



Undue Force:

An Overview of Provincial Legislation
on Forced Testing for HIV



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About the Canadian HIV/AIDS Legal Network

The Canadian HIV/AIDS Legal Network (www.aidslaw.ca) promotes the human rights of people living with and vulnerable to HIV/AIDS, in Canada and internationally, through research, legal and policy analysis, education, and community mobilization. The Legal Network is Canada's leading advocacy organization working on the legal and human rights issues raised by HIV/AIDS.

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About This Booklet

This booklet looks at existing or pending provincial legislation in Ontario (page 3), Alberta (page 6), Nova Scotia (page 10), Saskatchewan (page 14) and Manitoba (page 18) allowing forced testing for blood-borne diseases such as HIV.

For each province, we look at:

- Situations in which forced testing may be allowed;
- Getting a testing order;
- Factors a court or other tribunal must consider in making a testing order;
- Carrying out the testing order;
- Appealing a decision about a testing order;
- Restrictions on use of samples and test results; and
- Penalties for breaching the Act.

We conclude with a commentary (page 19) on why forced testing is unjustified and unnecessary, and what measures are really needed to deal with workplace exposure to HIV.

For more information on HIV testing, visit www.aidslaw.ca/testing.

Introduction

In 1999, a private member's bill was tabled in the House of Commons to amend the federal *Criminal Code* to permit forced blood testing for diseases such as HIV, hepatitis B and hepatitis C in certain circumstances, such as cases where peace officers, firefighters and other emergency medical services personnel or health care workers may have been exposed to the risk of infection by another person (referred to as the "source person"). The Standing Committee on Justice and Human Rights held hearings on the bill in June 2000, but the bill did not proceed because a federal election was called in October. The legislation was reintroduced in 2001 and the Committee heard from witnesses in February 2002, before ultimately concluding that the bill should not proceed.¹

Instead, the Committee recommended that the issues raised by the bill be referred to the Council of Justice Ministers (representing federal, provincial and territorial governments), as well as to the Uniform Law Conference of Canada (ULCC) for consideration.² The ULCC "assembles government policy lawyers and analysts, private lawyers and law reformers to consider areas in which provincial and territorial laws would benefit from harmonization."³ In 2003, the ULCC released a paper exploring some of the issues raised by forced testing.⁴ In 2004, it released a draft, with commentary, of a *Uniform Mandatory Testing and Disclosure Act* (the "Uniform Act") as a model for governments that might wish to pass legislation on this issue.⁵

The Uniform Act outlines the steps for an emergency worker to petition the relevant provincial court for an order to force HIV testing of a source person. According to the Uniform Act, the court can issue such an order if satisfied that certain conditions are fulfilled:

- That the contact occurred in the course of providing emergency services or a crime committed by the source person;
- That infection could have resulted from the contact;
- That testing the exposed person would not be enough to determine HIV status;
- That taking a blood sample would not endanger the source person; and
- That there is no other way to get this information besides forced testing.

In 2001, before the ULCC released the Uniform Act, Ontario became the first province to pass legislation authorizing forced testing for HIV and other blood-borne diseases. Since then, the Uniform Act has been the basis for legislation adopted in three other provinces: Alberta, Nova Scotia, and Saskatchewan. In Manitoba, similar legislation was introduced in late 2006 as a private member's bill, but it had not proceeded further at the time of writing.

¹ Standing Committee on Justice and Human Rights, House of Commons, 37th Parliament, 1st Session. Twelfth Report, 1 March 2002, on-line via <http://cmte.parl.gc.ca/cmte>; see also: T. de Bruyn and R. Elliott. Compulsory HIV Testing after an Occupational Exposure. *Canadian HIV/AIDS Policy & Law Review* 2002; 6(3): 1, 24–31, on-line via www.aidslaw.ca/review.

² Standing Committee on Justice and Human Rights, House of Commons, 37th Parliament, 1st Session. Thirteenth Report, 1 March 2002, on-line via <http://cmte.parl.gc.ca/cmte>.

³ Uniform Law Conference of Canada. "What we do", on-line at: <http://www.ulcc.ca/en/about/>.

⁴ W. Renke. *Bill C-217 — Blood Samples Act — Communicable Disease Exposure and Privacy Limitations: Issues Paper*. Uniform Law Conference of Canada (Civil Law Section): Fredericton, N.B., 10–14 August 2003, on-line: www.ulcc.ca/en/poam2/Communicable_Disease_Issues_En.pdf.

⁵ Uniform Law Conference of Canada (Mandatory Testing and Disclosure Working Group). *Uniform Mandatory Testing and Disclosure Act (Draft and Commentary)*, undated, on-line: www.ulcc.ca/en/us/Uniform_Mandatory_Testing_and_Disclosure_Act_Draft_En.pdf.



On December 13, 2001, Ontario became the first province to pass forced-testing legislation, when the provincial legislature passed Bill 105, the *Health Protection and Promotion Amendment Act, 2001*.⁶ The Minister of Health and Long-Term Care brought an accompanying regulation into effect on September 1, 2003.⁷ The so-called “blood samples” legislation allows an exposed person to apply to the local medical officer of health for an order forcing a source person to be tested for HIV, as well as hepatitis B and C.

According to the Ministry of Community Safety and Correctional Services, between September 2003 and June 2005, 77 applications were filed for such an order (35 from police officers, 26 from members of the general public, 6 from correctional officers, 5 from emergency medical services personnel, 3 from firefighters, and 2 from health care workers). Of these applications, 39 were resolved voluntarily, 26 were dismissed and 10 were refused; in the other 2 cases, medical officers of health issued orders for forced testing.⁸

However, on November 15, 2005, the government introduced Bill 28, the *Mandatory Blood Testing Act, 2006*, to make significant amendments to the existing forced-testing legislation, including:

- Expanding the law to cover police officers;
- Removing medical officers of health from the quasi-judicial role of deciding whether to order forced testing; and
- Speeding up the process of obtaining and enforcing a testing order. (The government stated that, under the original legislation passed in 2001, it could take “up to 70 days or more” to complete the process, from application to testing.⁹)

Bill 28 passed third reading on December 7, 2006 and received royal assent on December 20, 2006.¹⁰ It was proclaimed into force on August 10, 2007 and replaces the earlier law passed in 2001. The description that follows is based on this new Act.

Situations in which forced testing may be allowed

A person who comes into contact with a bodily substance of another person may apply to a medical officer of health to have a blood sample of the source person tested for one or more of HIV, hepatitis B, hepatitis C or other communicable disease set out in a regulation by the Minister of Community Safety and Correctional Services.

To be able to apply for a testing order, a person must have been exposed to a bodily substance in one of the following circumstances:

- As a result of being a victim of crime;

⁶S.O. 2001, c. 30. The bill added a new section to Ontario’s *Health Protection and Promotion Act*. The full text of this original bill can be found on the website of the Ontario Legislative Assembly via www.onlta.on.ca (under “Bills & Law-making” > Bills from Previous Parliaments). See: R. Carey. Ontario adopts “blood samples” legislation. *Canadian HIV/AIDS Policy & Law Review* 2002; 6(3): 39–40, on-line via www.aidslaw.ca/review.

⁷O. Reg. 166/03, “Orders under s. 22.1 of the Act”. See: R. Carey. Ontario: People can now apply for forced HIV testing in certain situations. *Canadian HIV/AIDS Policy & Law Review* 2003; 8(3): 25–27, on-line via www.aidslaw.ca/review.

⁸Ministry of Community Safety and Correctional Services. “Mandatory Blood Sampling”, Presentation to Health Professionals, September 2005, on file.

⁹Proposed legislation on blood testing means better protection for public safety workers. News release, Toronto, (Ontario) Ministry of Community Safety and Correctional Services, 15 November 2005.

¹⁰S.O. 2006, c. 26.

- While providing emergency health care services or emergency first aid to the source person;
- In the course of his or her duties as a member of a group specified in regulations; or
- In some other circumstances or while carrying out some other activity, as may be set out in regulations.

Getting a testing order

Upon receiving an application for testing, the medical officer of health must try to contact the source person and request that the source person provide either a blood sample for testing purposes, or other evidence about whether he or she has any of the communicable diseases covered by the law. The medical officer of health must tell the source person that if he or she fails to provide voluntarily either this blood sample or other evidence, the application will be referred to the Consent and Capacity Board.¹¹

If the source person fails to provide a blood sample or other evidence by the end of the second day after the medical officer of health received the application, or if the source person cannot be located in that time despite the officer’s reasonable efforts, the medical officer of health must refer the application for testing to the Consent and Capacity Board. The Board must then hold a hearing to decide whether to issue an order compelling the source person to provide a blood sample for analysis. The hearing must be finished within seven days after the Board receives the application, and the Board must make its decision within one day after the end of the hearing.

The exposed person must submit to the medical officer of health a report from a physician that assesses the risk to the exposed person’s health as a result of the contact with the source person’s bodily substance. The physician’s report must be made within seven days of the exposure.

Board’s testing order

In order to grant an order compelling the source person to be tested for a particular disease or diseases, the Board must be satisfied that:

- The exposed person has come into contact with a bodily substance of the source person in one of the circumstances covered by the legislation;
- The exposed person “may” have become infected with a virus that causes any of the listed diseases;
- Given the incubation periods for the listed diseases and the available testing methods, testing the exposed person would not determine in a timely manner whether he or she has become infected;
- Taking a sample of a bodily substance from the source person would not endanger his or her life or health; and
- Having regard to the physician’s report, the testing order “is necessary to decrease or eliminate the risk to the health” of the exposed person resulting from the contact with the bodily substance.

Under a testing order, the source person must allow a qualified health professional to take a blood sample within the time set out in the order, for the purpose of testing him or her for any of the listed diseases.

¹¹ The Board already conducts hearings under the *Mental Health Act*, the *Health Care Consent Act*, the *Personal Health Information Protection Act* and the *Substitute Decisions Act*.

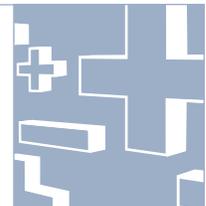
Carrying out the testing order

Within one day after the hearing concludes, the Board must provide a copy of its decision and any order to the exposed person, the source person, and the medical officer of health. In its order, the Board must provide instruction to the physician or other person taking the blood sample, and to the analyst who tests the sample.

The analyst must make “reasonable attempts” to deliver the test results to the exposed person’s physician and to notify the exposed person of this effort, plus recommend that the exposed person consult his or her physician for the test results. If the source person requests it, the analyst must also deliver the test results to the source person’s physician, and must notify the source person once this is done, along with a recommendation to consult the physician. There is no obligation on the source person to have the test results delivered to his or her physician or otherwise to learn the results.

If the source person does not comply with an order from the Board within the time required in the order, the exposed person may apply to a judge of Ontario’s Superior Court of Justice for an order compelling the person to comply with the Board’s order within a specified time. The Court may also order the source person to take “whatever other action the Court considers appropriate in the circumstances.”

[L]egislation that authorizes forced HIV testing, and the disclosure of the test results, violates Canadians’ constitutional rights to bodily integrity and privacy . . .



Appealing a decision about a testing order

There is no right to appeal from the Board’s decision regarding a testing order.

Restrictions on use of samples and test results

A person who takes a blood sample from someone else, either at the request of a medical officer of health or under a Board order, is prohibited from using the sample in any way except as permitted by the regulations or as required by the Board order. Similarly, the analyst who tests the sample must “ensure that the sample is not used for any purpose other than the analysis required by the testing order”. The analyst is also prohibited from releasing the sample to anyone other than a person assisting with the testing or storage of the sample. The analyst is prohibited from disclosing the test results except as authorized by the regulations or a Board order.

As a general rule, the test results obtained under the Act, whether voluntarily in response to a request from a medical officer of health or as compelled by a Board order, “are not admissible in evidence in a criminal proceeding.” The Act says nothing about any other disclosure of information about a source person or an exposed person by anyone else. There is no general prohibition on disclosure. The Minister of Community Safety and Correctional Services has the power to make regulations specifying restrictions or conditions on the use of a blood sample, and on the use or disclosure of any information obtained from the sample (e.g., HIV status of the source person).

Penalties for breaching the Act

A person who fails to obey an order of the Board under the Act, or who breaches or fails to comply with any requirement under the Act or a regulation, is guilty of an offence. This would include refusing to provide a sample for testing, as well as disclosure of information about a source person or an exposed person, such as the result of blood tests, by a physician or the analyst. The penalty is a fine of up to \$5000 for every day on which the offence occurs or continues.



The Legislative Assembly of Alberta enacted the *Blood Samples Act* on May 10, 2004.¹² It received royal assent the next day, but the law specified that it would not come into force until it was proclaimed. In the process of drafting regulations, the Alberta government subsequently decided, in April 2005, that it needed to “strengthen” the *Blood Samples Act* before proclaiming it. In March 2006, the *Mandatory Testing and Disclosure Act* was introduced. This new Act more closely resembles the ULCC’s Uniform Act, and repeals the earlier *Blood Samples Act*. It was passed by the legislature on May 11, 2006 and received royal assent on May 24, 2006.¹³ The new Act, and accompanying regulations, came into force on October 1, 2007.

Situations in which forced testing may be allowed

The law allows a person to seek a testing order if he or she has come into contact with a bodily substance of another person while

- providing emergency assistance to the source person who is ill, injured or unconscious as a result of an accident or other emergency;
- performing duties as a firefighter, paramedic or peace officer; or
- being involved in a circumstance or activity described in the regulations.

In addition, the provincial Cabinet may make regulations designating other classes of people that may apply for a testing order following contact with a bodily substance. The Act covers “communicable diseases” that are prescribed by regulations (which have not yet been published).

Getting a testing order

The exposed person must file an application with the Provincial Court of Alberta within 30 days of the exposure. Ordinarily, the source person who might be subject to a testing order must be given at least seven days’ notice before the application is heard by the Court, and the application and other documents must be served personally on the source person. However, these requirements may be waived if the Court is satisfied that, in the circumstances of the case, giving seven days’ notice to the source person is impossible or impracticable.

The application must set out the circumstances of the contact with the source person’s bodily substance, and state what attempts have been made to determine if the source person has a communicable disease. The application must also include a physician’s report. The form, and the information required, is specified in regulations; these are likely to include the physician’s assessment of the risk of transmission and the need for a testing order to treat or manage the health of the exposed person. (The government may add other requirements through regulations.)

¹² S.A. 2004, c. B-4.5. The full text is on-line from the Queen’s Printer via www.qp.gov.ab.ca/index.cfm (search the Act by its title in the Catalogue Search). See: R. Scheer. Alberta: “Blood Samples” act passes third reading. *Canadian HIV/AIDS Policy & Law Review* 2004; 9(2): 28, on-line via www.aidslaw.ca/review.

¹³ S.A. 2006, c. M-3.5. The full text is on-line from the Queen’s Printer via www.qp.gov.ab.ca (search for the Act by its title in the Catalogue Search).

Court's testing order

In hearing an application for a testing order, the Court “must consider all relevant factors and all relevant evidence submitted . . . including any evidence about the impact a testing order may have on the source individual’s life or health.” In order to grant an order compelling the source person to be tested for a particular disease or diseases, the Court must be satisfied that:

- The exposed person has come into contact with a bodily substance of the source person;
- As a result of that contact, there are “reasonable grounds” to believe that the exposed person “might have become infected” with a communicable disease listed in the regulations;
- Given the incubation periods for the listed disease and the available testing methods, testing the exposed person would not determine, in a timely manner, whether he or she has become infected;
- There is no reasonable alternative to obtain the information that would be obtained by testing the source person; and
- Having regard to the physician’s report, the testing order “is necessary to treat or manage the health” of the exposed person.

The testing order may require the province’s Chief Medical Officer of Health to search databases (to be specified in the regulations) to determine if the source person is recorded in one of those databases as having one of the listed communicable diseases. (In Alberta, as in all provinces and territories, every diagnosis of certain communicable diseases, including HIV infection, must be reported to public health authorities. If a previous test result has been reported along with the person’s name, this information will be found in relevant databases.) The source person may also be ordered to provide information that is needed to perform such a database search. If a database search provides sufficient information that taking a sample of a bodily substance from the source person is not necessary, the Chief Medical Officer of Health may decide not to require further testing and must provide the information from the database search to the exposed person’s physician.

The testing order may direct how the test is to be carried out, and order the source person to comply with any directions of a medical officer of health. Under a testing order, the source person must allow a qualified health professional to take a sample of any bodily substance that the Court orders, for the purpose of testing him or her for any of the listed diseases. The order may also include “any additional directions that the Provincial Court considers necessary.”

If there is already a sample of a bodily substance from the source individual, obtained at the time of the exposure, then the Court may order testing on the existing sample instead of requiring the source person to provide another sample. This could well be the case, for example, where a health care worker is exposed to a bodily substance of a source person from whom a blood sample has just been taken.

Carrying out the testing order

Once the Court makes a testing order, the exposed person who obtained the order must give a copy to the Chief Medical Officer of Health, along with a copy of the physician’s report. The Chief Medical Officer of Health must “as soon as reasonably possible” give a copy of the order and the physician’s report to the medical officer of health for the health region in which the source person lives. The medical officer must designate a qualified health professional to take the sample from the source person, and one or more qualified analysts to conduct those tests on the sample that the medical officer specifies. The medical officer must also give the source person a copy of the testing order and instructions about seeing the health professional who will take the sample.

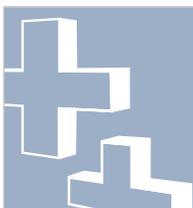
The health professional designated by the medical officer must take the sample of the bodily substance as

ordered by the Court and deliver it to a qualified analyst for testing. The health professional may also request the name and contact information of the source person’s physician, if any, and the source person must comply with that request. If either the medical officer of health or the health professional believes that taking a sample of a bodily substance from the source person will endanger the source person’s life or health, then an application must be filed with the Court for further direction, with two days’ notice to both the source person and the exposed person (unless this is impossible or impractical).

Upon receiving the sample, the analyst must then test the sample for the listed diseases, and promptly provide a written record of the test results to the medical officer. “As soon as practicable after receiving the [test] results”, the medical officer must make “all reasonable efforts” to give a copy of the results to the exposed person’s physician and the source person’s physician, and to notify each of them that the results have been given to their respective physicians.

A medical officer of health, or a qualified health professional, may need the help of a police officer in carrying out a testing order. If the order does not provide sufficient authority for this, the exposed person, medical officer of health, qualified health professional or police officer may file an application to the Court “for further direction”. This normally requires two days’ notice to the source person, although the Court can waive this requirement if this would be impossible or impractical in the circumstances.

The government is not responsible for any costs incurred by the exposed person or the source person in the process of seeking or resisting a testing order unless the regulations state otherwise.



[I]t is an offence to refuse to provide a blood sample when ordered to do so — which means that people are criminalized for asserting their legal right to bodily integrity and informed consent.

Appealing a decision about a testing order

The Act does not specifically state whether there is any appeal from the Court’s decision regarding a testing order, which means the general rules regarding appealing from Provincial Court decisions to a higher court apply. The Act also indirectly contemplates that a testing order made by the Provincial Court might be appealed to the Court of Queen’s Bench.

Restrictions on use of samples and test results

The Provincial Court has the discretion to decide to hold any hearing for an application in private, and to seal the record of the proceedings so that the information is not made public. This is also an option for the Court of Queen’s Bench if an order made by the Provincial Court is appealed.

A health professional who takes a sample from a person under a testing order is prohibited from using the sample in any other way or for any other purpose. Similarly, the analyst who tests the sample must “ensure that the sample is not used for any purpose other than the analysis required by the testing order”. The analyst is also prohibited from releasing the sample to anyone other than a person assisting with the testing or storage of the sample. The analyst is prohibited from disclosing the test results except as authorized by the *Mandatory Testing and Disclosure Act* or the *Public Health Act*.

As a general rule, the test results obtained under a forced-testing order “are not admissible in evidence in any criminal or civil proceeding other than in accordance with this Act or the *Public Health Act*.” Furthermore, the Act prohibits anyone from disclosing information about the exposed person or the source person — such as HIV status — that comes to his or her knowledge in the course of carrying out a testing order.

However, there are numerous exceptions to this prohibition. Disclosure of such information is allowed if it is done with the consent of the person, or if disclosure is required to administer or comply with the Act or regulations. There are also very broadly worded exceptions that could significantly further undermine the privacy of the source person who has been tested without consent. Disclosure of the source person's test results is allowed where it "is ordered by the Minister [of Health and Wellness] for the purpose of protecting the public health". Disclosure is also permitted "pursuant to a subpoena, warrant or order issued by the Provincial Court or the Court of Queens' Bench", or where "required by an enactment" (meaning any other legislation, a potentially wide loophole in the protection of confidentiality). The provincial Cabinet may also, by regulation, set out other circumstances in which disclosure is permitted.

Penalties for breaching the Act

A person who breaches any provision of the Act or the accompanying regulations is guilty of an offence. This would include disclosing information (e.g., a test result) about a source person or an exposed person. It would also include a source person's refusal to comply with a testing order (and this would also be contempt of a court order). The penalty upon conviction is a fine of up to \$2000 for a first offence, and up to \$5000 for a second or subsequent offence.



The *Mandatory Testing and Disclosure Act* was first introduced in the provincial legislature as a private member's bill on October 6, 2004 and was passed into law a mere 12 days later on October 18, 2004.¹⁴ The legislation is based on the ULCC's Uniform Act. The Act and the accompanying *Mandatory Testing and Disclosure Regulations*¹⁵ came into effect on June 1, 2006.

Situations in which forced testing may be allowed

The law allows a person to apply to the court for a testing order if, as a result of contact with a bodily substance of another person, he or she "might be infected with a microorganism or pathogen that causes a . . . communicable disease" listed in the regulations. At the time of writing, the regulations listed HIV, hepatitis B and hepatitis C. The provincial Cabinet has the power to add to the list.

To be able to apply for a testing order, a person must have been exposed to a bodily substance in one of the following circumstances:

- As a result of being a victim of crime;
- While providing the source person with emergency health care services (by a paramedic on duty) or emergency first aid (including by a volunteer);
- While performing duties as a firefighter, peace officer, police officer, or prison guard; or
- While performing some other function in relation to the source person that is set out in regulations.

Getting a testing order

The exposed person must file an application before the Supreme Court of Nova Scotia, the province's highest trial court. Ordinarily, the source person must be given at least three days' notice before the application is heard by the Court. However, this requirement can be waived if the Court is satisfied that, in the circumstances of the case, giving notice to the source person within a reasonable time is impossible or impracticable.

The application must set out the circumstances of the contact with the source person's bodily substance, and must be accompanied by a report from a qualified physician. (The government may add other requirements through regulations.) The physician's report must assess the risk to the exposed person's health as a result of the contact with the bodily substance. The physician must indicate whether the exposed person has

- been assessed for, and received counselling after, the exposure to the bodily substance;
- had a baseline test for possible pre-existing infection with HIV, hepatitis B or hepatitis C (if known, the results of any such tests must also be indicated, unless the exposed person declines to disclose this information);
- received a vaccine against hepatitis B before the exposure, and if so, the details; and

¹⁴ S.N.S. 2004, c. 29. The full, official text of the legislation may be found on the Office of the Legislative Council of the Nova Scotia House of Assembly at <http://www.gov.ns.ca/legislature/legc/>. See also: G Betteridge. Nova Scotia: "Blood samples" legislation passed. *HIV/AIDS Policy & Law Review* 2004; 9(3): 26.

¹⁵ O.I.C. 2006-246 (12 May 2006, effective 1 June 2006), N.S. Reg. 75/2006, available via: www.gov.ns.ca/just/regulations/regs/mtdregs.htm.

- been offered post-exposure prophylaxis (antiretroviral drugs against HIV, hepatitis B immune globulin, and vaccination against hepatitis B).

The physician must also state whether he or she considers the exposed person to be at risk for infection with HIV, hepatitis B or hepatitis C, and whether he or she believes that testing the source person is “necessary to decrease or eliminate the risk to the exposed person’s health resulting from the exposure to bodily fluids from the source individual.”

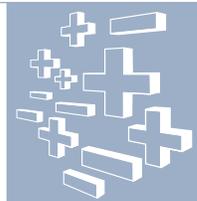
Court’s testing order

In order to grant an order compelling the source person to be tested for a particular disease or diseases, the Court must be satisfied that:

- The exposed person has come into contact with a bodily substance of the source person;
- As a result of that contact, there are “reasonable grounds” to believe that the exposed person “might have become infected” with any of the listed diseases;
- Given the incubation periods for the listed diseases and the available testing methods, testing the exposed person would not determine, in a timely manner, whether he or she has become infected;
- Taking a sample of a bodily substance from the source person would not endanger his or her life or health;
- There is no reasonable alternative to obtain the information that would be obtained by testing the source person; and
- Having regard to the physician’s report, the testing order “is necessary to decrease or eliminate the risk to the health” of the exposed person resulting from the contact with the bodily substance.

Under a testing order, the source person must allow a qualified health professional to take a sample of any bodily substance that the Court orders, for the purpose of testing him or her for any of the listed diseases. The source person must also follow any directions from a medical officer of health given for the purpose of having this testing done. The order may also include “any additional directions that the court considers necessary.”

[I]n the great majority of cases, the source person consents to testing, meaning that that there is no need for forced testing.



Carrying out the testing order

Once the Court makes a testing order, the court registrar must immediately send a copy to the medical officer of the health region in which the source person lives (or, if this is not known, to the province’s Chief Medical Officer of Health). The medical officer must designate a qualified health professional to take the sample from the source person, and one or more qualified analysts to conduct those tests on the sample that the medical officer specifies. The medical officer must also give the source person a copy of the testing order and instructions about seeing the health professional who will take the sample.

The health professional designated by the medical officer must take the sample of the bodily substance as ordered by the Court. The analyst must then test the sample for any of the listed diseases, and promptly provide a written record of the test results to the medical officer.

“As soon as possible after receiving the [test] results”, the medical officer must make “reasonable efforts” to give a copy of the results to the exposed person and his or her physician. In addition, at the request of the source person, the medical officer must also give a copy of the test results to the source person and his or her physician. There is no obligation on the part of the source person to receive the test results.

In carrying out his or her responsibilities, a medical officer may require the assistance of a public health inspector or public health nurse. A “peace officer” (e.g., a sheriff, police officer or prison guard) may assist these public health officials in enforcing a testing order. The costs of any medical reports needed to obtain a testing order, of taking and testing a sample, and any costs incurred by a medical officer in enforcing the order, are covered by the provincial Department of Health.

Appealing a decision about a testing order

The Court’s decision about an application for a testing order can be appealed to the Nova Scotia Court of Appeal, but only on “a question of law” (i.e., not on a “question of fact”). If the exposed person’s request for an order forcing the source person to be tested is turned down, the exposed person can appeal. If it is the source person who is appealing the decision to force him or her to be tested, he or she may apply to a judge of the Court of Appeal for an order “staying” the testing order until the appeal is decided. If the testing order is “stayed” pending the outcome of the appeal, the forced testing cannot proceed.

Restrictions on use of samples and test results

A health professional who takes a sample from a person under a testing order is prohibited from using the sample in any other way or for any other purpose. Similarly, the analyst who tests the sample must “ensure that the sample is not used for any purpose other than the analysis required by the testing order”. The analyst is also prohibited from releasing the sample to anyone other than a person assisting with the testing or storage of the sample. The analyst is prohibited from disclosing the test results except as authorized by the Act.

As a general rule, the test results obtained under a forced testing order “are not admissible in evidence in any criminal or civil proceeding other than in accordance with this Act.” Furthermore, the Act prohibits anyone from disclosing information about the exposed person or the source person — such as HIV status — that comes to his or her knowledge in the course of carrying out a testing order.

However, there are numerous exceptions. Disclosure of such information is allowed if it is done with the consent of the person, or if disclosure is required to administer or comply with the Act or regulations. The exposed person may disclose the results of testing the source person to a physician and other health care providers “as and when necessary to obtain appropriate medical advice and treatment”. (It should be noted that, technically, the exposed person is not allowed to reveal the source person’s test results to any other person, such as a spouse/partner.)

There are also very broadly worded exceptions that could significantly further undermine the privacy of the source person who has been tested without consent. Disclosure of the source person’s test results is allowed where it “is ordered by the Minister [of Health] for the purpose of protecting the public health”. The provincial Cabinet may also, by regulation, set out other circumstances in which disclosure is permitted. Finally, the Act also says that disclosure is permitted where it “is required by law”. It says that a person who is subpoenaed or otherwise compelled to give evidence in a legal proceeding is not required or allowed to answer any question or to produce any document that reveals information that is made confidential by the Act. However, a judge or other person presiding over the proceeding may examine the information, in private, to determine whether the information should be disclosed. In making that decision, the judge must consider the relevance of the information to the proceeding, its probative value, and the invasion of privacy of the person who is the subject of the information.

Penalties for breaching the Act

A person who breaches any provision of the Act is guilty of a summary conviction offence. This would include disclosing information (e.g., a test result) about a source person or an exposed person. It would likely also include a source person's refusal to comply with a testing order (and this would also be contempt of a court order). The penalty upon conviction is a fine of up to \$2000 or up to six months' imprisonment, or both.¹⁶ Every day on which a person continues to breach the Act is considered a separate offence.

¹⁶ *Summary Proceedings Act*, R.S.N.S. 1989, c. 450, as amended, s. 4.

SASKATCHEWAN



The *Mandatory Testing and Disclosure (Bodily Substances) Act* was first introduced in the Saskatchewan legislature on April 12, 2005, following consultation with police and emergency service providers.¹⁷ No other parties were consulted.¹⁸ Saskatchewan's legislation is based on the ULCC's Uniform Act, and was passed on May 24, 2005.¹⁹ The Act is supplemented by the *Mandatory Testing and Disclosure (Bodily Substances) Regulations*.²⁰ The Act and regulations came into force on October 17, 2005.

Situations in which forced testing may be allowed

A person may apply to the court for a testing order if, as a result of contact with a bodily substance of another person, he or she “might be infected with a micro-organism or pathogen that causes a . . . communicable disease” listed in the regulations, and the source person “has refused to be voluntarily tested”. At the time of writing, the regulations listed HIV, hepatitis B and hepatitis C; the provincial Cabinet has the power to add to the list.

To be able to apply for a testing order, a person must have been exposed to a bodily substance in one of the following circumstances:

- As a result of being a victim of crime;
- While providing emergency health care services or emergency first aid to the source person; or
- While performing any function in relation to the source person that is set out in regulations. (At the time of writing, the regulations do not specify any particular functions, such as those of a police officer. However, the Minister of Justice has stated the government's understanding and intention that police officers are eligible to apply for testing orders under the legislation as it is worded.²¹)

Getting a testing order

The exposed person must file an application before the Saskatchewan Court of Queen's Bench, the province's highest trial court. Ordinarily, the source person must be given at least three days' notice before the application is heard by the Court. However, this requirement can be waived if the Court is satisfied that, in the circumstances of the case, giving notice to the source person within a reasonable time is impossible or impracticable.

The application must set out the circumstances of the contact with the source person's bodily substance, and must be accompanied by a report from a qualified physician. (The government may add other requirements through regulations.) The physician's report must assess the risk to the exposed person's health as a result of the contact with the bodily substance, and state the physician's view as to whether testing the source person is “necessary to decrease or eliminate the risk” to the exposed person's health resulting from that contact. The report must also indicate whether the exposed person has had a baseline test for HIV, hepatitis B or hepatitis

¹⁷ Saskatchewan. Legislative Assembly. *Hansard*, 90A (12 April 2005) at 2480–81; *Hansard*, 94A (19 April 2005) at 2569–71; *Hansard*, 115A (24 May 2005) at 3130.

¹⁸ Saskatchewan. Standing Committee on Human Services. *Hansard*, 20 (17 May 2005) at 279–83.

¹⁹ S.S. 2006, c. M-2.1, on-line: www.qp.gov.sk.ca/documents/English/Statutes/Statutes/M2-1.pdf. See: S. Bahk. Saskatchewan: Mandatory “bodily substances” testing legislation passed. *HIV/AIDS Policy & Law Review* 2005; 10(2): 20.

²⁰ Chapter M-2.1, Reg. 1 (effective 17 October 2005).

²¹ Government of Saskatchewan. News release: Mandatory testing legislation proclaimed, 17 October 2005, on-line via www.gov.sk.ca/news/.

C to identify possible previous infection. The physician may compel the exposed person to have such tests in order to prepare the physician's report.

Court's testing order

In order to grant an order compelling the source person to be tested for a particular disease or diseases, the Court must be satisfied that:

- The exposed person has come into contact with a bodily substance of the source person;
- As a result of that contact, there are "reasonable grounds" to believe that the exposed person "might have become infected" with any of the listed diseases;
- Given the incubation periods for the listed diseases and the available testing methods, testing the exposed person would not determine, in a timely manner, whether he or she has become infected;
- Taking a sample of a bodily substance from the source person would not endanger his or her life or health;
- There is no reasonable alternative to obtain the information that would be obtained by testing the source person; and
- Having regard to the physician's report, the testing order "is necessary to decrease or eliminate the risk to the health" of the exposed person resulting from the contact with the bodily substance.

Under a testing order, the source person must allow a qualified health professional to take a sample of any bodily substance that the Court orders, for the purpose of testing him or her for any of the listed diseases. The source person must also follow any directions from a medical officer of health given for the purpose of having this testing done. The order may also include "any additional directions that the court considers necessary."

Carrying out the order

Once the Court makes a testing order, the exposed person must immediately send a copy to the medical health officer of the health region in which the source person lives (or, if this is not known, to the province's Chief Medical Officer). The medical health officer must designate a qualified health professional to take the sample from the source person, and one or more qualified analysts to conduct those tests on the sample that the medical health officer specifies. The medical health officer must also give the source person a copy of the testing order and instructions about seeing the health professional who will take the sample.

The health professional designated by the medical health officer must take the sample of the bodily substance as ordered by the Court. The analyst must then test the sample for any of the listed diseases, and promptly provide a written record of the test results to the medical health officer.

"As soon as possible after receiving the [test] results", the medical health officer must make "reasonable efforts" to give a copy of the results to the exposed person and his or her physician, and to the source person.

In carrying out his or her responsibilities, a medical officer may require the assistance of a "peace officer" (e.g., a sheriff, police officer or prison guard) in enforcing a testing order. The person who applies for a testing order must cover the costs of an application for a testing order, of preparing the physician's report, of testing a sample taken from the source person, of serving any documents, and of any appeal conducted under the Act.

Appealing a decision about a testing order

The Court's decision about an application for a testing order can be appealed to the Saskatchewan Court of Appeal, but only on "a question of law" (i.e., not on a "question of fact"). If the exposed person's request for an order forcing the source person to be tested is turned down, the exposed person can appeal. If it is the source person who is appealing the decision to force him or her to be tested, he or she may apply to a judge of the Court of Appeal for an order "staying" the testing order until the appeal is decided. If the testing order is "stayed" pending the outcome of the appeal, the forced testing cannot proceed.



[T]he likelihood of HIV infection from an exposure such as a needle-stick injury is 0.3% (a 1 in 300 chance) . . .

Restrictions on use of samples and test results

Unless the Court orders otherwise, the Court must hear the application for a testing order in private. The law says explicitly that the court registrar must keep the source person's personal information confidential. The Court may also order a ban on publishing a report of the hearing if it believes that publication "would not be in the best interests" of the exposed person or the source person, or "would be likely to identify, have an adverse effect on or cause hardship to" the exposed person or the source person.

A health professional who takes a sample from a person under a testing order is prohibited from using the sample in any other way or for any other purpose. Similarly, the analyst who tests the sample must "ensure that the sample is not used for any purpose other than the analysis required by the testing order". The analyst is also prohibited from releasing the sample to anyone other than a person assisting with the testing or storage of the sample. The analyst is prohibited from disclosing the test results except as authorized by the Act.

As a general rule, the test results obtained under a forced testing order "are not admissible in evidence in any criminal or civil proceeding other than in accordance with this Act." Furthermore, the Act prohibits anyone from disclosing information about the exposed person or the source person — such as HIV status — that comes to his or her knowledge in the course of carrying out a testing order.

However, there are numerous exceptions to this prohibition. Disclosure of such information is allowed if it is done with the consent of the person, or if disclosure is required to administer or comply with the Act or regulations. The exposed person may disclose the results of testing the source person to a licensed health professional "on a need to know basis . . . in the course of a professional consultation regarding the treatment" of the exposed person. (It should be noted that, technically, the exposed person is not allowed to reveal the source person's test results to any other person, such as a spouse/partner.)

There are also very broadly worded exceptions that could significantly further undermine the privacy of the source person who has been tested without consent. Disclosure of the source person's test results is allowed where it "is ordered by the minister [of health] where it is determined to be necessary for the purpose of protecting the public health." The provincial Cabinet may also, by regulation, set out other circumstances in which disclosure is permitted.

Finally, the Act also says that disclosure is permitted where it "is required by law." It says that a person who is subpoenaed or otherwise compelled to give evidence in a legal proceeding is not required or allowed to answer any question or to produce any document that reveals information that is made confidential by the Act. However, a judge or other person presiding over the proceeding may examine the information, in private, to determine whether the information should be disclosed. In making that decision, the judge must consider the relevance of the information to the proceeding, its probative value, and the invasion of privacy of the person

who is the subject of the information.

Penalties for breaching the Act

A person who breaches any provision of the *Mandatory Testing and Disclosure Act* is guilty of a summary conviction offence. This would include disclosing information (e.g., a test result) about a source person or an exposed person. It would likely also include a source person's refusal to comply with a testing order (and this would also be contempt of a court order). The penalty upon conviction, in the case of a first offence, is a fine of up to \$5000 and a further fine of \$500 for each day on which the offence continues, and in the case of a second or subsequent offence, a maximum fine of \$10,000 and a further fine of \$1000 for each day on which the offence continues.

MANITOBA



On November 30, 2006, Bill 209, a private member’s bill to enact the *Mandatory Testing of Bodily Substances Act*, was introduced in the Legislative Assembly of Manitoba.²² As is the case with legislation in Nova Scotia and Saskatchewan, Bill 209 is based on the ULCC’s Uniform Act, but in some other respects is more similar to Ontario’s 2001 legislation (which pre-dated the ULCC model).

For example, the application for a testing order would be made to a medical officer of health (rather than to a court), and while the medical officer of health “may” hold a hearing “of all persons who may be affected by the order,” he or she “is not required to do so”. The source person who is the subject of a testing order does not have any appeal from a decision to issue the order, whereas the exposed person may appeal an original decision not to issue the order to the province’s Chief Medical Officer of Health. If a source person does not comply with a testing order, the Chief Medical Officer of Health or the Minister of Health may apply to the Manitoba Court of Queen’s Bench for a court order that compels the person to comply with the testing order and “to take any other action the court considers appropriate in the circumstances to protect the interests of” the exposed person.

Bill 209 did not proceed beyond first reading before the legislature was dissolved in April 2007 for a provincial election. On October 16, 2007, the legislation was reintroduced as a private member’s bill in the newly elected assembly by the same Member of the Legislative Assembly, from an opposition party. Press reports indicated the provincial government’s Health Minister supported the bill and intended to speed its passage.²³

²² The full text of the former Bill 209 can be seen on-line at <http://web2.gov.mb.ca/bills/38-5/b209e.php>.

²³ “Manitoba Wants Your Blood: Province Looking at Some Mandatory Tests”, Canadian Press, 16 October 2007.

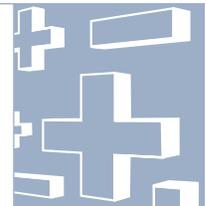
Comment: Forced testing is unjustified

Forced-testing laws raise troubling ethical and legal issues. It is unethical and illegal to perform a medical procedure such as HIV testing on anyone without his or her informed consent.²⁴ With forced-testing laws, the state is authorizing what would normally be considered medical malpractice for which health care professionals can be sued or professionally disciplined.

In addition, legislation that authorizes forced HIV testing, and the disclosure of the test results, violates Canadians' constitutional rights to bodily integrity and privacy, which are meant to be guaranteed by the *Charter of Rights and Freedoms*.²⁵ The Privacy Commissioner of Canada has stated unequivocally that "compulsory blood testing, and compulsory disclosure of the results of blood testing, is a massive violation of privacy and the personal autonomy that flows from privacy."²⁶ Furthermore, in each of the jurisdictions that have adopted forced-testing laws, it is an offence to refuse to provide a blood sample when ordered to do so — which means that people are criminalized for asserting their legal right to bodily integrity and informed consent. (All the provincial laws that have been passed provide for hefty fines; in Nova Scotia, imprisonment is also a possible penalty for such an offence.)

The benefits to be obtained from forced HIV testing are also limited. Benefits will only exist in circumstances where there has been a significant exposure to the risk of infection with HIV, where the source person is available to be tested, *and* where the source person does not consent to testing.

[T]he evidence so far does not suggest that such a crude overreaction as forced HIV testing laws is warranted.



Available evidence suggests that in the great majority of cases, the source person consents to testing, meaning that there is no need for forced testing.²⁷ Stronger evidence is needed before governments step onto the slippery slope of authorizing forced medical procedures, particularly testing people for conditions such as HIV that continue to attract stigma and discrimination.

Indeed, forced testing is even more objectionable when the risk of HIV transmission from an occupational exposure to body fluids is exceedingly low. Researchers have estimated that the likelihood of HIV infection from an exposure such as a needle-stick injury is 0.3% (a 1 in 300 chance) if the person on whom that needle has been used is already known to be HIV-positive.²⁸ The risk is statistically even closer to zero if the person's HIV status is unknown. There has been only one definite case (and two probable cases) of HIV transmission through workplace exposure in Canada in over two decades of the HIV epidemic.²⁹ The Canadian Needle Stick Surveillance Network documented over 2600 reported exposures of health care workers (primarily nurses, medical doctors and laboratory technicians) to blood-borne pathogens between

²⁴ *Reibl v. Hughes*, [1980] 2 SCR 990; *Hopp v. Lepp*, [1980] 2 SCR 192.

²⁵ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, ss. 7 and 8.

²⁶ Privacy Commissioner of Canada. Opening Statement, Appearance before the House of Commons Standing Committee on Justice and Human Rights regarding Bill C-217 (*Blood Samples Act*), 21 February 2002, on-line: http://www.privcom.gc.ca/speech/02_05_a_020222_e.asp.

²⁷ See data reviewed in T. de Bruyn. *Testing of Persons Believed to Be the Source of an Occupational Exposure to HBV, HCV or HIV: A Backgrounder* (Canadian HIV/AIDS Legal Network, 2001), p. 7, on-line via www.aidslaw.ca/testing.

²⁸ U.S. Centers for Disease Control and Prevention. "Updated U.S. Public Health Service Guidelines for the Management of Occupational Exposures to HIV and Recommendations for Postexposure Prophylaxis", *Morbidity and Mortality Weekly Report* 2005; 54(RR-9), p. 2, on-line: www.cdc.gov/mmwr/PDF/rr/rr5409.pdf.

²⁹ Canadian Centre for Occupational Health and Safety. "Needlestick injuries", 25 January 2005, on-line: www.ccohs.ca/oshanswers/diseases/needlestick_injuries.html; see also de Bruyn, *supra* note 26, pp. 7–8.

April 2000 and March 2002, but not a single case of seroconversion as a result of an exposure.³⁰ Given the very low risk involved, the evidence so far does not suggest that such a crude overreaction as forced HIV testing laws is warranted.

Beyond these ethical and human rights concerns, the benefit to the exposed person of forcibly testing the source person for HIV is limited. Consider the case of an emergency worker who, after an occupational exposure, uses such legislation to force someone to be tested for HIV. The source person's test comes back negative and, based on that information, the emergency worker decides not to begin or continue with "post-exposure prophylaxis" (PEP), usually prescribed as a four-week course of anti-HIV drugs. But it can take several weeks (even up to three months) before a confirmatory test produces a definite diagnosis. HIV infection begins with a "window period" in which the virus is in the body, but the antibodies needed to detect the virus are either not present in blood or cannot be detected definitively. The results of the forced HIV test could be inaccurate, particularly if the source person has recently engaged in higher-risk activities such as unprotected sex or sharing equipment to inject drugs. This limitation of testing does not undo, but it does limit, the benefit to the exposed worker who must decide whether to continue with the PEP treatment for another few weeks.

Coercive forced-testing laws that create the illusion of protecting emergency workers by invading people's privacy and bodies are not a panacea to increased occupational exposure. Both the Canadian Medical Association³¹ and the Canadian Nurses Association³² — organizations that represent the two professions with the greatest rates of occupational exposure to bodily fluids — agree that forced testing is not the best way forward.

Provincial governments should instead focus on legislation mandating the use of safety-engineered needles as a preventive measure to reduce the risk of exposure in the first place — a step already taken in Manitoba, Saskatchewan, Nova Scotia, and at least two dozen states in the United States.³³

In addition, workers need policies and procedures to respond quickly and effectively when exposure does occur — including access to voluntary HIV testing with appropriate pre- and post-test counselling, fully covered access to post-exposure prophylaxis drugs, and accurate information from informed physicians who can help workers assess the risk from a given exposure.

A more careful look at the real risks and consequences of forced testing, and more progressive and productive measures that better protect both the health of emergency workers and the rights of people living with HIV/AIDS are needed.

Additional Resources

For more information on HIV testing, visit www.aidslaw.ca/testing.

³⁰ Canadian Needle Stick Surveillance Network. Update — Surveillance of Health Care Workers Exposed to Blood, Body Fluids and Bloodborne Pathogens in Canadian Hospital Settings: 1 April 2000 to 31 March 2002. *Canada Communicable Disease Report* 2003; 29(24): 209–213, on-line: www.phac-aspc.gc.ca/publicat/ccdr-rmtc/03pdf/cdr2924.pdf.

³¹ Canadian Medical Association. *CMA Policy: HIV Infection in the Workplace (Update 2000)*, PD01-03, 9 December 2000, on-line: www.cma.ca > Policy / Advocacy > CMA PolicyBase.

³² Canadian Nurses Association. *Position Statement on Blood-Borne Pathogens*, November 2000. A more recent CNA position statement, *Blood-borne Pathogens: Registered Nurses and their Ethical Obligations* (May 2006), makes no explicit reference to the issue of compulsory testing, but suggests implicitly that such measures are not necessary by declaring that adherence to infection control precautions as "ethically acceptable because it precludes the need to know the blood-borne pathogen status of clients or nurses and safeguards the rights of all individuals to privacy and confidentiality of information."

³³ For additional information and updates on the status of such legislation across the country, see the website of the "Safer Needles Now" campaign, led by Services Employees International Union (SEIU) Canada in collaboration with various other labour unions at www.saferneedlesnow.ca.