

Opening Remarks and Keynote Address

Dr. Fran Scott, Associate Medical Officer of Health with Toronto Public Health, welcomed the 265 practitioners, academics, students, speakers, and moderators attending the conference from across Canada and beyond. She said recognition of the need for a national forum on public health and the law grew out of the expert reviews and commissions of inquiry that followed the SARS outbreak in Ontario in 2003. Dr. Scott acknowledged the volunteers from many different departments and associations who had helped make the conference a reality, and described the frequent assistance that Toronto Public Health receives from legal counsel.

Dr. David Butler-Jones, Canada's Chief Public Health Officer, quoted Benjamin Disraeli's observation that "the health of the public is the foundation upon which rest the happiness of the people and the welfare of the state." In that context, he described public health as an organized effort to address the challenges a society faces, beginning with recognition of the connections between issues like chronic disease, poverty, public protection, and the way governments function.

One of the lessons from SARS was "the need to refocus on the public's health, to rebuild that foundation which is really essential for the rest of the system," he told participants. "Because like a house, if it doesn't have a sound foundation, you can patch the walls all you want but they will continue to crack. That's what we've seen over the last few decades," partly because of the tendency to take public health and its benefits for granted while the system works well. But he said the last few years have seen "a small sea change in our understanding and appreciation of public health." Key meetings at the federal-provincial and international levels have dealt much more frequently with issues related to chronic disease, infectious disease, and the social determinants of health.

While legislation has been a key tool for public health action, alongside policy, programs, funding, and public information, Dr. Butler-Jones said the last 150 years have seen "tremendous challenges in terms of understanding and applying the principles that allow societies to move forward." At one level, public health is about all the details, from street lights to seatbelts, from alcohol laws to the structure of local school systems. "But at another level, it's really about how a society is organized, and the perspective we bring to that effort."

In the aftermath of SARS, several provinces introduced new public health acts, and Ontario changed the powers of its Chief Medical Health Officer. But Dr. Butler-Jones said the process of preparing the ground is not always about legislation or the courts. There are times when a public health officer must exercise the authority to ban a contaminant or halt the spread of a contagion, but on some issues, it may be more effective to rely on program development or advocacy. The art of public health "is

knowing the distinction, and knowing that nobody's got it 100 percent right yet. That's why it's a team sport, and what a great team sport to be in."

Alongside science, Dr. Butler-Jones said the law "is one of several bases for effective decision-making by public health practitioners. But much as we strive for objectivity, in science and in the law, we know that it is shaped by our culture, experiences, and circumstances." To operate effectively and confront emerging challenges like pandemic influenza—or even seasonal influenza—the public health system relies on collaboration among disciplines, and among federal, provincial, Aboriginal, and local authorities.

Prof. Lawrence Gostin, Associate Dean and Professor of Law at Georgetown University, described Canada's first conference on public health and the law as "joyous for all of us who care so deeply about this field." He recalled his amazement at seeing many billions of dollars spent on medical care, at the same time that community prevention programs received endless scrutiny over amounts that would have been seen as rounding errors in the Medicare budget.

Notwithstanding the renaissance in interest since SARS, anthrax, and the explosion of chronic diseases, public health action is still "politically and publicly underappreciated," partly because of the "rescue imperative" that attaches "a name, a face, a history" to acute care services. "When we think of questions like vaccines, where there isn't one identifiable face we can save, we're less likely to be enamoured of it." Other challenges include:

- The heightened public and political appeal of high technology solutions in fields like microbiology and genetics;
- The invisibility of public health, and the tendency to take it for granted, when it works well;
- A culture of individualism that values personal goods, individual autonomy and choice, personal satisfaction and preference, and free enterprise over public goods like population health and safety.

Prof. Gostin said these factors underlie the need for a theory and a well-articulated vision that assess the potential of the law to protect the public's health and reduce morbidity and premature mortality. That theory begins with a definition of public health law as "a study of the legal powers and duties of the state to assure the conditions in which people can be healthy, that is, to identify, prevent and ameliorate risks to the populations," he said. Based on a recent Institute of Medicine Report on the public's health in the 21st century, he listed a series of factors that affect public health law:

- The primary role of government in delivering population health;
- The importance of partners in business, medicine and health care, media, academia, non-government organizations, charitable foundations, and the community at large;
- A public health focus on populations, compared to the priority medicine attaches to the individual patient;
- A public health interest in communities, civic participation, and healthy behaviours;

- A primary orientation toward preventing injury, disease, and disability;
- An aspect of social justice.

Prof. Gostin added that a systematic understanding of public health law requires an understanding of two key terms: the public's health, and the common good. The word "public" in public health simultaneously signals the government's primary responsibility for service delivery and the population's right to expect a reasonable level of public health protection. Public health often shies away from "intensely political" questions about the services that should be delivered, to whom, and how well, but Prof. Gostin said that is a mistake. "I believe there are politicians who do understand that their primary role is to serve the community, and [the first priority] is the health of that community."

But public health would also benefit from a "vibrant definition" that places the common good as more than the sum of individual interests. "A non-aggregative understanding of public goods recognizes that everyone has a stake in living in a society that regulates risks that we all share," he said. "Individuals have a stake in healthy, secure communities where they can live in peace and well-being. Consequently, people may have to forego a little bit of self-interest in exchange for the protection and satisfaction gained from healthier, safer communities."

Public health also has its own understanding of "the good," a term that medicine defines purely in terms of a patient's wants and needs. "In public health, the meaning is much less clear," Prof. Gostin said. "Who gets to decide which value is more important, liberty or health? If individuals get to decide whether to, say, acquiesce to a vaccine, it will result in the tragedy of the commons," leading to a role for public health in preventing behaviours that bring risk to society.

The ideal of social justice as a foundation of public health, in turn, is grounded in the "twin moral impulse" to advance human well-being while focusing on the needs of the most disadvantaged. He recalled international discussions around pandemic flu preparedness that had focused in large part on questions of distributive justice, beginning with the ethical criteria for allocating scarce supplies of vaccines or antiviral medication. "When we treat the poor, the vulnerable, and the disadvantaged unfairly, it signals that the basic needs of vulnerable populations don't matter as much, that we don't give them equal respect. That is a very divisive and corrosive message."

Prof. Gostin cited seven models of legal intervention that governments can use to assure the conditions for people to be healthy:

- Taxing and spending, to create incentives or disincentives for specific behaviours;
- Altering the information environment, using publicity campaigns to shape lifestyle choices or timely disclosure to shift commercial product offerings;
- Altering the built environment, since information campaigns will have limited impact on households with limited access to healthy alternatives;
- Altering the socio-economic environment, in our own society and others;
- Direct regulation, an activity often presented as the only role for public health;

- Indirect regulation through the court system, exemplified by recent U.S. litigation against tobacco, firearms, and fast food;
- Deregulation, in cases where criminalization of certain products or behaviours becomes a barrier to public health initiatives.

Recent regulations and conventions developed by the World Health Organization have brought some of these instruments to the international level. “Ill health is truly a global problem,” Prof. Gostin said. Health hazards like SARS “inexorably spread to countries, regions, and even continents. Peoples’ lives are profoundly affected by commerce and politics, by technology from all over the world,” and global interdependence is heightened by trade in products, concepts, ideas, and values. For all of those reasons, “it is critically important that we think of public health now not simply in municipal, local, provincial, or national terms,” but in a transnational context.

With public health becoming “a matter of high politics” around the world, it is also clear that health “can be achieved only through collective action, not individual endeavour,” Prof. Gostin said.

“Meaningful protection requires a communal effort,” he stressed. Only the community as a whole has a stake in environmental protection, hygiene and sanitation, clean air and surface water, uncontaminated surface and drinking water, safe roads and products, and the control of infectious disease. “These essential conditions of health are critically important, yet these benefits can only be achieved through organized action on behalf of the people.”

This sense of partnership, citizenship, community, and international co-operation received insufficient attention through the late 20th century, as neo-liberalism flourished in North America, Western Europe, and within the international system. “We need to recapture a classic tradition that emphasizes communal obligations as well as self-importance,” Prof. Gostin said. Alongside the responsibility to protect individual entitlements, “we also have an obligation to protect and defend the community against threats to health, safety, and security.”

Questions and Discussion

A participant recalled a recent magazine article that traced the collapse of public health in the United States. He said he had been surprised to learn that no single agency in the U.S. was responsible for public health, and asked whether Canadians should be concerned that its closest neighbour is so vulnerable to deadly disease.

Prof. Gostin replied that “multiple levels of criticism” can be levelled at the U.S. government, and cited food regulation as an example of the fragmentation of public health agencies: while the Food and Drug Administration would have authority over a plain pizza, he said a pepperoni pizza would fall under the Department of Agriculture, while the Department of Commerce would get involved if the toppings included

anchovies. During the 1993 cryptosporidium outbreak in Milwaukee, it became clear that no one jurisdiction had authority to issue or remove a boil-water advisory.

A second problem “is simply the lack of funding,” Prof. Gostin said. “Less than one percent of your health dollar in the U.S. goes to population health and prevention, which is a serious problem.” More money has gone into the system in response to specific issues like anthrax, smallpox, and pandemic flu. But “rather than strengthening the systematic infrastructure of public health, it’s focused on the disease du jour,” Prof. Gostin said. “It’s been too responsive to these single events, rather than having a strong, sustained public health activity.”

Dr. Butler-Jones noted that form often drives function, rather than following on it. While the U.S. has the Centers for Disease Control and Prevention as its national public health agency, a great deal of authority rests with a multitude of other regulatory agencies, and with state and local governments. He said the formation of a central public health agency has given Canada a window on the global effort to develop common approaches, better regulations, and more consistent responses to public health problems. “We’re starting down the right road, but there are some very strong structural challenges as we do so.”

A participant said public health is invisible because too many public health practitioners believe it should be. He asked the two speakers to comment on the criteria for treating specific public health issues as a basis for litigation rather than public education.

Dr. Butler-Jones said the impact of legal provisions may be merely symbolic in the absence of public acceptance and a willing enforcement authority. The most important criteria are timing and a supportive environment, but “there’s no hard and fast rule. Sometimes the most effective legal response is not to enforce it,” using the law to make a point while still “understanding where people are coming from and what their motivations are.”

Prof. Gostin agreed that public health is the art of knowing when to take the next step. “We know that behaviour is one of the leading causes of chronic disease, in terms of sedentary lifestyles,” he said. “On the other hand, it’s not like an infectious disease, where governments’ legitimacy in intervening is very clear to everyone.” He said public health will be working in the political environment over the next five to 10 years to see how far it can go, and “it will be very interesting to see where that leads.”