UNIFORM MANDATORY TESTING AND DISCLOSURE ACT

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INTRODUCTION AND OVERVIEW

Under current law, an individual exposed to the risk of communicable disease infection (an "exposed individual") through contact with another individual (a "source individual") does not have an efficacious means to compel the source individual to provide a bodily sample for assessment and treatment purposes. The lack of this type of legal mechanism is a particular concern for emergency services providers, peace officers, and correctional officers. They may be exposed to risks of communicable disease infection in the course of their work, but source individuals may not consent to provide bodily samples for analysis.

This Act creates a procedure for the compulsory taking of bodily samples, the analysis of those samples, and the disclosure of personal health information derived from the analysis. Source individuals' *Charter*-protected rights to privacy and security of the person are engaged. The Act, however, applies only if the exposed individual came into contact with a bodily substance of the source individual in specified circumstances – e.g., as a crime victim, or while providing emergency services to the source individual. In these circumstances, source individuals' privacy interests are attenuated, since the risks to exposed individuals were created through their own actions or through their receiving the benefits of emergency or health care services. Balanced against source individuals' interests are the interests of exposed individuals, the interests of other individuals, and the public interest in their health and well being. Risk assessments relating to these interests involve consideration of both probability and magnitude: while the risks of transmission of particular microorganisms or pathogens may be small, the consequences of transmission may be grave. An overarching contextual factor is that the information gathered through the Act's procedure is to be used for individuals' health purposes only, and not for criminal prosecutions or civil litigation.

The procedure established by this Act respects and reflects source individuals' rights and the interests of exposed individuals and the public. The procedure is commenced by an application in the provincial superior court by an exposed individual. The application is on notice to the source individual, unless the exposed individual can establish that giving notice is impossible or impracticable. The application must be supported by evidence of the contact circumstances and a report made by a qualified physician. The judge has the discretion to make a testing order if satisfied of the following: contact occurred in specified circumstances; the applicant likely became infected as a result of the contact; testing the exposed individual would not determine infection status accurately and quickly; taking a bodily sample would not endanger the source individual; the information would not reasonably be available without compulsory testing; and testing the source individual is necessary to decrease or eliminate the risk to the exposed individual's life or health.

The testing order is directed to a medical officer of health. This medical officer ensures that a bodily sample is taken from the source individual by a qualified health professional, the sample is analysed by a qualified analyst, and the derived information is provided to the exposed individual and his or her physician, and the source individual and his or her physician.

The Act restricts the use of bodily samples and derived information. It also requires that any information about the exposed individual or the source individual obtained through carrying out responsibilities under the Act be kept confidential. Unauthorized use or disclosure of bodily samples or information is an offence. The Act creates a form of statutory privilege, should an individual be compelled to give evidence.

The Act establishes a right of appeal and a right to apply for a stay of a testing order, pending appeal.

Disobeying a testing order is an offence.

The costs of the application and conducting testing and analysis are borne by the exposed individual.

The Act contains additional ancillary provisions, concerning, *inter alia*, assistance provided by public health officers and peace officers, service of documents, immunity from liability for persons who have carried out responsibilities under the Act in good faith, regulation-making authority, and the paramountcy of the Act over other provincial legislation.

The Act does concern issues that may arise in circumstances to which the criminal law applies – e.g., a risk of infection may arise during an arrest. But because the focus of the Act is on the health of exposed individuals and source individuals, and the collection, use, and disclosure of health information within provinces, this Act falls within provincial legislative jurisdiction.

Short title

1 This Act may be cited as the *Uniform Mandatory Testing and Disclosure Act*.

Comments:

This is not a “Blood Samples Act”. It is not targeted at one type or some few types of disease. Neither does it contemplate the performance of only one type of medical test.

Interpretation

2 In this Act:

(a) “applicant” means an individual who applies for a testing order pursuant to section 3;

(b) “chief medical health officer” means the chief medical health officer appointed pursuant to [*enacting jurisdiction to insert appropriate title of officer and title of public health legislation]*;

(c) "court" means [*superior court of enacting jurisdiction*];

(d) "department" means [*enacting jurisdiction to insert appropriate name or description of department*];

(e) "guardian", in relation to an individual, includes a person who stands *in loco parentis* to the individual;

(f) "jurisdictional area" means the area within [*name of enacting jurisdiction*] in which a local authority has jurisdiction for the purposes of [*title of public health legislation of enacting jurisdiction*];

(g) "local authority" means a local authority as defined in [*title of public health legislation of enacting jurisdiction*];

(h) "medical health officer" means a medical health officer appointed pursuant to [*enacting jurisdiction to insert appropriate title of officer and title of public health legislation*];

(i) "minister" means [*enacting jurisdiction to insert appropriate title or description of minister*];

(j) "minor" means an individual who:

(i) is less than 14 years of age; or

(ii) is 14 years of age or more but less than 18 years of age and, in the opinion of the court, is unable to understand the nature and effect of a testing order;

(k) "physician report" means a report described in section 4;

(l) "prescribed" means prescribed in the regulations;

(m) "public health officer" means a public health officer appointed pursuant to [*enacting jurisdiction to insert appropriate title of officer and title of public health legislation*];

(n) "qualified analyst" means, with respect to the conduct of any analysis required by a testing order, a person who:

(i) holds the prescribed qualifications for conducting that type of analysis; and

(ii) in the case of any type of analysis that must, by law, be carried out by a licensed professional, holds a valid licence to practise that profession in [*name of enacting jurisdiction*];

(o) "qualified health professional" means a member of a prescribed health profession who holds a valid licence to practise that profession in [*name of enacting jurisdiction*];

(p) "source individual" means an individual from whom a sample of a bodily substance is sought for the purposes of testing;

(q) "testing order" means an order described in subsection 5(2).

Comments:

s. 2(a), "applicant": The exposed individual, and not a representative party (such as a public health official) is the applicant. Read in conjunction with s. 3, only the exposed individual, and not other individuals who may have had contact with the exposed individual, are entitled to make the application.

s. 2(c), "court": The application is made to a judge of the superior court, rather than to a provincial court judge, a justice, or a public health official. The dedication of these applications to superior court judges accomplishes several purposes. First, it helps preserve the distinction between the public health system and the justice system. Public health officials are not forced into adjudicative roles – for which, regardless of the appropriateness of the assignment, they may be suited neither by training nor inclination. Moreover, public health offices do not have institutional experience as receivers and coordinators of applications, as do offices of clerks of the court. Second, the dedication to superior court judges (as in the case of applications under s. 185 of the *Criminal Code*) confirms the seriousness of the issues at stake.[1] It also is a means of reinforcing that applications are civil in nature, since provincial court judges may be more closely associated with criminal litigation than civil litigation respecting health information. Finally, the dedication to superior court judges reinforces the independence and impartiality of the adjudicator.

s. 2(j), "minor": The general rule is that a parent or guardian of a minor must be fitted into the testing order process. This provision relies on the "mature minors" doctrine, and permits a minor to be solely involved, if he or she is age 14 or older and able to understand the nature and effect of a testing order. A presumption of "maturity" for minors over 14 is created; a parent or guardian is fitted into the process only if, in the opinion of the court, the minor is unable to understand the nature and effect of a testing order. Evidence of lack of "maturity", then, would have to be before the court to support this finding. The other provisions relating to minors are ss. 5(3), 6(2), 7(2), 10(1)(c), and 17(2)(f).

s. 2(m), "public health officer": Public health officers are commonly appointed by local (municipal) authorities. However, this may not be true in all jurisdictions. They might be appointed by the board of a health region or district or they might be appointed provincially. Enacting jurisdictions will have to make appropriate adjustments. We have drafted on the basis of the Saskatchewan model, in which local authorities (municipalities for the most part) appoint medical health officers

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[1]It may be constitutionally permissible for these applications to be heard by provincial court judges; enacting jurisdictions concerned with issues of application expediency or practicality may wish to consider this option. Applications for forensic DNA warrants are heard by provincial court judges. The Supreme Court has held that this is an adequate recognition of the seriousness of the issues at stake. R. v. S.A.B., 2003 SCC 60, Arbour J., para. 38.

and public health officers pursuant to *The Public Health Act, 1994*, and in which there is no connection between this system and the system of health regions and regional health authorities established by *The Regional Health Services Act*.

Application for testing order

3(1) An individual may apply to the court for a testing order if the individual:

(a) has come into contact with a bodily substance of another individual:

(i) as a result of being a victim of crime;

(ii) while providing emergency health care services or emergency first aid to that individual; or

(iii) while performing any prescribed function in relation to that individual; and

(b) as a result of that contact might be infected with a microorganism or pathogen that causes a prescribed communicable disease.

(2) Subject to subsection (3), an application must be made on three days' notice to the source individual.

(3) An applicant may apply for a testing order without notice to the source individual if the applicant satisfies the court that, in the circumstances of the case, giving notice to the source individual within a reasonable time is impossible or impracticable.

(4) An application:

(a) must set out the circumstances in which the applicant came into contact with a bodily substance of the source individual;

(b) must be accompanied by a physician report; and

(c) must meet any other requirements set out in the regulations.

Comments:

s. 3(1): The application is made by an exposed individual, not by any representative party. He or she must take the initiative to make the application, and he or she must bear the costs of the application, service, testing, and analysis – see s. 13.

Subsection 3(1) is engaged if the applicant has come into contact with a "bodily substance" of another individual. The use of the term "bodily substance" is preferable to a more restrictive "contact with blood" approach. The substance may be blood, or saliva, urine, or other substance.

The application would be commenced by the appropriate pleading under the local rules of court. Enacting jurisdictions should take care to ensure that the application entails only a summary procedure and does not initiate a civil action.

No limitation period (a set number of days after exposure) is established. The amount of time that elapses after exposure and before the application would certainly be relevant to the need for and value of mandatory testing.

s. 3(1)(a): This paragraph specifies the "contact circumstances" supporting the availability of the mandatory testing and disclosure process. Read in conjunction with s. 5(1), an applicant must provide reasonable grounds for the finding that (i) he or she was a victim of a crime, (ii) the exposure occurred while the applicant was providing emergency services to the source individual; or (iii) the exposure occurred while the applicant was performing a "prescribed function." Since the guilt of an accused is not at stake, whether a crime was committed need not be established beyond a reasonable doubt. Many types of contact circumstances would be captured by subparagraphs (i) and (ii). Subparagraph (i) would apply to exposures in policing and correctional contexts, if (e.g.) an officer were the victim of an assault. Subparagraph (ii) would apply not only to professional emergency service providers (e.g., firefighters, EMT, paramedics, health services workers, police), but also to Good Samaritans. Subparagraph 3(a)(iii) leaves other contact circumstances to be specified by regulation (see s. 20(d)). Other contact circumstances could include contact in policing or correctional contexts, if an officer were not the victim of an assault (e.g., if the exposure occurred when the officer broke up a fight between other individuals).[2]

The relevant contact is with a bodily substance of the source individual, not merely that person's blood. Bodily substances would include blood, saliva, and other substances.

s. 3(1)(b): This paragraph identifies relevant medical risks. This paragraph does not limit risk to viral exposure events. The exposure may be to "a microorganism or pathogen." The purpose of this Act is to manage risks of disease exposure generally, not the risks of specific viral infections, such as HIV/AIDS. The microorganism or pathogen must cause a "prescribed communicable disease." The Act does not limit its scope to particular diseases of current concern – it is difficult to predict which diseases will be of greatest future concern. The Act leaves the relevant diseases to be specified in regulation. The list of diseases prescribed under public health legislation would be relevant to the determination of which diseases should be prescribed under the Act. The term "prescribed communicable disease," however, is not defined to include (automatically) the same diseases prescribed or regulated by public health legislation. The diseases prescribed for the purposes of this Act may include some but not all diseases falling under public health legislation.

[2] Alberta's recently enacted Blood Samples Act, S.A. 2004, c. B - 4.5, not yet proclaimed in force, deals with the issue of professional exposures by referring to contact that occurred "while fulfilling duties as (A) a firefighter, (B) a peace officer, or (C) a police officer:" s. 4(2)(a)(ii).

ss. 3(2), (3): Subsections 3(2) - (4) create procedural rules. The application is made to a superior court judge: see s. 2(c). The use of a judge as decision-maker guarantees independence and impartiality or neutrality, and, as indicated above, requiring the application to be made in the superior court emphasizes the seriousness of the application.

In keeping with natural justice, s. 3(2) provides that the application is presumptively on notice to the source individual. Pursuant to s. 3(3), however, notice may be dispensed with if the applicant shows that giving notice is "impossible or impracticable." Considerations relevant to testing and prophylactic treatment may militate against providing notice, for example.

s. 3(4): The application must be supported by evidence. An affidavit of the exposed individual will typically be required. The contact circumstances must be set out. Furthermore, the application must be accompanied by a physician report, described in the next section.

Other application details are left to be established by regulation (see s. 20(e)). These might include, for example, the establishment of standard forms for the application process.

Physician report
4(1) A physician report required for the purposes of section 3:

- **(a) must be made by a physician who possesses the prescribed qualifications;**
- **(b) must assess the risk to the health of the applicant as a result of the applicant's contact with a bodily substance of the source individual; and**
- **(c) must meet any other requirements set out in the regulations.**

(2) For the purposes of preparing a physician report, a physician may require the applicant to submit to an examination, testing, counselling or treatment.

Comments:
s. 4(1): The requirement for a physician's report (s. 3(4)(b)) confirms that the application must be supported by objective medical evidence, and not by mere speculation, myth, or emotion.

The presupposition of this section – and, indeed, of the Act as a whole – is that the individual and social interests in the health of exposed individuals (and those who might in turn be infected by them) warrant limiting the privacy interests of source individuals. But while health concerns relating to exposed individuals could, in the abstract, support testing and disclosure, it is necessary that in a particular case the particular risk to the particular exposed individual be established; and it is necessary that in a particular case the need for testing and disclosure be established. The

physician report bridges the gap between the general interest in managing health risks and the interest in managing the risk of a particular exposure.

s. 4(1)(a): The report must be prepared by a physician with the "prescribed" qualifications (see s. 20(f)). Only properly qualified physicians are to be authorized to provide these reports – that is, physicians with the requisite experience or formal background concerning communicable diseases.

s. 4(1)(b): The report must contain an opinion respecting the health risks to which the exposed individual has been exposed through the contact circumstances. For the report to support an order for testing and disclosure, the report should also deal with the matters described in ss. 5(1)(c), (d), and (e). Additional evidence, not set out in the physician report, could also be tendered in relation to these matters.

s. 4(2): The applicant himself or herself must submit to testing, counselling, or treatment. If it can be determined from this testing whether or not the applicant has been infected, then the testing and disclosure order would not be necessary. If testing of the exposed individual does not or cannot yield satisfactory diagnostic information, then support is provided for testing the source individual.

Testing order

5(1) On an application pursuant to section 3, the court may make a testing order if the court is satisfied that:

(a) the applicant has come into contact with a bodily substance of the source individual in one of the circumstances described in clause 3(1)(a);

(b) there are reasonable grounds to believe that the applicant might have become infected with a microorganism or pathogen that causes a prescribed communicable disease as a result of the contact;

(c) having regard to the incubation periods for the prescribed communicable disease and the methods available for ascertaining the presence of the microorganisms or pathogens in the human body, an analysis of the applicant's bodily substances would not accurately determine in a timely manner whether, as a result of the contact, the applicant has become infected with a microorganism or pathogen that causes a prescribed communicable disease;

(d) taking a sample of a bodily substance from the source individual would not endanger the source individual's life or health;

(e) the information to be obtained by the proposed testing cannot reasonably be obtained in any other manner; and

(f) having regard to the physician report submitted by the applicant, the testing order is necessary to decrease or eliminate the risk to the health of the applicant resulting from the contact.

(2) A testing order must require the source individual:

(a) within the time specified in the order, to allow a qualified health professional to take from the source individual a sample of any bodily substance specified in the order for the purpose of determining whether the source individual is infected with a microorganism or pathogen that causes a prescribed communicable disease; and

(b) for the purposes of fulfilling the requirement described in clause (a), to comply with any directions of a medical health officer pursuant to subclause 6(1)(d)(ii).

(3) If the source individual named in a testing order is a minor, the testing order must require a parent or guardian of the source individual to take all reasonable steps to ensure that the source individual complies with the testing order.

(4) A testing order may contain any additional directions that the court considers necessary.

(5) If the court makes a testing order, the local registrar shall immediately forward a copy of the order and all documents relating to the application:

(a) to the medical health officer of the health region in which the source individual resides; or

(b) if the place of residence of the source individual is not known, to the chief medical health officer.

Comments:

s. 5(1): Under s. 5(1), the judge must be "satisfied" of the requisite facts – i.e., the standard is the balance of probabilities. Paragraphs (a) - (c) were referred to in the Comments on s. 4.

s. 5(1)(d): Testing is appropriate only if it would not endanger the source individual. The provision aids in balancing the deleterious effects of the privacy limitation against its benefits.

s. 5(1)(e): This paragraph establishes a type of "investigative necessity" criterion (similar to s. 185(1)(h) of the *Criminal Code*). It elevates privacy protection for the source individual. It should be noted that the forensic DNA warrant regime in the *Criminal Code* lacks this particular protection. Nonetheless, that regime was held to be constitutional by the Supreme Court.[3] Evidence will be required on the lack of reasonable alternatives. As indicated above, the physician's report could deal with this issue.

s. 5(1)(f): Again, as indicated above, the physician's report could also deal with the issue of the linkage of the testing to positive health outcomes for the exposed

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[3]S.A.B., supra note 1 at para. 54.

individual. This paragraph confirms that testing is to be ordered only if the evidence establishes that it will promote the exposed individual's health.

ss. 5(2) - (4): These provisions set out the contents of a testing order.

s. 5(3): See the comment respecting s. 2(j).

s. 5(5): This subsection governs the initiation of the testing, analysis, and disclosure process. The bridge between the adjudication in the justice system and the testing and analysis is the medical health officer. Orders do not directly require persons (e.g. physicians) to perform testing. Instead, an order is forwarded to the medical health officer of the region in which the source individual resides or, if the source individual's residence is unknown, to the chief medical health officer. Routing the order through the medical health officer might be perceived to add steps to the testing and disclosure process. It is a means, however, for providing coordination and oversight for the testing and disclosure process by a knowledgeable professional, and for ensuring that the testing and disclosure steps are carried out in a reasonable manner. The medical health officer should be a person with some experience in administering testing; and the testing and analysis contemplated by the Act is similar to the types of testing and analysis that could occur in other public health contexts.

The term "local registrar" is used in s. 5(5); enacting jurisdictions should substitute their appropriate terms.

Responsibilities of medical health officer

6(1) On receiving a testing order pursuant to clause 5(5)(a), a medical health officer shall:

(a) designate a qualified health professional to take from the source individual a sample of any bodily substance specified in the testing order;

(b) designate one or more qualified analysts to conduct tests on the sample obtained from the source individual and specify the tests to be conducted;

(c) provide directions to the persons designated pursuant to clauses (a) and (b); and

(d) subject to subsection (2), serve the source individual with a copy of the testing order and a notice that:

(i) sets out the name and address of the qualified health professional designated by the medical health officer; and

(ii) gives directions to the source individual respecting the manner in which he or she must comply with the testing order.

(2) If a source individual is a minor, a medical health officer shall serve a parent or guardian of the source individual with a copy of the testing order and the notice described in clause (1)(d).

Comments:

As indicated, the medical health officer plays a central role in the execution of the order. He or she designates the health professional to extract the sample, the analyst to test the sample, and gives the appropriate notice of the testing procedures to the source individual. Under s. 9(1)(b), the results of the analysis are returned to the medical health officer. Then, under s. 10(1), the medical health officer furnishes the results to the applicant, the applicant's physician, the source individual, and the source individual's physician.

Responsibilities of chief medical health officer

7(1) On receiving a testing order pursuant to clause 5(5)(b), the chief medical health officer may require any medical health officer to carry out the responsibilities of a medical health officer pursuant to section 6 with respect to that order.

(2) If a medical health officer who receives a testing order pursuant to clause 5(5)(a) is unable to serve the source individual in accordance with clause 6(1)(d), or the parent or guardian of a source individual who is a minor in accordance with subsection 6(2):

(a) the medical health officer shall advise the chief medical health officer of that fact; and

(b) the chief medical health officer may require any other medical health officer to carry out the responsibilities of a medical health officer pursuant to section 6 with respect to that order.

(3) A medical health officer acting pursuant to subsection (1) or (2) may exercise the powers of a medical health officer anywhere in [*name of enacting jurisdiction*].

Comments:

The chief medical health officer becomes involved in the testing order process in two ways. First, under s. 5(5)(b), if the residence of a source individual is unknown, the testing order is directed to the chief medical health officer; under s. 7(1), the chief medical health officer may direct a medical health officer to carry out the s. 6 responsibilities. Second, if the source individual's residence is known, but the medical health officer is unable to serve him or her, the chief medical health officer may direct another medical health officer to carry out the s. 6 responsibilities. The presupposition of s. 7(2) is that some other medical health officer could carry out those responsibilities – as when a source individual is resident in one part of the province, but is working in another.

Responsibilities of qualified health professional

8(1) A qualified health professional designated by a medical health officer pursuant to clause 6(1)(a) must:

(a) take from the source individual a sample of any bodily substance specified in the testing order and deal with the sample in the manner directed by the medical health officer; and

(b) deliver the sample to a qualified analyst designated by the medical health officer for the purpose of having the sample analysed.

(2) A qualified health professional who takes a sample of a bodily substance from any individual pursuant to a testing order shall not use the sample in any manner other than the manner specified in the order or for any purpose other than the purposes of the order.

Comments:

The role of the qualified health professional is to take a bodily sample from the source individual, then deliver the sample to a designated qualified analyst.

Subsection 8(2) restricts the use of the sample to use for the purposes of the testing order. Violation of this provision would be an offence under s. 21.

Responsibilities of qualified analyst

9(1) A qualified analyst designated by a medical health officer pursuant to clause 6(1)(b) must:

(a) in accordance with any directions of the medical health officer, conduct an analysis of the sample delivered by a qualified health professional pursuant to clause 8(1)(b); and

(b) promptly provide a written record of the results of the analysis to the medical health officer.

(2) A qualified analyst who receives a sample pursuant to clause 8(1)(b):

(a) must ensure that the sample is not used for any purpose other than the analysis required by the testing order;

(b) shall not release the sample to any person unless:

(i) the sample is released to a person who is acting on behalf of the analyst for the purposes of:

(A) carrying out the analysis required by the testing order; or

(B) retention of the sample; and

(ii) the qualified analyst ensures that no other person has access to the sample while it is in the custody of that person;

(c) must ensure that the sample is retained for a prescribed period and then destroyed in accordance with the regulations at the end of the period; and

(d) shall not disclose the results of the analysis except in accordance with this Act.

Comments:
The role of the qualified analyst is to analyse the bodily substance delivered by the qualified health professional, then to provide a written record of the analysis to the medical health officer.

Like the qualified health professional, the qualified analyst is obligated by s. 9(2)(a) not to use the bodily sample for any purpose other than for the purposes of the testing order. Paragraph 9(2)(b) imposes further restrictions on the disclosure of the bodily sample by the analyst. Paragraph 9(2)(c) imposes restrictions on the disclosure of health information derived from the analysis. The analyst is entitled to disclose information gained through the analysis only to the medical officer (s. 9(1)(b)), and not otherwise, except in accordance with the Act. Violations of these provisions would be offences under s. 21.

The retention and destruction of samples is governed by regulation, which should reflect medico-scientific best practices (see s. 20(h)).

Results of analysis
10(1) As soon as possible after receiving the results of an analysis, a medical health officer shall make reasonable efforts to furnish a copy of the results to:

(a) the applicant and the applicant's physician;

(b) to notify the source individual or, in the case of a source individual who is a minor, a parent or guardian of the source individual, that the results of the analysis have been received and that the source individual, parent or guardian, as the case may be, is entitled on request:

(i) to receive a copy of the results; and

(ii) to have a copy of the results provided to the source individual's physician; and

(c) to furnish a copy of the results in accordance with a request pursuant to clause (b).

(2) The results of an analysis are not admissible in evidence in any criminal or civil proceeding other than in accordance with this Act.

Comments:
s. 10(1): The information derived from the analysis of the source individual's bodily sample is delivered to the medical health officer, who is obligated to distribute the information in accordance with this subsection.

Under this subsection, the source individual has the right to decide whether or not he or she is informed of the test results, and has the right to decide whether or not the results are provided to his or her physician.

s. 10(2): This subsection tempers the deleterious effects of a testing order on a source individual. It establishes a general rule of inadmissibility for information derived from an analysis of a source individual's bodily sample. Thus, the procedures of this Act (generally) cannot be used as a substitute for discovery or in aid of evidence-gathering for civil litigation (but see s. 17(2) below). A province is constitutionally incapable of declaring evidence inadmissible in criminal proceedings. This subsection, however, should be an important consideration in a judge's assessment of a source individual's reasonable expectation of privacy respecting this information, and should be a factor strongly supporting exclusion in a determination under ss. 8 and 24(2) of the *Canadian Charter of Rights and Freedoms*. See also ss. 17 and 18 below.

Assistance of public health officers
11(1) In carrying out his or her responsibilities pursuant to this Act, a medical health officer:

(a) may require the assistance of any public health officers appointed by the local authority for the jurisdictional area of the medical health officer; and

(b) if acting pursuant to section 7, may require the assistance of a public health officer appointed by any local authority.

(2) A public health officer who is providing assistance for the purposes of this Act may exercise any of the powers of a public health officer set out in [*sections x, y and z of the enacting jurisdiction's public health legislation-the enacting jurisdiction to insert appropriate legislative references*]:

(a) in the jurisdictional area of the local authority that appointed the public health officer; and

(b) if acting pursuant to clause (1)(b), anywhere in [*name of enacting jurisdiction*].

Comments:
This provision allows a medical health officer to be assisted in carrying out his or her responsibilities by a public health officer.

Assistance of peace officer

12(1) A medical health officer or a public health officer may call for the assistance of a peace officer in carrying out any of his or her responsibilities pursuant to this Act.

(2) A peace officer who is called on pursuant to subsection (1) may render the assistance requested.

Comments:

This provision allows a medical health officer or public health officer to be assisted in carrying our his or her responsibilities by a peace officer. This provision could be useful if the source individual is uncooperative.

Provisions authorizing measures for dealing with "recalcitrant patients" infected with communicable diseases occur in public health legislation – Alberta and Ontario provide examples.[4]

This and the previous section should be cross-referenced with s. 19, which extends an immunity to persons who act in the exercise of powers conferred by this Act, so long as they were acting in good faith.

Costs

13 The costs of an application for a testing order, the costs of conducting any analysis required by a testing order and the cost of serving or attempting to serve any documents shall be borne by the applicant.

Comments:

Section 13 imposes a disincentive for applicants: they bear the costs of the application, testing, analysis, and service. No view is offered on whether these costs would be recoverable through provincial health insurance, or through any supplementary or private health insurance or benefits policy. An employer, of course, might provide funding for an applicant. That would be an issue between the employee and employer.

Appeal to [*appellate court*]

14(1) An appeal lies to the [*enacting jurisdiction to insert name of appellate court*] on a question of law from a decision of the court respecting an application for a testing order.

(2) If a testing order was granted pursuant to the application that is the subject of an appeal, the appellant shall serve a copy of the notice of appeal on the medical health officer who performed the activities described in section 6 in relation to the testing order.

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[4] Public Health Act, R.S.A. 2000, c. P - 37, ss. 39ff; Health Protection and Promotion Act, R.S.O. 1990, c. H.7, ss. 35 and 36.

Comments:

s. 14(1): This subsection permits an appeal of a decision to grant an order as well as to deny an order. Under enacting jurisdictions' appellate court legislation and rules of court, the rules of court respecting appeals should apply.

s. 14(2): The rules of court would cover service on the respondent.

Application for stay of testing order

15(1) An appellant pursuant to section 14 may apply to a judge of the [*enacting jurisdiction to insert name of appellate court*] for an order staying a testing order until the appeal is determined.

(2) The appellant shall serve the medical health officer who performed the activities described in section 6 in relation to the testing order with a copy of the notice of motion.

Comments:

A stay is discretionary, not automatic upon appeal. In determining whether to grant a stay, the judge should consider the timing concerns that supported the application.

Service of documents

16(1) Any document that is required to be served pursuant to this Act or the regulations must be served on the person to whom it is directed.

(2) A document may be served personally or mailed by registered mail to the last known address of the person being served.

(3) A document served by registered mail is deemed to have been received on the seventh day following the day of its mailing unless the person to whom it was mailed establishes that, through no fault of that person, the person did not receive the document or received it at a later date.

Comments:

The deemed service provision in s. 16(3) should be consistent with statutory rules respecting deemed service, such as in s. 23 of the *Interpretation Act* (Alberta).[5]

Confidentiality

17(1) Subject to subsection (2), no person shall use or disclose any information that comes to the person's knowledge in the course of carrying out responsibilities pursuant to this Act or the regulations concerning an applicant or a source individual.

(2) A person may disclose information described in subsection (1) if the disclosure:

(a) is required to administer this Act or the regulations;

....

[5] R.S.A. 2000, c. I - 8.

(b) is required to carry out a responsibility imposed or to exercise a power conferred by this Act or the regulations;

(c) is required by law;

(d) is requested or approved by the individual who is the subject of the information;

(e) is ordered by the minister for the purpose of protecting the public health; or

(f) is made:

(i) to a member of a health profession who holds a valid licence to practise that profession in [*name of enacting jurisdiction*] in the course of a professional consultation;

(ii) between solicitor and client;

(iii) in the case of information pertaining to a minor, to a parent or guardian of the individual; or

(iv) in prescribed circumstances.

Comments:

s. 17(1): This provision, along with ss. 8(2), 9(2), 10(2), and 18, protect the source individual's privacy by imposing a confidentiality obligation – a form of limitation on disclosure of the source individual's health information. The source individual's health information is to be disclosed only to achieve the purposes of the testing order and (generally) not for any other purpose. Subsection 17(1) and s. 18 also protect the privacy of the exposed individual. His or her information is also caught by the general confidentiality obligation. All of these protections are subject to the division-of-powers constitutional limitations of provincial legislation.

s. 17(2): This subsection creates some exceptions to the general non-disclosure rule confirmed in s. 18(1). While recognizing the legitimacy of disclosure with the consent of the subject of the information, it permits disclosure of personal information (without consent) in restricted circumstances. This includes circumstances where the disclosure is required by law such as by subpoena or other legal process (clause 17(2)(c)). This clause should however be read in the context of section 23 which provides that, subject to disclosure under public health legislation, this Act will prevail over other provincial legislation. Accordingly, the scope of operation of clause 17(2)(c) needs to be understood in this narrower context.

s. 17(2)(f)(i): The term "qualified health professional" is not used in this subparagraph, since that term applies to professionals designated by regulation as being entitled to take samples of bodily substances; this group may be smaller than the group of validly licenced members of a health profession.

Subpoena

18(1) No person who is subpoenaed or otherwise compelled to give evidence in a legal proceeding is required or allowed to answer any question or to produce any document that reveals information that is made confidential by this Act unless the judge or other person presiding over the proceeding first examines the information, with the public excluded, to determine whether the information should be disclosed.

(2) In making a ruling pursuant to subsection (1), the judge or other person presiding over the proceeding shall consider the relevance to the proceeding and the probative value of the information to be disclosed and the invasion of privacy of the person who is the subject of the information.

Comments:

This section permits a judge to order that a witness disclose information made confidential under this Act. A judge is entitled to make such a ruling only following consideration of the effect of disclosure on the privacy of the subject of the information.

Immunity

19(1) No action or proceeding lies or shall be commenced against the Crown, the minister, the department, an officer, employee or agent of the department, a local authority, an officer, employee or agent of a local authority or a peace officer for anything in good faith done, caused, permitted or authorized to be done, attempted to be done or omitted to be done by that person or by any of those persons pursuant to or in the exercise or supposed exercise of any power conferred by this Act or the regulations or in the carrying out or supposed carrying out of any order or direction made pursuant to this Act or any duty imposed by this Act or the regulations.

(2) No action or proceeding lies or shall be commenced against:

(a) a physician who in good faith makes a physician report;

(b) a qualified health professional who in good faith takes a sample of a bodily substance from an individual pursuant to this Act; or

(c) a qualified analyst who in good faith performs an analysis of a sample of a bodily substance delivered by a qualified health professional pursuant to this Act.

Comments:

This provision establishes immunities from civil liability for persons who carry out their responsibilities under this Act in good faith. It does not establish immunities for an exposed individual.

Regulations

20 The Lieutenant Governor in Council may make regulations:

(a) prescribing diseases as communicable diseases for the purposes of this Act;

(b) for the purposes of subclause 2(l)(n), prescribing the qualifications for conducting types of analysis;

(c) for the purposes of subclause 2(1)(o), prescribing the health professions whose members are eligible to be qualified health professionals;

(d) for the purposes of subclause 3(1)(a)(iii), prescribing functions that, if performed in relation to an individual, give rise to grounds for an application for a testing order if the individual performing the function comes into contact with a bodily substance of the individual in relation to whom the function is performed;

(e) governing applications for testing orders;

(f) prescribing the qualifications of physicians who may make a physician report;

(g) for the purposes of clause 4(1)(c):

(i) governing the information to be furnished in a physician report; and

(ii) prescribing a form for a physician report and requiring that a physician report be made in the prescribed form;

(h) for the purposes of clause 9(2)(c):

(i) prescribing a retention period for samples; and

(ii) governing the retention and destruction of samples;

(i) for the purposes of subclause 17(2)(f)(iv), prescribing circumstances in which confidential information may be disclosed.

Offence and penalty

21 Every person who contravenes any provision of this Act or the regulations or an order made pursuant to this Act is guilty of an offence and liable on summary conviction:

(a) for a first offence:

(i) to a fine not exceeding [*enacting jurisdiction to insert maximum amount of fine*]; and

(ii) to a further fine of [*enacting jurisdiction to insert maximum amount of daily additional fine for continuing offence*] for each day or part of a day in which the offence continues; and

(b) for a second or subsequent offence:

(i) to a fine not exceeding [*enacting jurisdiction to insert maximum amount of fine*]; and

(ii) to a further fine of [*enacting jurisdiction to insert maximum amount of daily additional fine for continuing offence*] for each day or part of a day in which the offence continues.

Comments:

The continuing fine provisions in ss. 21(a)(ii) and (b)(ii) are to provide financial motivations to comply promptly with testing orders, in view of the time-sensitiveness of testing.

It is true that some source individuals may not be motivated by financial considerations. This provision, however, may be beneficial in some situations. This type of enforcement provision is found in public health legislation.[6]

Limitation

22 No prosecution for an alleged contravention of this Act or the regulations shall be commenced more than two years after the date of commission of the alleged contravention.

Act prevails

23(1) Subject to [enacting jurisdiction to insert appropriate legislative provisions, e.g. in Saskatchewan, *The Public Health Act, 1994*], if there is a conflict or inconsistency between this Act or the regulations and any other Act or any regulation made pursuant to another Act, this Act and the regulations prevail.

(2) Subsection (1) applies notwithstanding any provision in the other Act or regulation that states that the provision is to apply notwithstanding any other Act or law.

(3) Subsection (1) applies notwithstanding [*enacting jurisdiction to insert appropriate legislative provisions, e.g., in Saskatchewan, subsection 4(2) of The Health Information Protection Act, subsection 23(2) of The Freedom of Information and Protection of Privacy Act and subsection 22(2) of The Local Authority Freedom of Information and Protection of Privacy Act.*]

[6]See, again for example, the Public Health Act (Alberta), s. 73 and the Health Protection and Promotion Act (Ontario), ss. 100 - 101, supra note 4.

Comments:

s. 23(1): Prescribed communicable diseases for the purposes of this Act may be the same as communicable diseases prescribed for the purposes of mandatory reporting. As a result of analyses conducted under this Act, persons could acquire information which they would be obligated to disclose under public health legislation.[7] The "subject to" clause ensures that public health disclosure obligations apply in circumstances governed by this Act.

ss. 23(2) and (3): There may be problems with an existing hierarchy of paramountcy provisions. For example, in Saskatchewan legislation, three existing Acts contain provisions to override paramountcy provisions in other Acts – hence the need for subsection (3), tailored to the specific legislative regime of the enacting jurisdiction.

Consequential amendments

x. [*The enacting jurisdiction will need to consider whether any of its existing legislation will need to be amended or overridden in order to implement this Act. Apart from legislation governing the privacy of health information or personal information generally, this could include legislation governing consent to medical procedures or the conduct of statutory proceedings, legislation regulating health professions or legislation respecting public health or occupational health and safety, for example*.]

[7] See, again as examples, the Public Health Act (Alberta), ss. 20ff and the Health Protection and Promotion Act (Ontario), ss. 25 - 29, ibid.