Ontario's post-SARS legislative framework for the public health system

Presentation to Ontario's Long-Term Care COVID-19 Commission
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ROADMAP:

1. **Impact of SARS reviews on legal framework for public health system**
2. **Local public health accountabilities**
3. **Central public health: Ministry & CMOH**
4. **Central public health: PHO**

1. Impact of SARS reviews on legal framework for public health system

- Key insights from SARS Commission Report (Campbell); also reflected in Walker
    - Precautionary principle
    - Need to protect & strengthen medical independence, capacity for leadership (as appropriate), power to act quickly & decisively
        - CMOH
        - Local MOH
    - Preparedness is essential; strong emergency powers only part of the solution
    - Clarity in emergency powers; crucial in times of emergency
    - Importance of transparency; increased transparency in scientific advice will provide for greater accountability
- Focus on the HPPA: “the legal engine that makes public health go”

2. Local public health accountabilities

Local public health = local "public health unit":

- Governed by a board of health (BOH) *[s.48]*
- Each with a medical officer of health (MOH) *[s.62]*
- MOH responsible to the BOH for management of public health programs & services, under HPPA and other statutes *[s.67(3)]*

Accountability to central public health (Ministry & CMOH):

- Public Health Funding and Accountability Agreements *[s.81.2]*
- BOH must provide mandatory programs & services *[ss.4 & 5]*
- Mandatory standards (OPHS) for delivery of mandatory programs & services and related accountability to the Ministry and public *[s.7]*
- Subject to substantial CMOH and Ministerial powers:
    - CMOH may exercise the powers of a BOH or MOH *[s.77.1]*
    - CMOH may seek a court order to direct BOH to act *[s.77.2]*
    - CMOH may require BOH to provide information re BOH and the health unit *[s.77.3]*
    - CMOH may issue a directive to any or all BOH or MOH requiring the adoption or implementation of policies or measures including re:
        - Infectious diseases
        - Health hazards
        - Public health emergency preparedness *[s.77.9]*
    - Minister (or CMOH) may:
        - appoint assessor to assess BOH *[s.82]*
        - follow assessment with written direction to BOH *[s.83]*
        - act to ensure compliance with s.83 direction *[s.84]*

"Drilling down" on the OPHS – what "mandated relationship" with LTCH?

- Mandatory standards for all BOH & MOH *[s.7]*
- Address full range of mandatory programs & services, including:
    - Infectious and Communicable Diseases Prevention and Control
    - Emergency Management

- **Infectious and Communicable Diseases Prevention and Control, in accordance with supporting protocols:** *[s.7(5)]*
    - Express BOH mandate: The BOH "shall inspect and evaluate [IPAC] practices in personal care settings …" [OPHS, p.46, #19]
    - No such express mandate for LTCH
    - **BOH mandate to inspect and evaluate IPAC for LTCH more limited, responsive to:** [OPHS, p.46, #20]
        - **Complaints,** as specific to the subject-matter of the complaint [*IPAC Complaint Protocol, 2019*]
        - **Outbreak,** as relevant to the outbreak [*Institutional/Facility Outbreak Management Protocol, 2018; Control of Respiratory Infection Outbreaks in LTCH, 2018*]
        - Legislative context for current role may be *Long-Term Care Homes Act*, obligations and inspection regime

Should IPAC in LTCH be more fully integrated into local PHU responsibilities?

Local MOH testimony that there is good "fit" for stronger, more comprehensive mandated relationship with LTCH:

- Logical, given MOH/PHU expertise & relationships
- Efficient, given MOH/PHI powers to require & enforce compliance, immediately where necessary

If so, mandate and related authorities should be express in legal framework to eliminate potential disputes, e.g.

- Ongoing PHU mandate to <u>proactively</u> inspect and evaluate IPAC <u>practices</u>
- PHU authority to communicate with / involve others as may be necessary (e.g., hospitals, LHINs/Ontario Health), including by order
- PHU obligation to publicly report

Options for recommendations:

- ***<u>Express BOH mandate in OPHS</u>:*** The BOH shall inspect and evaluate IPAC practices in LTCH …"
    - Corresponding revisions to related protocols & guidelines

- ***<u>Express BOH mandate in HPPA</u>:*** Establish BOH responsibility for IPAC in LTCH as a mandatory program and service under s.5
    - Corresponding revisions to OPHS and related protocols & guidelines

Extract from HPPA:

Mandatory health programs and services

5. Every board of health shall superintend, provide or ensure the provision of health programs and services in the following areas:

1. Community sanitation, to ensure the maintenance of sanitary conditions and the prevention or elimination of health hazards.

1.1 The provision of safe drinking water by small drinking water systems.

2. Control of infectious diseases and diseases of public health significance, including provision of immunization services to children and adults ["and the inspection and evaluation of IPAC practices in LTCH"].

3. Health promotion, health protection and disease and injury prevention, including the prevention and control of cardiovascular disease, cancer, AIDS and other diseases.

4. Family health, including,

i. counselling services,

ii. family planning services, …

- **HPPA, s.29.2:** Possible gap as relates to capacity to order LTCH supports:

(1) Subject to subsection (2), a medical officer of health **may make an order requiring a public hospital or an institution to take any actions specified** in the order **for the purposes of** monitoring, investigating and responding to an outbreak of communicable disease **at the hospital or institution**.

- **Emergency Management under the OPHS:**

    - **OPHS Requirement:** The BOH "shall effectively prepare for emergencies to ensure 24/7 timely, integrated, safe, and effective response to, and recovery from emergencies with public health impacts, **in accordance with ministry policy and guidelines."** [OPHS, p.27, #1]

    - ***Emergency Management Guideline, 2018***

        - Focus appears to be continuity of BOH programs & services
        - No express reference to LTCH

    - **Contrast with SARS Commission recommendation:**

        "Public health emergency planning, preparedness, mitigation, management, recovery, coordination and public health risk communication **under the direction of the local MOH** be **added to the list of mandatory public health programmes and services** required by s.5 of the HPPA."

        (SARS Commission, Vol.5, p.64)

3. **<u>Central public health (Ministry & CMOH)</u>**

Broad central powers for policy direction, guidance and oversight of local PHUs:

- As above

Broad central powers to act in response to risks to health anywhere in Ontario:

- Post-SARS, collected together in new "Part VI.1 – Provincial Public Health Powers"; some pre-existing & some new powers

- **CMOH may investigate and act as considers appropriate to prevent, eliminate or decrease identified risk, including exercising BOH or MOH powers** [s.77.1]
    - *Trigger:* Where CMOH "of the opinion" that "a situation exists anywhere in Ontario that constitutes or may constitute a risk to the health of any persons"

- **CMOH may seek a court order to direct BOH to act** [s.77.2]
    - *Trigger:* Where "of the opinion" that "a situation exists anywhere in Ontario that constitutes or may constitute a risk to the health of any persons"

- **CMOH may require BOH to provide information re BOH and the health unit** [s.77.3]
    - *Trigger:* No specified threshold

- **Minister may by order require an occupier to deliver premises for public health purposes, including temporary isolation facility** [s.77.4]
    - *Trigger:* Where CMOH certifies that an outbreak of communicable disease or immediate risk to health of persons anywhere in Ontario, exists or may exist and premises are necessary

- **Minister may by order require the procurement, acquisition and seizure of medications and supplies and/or related information** [s.77.5]
    - *Trigger:* Where CMOH certifies that an outbreak of communicable disease or immediate risk to health of persons anywhere in Ontario, exists or may exist and what is sought is necessary

- **CMOH may by order require a Health Information Custodian (HIC) to supply any information, including Personal Health Information (PHI)** [s.77.6]
    - *Trigger:* Where "of the opinion, based on reasonable and probable grounds" that "there exists an immediate and serious risk to the health of persons anywhere in Ontario" and the information is necessary

- **CMOH may issue a directive to any heath care provider or entity (broadly defined) requiring precautions or procedures to protect the health of persons anywhere in Ontario** [s.77.7]
    - *Trigger:* Where "of the opinion" that "there exists or there may exist an immediate risk to the health of persons anywhere in Ontario"

- **Minister may issue an order to any heath care provider or entity (broadly defined) directing information to be provided to the Minister** [s.77.7.1]
    - *Trigger:* Where "of the opinion" that "there exists or there may exist an immediate risk to the health of persons anywhere in Ontario from a new or emerging disease"

- **CMOH may collection of previously collected specimens of information about their analysis** [s.77.8]
    - *Trigger:* Where "of the opinion, based on reasonable and probable grounds" that "there exists an immediate and serious risk to the health of persons anywhere in Ontario" and what is sought is necessary

- **CMOH may issue a directive to any or all BOH or MOH requiring the adoption or implementation of policies or measures including re:**
        - **Infectious diseases**
        - **Health hazards**
        - **Public health emergency preparedness** [s.77.9]
    - *Trigger:* Where "of the opinion" that "there exists or there is an immediate risk of a provincial, national or international public health event, a pandemic or an emergency with health impacts anywhere in Ontario" and what is directed is necessary

- **Some key points:**
    - Not limited to declared provincial emergency
    - Advantage to addressing system-wide issues at central level in context of an emergency; "clears the field" for local MOHs to act, e.g., where authority may be ambiguous / disputed
    - No right to review (hearing *de novo*) by HSARB *[s.44]*
    - Capacity for enforcement:
        - Provincial offence provisions for non-compliance *[s.100]*
            - Lower fines than *Emergency Management and Civil Protection Act*
        - Application to Superior Court where Act contravened *[s.102(1)]*

Role & responsibilities of the CMOH:

- SARS Commission recommendations emphasize need for robust role & responsibilities for CMOH and clear accountability, emphasizing:
    - Independence re medical matters pertaining to public health
    - Primary authority re public health aspects of provincial emergency
- Detailed review of recommendations underway

- **Some observations:**
    - **Limited provisions to define CMOH role & mandate** [s.81]
        - Must report annually on state of public health & may make other reports
        - Must keep informed on matters of occupational and environmental health
        - Contrast with B.C.'s *Public Health Act*, ss. 64 and 66:

Role of provincial health officer

64. The provincial health officer is the senior public health official for British Columbia.

Duty to advise on provincial public health issues

66. (1) The provincial health officer must monitor the health of the population of British Columbia and advise, in an independent manner, the minister and public officials

(a) on public health issues, including health promotion and health protection,
(b) on the need for legislation, policies and practices respecting those issues, and
(c) on any matter arising from the exercise of the provincial health officer's powers or performance of his or her duties under this or any other enactment.

(2) If the provincial health officer believes it would be in the public interest to make a report to the public on a matter described in subsection (1), the provincial health officer must make the report to the extent and in the manner that the provincial health officer believes will best serve the public interest.

(3) The provincial health officer must report to the minister at least once each year on

(a) the health of the population of British Columbia, and
(b) the extent to which population health targets established by the government, if any, have been achieved,

and may include recommendations relevant to health promotion and health protection.

(4) The minister must lay each report received under subsection (3) before the
Legislative Assembly as soon as it is reasonably practical.

- **In declared emergency, *potential* exercise of CMOH powers by Premier and others under EMCPA, s.7.0.3**
  - Premier may exercise statutory powers of a Crown employee
    - May further delegate to Minister, Commissioner of Emergency Management
  - Does protection of CMOH powers prevent this? [s.7.2(5), EMCPA]

- **Limited CMOH authority to direct PHO** (next)

4. Central public health: PHO

- **SARS Commission:** Recommended CMOH direction the public health laboratories (now transferred to PHO) as “a vital aspect of public health protection” (p.36)
- **Walker Report:** Recommended PHO should report to CMOH, who shall set strategic direction and sit as *ex officio* member of PHO board; CEO to provide scientific direction & run the agency; to report to CMOH (Rec #3)

- PHO’s current legislative framework does not provide the CMOH with control to direct PHO operations or the nature and extent of its work, and only limited CMOH power to issue directives to PHO.

- *Ontario Agency for Health Protection and Promotion Act, 2007* (OAHPPA):
    - PHO’s CEO is responsible for management and administration of its affairs, subject to the supervision and direction of its board of directors; *[ss.12, 19(2)]*
    - PHO's board of directors is comprised of up to 13 people appointed by Cabinet; *[s.9]*
    - CMOH is not a director; has rights to reasonable notice of, and to attend and participate in, any meeting of the board of directors; *[s.18(3), (4)]*
    - CMOH is a member of PHO's strategic planning standing committee; *[s.14(1), (4)]*
        - PHO's strategic objectives must form part of its annual business plan and are subject to the Minister's approval; *[s.21(2), (3)]*
    - CMOH's power to issue directives to PHO limited to written directives "to provide scientific and technical advice and operational support to any person or entity in an emergency or outbreak situation that has health implications"; *[ss.6(j), 24]*