

ONTARIO HEALTH PROTECTION AND PROMOTION ACT

by Walied Soliman

The recent outbreak of SARS, and its potential for wide-reaching ill effects, has generated renewed interest in the scope of the state's power to control the actions of individuals and groups when confronted with a suspected communicable disease.

Under the Ontario *Health Protection and Promotion Act* ("the Act"), medical officers of health are accorded extremely broad powers to restrict the mobility and conduct of persons, the exercise of which powers may significantly impair individual rights and constrain the operation, and continued viability, of businesses.

Powers of Closure and Quarantine

Part IV of the Act addresses communicable diseases. Communicable diseases for the purpose of the Act are those that are prescribed by regulation made by the Minister of Health and Long-Term Care.

The Act empowers a medical officer of health (a "medical officer") to order a person to take or refrain from taking a specific course of action in circumstances where, upon reasonable and probable grounds, the medical officer is of the opinion that a communicable disease exists or may exist, or that there is an immediate risk of an outbreak of a communicable disease in the jurisdiction served by that medical officer; that the communicable disease presents a risk to the health of persons in that jurisdiction; and that the requirements specified in the medical officer's exercise of its powers are necessary to decrease or eliminate the health risks presented by the communicable disease. A medical officer's powers extend to

ordering the closure of premises; isolating persons or a class of persons; cleaning, disinfecting or destroying items; having persons examined by a physician; and restricting the conduct of any such person so as not to expose another person to infection. The exercise of these powers is specifically exempt from the normal requirement of obtaining the targeted person's consent.

Duty to Report Communicable Diseases

Under the Act, every physician is under an obligation to report to the supervising medical officer the name and address of any person under that physician's care for a suspected communicable disease who refuses or neglects to continue the required treatment to a degree satisfactory to that physician.

In addition to the general powers available to a medical officer, section 35 of the Act permits a medical officer to bring an application to a judge of the Ontario Court of Justice when a person fails to comply with a medical officer's orders in respect of a communicable disease that is a virulent disease, which application may result in a court order requiring the person to be taken into custody and detained in a hospital, to be subject to examination by a physician and, if determined to be infected, to be forcibly treated for the disease. Although the Act limits the initial period of detention to a maximum of four months, there is provision for further application to the court in order to extend the detention period in circumstances where the medical officer can demonstrate a basis for such an extension.

Balance of Public Health and Private Rights

These are clearly potent powers available to a medical officer, which may dramatically interfere with a citizen's normal liberties. Although the case focused on the issue of reporting, the 1995 decision of the Ontario Court (General Division) in *Canadian AIDS Society v. Ontario* reflects judicial recognition that the Act has been structured to strike an appropriate balance between the state's goal of promoting public health and the privacy rights of individuals. Although the court acknowledged that an individual's privacy rights are given due consideration under the Act, the state's objective of promoting public health for the safety of all will be given great weight by courts when called upon to scrutinize any actions taken under the authority of the Act.

To the extent that we face a serious communicable disease outbreak in the future that is not contained early on and begins to extend into the community, a medical officer's exercise of the powers provided for under the Act could significantly impair the mobility and civil rights of individuals and affect the viability of businesses on a broad scale. The exercise of this authority could also create a serious tension with the fundamental rights protected under the *Canadian Charter of Rights and Freedoms*. This remains an area yet to be tested.

Reprinted with permission.

Walied Soliman is an Associate at Blake, Cassels & Graydon LLP.

For more information, please contact Walied Soliman at 416-863-2274 or walied.soliman@blakes.com.