happen here, and Americans surely felt that same sentiment until quite recently. Yet, people travel, and so do ideas and ideologies. Perhaps what the reversal of *Roe v Wade* has to teach Canadian physicians is that we have an obligation

to advocate for and protect even those rights that seem untouchable. Legislation that clarifies protections for Canadian physicians cannot come fast enough. 

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#### Competing interests

None declared

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