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Could right to abort be criminalized in Canada?

Jacques Gallant Political Reporter

The United States Supreme Court appears set to overturn its landmark decision in *Roe v. Wade*, which found women have a constitutional right to choose to have an abortion.

That's according to a draft decision from the Republican-appointed majority of the court obtained by Politico, with the final ruling expected in June. Should that happen, states could pass laws making access even more restrictive, or making the procedure illegal outright.

That leads to questions about the differences between abortion access in Canada and the United States, and whether the procedure could ever be illegal here.

Understanding how criminal laws are made in the U.S. vs. Canada

"The single biggest difference" is that criminal law is the purview of each individual state in the United States, whereas in Canada criminal law is the purview of Parliament, said University of Ottawa law Prof. Carissima Mathen.

In order to make abortion illegal in Canada, the federal government would have to introduce a bill to that effect,

which would need to pass both Houses of Parliament.

Could a Canadian government make abortion illegal?

It's "maybe a finer question" to ask whether the Canadian Charter of Rights and Freedoms would prohibit all possible restrictions on abortion, Mathen said. But a law resembling those in some American states that severely restrict access "I think would be manifestly unconstitutional. I don't think that those kinds of laws would be possible in Canada."

University of Waterloo law Prof. Emmett Macfarlane agreed, saying upholding such a law would be "a complete rupture" of how the Supreme Court of Canada has approached the rights to life, liberty and security of the person.

The U.S. Supreme Court will be overturning one of its own decisions if it strikes down *Roe v. Wade*. Couldn't the Supreme Court of Canada do the same some day?

Canada's top court struck down the country's criminal law on abortion - which limited where and under which circumstances the procedure could be

performed - in a landmark decision known as *R. v. Morgentaler* in 1988. Since then, there have been no criminal laws regarding abortion in Canada.

Overturning itself on that decision seems unlikely, Mathen and Macfarlane said. Canada's court has not been plagued by the same kind of partisanship found on the American court, they noted, where there are often two entrenched camps, with many of the Republican-appointed justices voting against arguments in favour of abortion access and same-sex marriage.

Mathen highlighted the example of Canada's court ruling unanimously in favour of striking down the criminal prohibition on medical assistance in dying, in a 2015 case called *Carter v. Canada*. By doing so, the court was overturning itself, departing from a 1993 ruling that had kept the ban in place.

But could access to abortion be further restricted in Canada, even if the procedure remains legal?

Yes. Restrictions already exist in some provinces, as they have jurisdiction over health care. Some of those restrictions are the subject of ongoing court chal-

lenges.

"Provinces can put obstacles in place to abortion because they control the framework in which the medical service of abortion is provided," Mathen said.

"But what provinces absolutely cannot do is they cannot simply prohibit abortion in the way that Parliament could try to do by criminal legislation."