

Providing abortions to Americans could land Canadian doctors in legal trouble — without CMPA assistance

■ Cite as: *CMAJ* 2022 August 8;194:E1072-3. doi: 10.1503/cmaj.1096010

Posted on cmajnews.com on July 25, 2022

Canadian physicians should not count on assistance from the Canadian Medical Protective Association (CMPA) in foreign legal matters — including those that may arise from providing abortions to Americans in Canada.

The CMPA says it won't assist members facing criminal charges or civil actions in the United States related to elective abortions, even those provided in Canada.

"We are in uncharted territory," says Pamela Eisener-Parsche, executive director of member experience at the CMPA. In the wake of the U.S. Supreme Court overturning *Roe v. Wade*, "the legal landscape is so unclear that it's very difficult to provide any kind of more definitive guidance."

States are enacting a wide range of new restrictions and bans on seeking, providing, or assisting people to access abortions. For example, Texas empowers private citizens, regardless of where they live, to bring a civil suit against anyone who in any way "aids or abets" a Texan obtaining an abortion after six weeks of pregnancy.

Some states also appear to be testing how far these laws can reach beyond their borders, which may open the door for legal action to be brought in U.S. courts against Canadian physicians providing abortions to Americans in Canada.

The CMPA isn't equipped to handle such cases, Eisener-Parsche says. "We do not have the expertise or the reach beyond Canada.

Doctors providing emergency abortions still eligible for CMPA assistance

The only exception is in emergencies, Eisener-Parsche says, for example, "someone who is in the emergency room

with an ectopic pregnancy who clearly needs treatment urgently."

In urgent situations, Eisener-Parsche says, physicians should feel comfortable to "carry on and provide care in the way they generally would," and the CMPA can assist with any foreign legal matters that arise after the fact.

Otherwise, the CMPA is recommending members seek additional liability protection and legal counsel in the U.S. before providing elective abortions to Americans.

If possible, physicians should ensure that non-resident patients complete the CMPA's Governing Law and Jurisdiction Agreement before providing treatment. The document can help establish Canadian jurisdiction in any ensuing legal action, and if the matter is heard in Canada, the case may be eligible for CMPA assistance.

"It's important to remember that abortion is still available in the United States," Eisener-Parsche says. So, a Canadian physician who refuses to provide an elective abortion to a visiting American "is not abandoning that patient."

Doubtful criminal risk for Canadian providers

The CMPA's stance sparked frustration and concern among some physicians on social media.

However, legal experts say the legal risks posed by American abortion laws should be relatively low for Canadian doctors.

"I think the CMPA is acting with an abundance of caution, justifiably, considering how quickly the legal landscape has changed," says Robert Russo a lecturer at the Peter A. Allard School of Law at the University of British Columbia.

Even so, Russo says, "it's doubtful that states can legislate criminal offences extra-territorially, although that point is somewhat in debate in American legal circles."

Any state that tried to reach beyond its borders would face "a lot of political wrangling and tension" over jurisdiction, says Lorian Hardcastle, an associate professor at the University of Calgary's Faculty of Law and Cumming School of Medicine.

"Forget Canada, even trying to criminalize the provision of abortion in another state is likely to cause problems," she says. Not to mention, "there is already a vision of interstate variation" baked into the Supreme Court decision to transfer responsibility for abortion back to the states.

Meanwhile, "there are also a lot of question marks around enforceability," Hardcastle says. "How are they going to get that Canadian doctor down to the U.S.?"

Canada has an extradition treaty with the United States, but that treaty would only apply if abortion was illegal in both jurisdictions.

Doctors who face criminal charges in a certain state could be arrested if they later travelled there and encountered police, says Tonya Kent, a Toronto-based criminal lawyer.

Yet, it's unclear how states would even know to charge a Canadian doctor in the first place, Kent says. "How would American authorities gain access to health care information in another country without the permission of the patient? There would be a lot of steps for American authorities to know an abortion took place, let alone who performed it."

What about the risk of civil action?

According to Russo, the legal picture may be more complicated when it comes to civil lawsuits. “In theory, it’s possible that a doctor outside of Texas, for example, could be sued for performing an abortion on a Texas resident,” he says. “It’s very uncertain whether such a case could succeed and there are likely cases running through the U.S. system now that will test that point.”

The risk of cross-border civil actions has “always been there for doctors who treat foreign patients,” usually in the context of malpractice, Russo notes.

Such cases face numerous hurdles, from disputes over jurisdiction (typically, the law of the country where the act in question occurred is preferred) to challenges in enforcing a judgment.

Given these uncertainties, Hardcastle says it may be premature for the CMPA to wash their hands of offering legal assistance “without even seeing what the states will do.” It’s not even clear yet that many Americans will seek abortions in Canada, she says.

Still, the CMPA’s stance may have a chilling effect on Canadian physicians providing abortions to Americans. “Physicians may just decide not to provide these services to American patients, except perhaps in very narrow, very emergent circumstances,” Hardcastle says.

Kent argues the CMPA has an opportunity to “take a stand to support reproductive justice.” She says the organization should seek advice from cross-border lawyers “to advise doctors appropriately instead of taking a stance that just leaves them out to dry.”

The CMPA, for its part, is urging the federal and provincial governments to ensure liability protection for Canadian physicians providing abortions to American patients.

“We’re really trying to ensure that the government understands that this is an issue they’re going to need to engage with,” says Eisener-Parsche. “This issue is bigger than the CMPA itself can help resolve.”

Lauren Vogel and Diana Duong, CMAJ

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