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Mandatory Blood Testing: A Personal Perspective and Overview of Canadian Legislation

Canadian Conference on
The Public's Health and the Law
Panel Presentation November 7, 2006
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Overview of Presentation

- **Recommendations of 2004 Uniform Law Conference**
- **Current / proposed legislation in Ontario**
- **The Good Samaritan in Ontario**
- **Review of legislation in other provinces**
- **Review of federal legislative efforts**



2004 Uniform Law Conference

- Identified and addressed gap in law – individuals exposed to risk of infection have no means to compel sample from source individual
- Particular concern for ESWs, Police / Correctional Officers
- Acknowledged *Charter* protected rights to privacy and security of the person for source individual are engaged



2004 Uniform Law Conference Cont.

- **Determined that source individual's *Charter* rights attenuated, or lessened, if:**
 - committing a crime
 - receiving benefits of emergency health care services
 - during prescribed situations
- **Why? Because risk to exposed individual resulted from source's own actions or from source receiving a benefit of ER health care.**
 - Strong policy reasons to ensure good Samaritans and ESW's and others continue to provide emergency health care



2004 Uniform Law Conference Cont. – Uniform Act

- ***Uniform Mandatory Testing and Disclosure Act* was adopted as a ‘uniform act’**
- **Recommended to each jurisdiction for enactment**
- **Outlined a compulsory mechanism to obtain sample for testing, if:**
 - contact in specified circumstances
 - infection likely due to nature of exposure
 - testing exposed person would not determine infection status accurately and quickly



2004 Uniform Law Conference Cont. – Uniform Act Cont.

- **Application for a testing order is to a Medical Officer of Health**
- **Restricts the use of bodily samples and derived information to protect privacy of source individual**
- **It is an offence to:**
 - not comply with a testing order
 - use or disclose bodily samples or derived info for unauthorized purposes
- **Costs borne by exposed individual**



Ontario – Current Legislation

- **s. 22.1 of the *Health Protection and Promotion Act (HPPA)***
- **Any person may apply to MOH for order if contact with bodily substances in context:**
 - victim of crime or
 - providing emergency health services
- **And the applicant:**
 - may have been infected with a prescribed communicable disease w/ lengthy incubation period
 - applicant has submitted a physician report to MOH within 7 days of contact
 - taking sample will not endanger health of source



Ontario – Current Legislation Cont'd

- **MOH has up to 7 days to obtain blood sample voluntarily from source and/or may then order person to provide sample**
- **MOH's decision can be appealed to Chief MOH by applicant or to HSARB by respondent**



The Nice Guy's experience

- **Oct. 3, 2005: Fellow commuter on Go Train experiences seizure – about 10 p.m.**
- **During emergency first aid a penetrating bite wound: exposure to blood and saliva**
- **Ambulance arrives and ill passenger taken to hospital**
- **Oct. 4, 2005: attendance at E.D. for counseling re risks of exposure, base line testing, prophylactic treatment options and next steps**



The Clock is Ticking

- **Oct. 5: legal research re HPPA s. 22.1 – what's required?**
- **Oct. 5: Getting the MD's report form to the doctor**
- **Oct. 6: Obtain completed MD report and some base line test results**
- **Oct.6: Contact with MOH in region where exposure occurred**



Mandatory conditions for application

- **Must be received by MOH in “appropriate health unit” no more 7 days post occurrence (Oct 12)**
- **Appropriate health unit is where source individual resides**
- **Must include the name and address of the respondent**
- **Applicant must consent to release of personal health information**
- **Applicant must consent to examination, counseling and base line testing but not prophylactic treatment**

Effect of failure to meet any one of mandatory conditions

- **If any one condition is not met, the application is invalid and shall be dismissed by MOH: O.Reg. 166/03, s. 7(2)**
- **How does the Good Samaritan comply with mandatory condition requiring name and address of respondent?**
- **This case: source individual incoherent due to seizure**

Steps taken to determine respondent's identity

- **Oct. 6: contact Go Transit – no incident report**
- **Oct. 6: contact Director of Regional Ambulance Service requesting disclosure of respondent info under s. 40 of PHIPA**
- **Oct. 6: contact MOH in Region where exposure took place asking him to collect information under s. 39(2) of PHIPA**
- **Oct. 7: Above conferring with legal counsel**



The Clock keeps ticking . . .

- **Nice guy's wife researching various ways to allow lawful disclosure under PHIPPA, MFIPPA**
- **Oct. 7: Regional Ambulance Service decides not to disclose information**
- **Clear that authorities know identity of source individual but feel constrained by privacy legislation**



The Application is due Oct. 12

- **Oct. 11: Informed by MOH in exposure region that there is no way to disclose information to applicant**
- **Oct. 12: Application is submitted but without the name and address of source individual**
- **Oct. 17: Letter from MOH in exposure region indicating that unit is not “appropriate unit”**

The response is

- **Although not appropriate unit, that office received information under s. 39(2) of PHIPPA re name and address of source individual**
- **Mandatory referral to appropriate unit**
- **Oct. 17: Letter from MOH in source's unit dismissing application – for failure to comply with mandatory condition – no name and address of source individual**



An appeal to the Chief MOH?

- **By Oct. 17, time to obtain benefits of any prophylactic treatment is long gone**
- **Appeal must be launched within 5 days**
- **If any mandatory condition not met, dismissal is confirmed**
- **Does good Samaritan enjoy equal benefit under the law?**



Ontario – Proposed *Mandatory Blood Testing Act*, 2005

- **Bill 28: completed 2nd reading June 13, 2006**
- **Proposed application process**
 - Initial application to MOH within 7 days of exposure
 - ◆ MOH can only request (not order) sample
 - If after request no sample provided within 2 days, MOH must refer application to CCB
 - CCB must hold hearing within 7 days and render decision within 1 day
 - CCB has authority to order sample
 - If no compliance with order, application to judge of SCJ can be made

Ontario – Proposed *Mandatory Blood Testing Act*, 2005 - Cont.'d

- **Same context as current statute:**
 1. victims of crime,
 2. providing emergency first aid or health care services,
 3. in the course of his or her duties, if the person belongs to a prescribed class, or
 4. involved in a prescribed circumstance or while carrying out a prescribed activity



Ontario – Proposed Legislation Cont.

■ CCB decides, on reasonable and probable grounds, whether:

- the indiv. may have been infected due to exposure
- due to nature of infection testing of exposed indiv. will not accurately and timely identify an infection
- the taking of a blood sample will endanger the life of the source individual
- an application to a MOH was made within 7 days of exposure – what application requires to be determined by regulation
- the taking and analysis of a blood sample is necessary to decrease or eliminate risk to the health of the exposed individual



Ontario – Summary of Main Differences Between Current and Proposed Legislation

- **length of time under proposed legislation from application to order is considerably shorter (max 10 days) to order)**
- **CCB rather than MOH has power to make an order for a blood sample**
- **Hearing required**
- **CCB's decision is final – no right of appeal**



Nova Scotia - *Mandatory Testing and Disclosure Act*

- **June 1, 2006, came into force**
- **Applications are made to the court and may be appealed to the NSCA**
- **Protects individuals providing emerg first aid, victims of crime and prescribed duties (ie. fire fighter, peace officer)**
- **Testing order requires source individual to attend to provide sample within specified time**
- **The MOH co-ordinates the collection/analyzing of the sample**

Alberta - *Mandatory Testing and Disclosure Act*

- Awaiting proclamation
- Repeals *Blood Samples Act* passed in 2004 but never proclaimed
- Applications are made to provincial court for testing order
- Same context: protects indiv. providing emerg. first aid, firefighters and peace officers or while being involved in a circumstance or activity described in the regulations (yet to be drafted)



Saskatchewan - *Mandatory Testing and Disclosure (Bodily Substances) Act*

- **Came into force on October 17, 2005**
- **Applications are made to court for a testing order and may be appealed on a question of law to CA**
- **Same context: protects indiv. providing emerg. first aid, victims of crime and those performing prescribed function (not further defined in regs) where the source indiv. has refused to provide a sample**

British Columbia

- **February 27, 2006, first discussions in Parliament re: introducing mandatory blood testing legislation**
- **Preliminary discussions only**
- **Envisions protection afforded to health care workers, emergency services workers, correctional and police services officers and Good Samaritans**

Quebec

- **Amendments to Public Health Act**
- **Emphasis on protection of privacy**
- **Prohibition on ordering testing**
- **With exception of blood transfusions and donations of human tissue, testing can only be carried out with consent of source individual.**

Federal Proposed Legislation

- **Bill C-452 provides for mandatory blood testing to protect good Samaritans, emergency services workers who provide assistance in certain contexts and provides for amendments to Criminal Code to protect persons administering and enforcing the law**
- **Ensures access to mandatory blood testing throughout Canada regardless of status of legislation in each province.**
- **Applications are made to a justice for a warrant , which authorizes blood sample for express purpose of analyzing for Hep B, Hep C or HIV.**



Federal Proposed Legislation – *Criminal Code Amendments*

- **Bill C-452 proposes to incorporate provisions into the *Criminal Code***
- **CC provisions for persons performing “designated function”:**
 - defined as peace officers, security officers or in the course of any act under CC s. 494



Summary

- **Ontario's statutory framework changing**
 - The regulations, not yet drafted, will determine the full extent of who is protected by the legislation and whether application process is anything more than disincentive
- **Saskatchewan and Nova Scotia have legislation in force**
- **Alberta's legislation is awaiting proclamation; BC under consideration**
- **Quebec exceptional approach**
- **Federal legislation for gaps in provincial law**



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Thank You!

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