9. Legal Access and Preparedness

SARS demonstrated weakness and confusion in the legal machinery for the enforcement of health protection orders under the *Health Protection and Promotion Act*, the legal engine that drives health protection. One lawyer told the Commission that their ability during SARS to give clear legal advice was at times hampered by weaknesses in the enforcement portions of the Act:

> During SARS, I would often say when asked if we could do something, 'you can try it, but if we are challenged we may be on shaky legal grounds and the courts will be in a very difficult position.'

The powers in the *Health Protection and Promotion Act* that authorize public health officials to make orders to protect the public are only as strong as the enforcement mechanisms that support them. Unless backed up by the power to enforce, an order is simply a request. Clarity in respect of enforcement powers is vital. Those who make orders and those who are obliged to comply with orders must know clearly in advance the consequences of noncompliance. Uncertainty is a prescription for trouble, doubly so in an emergency when there is no time to ponder and argue an uncertain power or an ambiguous enforcement procedure.

The *Health Protection and Promotion Act* requires amendment to ensure that the legal enforcement powers are strong and clear.

The following problems need to be addressed:

- The confusing tangle of enforcement powers.
- The procedural gaps within the enforcement machinery.
- The overlapping jurisdiction between the Ontario Court of Justice and the Superior Court.
- The lack of one-stop shopping for enforcement of orders.

- Uncertainty in the legal requirements for initiating and continuing enforcement procedures in court.

- The lack of systems to ensure legal preparedness in the application of enforcement machinery.

The Tangle of Enforcement Powers

The power to make orders lies primarily in three sections of the *Health Protection and Promotion Act:* s. 13,[282] which deals with environmental or occupational hazards; s. 22,[283] which deals with communicable diseases; and s. 86,[284] which allows the Chief Medical Officer of Health to act in the face of a health risk.

These three sections each have their own court enforcement route whenever a public health official seeks to compel the subject of the order to comply. In a completely different parallel process, the Health Services Appeal and Review Board under the *Ministry of Health Appeal and Review Boards Act, 1998,*[285] becomes involved whenever the subject of an order requests a hearing.[286] From that board there is an appeal to the Divisional

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282. Subsection 13(1) provides:

> A medical officer of health or a public health inspector, in the circumstances mentioned in subsection (2), by a written order may require a person to take or to refrain from taking any action that is specified in the order in respect of a health hazard.

283. Subsection 22(1) provides:

> A medical officer of health, in the circumstances mentioned in subsection (2), by a written order may require a person to take or to refrain from taking any action that is specified in the order in respect of a communicable disease.

284. Subsection 86(1) provides:

> If the Chief Medical Officer of Health is of the opinion that a situation exists anywhere in Ontario that constitutes or may constitute a risk to the health of any persons, he or she may investigate the situation and take such action as he or she considers appropriate to prevent, eliminate or decrease the risk.

285. S.O. 1998, c. 18, Sched. H.

286. Sections 44 through 46 deal with the review of orders by the Health Services Appeal and Review Board and the appeal process that follows. Those sections provide:

> 44(1) An order by a medical officer of health or a public health inspector under this Act shall inform the person to whom it is directed that the person is entitled to a hearing by the Board if the

person mails or delivers to the medical officer of health or public health inspector, as the case requires, and to the Board, within fifteen days after a copy of the order is served on the person, notice in writing requiring a hearing and the person may also require such a hearing.

Oral order

(2) An oral order or an order directed to a person described but not named in the order need not contain the information specified in subsection (1) but a person to whom the order is directed may require a hearing by the Board by giving the notices specified in subsection (1) within fifteen days after the day the person first knows or ought to know the contents of the order. R.S.O. 1990, c. H.7, s. 44 (2).

Effect of order

(3) Although a hearing is required in accordance with this Part, an order under this Act takes effect,

(a) when it is served on the person to whom it is directed; or

(b) in the case of an oral order or an order directed to a person described but not named in the order, when the person to whom it is directed first knows or ought to know the contents of the order,

but the Board, upon application with notice, may grant a stay until the proceedings before the Board are disposed of.

Powers of Board

(4) Where the person to whom an order is directed requires a hearing by the Board in accordance with subsection (1) or (2), the Board shall appoint a time and place for and hold the hearing and the Board may by order confirm, alter or rescind the order and for such purposes the Board may substitute its findings for that of the medical officer of health or public health inspector who made the order.

Time for hearing

(5) The Board shall hold a hearing under this section within fifteen days after receipt by the Board of the notice in writing requiring the hearing and the Board may, from time to time, at the request or with the consent of the person requiring the hearing, extend the time for holding the hearing for such period or periods of time as the Board considers just.

Extension of time for hearing

(6) The Board may extend the time for the giving of notice requiring a hearing under this section by the person to whom the order of the medical officer of health or public health inspector is directed either before or after the expiration of such time where it is satisfied that there are apparent grounds for granting relief to the person following upon a hearing and that there are reasonable grounds for applying for the extension, and the Board may give such directions as it considers proper consequent upon the extension.

Parties and evidence

45. (1) The medical officer of health or public health inspector who made the order, the person who has required the hearing and such other persons as the Board may specify are parties to the proceedings before the Board.

Examination of documentary evidence

(2) Any party to the proceedings before the Board shall be afforded an opportunity to examine

before the hearing any written or documentary evidence that will be produced or any report the contents of which will be given in evidence at the hearing.

Members holding hearing not to have taken part in investigation, etc.

(3) Members of the Board holding a hearing shall not have taken part before the hearing in any investigation or consideration of the subject-matter of the hearing and shall not communicate directly or indirectly in relation to the subject-matter of the hearing with any person or with any party or representative of the party except upon notice to and opportunity for all parties to participate, but the Board may seek legal advice from an advisor independent from the parties and in such case the nature of the advice shall be made known to the parties in order that they may make submissions as to the law.

Recording of evidence

(4) The oral evidence taken before the Board at a hearing shall be recorded and, if so required, copies or a transcript thereof shall be furnished upon the same terms as in the Superior Court of Justice.

Release of documentary evidence

(6) Documents and things put in evidence at a hearing shall, upon the request of the person who produced them, be released to the person by the Board within a reasonable time after the matter in issue has been finally determined.

Appeal to court

46. (1) Any party to the proceedings before the Board under this Act may appeal from its decision or order to the Divisional Court in accordance with the rules of court.

Stay of order

(2) Where an appeal is taken under subsection (1) in respect of an order that was stayed by the Board, a judge of the Superior Court of Justice upon application may grant a further stay until the appeal is disposed of

Record to be filed in court

(3) Where any party appeals from a decision or order of the Board, the Board shall forthwith file with the Divisional Court the record of the proceedings before it in which the decision was made, which, together with the transcript of evidence if it is not part of the Board's record, shall constitute the record in the appeal.

Minister entitled to be heard

(4) The Minister is entitled to be heard, by counsel or otherwise, upon the argument of an appeal under this section.

Powers of court on appeal

(5) An appeal under this section may be made on questions of law or fact or both and the court may confirm, alter or rescind the decision of the Board and may exercise all powers of the Board to confirm, alter or rescind the order as the court considers proper, or the court may refer the matter back to the Board for rehearing, in whole or in part, in accordance with such directions as the court considers proper.

Court, and if leave to appeal is granted, a further appeal to the Ontario Court of Appeal. This cumbersome appeal system stands in contrast to the system by which labour injunctions are appealed directly to the Court of Appeal to eliminate the time-consuming process of an intervening appeal to the Divisional Court and the uncertainty whether leave will be granted to appeal further to the Court of Appeal. The Commission recommends that the *Health Protection and Promotion Act* be amended to eliminate this complex appeal process, rife with delay, and provide an appeal as of right directly to the Court of Appeal with no prior requirement to secure leave to appeal.

The Commission has had no opportunity in the course of preparing this interim report to study the impact on enforcement of the injection into the judicial enforcement process of the Health Services Appeal and Review Board process. It is, however, logical to ask whether it is appropriate to have this confusing and time-consuming parallel mixture of separate judicial and administrative procedures when infection is spreading and time is of the essence. Considering the need during an infectious outbreak for speed and one-stop shopping, it is logical to ask whether it would be better to remove the board from the process and to substitute a hearing before a Superior Court judge as part of the process of consolidating all powers and procedures in one forum.

The discussion below will focus on the enforcement of orders in the face of noncompliance. The following comments and recommendations apply only to procedures in respect of orders made under Part IV (Communicable diseases) and Part VII (Administration). It is in these two parts of the *Health Protection and Promotion Act* that the enforcement powers of the local medical officers of health and the Chief Medical Officer of Health in respect of communicable diseases are found. The Commission makes no recommendations in respect of the enforcement procedures set out in Part III of the Act.

An order made under s. 22, in relation to a virulent disease, may be enforced in the Ontario Court of Justice, through an application under s. 35 of the *Health Protection and Promotion Act*. Section 35[287] authorizes the Court to order that a person be taken

287 Subsection 35(1) provides:

> Upon application by a medical officer of health, a judge of the Ontario Court of Justice, in the circumstances specified in subsection (2), may make an order in the terms specified in subsection (3)
>
> (2) An order may be made under subsection (3) where a person has failed to comply with an order by a medical officer of health in respect of a communicable disease that is a virulent disease,
>
> (a) that the person isolate himself or herself and remain in isolation from other persons;

into custody and detained, examined by a physician to determine if infected with the agent of a virulent disease, and, where infected, treated. An Ontario Court of Justice order under s. 35, enforcing a public health order made under s. 22, may be appealed to a judge of the Superior Court and may be further appealed to the Court of Appeal but only if a judge of that court, in a separate hearing, grants special leave to appeal on a question of law alone. Although it is sensible that the appeal goes directly to the Court of Appeal without a time consuming intermediate appeal to the Divisional Court, the requirement of special leave creates delay. The restriction of the appeal to a question of law alone restricts the access to justice of someone affected by an order that significantly infringes his individual rights. The Commission recommends that this complex appeal process, which produces delay and restricts access to justice, be simplified. This process could be simplified by eliminating the intermediate appeal to the Superior Court or the restricted leave to appeal to the Court of Appeal or both.

Orders made under s. 22 that do not relate to virulent diseases or that require action other than detention, examination or treatment, must be enforced through s. 102 of the Act. If the order relates to virulent disease and involves detention, examination or treatment, the order is enforced in the Ontario Court of Justice, through the quasi-criminal machinery of the *Provincial Offences Act*. If the order is of any other kind, it is enforced in the Superior Court pursuant to s. 102, through the civil machinery of the *Rules of Civil Procedure*.[288] In an earlier day and age this arcane mixture of proceedings may have

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(b) that the person submit to an examination by a physician;

(c) that the person place himself or herself under the care and treatment of a physician; or

(d) that the person conduct himself or herself in such a manner as not to expose another person to infection.

(3) In an order under this section, the judge may order that the person who has failed to comply with the order of the medical officer of health,

(a) be taken into custody and be admitted to and detained in a hospital or other appropriate facility named in the order;

(b) be examined by a physician to ascertain whether or not the person is infected with an agent of a virulent disease; and

(c) if found on examination to be infected with an agent of a virulent disease, be treated for the disease.

288. R.R.O. 1990, Reg. 194. The *Rules of Civil Procedure* are enacted as a regulation to the *Courts of Justice Act*, R.S.O. 1990 c. C. 43.

appeared logical. In times like these when disease can strike overnight, clarity, speed, and unified procedures are required. The Commission recommends that this multiplicity of procedures be replaced by a single, simple, codified procedure in the Superior Court.

Section 102 contains two parts: s. 102(1), which allows a court to restrain the contravention of an order, and s. 102(2), which allows a court to prohibit continuation or repetition of a contravention.[289]

If this were not complex enough it must be remembered, as noted above, that s. 86 of the *Health Protection and Promotion Act* provides a completely separate and parallel duplicate system of enforcement in respect of orders made by the Chief Medical Officer of Health in respect of a health risk. Where an order is made under s. 86, by the Chief Medical Officer of Health, the enforcement of that order is governed by s. 86.1,[290] which authorizes an application to the Superior Court. Under s. (2), the

289. Subsection 102(1) provides:

> Despite any other remedy or any penalty, the contravention by any person of an order made under this Act may be restrained by order of a judge of the Superior Court of Justice upon application without notice by the person who made the order or by the Chief Medical Officer of Health or the Minister. Proceedings to prohibit continuation or repetition of contravention.
>
> Proceedings to prohibit continuation or repetition of contravention
>
> 102(2) Where any provision of this Act or the regulations is contravened, despite any other remedy or any penalty imposed, the Minister may apply to a judge of the Superior Court of Justice for an order prohibiting the continuation or repetition of the contravention or the carrying on of any activity specified in the order that, in the opinion of the judge, will or will likely result in the continuation or repetition of the contravention by the person committing the contravention, and the judge may make the order and it may be enforced in the same manner as any other order or judgment of the Superior Court of Justice.

290. Section 86.1 provides:

> If the Chief Medical Officer of Health is of the opinion that a situation exists anywhere in Ontario that constitutes or may constitute a risk to the health of any persons, he or she may apply to a judge of the Superior Court of Justice for an order under subsection (2).
>
> (2) If an application is made under subsection (1), the judge,
>
> (a) may order the board of health of a health unit in which the situation causing the risk exists to take such action as the judge considers appropriate to prevent, eliminate or decrease the risk caused by the situation; and
>
> (b) may order the board of health of a health unit in which the health of any persons is at risk as a result of a situation existing outside the health unit to take such action as the judge considers appropriate to prevent, eliminate or decrease the risk to the health of the persons in the health unit.

court may order a board of health to take or refrain from taking action where there is a health risk. It does not authorize the court to make an order against anyone other than boards of health.

Therefore, if the Chief Medical Officer of Health makes an order under s. 86 that is directed at an individual, institution or organization other than a board of health, she too must resort to the enforcement powers in s. 102.

The wording of s. 102(1) is unclear and confusing. Subsection (1) authorizes a restraining order;[291] an order to stop someone from doing something. It does not authorize a mandatory order; an order to require someone to do something. Subsection 102(2), which was obviously intended to add some additional power, is unclear in its purpose, intention, and scope. It can only be triggered by the Chief Medical Officer of Health or the Minister. It contains the same problem as s. (1) in the sense that it does not provide for a mandatory order.

This lack of mandatory power in s. 102 has led public health lawyers to have to frame their argument in a reverse fashion. For example, instead of asking the court to order a person to comply with an order of a medical officer of health, the court order must be to refrain from noncompliance with the order of a medical officer of health: a double negative along the lines of "Don't not do what you have been ordered to do," instead of "do what you have been ordered to do."

The Superior Court procedure set out in s. 102 is confusing and weak. This is no way to enforce a statute. The Commission recommends that the *Health Protection and Promotion Act* be amended to provide the Superior Court, when ordering compliance with a public health obligation, with a full range of remedial power including the power to make mandatory orders.

What the *Health Protection and Promotion Act* lacks, and what it needs, is a single, clear, one-stop shopping system for the enforcement of all public health orders in respect of communicable diseases. Jurisdiction to enforce public health orders is divided artificially and confusingly between the Superior Court and the Ontario Court of Justice. The Ontario Court of Justice, if the subject of an order does not comply in response to an order in relation to a virulent disease, may order compliance. The Superior Court may make a similar order. As noted in greater detail below, each

291. An application under s. 102(1) may be made without notice, although a judge can always require notice if the circumstances appear to require it.

court has different procedures, none of them tailor-made for the purpose of public health protection. None of the legal procedures are designed for the delicate task of balancing individual rights against the right of the public to be protected against infectious disease. None of the legal procedures is designed for the speed required in an emergency.

The problem of overlapping jurisdiction is compounded by a number of constitutional rules which severely limit the power of the Ontario Court of Justice to issue certain kinds of orders and to grant certain kinds of remedies.

The Provincial Court lacks constitutional authority to make orders of the kind contemplated in s. 102 of the *Health Protection and Promotion Act*, which provides for Superior Court orders to restrain the contravention of public health orders and to prohibit the continuation of the contravention of such orders. In some specified circumstances the order may be made without notice and in other cases a judge may, under the inherent power of the court and the *Rules of Civil Procedure*, proceed without notice on an interim basis subject to a later hearing.

Orders of the kind required for a full range of enforcement procedures, orders in the nature of mandatory orders or orders for injunctions, are constitutionally reserved to the exclusive authority of the Superior Court. Even if Ontario passed a statute to give the Ontario Court of Justice such power, the statute would be constitutionally dubious in the sense of invalid and ineffective[292] on the grounds that the province cannot give such power to a provincially appointed judge. A similar problem arises from the limited jurisdiction of the Ontario Court of Justice to grant remedies under the *Canadian Charter of Rights and Freedoms* because rigid constitutional doctrines reserve that power primarily to the Superior Court.[293] It is only in Superior Court that the

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292. Section 96 of the *Courts of Justice Act* confers on non-superior courts the power to apply the rules of equity but not the power to grant equitable relief, including injunctive relief: see also *Moore v. Canadian Newspapers Co.* (1989), 60 D.L.R. (4th) 113 (Div. Ct.). Altering this jurisdiction, even indirectly, would be difficult. Historically, Canadian courts have been vigilant in limiting efforts by provincial legislatures to enhance the jurisdictions of non-superior courts and statutory tribunals. The Supreme Court of Canada has repeatedly allowed challenges to purported extensions of the powers of non-superior courts and tribunals: see for example *Re Residential Tenancies Act* [1981] 1 S.C.R. 714.

293. Section 24(1) of the *Canadian Charter of Rights and Freedoms* limits remedial jurisdiction to courts of "competent jurisdiction." Provincial superior courts are always courts of competent jurisdiction; they constitute the "default court of competent jurisdiction" for the purpose of Charter applications: *Doucet-Boudreau v. Nova Scotia (Minister of Education)* [2003] 3 S.C.R. 3 at para 49. By contrast, a non-superior court is a court of competent jurisdiction to grant a Charter remedy only if it has the power independently of the Charter to grant that remedy: *R. v. 974649 Ontario Ltd.* [2001] 3 S.C.R. 575.

availability of a full range of Charter remedies is constitutionally unassailable.

These constitutional limitations on the jurisdiction of the Ontario Court of Justice complicates matters unnecessarily for those who seek to enforce public health orders, or those who seek remedies for the alleged infringement of their legal rights. It makes no sense to divide public health enforcement and public health remedies so confusingly between two different courts.

Legal clarity and simplicity is vital in the enforcement of public health orders and the availability of legal remedies to those affected by orders. Multiplicity of courts and procedures produces nothing but delay and confusion. One court should have unified jurisdiction over all public health enforcement procedures and remedies. Without one-stop shopping in one court and one single code of procedure, the application of public health law will be hopelessly cumbersome. Unfortunately the rigidity of constitutional doctrines around court jurisdiction give no choice as to which court should have the full jurisdiction to enforce public health orders and grant remedies to individuals. The one court with that plenary jurisdiction is the Superior Court. The Commission recommends that the *Health Protection and Promotion Act* be amended to provide that all public health enforcement and remedial procedures be taken in the Superior Court pursuant to a unified code of procedure to be enacted with the Act.

Recommendation

The Commission therefore recommends that:

- **The *Health Protection and Promotion Act* be amended to eliminate the complex appeal process, rife with delay, in respect of an appeal by the subject of an order from a decision of the Health Services Appeal and Review Board, and provide an appeal as of right directly to the Court of Appeal with no prior requirement to secure leave to appeal.**

- **The Ministry of Health and Long-Term Care consider whether the Health Services Appeal and Review Board is a necessary step in the complex hearing and review process in the *Health Protection and Promotion Act* or whether some other system should be enacted.**

- **The *Health Protection and Promotion Act* be amended to simplify the complex and restrictive appeal process in respect of appeals from provincial court to the Superior Court and then to the Court of Appeal but only if a**

judge of the Court of Appeal grants leave to appeal on special grounds on a question of law alone. This process could be simplified by eliminating the intermediate appeal to the Superior court the restricted leave to appeal to the Court of Appeal or both.

- **The multiplicity of procedures in respect of the enforcement of Orders made under Part IV (communicable diseases) and Part VII (administration) of the *Health Protection and Promotion Act*, be replaced by a single, simple, codified procedure in the Superior Court.**

- **The *Health Protection and Promotion Act* be amended to provide the Superior Court, when ordering compliance with a public health obligation, with a full range of remedial power, including the power to make mandatory orders.**

Procedural Uncertainty

To complicate matters further the *Health Protection and Promotion Act* does not even contain all the rules for the enforcement of health protection orders. Some of these rules are found in the *Provincial Offences Act*, a quasi-criminal statute that codifies many of the procedures for the enforcement of Ontario laws like the *Highway Traffic Act*[294] that provide for prosecutions and punishments. For Superior Court procedures, the compendious and complex *Rules of Civil Procedure* must be followed. It is unacceptable that those enforcing public health protection have to wrestle with a multiplicity not only of courts, but of outside procedural regimes such as the *Provincial Offences Act* and the *Rules of Civil Procedure.*

For example, s. 86.1(1) of the *Health Protection and Promotion Act,* which allows the Chief Medical Officer of Health to resort to the Superior Court for an order directing a board of health to act in a situation where there is a health risk, says nothing about notice requirements or the procedural aspects of the application, for which one would have to consult the compendious and complex *Rules of Civil Procedure*.

To those who simply want to get on with the urgent business of enforcing public health orders or securing remedies in respect of those orders, the present law presents a confusing maze of overlapping and uncertain judicial powers and procedures best described as a legal nightmare.

294. R.S.O. 1990, c. H-8.

One public health legal expert described a few of the problems:

> [T]here is no procedure provided under the HPPA for obtaining a s. 35 order, there is nothing really prescribed under the HPPA for how you go about getting a s. 35 order. Actually in the case of SARS it was unclear whether s. 35 was really what was needed, given that for the most part, the types of orders that we would have wanted to enforce were home quarantine orders and whether s. 35 was really the right tool for enforcing a home quarantine order, raises questions given that you are going to be taking someone out of their house and detaining them in a hospital under s. 35 and whether that is really what you want to do in those circumstances.
>
> … I guess one of the other revelations in doing research into it was that if there was any procedure provided for obtaining a s. 35 order, it appears to be under the *Provincial Offences Act*, s. 161 of the *Provincial Offences Act*.
>
> I think in a nutshell … that is not where most of us really expect it to be. Most people think of it really as a civil kind of an injunction or application. They do not think of it as a criminal type of procedure and I think there is some confusion between the proceedings under s. 35 and those that are permitted under s. 102 that allows you to go *ex parte* [in the absence of the person against whom an order is sought] to the Superior Court to obtain an order. We were very focused on s. 35 because it deals specifically with communicable diseases. It seems to have everything you want to do under s. 35 but when you actually look more closely into it, it is actually more of a straightjacket to what you want to do than would be the case under s. 102. It is very specific on what you are allowed to get.
>
> If you look at s. 35(3) it basically prescribes the order that you can get and it says that the person may be taken into custody, admitted and detained in a hospital, now it has been amended to say other appropriate facility named in the order, to be examined by a physician and, if found on examination to be infected, to be treated. So that is what it allows you to get. My question was if you just wanted people to stay home, and that is what you wanted to enforce, and you were not getting police assistance otherwise, and the police may not give you any assistance unless you get a court order, is this what you really want?
>
> I think that at first glance, it seems to be a procedural void. When you

> first look at the HPPA, you think there is no procedure here for obtaining this. When you look at s. 161 of the POA, your second impression is, I am going to the Ontario Court of Justice but what does the Ontario Court of Justice do? It normally does provincial offences or it does custody and access kind of disputes. So you are thinking, do I make it look like a custody and access application or do I make it look like some sort of a provincial offences application, otherwise they may not let me file this anywhere.

This highlights many areas of confusion in the current system of court enforcement. It is inappropriate to enforce a public health order in the Ontario Court of Justice through the quasi-criminal provisions of the *Provincial Offences Act*, which were never designed for that purpose. It is inappropriate in the Ontario Court of Justice (Provincial Court) or the Superior Court to use a system of procedure that was never designed for the special problems of public health enforcement.

The lack of certainty as to whether the law requires the presence at the hearing of the person sought to be quarantined is particularly troublesome. Applications under s. 35 of the *Health Protection and Promotion Act*, in which the court is asked to enforce a quarantine order made by the medical officer of health, are brought in the Ontario Court of Justice. These orders are governed by the quasi-criminal procedures of the *Provincial Offences Act*, which requires in s. 161(b) that parties be given an opportunity to respond to any application.[295] This requirement can be impracticable in a public health emergency when a noncompliant infected person cannot be found immediately. The requirement of notice and an immediate opportunity to be heard before even a temporary order can be made, may be impracticable if there is no machinery in place to ensure the infected person can safely be brought to court without endangering the health of everyone in the courthouse. It might be sensible to

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295. Subsection 161(b) provides:

> Where, by any other Act, a proceeding is authorized to be taken before the Ontario Court of Justice or a justice for an order, including an order for the payment of money, and no other procedure is provided, this Act applies with necessary modifications to the proceeding in the same manner as to a proceeding commenced under Part III, and for the purpose,
>
> (a) in place of an information, the applicant shall complete a statement in the prescribed form under oath attesting, on reasonable and probable grounds, to the existence of facts that would justify the order sought; and
>
> (b) in place of a plea, the defendant shall be asked whether or not the defendant wishes to dispute the making of the order.

make an initial temporary order in the Ontario Court of Justice without notice to the person involved, subject to review at a telephone or video hearing within a day or two in which he or she could participate electronically. However sensible it might be to do so, it is questionable whether there is jurisdiction to do so. One expert in the field noted:

> If in fact the Ontario Court judge is saying, 'well what I am going to do is on an interim basis, I am going to allow you to get police assistance to keep them at home and then it is returnable in a few days.' The question is: is that really a substantive order under s. 35? Is he really making a determination that is not what that judge is permitted to make under s. 35. Is there a substantive element to that?

There are obvious problems with rules that require a public court attendance by someone who should be quarantined because he poses a risk of transmitting a virulent disease. It makes no sense to invite the virulent infection into the courthouse where others may be endangered and the entire court process may be jeopardized. The risk, which the law seeks to reduce, may in fact be increased by the procedure required to reduce it.

One expert familiar with the process described the problem to the Commission as follows:

> … Well, can I do this *ex parte* [in the absence of the person against whom an order is sought?] Can I not do this *ex parte*? … And every time I get a 35 I cringe because of this whole procedural quagmire, because the judges rightly so have never seen such applications. It was very rare before SARS … And they are concerned about the health of their staff, the court officials and legitimately so. They do not want them there at first instance. Do I give the person notice, do I not? Do I go there and try to get an interim order and then have them appear by teleconference or through an agent? And the real risk, we were very cognizant of this, what if we give them notice and they take public transportation to the place. Do we have to stand outside their houses and give them a mask. What is our authority to put a mask on them? This became very real in SARS. But even in a case we had after SARS with a TB patient, we did not know what to do with this person. You give them notice at first instance but they go on public transportation. Do we have to send them a cab and which cab company would take them. How do we force them to wear masks because contempt [of court power] would be too late. And what I notice

> about the people who have to get s. 35 orders against them, they do not believe that they have the disease. The common thread through every single s. 35 that I have done, is that they do not believe they have the disease. So they will get on public transportation, they will walk, they will do whatever, because they think this thing has been blown out of proportion. I think we need circumscribed set of circumstances. You can go *ex parte* initially, have a first cut at it, you can go *ex parte*, you can go with a three day order; have them at least assessed quickly, do you have TB, or do you not? That could be done I think pretty quickly.

Another suggested that many of the procedural difficulties could be resolved by sending all the enforcement applications to the Superior Court, which has more familiarity with *ex parte* procedures and interlocutory relief, and wider constitutional power than the Ontario Court of Justice:

> My preference with respect to these issues perhaps shows my roots as a civil litigator. It is to do away with the Ontario Court procedures and just have these applications in Superior Court. There is a familiarity of civil court judges for interlocutory procedures ultimately resulting in a restraining order or an order requiring one to remain in a particular place. It is not going to be, I believe, as much of an educational process … I do not see there being any real purpose in having these two separate processes that you can go to the Ontario Court or you can go to the Superior Court. Again I am showing my roots but my preference would be to go to the Superior Court to seek that type of relief. I do not anticipate there would be any kind of delay involved in going to Superior Court … That court would have greater familiarity with dealing with *ex parte* proceedings than would the Ontario Court because it really is not an offence based request by the medical officer of health, it is a request for interlocutory relief to detain someone. Now if you were to go that route to require that such applications are always made to the Superior Court, then you could still flesh out what types of orders could be made, including order more expansive than what is in s. 35(3) right now, and clarify in there that the judges can request and require the assistance of the police and all of that sort of thing. I do not know necessarily if the judges would require that sort of thing but I think that they would be fairly familiar with those types of terms, in restraining orders and the like. You could have a fairly clear process set out by which these applications would be made. But I think that you could make it more clear by going to the Superior Court.

As noted above, the powers of judicial enforcement are scattered throughout the Act between two separate courts without any procedural guidance or explicit machinery for crucial procedures such as dispensing with hearings, determining whether a hearing should be open to the public, or amending orders as conditions change. It is not the time, in the middle of an infectious outbreak or even before it starts, for medical officers of health and their lawyers to navigate the substantive and procedural mysteries of this confusing and inadequate legal system.

Another area that requires amendment for procedural clarity is the power of medical officers of health to obtain police assistance in the enforcement of s. 35 orders. Subsection 35(6) provides:

> Section 35(6) provides:
>
> > An order under this section may be directed to a police force that has jurisdiction in the area where the person who is the subject of the order may be located, and the police force shall do all things reasonably able to be done to locate, apprehend and deliver the person in accordance with the order.

Uncertainty ensues when the person crosses boundaries into another health unit, with a different police service. One medical officer of health described the problem with this section to the Commission:

> There have been cases where a judge has issue a s. 35 order and circumstances required the services of a police department in a jurisdiction outside that of the health unit who applied for the s. 35 order, and the police refused to carry out the order claiming that because it was from outside it did not apply to them.

The Commission recommends that the *Health Protection and Promotion Act* be amended to provide that an order under s. 35 may be directed to any police service in Ontario where the person may be found, and the police service shall do all things reasonably able to be done to locate, apprehend, and deliver the person in accordance with the order.

It is not enough to provide legal authority to make orders. If the orders cannot be enforced through a clear set of reasonable and efficient procedures, there is no point in making the order in the first place. The procedures to exercise those powers must be in place and must be clear and fair. They must be learned thoroughly by all those

involved in their application. As one expert from the Centers for Disease Control and Prevention observed:

> … obviously you have to have the authority, you have to have the legal authority to do so. But you need more than that. You need procedures. You can have the authority but you need procedures. How is this actually going to work and those procedures have to be fair, they have to conform with the constitution of the United States, they have to allow due process in that sense, 14th amendment. They have to be defendable. These may have to be defended in court sometime and so they must be defendable legally. To be legally prepared, you have to have legal expertise in this state. People who understand these laws, how to use them, what their limits are. Coordination along jurisdictions is absolutely crucial … We learned this and we could learn it again with other public health challenges. And you need communications, three times, communications and education amongst all law officials, law enforcement and judiciary.

Recommendations

The Commission therefore recommends that:

- **The *Health Protection and Promotion Act* be amended to consolidate and codify all provisions in respect of court enforcement and access to judicial remedies in respect of communicable diseases into one seamless system or powers and procedures.**

- **The *Health Protection and Promotion Act* be amended to include special procedures such as *ex parte* procedures for interim and temporary orders, video and audio hearings, and other measures to prevent the court process from becoming a vector of infection.**

- **The *Rules of Civil Procedure* be amended to include a clear, self-contained and complete code of procedure for public health enforcement and remedies in respect of communicable diseases.**

- **There be a consequential amendment to the *Courts of Justice Act* to provide that proceedings in respect of the *Health Protection and Promotion Act* enforcement and remedies in respect of communicable diseases shall be heard at the earliest opportunity.**

- **The *Health Protection and Promotion Act* be amended to provide that an order under s. 35 may be directed to any police service in Ontario where the person may be found, and the police service shall do all things reasonably able to be done to locate, apprehend, and deliver the person in accordance with the order.**

- **The judiciary be asked to establish court access protocols in consultation with the public health legal community.**

- **The *Health Protection and Promotion Act* be amended to provide that an order under s. 35 may be directed to any police service in Ontario where the person may be found, and the police service shall do all things reasonably able to be done to locate, apprehend, and deliver the person in accordance with the order.**

- **The Ministry of Community Safety and Correctional Services and the Ministry of the Attorney General, together with public health officials, establish protocols and plans for the enforcement of orders under the *Health Protection and Promotion Act* and the involvement of police officers in that process.**

Legal Preparedness

Legal counsel for public health units faced a daunting task during SARS. When seeking judicial authority to enforce an order, they had to navigate a confusing maze of overlapping and uncertain judicial powers and procedures when speedy enforcement was vital to the containment of SARS. As one lawyer involved in the response to SARS told the Commission:

> It is quite a challenge to be in a middle of an emergency with the kind of huge range of legal issues coming up and you have to figure out what the legal requirements are and how to get what needs to be done, done in the face of those issues and still keeping everyone within the law.

SARS demonstrated that it is vital in the middle of an infectious outbreak to be able to get a judicial order quickly and to enforce it quickly.

Legal preparedness is seen increasingly as an essential element of public health preparedness, like epidemiological preparedness or diagnostic preparedness. As noted

in a paper published by the Centers for Disease Control and Prevention:

> Historically, public health legal counsels have served as "technicians" in public health practice, asked by the public health agencies they serve to interpret arcane statutory language and render opinions. Legal preparedness, however, is increasingly being viewed as a critical component of state and local government public health preparedness activities. As demonstrated repeatedly, in the SARS outbreak (quarantine/isolation); in the introduction of monkey-pox in the Western Hemisphere (restrictions upon the exotic animal pet trade); and during West Nile virus season (mosquito abatement/spraying programs), legal issues are nearly always intertwined with public health responses.[296]

A group of American public health experts added:

> Legal preparedness has gained recognition as a critical component of comprehensive public health preparedness for public health emergencies triggered by infectious disease outbreaks, natural disasters, chemical and radiologic disasters, terrorism and other causes. Public health practitioners and their colleagues in other disciplines can prepare for and respond to such an event effectively only if law is used along with other tools. The same is true for more conventional health threats.[297]

Public health lawyers in Ontario distinguished themselves during SARS by the initiatives they took to overcome the marked lack of systemic legal preparedness. Their hard-earned expertise inspired U.S. officials to develop new approaches to legal preparedness. An expert at the Centers for Disease Control and Prevention, for example, credited a presentation by Jane Speakman, Toronto Public Health's legal counsel, and Dr. Barbara Yaffe of Toronto Public Health, as a central element in the Centers for Disease Control and Prevention's development of a legal preparedness guide:

> This is something that we developed and posted, based upon some collaboration after hearing Jane Speakman and [Dr.] Barbara Yaffe pres-

296. James J. Misrahi, Joseph A. Foster, Frederic E. Shaw and Martin S. Cetron, "HHS/CDC Legal Response to SARS Outbreak," in Emerging Infectious Diseases, Vol. 10, No. 2, February 1994, pp. 354-355.

297. Anthony D. Moulton, Richard N. Gottfried, Richard A. Goodman, Anne M. Murphy and Raymond D. Rawson, "What is Public Health Legal Preparedness," Journal of Law, Medicine and Ethics, 31 (2003), p. 10.

> ent at the Phoenix Health Officers Conference in September. Then on the plane ride back, we started putting that together for the lawyers and the health officers in this country to get ready for SARS. So a lot of this is part of the presentation they had given together with some of things we had been thinking about for folks in this country, getting ready for SARS when it comes again. Know your legislation. Plan due process. Draft your documents in advance. Contact your other jurisdictions. Alert your judiciary. Plan for the practical problems in communication as filed. This is a work in progress … I heard very early in conference calls with Toronto that when they went to the judges, the judges were a little surprised. What is this law that you can issue an order without it first coming before the judiciary. That's the way many laws are in this country. That's the way our federal authority is. You can do it *ex parte*. And, and my understanding is that the judiciary was concerned with two parts: one, we've got to be sure that the law enforcement officials that are carrying out this are properly protected. What are the personal protective equipment and those rules of separation. And there needs to be legal representation for people that are put under order and that's where we're starting to draw this in. You've got to plan the due process.

Although the role of law in public health is not new, SARS underlined the importance of having not only the right laws and regulations in place, but also the ability to enforce them quickly and fairly. The current emphasis on legal preparedness reflects the perspective of James A. Tobey, the American public health legal scholar, who stated more than 50 years ago:

> … practical laws, reasonably and equitably enforced, are essential as a foundation for the public health activities of government. Education and moral suasion, desirable as they may be in the practice of public health, will not bring results unless the people realize that behind them is the long arm of the Law.[298]

Public health legal preparedness takes many forms and reaches into all aspects of emergency response. A group of American public health experts noted;

> At first glance, public health legal preparedness may appear to be only a matter of having the right laws on the books. On closer examination,

298. James A. Tobey, "Public Health Law," (The Commonwealth Fund, New York: 1947), p. 3.

> however, it is as complex as the field of public health practice itself. Public health legal preparedness has at least four core elements: laws (statutes, ordinances, regulations, and implementing measures); the competencies of those who make, implement, and interpret the laws; information critical to those multidisciplinary practitioners; and coordination across sectors and jurisdictions.[299]

> SARS demonstrated the importance of clearly drafted and well understood legal procedures in the containment of infectious outbreaks.[300] The need for clarity and speed was stressed by a public health lawyer who responded to SARS; a procedure for obtaining a section 35 order should be fully outlined in section 35 of the *Health Protection and Promotion Act*. This procedure should set out the most expeditious manner of providing individuals with rights to due process while at the same time expediting the process to reduce the potential transmission of disease.

As part of legal preparedness, public health officers need to be familiar with the legal procedures required to isolate infectious people and to quarantine exposed people. Courts need judicial education programmes to familiarize judges with the law, procedure, and practical challenges of public health enforcement powers and remedies. Protocols for court access, including electronic hearings and access to legal aid, need to be developed in consultation with private lawyers and public health officials. Echoing the experience of Ontario, the Centers for Disease Control and Prevention advises:

> Public health officers need to be prepared for the practical problems that may arise in affording adequate due process protections to persons subject to isolation and/or quarantine orders. Such problems may include how to arrange for the appearance and representation of persons in quarantine (e.g., video conference or other remote means); how to serve an isolation/quarantine order (likely through law enforcement) and other procedures to advise persons of their legal rights; and isolation arrangements for transient or homeless populations.[301]

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299. Anthony D. Moulton, Richard N. Gottfried, Richard A. Goodman, Anne M. Murphy and Raymond D. Rawson, "What is Public Health Legal Preparedness," Journal of Law, Medicine and Ethics, 31 (2003), p. 10.
300. See: The Centers for Disease Control and Prevention has published a useful guide entitled: "Fact Sheet: Practical Steps for SARS Legal Preparedness."
301. Centers for Disease Control and Prevention, "Fact Sheet: Practical Steps for SARS Legal Preparedness," January 8, 2004.

In addition, echoing another lesson also learned in Ontario during SARS, the Centers for Disease Control and Prevention advises:

> … public health officers should consider drafting key documents in advance of an emergency. These template documents can be critical time savers in an emergency. Documents that jurisdictions should consider preparing in advance include: draft quarantine and/or isolation orders; supporting declarations and/or affidavits by public health and/or medical personnel; and an explanation of the jurisdiction's due process procedures for persons subject to an isolation/quarantine order.[302]

An important element of legal preparedness is ensuring that court orders can be enforced. This may require police assistance.

The enforcement of public health orders involves police work different from the day to day experience of most officers. The orders arise from the opinions, beliefs and knowledge of medical professionals with expertise that police officers are unlikely to share. Police officers may face unfamiliar risks of infection without adequate information on how to protect themselves. In one case police officers were sent to apprehend an un-cooperative tuberculosis patient who was refusing medication and had a habit of spitting at persons in authority. The Police were not told that he had an infectious disease and they were not provided with the requisite personal protective equipment.

In the worst case scenario, police may face the prospect of trying to control large numbers of citizens who may balk at following certain public health orders. A study by a U.S. law enforcement think tank, the Police Executive Research Forum, highlights the insurmountable problem, and disturbing consequences, of trying to enforce the unenforceable:

> One person or a small number of persons can be restricted by force. As the number of affected persons increases, the efficacy of force diminishes because it is impossible to force a large number of persons, spread over a large area, to comply with restrictive orders. People must be convinced that the restrictions are for the public good and that they should comply with them voluntarily. The vast majority of the population will behave responsibly if they have confidence in public authorities and are properly

302. *Ibid.*

> informed. The role of the police then becomes one of facilitation of proper behavior and the management of non-complying individuals.[303]

SARS demonstrated the potential difficulties of police involvement in public health emergencies. Dr. Bonnie Henry reported that Toronto Public Health received exemplary cooperation from police in Toronto, but some other local units had a different experience:

> … the Toronto Police Service was extremely helpful to us. As a matter of fact, when the outbreak happened in Toronto, the deputy police chief said, "What can we do to help?" That is, I think, a monumental change in attitude, and we are probably the only jurisdiction in Ontario where that happened. Certainly in some of our neighbouring jurisdictions, police said, "We have no role in this."[304]

A public health lawyer for a neighbouring region had a different experience:

> Although the section 35 order authorizes police to [do] all things reasonable to locate, apprehend and deliver the person subject to the section 35 order to the hospital or facility, police are reluctant to become involved in a "health matter."
>
> For example, we were involved in an incident where police attempted to apprehend a person pursuant to a section 35 order on three occasions but were unsuccessful. Thereafter, the board of health used a public health inspector to undertake surveillance given the police indicated that this was a "health matter" as opposed to a "criminal matter," that they had insufficient resources and would simply "red flag" the address.
>
> This public health inspector was required to follow the person subject to the section 35 order when the person left the residence and to telephone police to apprehend the person pursuant to the section 35 order. A board of health does not have the expertise or the staff to undertake surveillance.

303. Police Executive Research Forum, *Quarantine and Police Powers: The Role of Law Enforcement in a Biomedical Crisis* (Washington, D.C.: January 2004), p. 12.
304. Justice Policy Committee, Public Hearings, August 18, 2004, p. 152.

This shows that legal preparedness requires prior consultation, planning, training, and protocols between public health and police.

Dr. Bonnie Henry pointed out the importance of this prior consultation and planning;

> I work for Toronto Public Health, but part of my job is coordinating very closely with our police, fire, EMS, and our office of emergency management … We've certainly had the discussions on a number of occasions. One of the things that our relationship has fostered is the ability to understand each other's roles a bit better … Developing those relationships and under-standing where each other's authority and responsibility lie makes a huge difference in allowing you to respond in a coordinated manner.[305]

Legal preparedness requires cooperation between jurisdictions. As the Centers for Disease Control and Prevention advises:

> It is possible for federal, [provincial], and local health authorities simultaneously to have separate but concurrent legal quarantine power in a particular situation (e.g., an arriving aircraft at a large city airport). Furthermore, public health officials at the federal, [provincial], and local level may occasionally seek the assistance of their respective counterparts, e.g., law enforcement, to assist in the enforcement of a public health order. Public health officers should therefore be familiar with the roles and responsibilities of other jurisdictions: vertically (local, [provincial], federal), horizontally (public health, law enforcement, emergency management, and health care), and in geographical clusters (overlapping neighbors).[306]

SARS demonstrated the importance of all these aspects of legal preparedness. The Commission therefore recommends that legal preparedness be an integral component of all public health emergency plans.

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305. Justice Policy Committee, Public Hearings, August 18, 2004, p. 148.
306. Centers for Disease Control and Prevention, "Fact Sheet: Practical Steps for SARS Legal Preparedness," January 8, 2004.

Recommendation

The Commission therefore recommends that:

- **Legal preparedness be an integral component of all public health emergency plans.**

Conclusion

Confusion and uncertainty are the only common threads throughout the legal procedures now provided by the *Health Protection and Promotion Act* for public health enforcement and remedies. Uncertainty as to which court to use. Uncertainty as to when notice is required and how to dispense with it when necessary. Confusion as to the procedural authority for orders and their degree of permanence. Uncertainty as to the procedure to amend orders to suit the circumstances. Confusion as to the authority and the procedure to obtain an interim *ex parte* order (a temporary order made in the absence of the person against whom the order is sought, to be followed by a court hearing) and the duration of such an order. Uncertainty as to the process by which the exclusion of the public from a hearing may be challenged.

Public health officials and the lawyers who advise them require not only the clear authority to act in the face of public health risks, they require also a simple, rational, effective and fair set of procedures to enforce compliance and to provide legal remedies for those who challenge orders made against them. Delays in legal enforcement may cost lives. Delays in legal remedies may put individual liberty at risk. The above recommendations are necessary to secure effective access to enforcement and to remedies.

Recommendations

The Commission therefore recommends that:

- **The *Health Protection and Promotion Act* be amended to eliminate the complex appeal process, rife with delay, in respect of an appeal by the subject of an order from a decision of the Health Services Appeal and Review Board, and provide an appeal as of right directly to the Court of Appeal with no prior requirement to secure leave to appeal.**

- **The Ministry of Health and Long-Term Care consider whether the Health Services Appeal and Review Board is a necessary step in the complex hearing and review process in the *Health Protection and Promotion Act* or whether some other system should be enacted.**

- **The *Health Protection and Promotion Act* be amended to simplify the complex and restrictive appeal process in respect of appeals from provincial court to the Superior Court and then to the Court of Appeal but only if a judge of the Court of Appeal grants leave to appeal on special grounds on a question of law alone. This process could be simplified by eliminating the intermediate appeal to the Superior court and the restricted leave to appeal to the Court of Appeal or both.**

- **The multiplicity of procedures in respect of the enforcement of Orders made under Part IV (communicable diseases) and Part VII (administration) of the *Health Protection and Promotion Act*, be replaced by a single, simple, codified procedure in the Superior Court.**

- **The *Health Protection and Promotion Act* be amended to provide the Superior Court, when ordering compliance with a public health obligation, with a full range of remedial power, including the power to make mandatory orders.**

- **The *Health Protection and Promotion Act* be amended to consolidate and codify all provisions in respect of court enforcement and access to judicial remedies in respect of communicable diseases into one seamless system or powers and procedures.**

- **The *Health Protection and Promotion Act* be amended to include special procedures such as *ex parte* procedures for interim and temporary orders, video and audio hearings, and other measures to prevent the court process from becoming a vector of infection.**

- **The *Rules of Civil Procedure* be amended to include a clear, self-contained and complete code of procedure for public health enforcement and remedies in respect of communicable diseases.**

- **A consequential amendment to the *Courts of Justice Act* provide that proceedings in respect of the *Health Protection and Promotion Act* enforcement and remedies in respect of communicable diseases shall be heard at the earliest opportunity.**

- **The *Health Protection and Promotion Act* be amended to provide that an order under s. 35 may be directed to any police service in Ontario where the person may be found, and the police service shall do all things reasonably able to be done to locate, apprehend, and deliver the person in accordance with the order.**

- **The judiciary be asked to establish court access protocols in consultation with the public health legal community.**

- **The *Health Protection and Promotion Act* be amended to provide that an order under s. 35 may be directed to any police service in Ontario where the person may be fond, and the police service shall to all things reasonably able to be done to locate, apprehend, and deliver the person in accordance with the order.**

- **The Ministry of Community Safety and Correctional Services and the Ministry of the Attorney General, together with public health officials, establish protocols and plans for the enforcement of orders under the *Health Protection and Promotion Act* and the involvement of police officers in that process.**

- **Legal preparedness be an integral component of all public health emergency plans.**