UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

Bill C-217 – Blood Samples Act

Communicable Disease Exposure and Privacy Limitations:

Issues Paper

By

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Fredericton, N.B
August 10 –14, 2003

FOREWORD

At the 2002 meetings of the Uniform Law Conference of Canada held in Yellowknife, it was resolved, following presentation of a Report outlining issues raised by the introduction of Federal Bill C-217, the ***Blood Samples Act***, and Ontario Bill 105, the ***Health Protection and Promotion Act***, RSO 1990, C-H.7 that a joint Civil-Criminal Working Group be struck to consider whether provincial legislation should be developed to address the issues arising out of the Report and if so, the elements that should be included in a draft Uniform Act. Pursuant to this resolution, Professor Wayne Renke, University of Alberta, was retained to prepare a paper which would give effect to the resolution. In undertaking his task Professor Renke had the benefit of a Working Group made up of representatives from the Civil and Criminal Sections of the Conference with whom he was able to discuss the content and form of his paper as the work progressed.

Members of the joint Working Group were: Glen Abbott; Christopher Curran, Chair, Civil Section, ULCC; Tamara Friesen; Daniel Gregoire, Chair, Criminal Section, ULCC; Lisette Lafonte; Sara Lugtig; Darcy McGovern; Paul Nolan; David O'Brien; Joanna Pearson; Frederique Sabourin; Jeffrey Schnoor and Jack Walsh. Discussion within the Group was animated. In particular, there was debate over whether the terms of reference should be broadened to include criminal law issues, including whether new criminal offences are necessary to deal with the transmission of communicable diseases. In the end it was agreed that the paper should have a health information focus with mandatory testing and disclosure legislation as the principal issue. Professor Renke's paper reflects this decision. As indicated in footnote 1 of the Paper, his conclusions and recommendations do not necessarily represent the views of all members of the Working Group and are presented for purposes of informed debate at the Conference.

On behalf of the Working Group I would like to congratulate Professor Renke for his thoughtful paper and for the skill with which he navigated Working Group discussions. I would also like to thank members of the Working Group for their dedication to this process. Finally, I would like to acknowledge Carol Prosser who prepared the Minutes of our teleconference meeting and who made the administrative arrangements for all our calls.

Christopher P. Curran, Convenor
Working Group on Communicable Disease Exposure

ABSTRACT

Persons may fear that they have been exposed to communicable disease in the course of employment or when rendering assistance to others. They may desire medical information respecting those who may have transmitted disease. This information could be relevant to treatment, conduct, and peace of mind. Outside of Ontario, "exposed individuals" have no legal mechanism to compel the testing of "source individuals" and the disclosure of their medical information. The author considers whether this legal mechanism is necessary, given currently available alternatives. The author explores the constitutional dimensions of legislation authorizing mandatory testing and disclosure. The author focuses on the reasonable expectations of privacy of source individuals and on whether mandatory testing and disclosure legislation may be consistent with those reasonable expectations, in light of the relationships of source individuals and exposed individuals, the purposes to be served by disclosure, the utility of legislative mechanisms in promoting those purposes, potential adverse consequences of legislation, and due process considerations. Division of powers issues are also examined. The paper concludes with two brief reflections on whether a new criminal offence should be enacted respecting certain types of communicable disease transmission conduct, and on whether the current search warrant provisions have sufficient scope to permit requisite evidence to be gathered in criminal communicable disease transmission cases.

UNIFORM LAW CONFERENCE OF CANADA

COMMUNICABLE DISEASE EXPOSURE AND PRIVACY LIMITATIONS: ISSUES PAPER

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1 We are increasingly aware of the risks of infection. We might hope for legal tools that will provide the information we believe we need if we have been exposed to communicable disease. But while the propriety and design of such legal tools are the subject of an ever-expanding literature, finding firm and satisfactory conclusions is difficult. This paper ventures into the debate concerning Amandatory testing and disclosure legislation.@It confronts the tensions between the need to know and the right to privacy. The paper works through the following main sets of issues: (A) a brief description of the practical background to the legislation [paras. 2 - 4]; (B) whether the legislation is unnecessary, given currently available alternatives [paras. 5 - 12]; (C) basic privacy rights [paras. 13 - 18]; (D) a proposed method for assessing privacy rights [paras. 19 - 20]; (E) reasonable expectations of privacy, with special consideration to factors that may diminish that expectation [paras. 21 - 39], and the reasonableness of legislative limitations of privacy, with regard to legislative objectives, means for limiting privacy, and process [paras. 40 - 87]; and (F) the authority to enact mandatory testing and disclosure legislation [paras. 88 - 102]. The paper concludes with (G) some suggested guidelines for constitutionally-permissible mandatory testing and disclosure legislation [paras. 103 - 110].[ii] Schedules A [paras. 111 - 118] and B [paras. 119 - 123] briefly address two matters falling outside the scope of this paper Bthe need for new criminal offences respecting communicable disease transmission and the need for new search warrant authority, respectively. In light of the legal, ethical, political, and emotional complications of the issues, this paper=s contributions can have no finality; they are but invitations to discussion.

A. Background

2 Suppose that an interaction between two individuals occurs, whereby one individual (the AExposed Individual@) is exposed to bodily substances of the other individual (the ASource Individual@). Exposure might occur in five main settings. First, exposure might occur in ordinary, casual interactions during travel, at work, or in any other gathering.

Second, the Exposed Individual may be a civilian victim of (allegedly) criminal conduct by the Source Individual, as in the case of a sexual assault. Third, the Exposed Individual may be a professional engaged in a public service role (e.g., a police officer, a corrections officer, or a firefighter) or a civilian assisting the professional; exposure results from the (allegedly) assaultive conduct of the Source Individual (e.g., biting, spitting, throwing bodily fluids). Fourth, the Exposed Individual may be a professional engaged in a public service role (such as a firefighter, emergency responder, police officer, or health services provider); exposure does not result from intentional contact by the Source Individual (e.g. a professional comes into contact with an accident victim=s blood in the course of providing emergency medical services). Fifth, the Exposed Individual may be a AGood Samaritan@ who provides emergency medical services to the Source Individual; again, exposure does not result from intentional contact by the Source Individual.

3 The Exposed Individual may come to believe that the exposure entails a risk that the Exposed Individual has contracted a communicable disease.[iii] The belief in the exposure to risk could impel the Exposed Individual take steps to manage the risk both to himself or herself and to others; the belief could cause considerable anxiety to the Exposed Individual and to those close to him or her. The Exposed Individual may also believe that the risk could be better managed if information about the Source Individual=s medical condition were disclosed to the Exposed Individual. Finally, the Exposed Individual may believe that this information could be gained if the Source Individual were subjected to physically invasive tests. But while the Exposed Individual may have significant interests in subjecting the Source Individual to testing and in accessing test results, the Source Individual may assert that he or she has basic rights to privacy, to be left alone, in the absence of justified limitations of those rights.

4 A legislature may be inclined to address the tension between the interests of Exposed and Source Individuals through legislation, such as Ontario=s *Health Protection and Promotion Act, 2001* (ABill 105@)[iv] which has become law, and the federal private member=s Bill C - 217 (ABill C - 217@)[v] which has not. Very generally, the legislation would allow certain classes of Exposed Individuals, in defined circumstances, to apply for orders

compelling Source Individuals to undergo invasive physical testing and compelling the disclosure of test result information to Exposed Individuals.

B. Whether Legal or Practical Remedies Already Exist

5 If Exposed Individuals are entitled to obtain the requisite information respecting Source Individuals under current law, then further consideration of mandatory testing and disclosure legislation is unnecessary. Arguments might be made that Exposed Individuals may obtain the requisite information through (1) public health legislation, (2) protocols respecting information disclosure, and (3) voluntary disclosure.[vi] Furthermore, arguments might be made that neither disclosure nor legislation supporting disclosure is necessary, because (4) preventative measures almost entirely reduce the risk of infection.

1. Public Health Legislation

6 Provincial public health legislation might be used to obtain information respecting the communicable disease status of Source Individuals. For example, Alberta=s *Public Health Act* accords extensive information-gathering and testing authority to medical officers of health (in the singular, AMOH@). If an MOH reasonably believes that an individual has engaged in or is engaging in any activity that is causing or may cause a threat to the health of the public or a class of the public, the MOH may require the individual to provide specified information to the MOH.[vii] An MOH may compel an individual to submit to medical examinations, if the MOH has reason believe that the individual may be infected with a communicable disease.[viii] Furthermore, a Provincial Court Judge may issue a warrant for examination of an individual, on the application of any person, if the applicant establishes that the individual is infected with a prescribed disease, has refused or neglected to submit to a medical examination to ascertain whether he or she is infected, and the individual should be examined in the interests of his or her own health or the health of others.[ix] It is true that information gathered through public health interventions must be kept confidential:

> Information contained in any file, record, document or paper maintained by the Chief

> Medical officer or by a regional health authority . . . that comes into existence through anything done under this Part and that indicates that a person is or was infected with a communicable disease shall be treated as private and confidential in respect of the person to whom the information relates and shall not be published, released or disclosed in any manner that would be detrimental to the personal interest, reputation or privacy of that person.[x]

This confidentiality obligation, however, is subject to discretionary exceptions. Information may be disclosed (generally) to any person if the Chief Medical Officer or regional health authority believes on reasonable grounds that the disclosure will minimize an imminent danger to the health or safety of any person;[xi] or if the responsible Minister provides written consent to disclosure, on the basis that disclosure is Ain the public interest.@[xii]

7 The relevance of these provisions is as follows: An Exposed Individual, through the provision of reasonable grounds, might cause an MOH or a judge to compel a Source Individual to be detained and tested. While the information gathered would be B at least initially B confidential, the Exposed Individual could apply to have the information released, on the grounds that it is necessary for the health of the Exposed Individual and others.[xiii] But while this is a possible procedure, it is not of practical value to Exposed Individuals.

8 Insofar as an MOH requires evidence of a threat to public health, an Exposed Individual may have difficulty meeting the standard. The conduct of the Source Individual may have posed a risk only to the Exposed Individual directly, and not to others (or only to others through the potential exposure of the Exposed Individual). That aside, the process would be two-part: a first directed at testing; a second directed at disclosure. The orientation of the *Public Health Act* is toward the protection of the public and the treatment of infected persons; it is not oriented to the disclosure of information for the benefit of individuals. And while success may be achieved respecting the first part of the process, the prospect of success at the second (disclosure) stage is uncertain. The exception to confidentiality is discretionary (Amay disclose@) not mandatory (Amust disclose@). The process would be time intensive. Aside from the evidence of recalcitrance that may be necessary to support a warrant to

examine, the information would flow from the Source Individual to the medical apparatus, and only from there to the Exposed Individual. The process is not abundantly clear; the legislation does not spell out the criteria that must be addressed to achieve disclosure. Finally B and this will be discussed further below B the adjudicators of disclosure would not be judges, but medical personnel. This may be inappropriate from the perspectives of both Exposed Individuals and Source Individuals.

2. Protocols

9 Pursuant to the *Guidelines for Establishing a Notification Protocol for Emergency Responders*,[xiv] emergency health care responders may have access to information about Source Individuals.[xv] Four provinces B BC, Alberta, Saskatchewan, and Ontario B have adopted this protocol. Current protocols, though, suffer from three defects. First, the *Guidelines* have not been adopted in all provinces. Second, not all Exposed Individuals are Aemergency responders@within the meaning of the *Guidelines* B particularly AGood Samaritans@and victims of crime. Third, the *Guideline* information disclosure provisions are only effective if the Source Individual has already provided bodily samples for institutional analysis, on the basis of which information may be provided.[xvi] It is not the case that participating medical facilities will have bodily samples of Source Individuals in all cases of exposure of Exposed Individuals.

3. Consent to Testing

10 Opponents of mandatory testing and disclosure legislation point to evidence that, in health care institution settings, a very high number of Source Individuals provide consent to testing, eliminating any need for mandatory testing.[xvii] One might observe that consent is not universal: Aabout 5 patients per 1000 either refuse to be tested or are incapable of testing@[xviii] That number of non-consenting Source Individuals might be sufficient to point to the need for legislation. Regardless, it is not possible to generalize beyond the health care institution setting. In criminal offence, policing or correctional settings, it is likely that Source Individuals would be less disposed to submit to testing or to provide information

voluntarily.[xix] Even outside of criminal justice settings, if the Source Individual were not institutionalized or in an ongoing relationship with the Exposed Individual (as in AGood Samaritan@situations) it is not clear whether samples or information would be provided voluntarily. In any event, if the legislation were in place, persons could continue to provide samples or information voluntarily. The point of the legislation would be to catch just those situations in which Source Individuals refuse to provide samples or information voluntarily. One might hope that this would be a small number of cases. Without the legislation, though, Exposed Individuals could be left with no or no practical relief. One might also reflect that the law often targets those who do not voluntarily conform to norms, even though they may be a tiny minority.

4. Preventative Measures

11 Preventative measures can vastly reduce risks of infection. These may include immunization (which prevents HBV infection[xx]), use of protective equipment, and use of protective techniques, as well as appropriate post-exposure actions.[xxi] One might argue that prevention will make a greater contribution to individuals= safety than legislation. Legislation, in fact, could undermine prevention. It will divert resources and attention from prevention programs. Allowing post-exposure access to others= health information could obscure the message that all are responsible for protecting themselves against exposure.[xxii] This sort of argument was rejected in the *Cuerrier* case, when it was advanced against the Acriminalization@of non-disclosed HIV transmission. Cory J. remarked that Athe primary responsibility for making the disclosure must rest upon those who are aware that are infected.@[xxiii] Regardless of the Aresponsibility@point, which we shall revisit below, the simple response to the prevent argument is that A[p]reventative efforts can reduce the risk of exposures, but not eliminate them.@[xxiv] Mandatory testing and disclosure legislation is necessary for circumstances in which prevention has not worked.

12 In view of the lack of effective legal or practical alternatives, exploring the constitutional possibility of mandatory testing and disclosure legislation is worthwhile.

C. Source Individuals= Basic Rights

13 The foundation of Source Individuals= rights is the *Canadian Charter of Rights and Freedoms.*[xxv] Source Individuals may claim protection under ss. 8 and 7 of the *Charter*.

14 Section 8 of the *Charter* provides that A[e]veryone has the right to be secure against unreasonable search or seizure.@ Legislated mandatory testing and health information disclosure would amount to Asearches@or Aseizures@even though the activities would be at the behest of private individuals (Exposed Individuals), since the testing and disclosure would be non-consensual and compelled and enforced by the State.[xxvi] As against State intrusions, s. 8 establishes that individuals have a Areasonable expectation of privacy.@[xxvii] The Areasonableness@of privacy expectations must be judged in relation to the particular context of the Aprivacy relationship,@and as against threatened or actual limitations of privacy. Without considering context or particular legislative limitations, it is fair to begin the s. 8 analysis with the proposition that individuals do have reasonable expectations that, without their consent, they will not be subjected to intrusive physical testing and that their health information will not be disclosed.[xxviii] The reasonableness of this expectation has multiple underpinnings.

15 Bodily integrity and health information are protected by professional ethics, research ethics standards,[xxix] common law, civil law,[xxx] statute, and international law. Physicians= professional ethics require that, generally, health information be kept confidential and that patients be treated only if they have provided informed consent to the treatment.[xxxi] The guiding ethical principles for research ethics approval in Canada require that researchers establish to the satisfaction of research ethics boards that (*inter alia*) proposed research respects the privacy and confidentiality of research subjects and provides for their free and informed consent to the research.[xxxii] The common law protects bodily integrity through the tort of battery.[xxxiii] The tort of defamation also protects privacy.[xxxiv] The civil law protects bodily integrity by art. 1457 of the *Civil Code*. Non-consensual interference with another=s bodily integrity is actionable. Hence, both the common law and civil law developed the doctrine of Ainformed consent,@to regulate the circumstances in which one individual,

particularly in medical contexts, would be entitled to pierce, or manipulate, or take substances from the body of another, for purposes of healing.[xxxv] The wrongful disclosure of health information could be pursued at common law through breach of contract or breach of confidence actions against physicians and at civil law through an action for damages.[xxxvi] The *Criminal Code*[xxxvii] provides statutory protection for bodily integrity through (*inter alia*) its assault and homicide provisions. The *Civil Code* and the Quebec *Charter of Human Rights and Freedoms* protect privacy expressly.[xxxviii] Some provinces have Privacy Acts, which establish causes of action for invasions of privacy.[xxxix] Provincial statutes respecting health care professionals and Health Information legislation protect privacy. International law documents, such as the *International Guidelines on HIV/AIDS and Human Rights* set out requirements for informed consent, protect voluntary testing,[xl] and promote privacy of health information.[xli]

16 Section 8, consistently with this legal backdrop, has been interpreted to provide strong protection for bodily integrity and health information.[xlii] The following passages provide some flavour of this protection:

$ Aa violation of the sanctity of a person=s body is much more serious than that of his office or even of his home.@[xliii]

$ AIn modern society . . . retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.@[xliv]

$ AThat physical integrity, including bodily fluids, ranks high among the matters receiving constitutional protection, there is no doubt . . . .@[xlv]

17 Section 7 of the *Charter* also protects physical and informational privacy, in both criminal and civil law proceedings.[xlvi] Section 7 provides that A[e]veryone has the right to life,

liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.@ ASecurity of the person@includes physical security, and so protects against unwarranted State interferences with bodily integrity. According to Robins J.A., Athe common law right to determine what shall be done with one=s own body and the constitutional right to security of the person, both of which are founded on the belief in the dignity and autonomy of each individual, can be treated as co-extensive.@[xlvii] ASecurity of the person@extends to psychological security, and establishes the right to be secure against psychological trauma.[xlviii] Psychological trauma could be the result of non-consensual disclosures of information, whether the information is disclosed to a third party, or even to the Source Individual himself or herself.

18 One might wonder whether fairness requires that Source Individuals=constitutional rights be counterbalanced with the constitutional rights of Exposed Individuals B surely they too have rights to Alife@and Asecurity of the person.@Of course, Exposed Individuals would have those rights B but not in the present context. Section 7 is engaged only if a person suffers or will potentially suffer Adeprivation@caused by the State.[xlix] While Source Individuals= constitutional rights are put in issue through the contemplated legislation, Exposed Individuals=rights are not. Exposed Individuals=security of the person is not limited by the contemplated legislation, but enhanced. Legal privileges that would not otherwise exist are created for their benefit.[l]

D. Assessing the Scope of Privacy Rights

19 Privacy interests falling under ss. 8 and 7 do not receive Aabsolute@protection. Privacy limitations may be justified in two ways. First, both s. 8 and s. 7 are Ainternally balanced@rights B the language creating the rights constrains the scope of protection. Section 8 protects against Aunreasonable@search or seizure; it protects (only) Areasonable@ expectations of privacy. The reasonableness of a proposed limitation must be balanced against the reasonableness of the expectation of privacy to determine whether the limitation or the expectation of privacy is the more reasonable. Section 7 protects the species of security against deprivations, unless those deprivations are An accordance with the principles of

fundamental justice.@ Again, the justice of proposed limitations must be weighed against the justice of personal security to determine whether a limitation will be recognized. Second, even if a proposed limitation would not be reasonable or would not be in accordance with the principles of fundamental justice, the limitation may be justified under s. 1 of the *Charter*, which allows rights to be overridden by Areasonable limits,@ Aprescribed by law,@ that can be Ademonstrably justified in a free and democratic society.@ It is difficult to imagine that a limitation that is not reasonable or not in accordance with fundamental justice could ever be a Areasonable limit@ that is demonstrably justified in a free and democratic society. In the absence of extraordinary circumstances, for ss. 8 and 7 the Ainternal balancing@ test is paramount. The prevailing view is that s. 1 could save an unreasonable or unjust limitation only, for example, in times of war or national emergency.[li]

20 If mandatory testing and disclosure legislation were challenged in court, we could expect both ss. 8 and 7 as well as s. 1 arguments to be raised.[lii] For present purposes, in the absence of any evidence of extraordinary circumstances, confining the analysis to balancing under ss. 8 and 7 makes sense.[liii] Another reason for avoiding a s. 1 approach in favour of a balancing approach is that this emphasizes that public health and human rights are complementary, mutually reinforcing, but not conflicting goals.[liv] Furthermore, the discussion shall, for the most part, focus on the Areasonableness@ inquiry under s. 8, rather than on the Afundamental justice@ inquiry under s. 7. This focus is adopted not only for reasons of space: The rights enumerated in ss. 8 - 14 of the *Charter* are specific instantiations of the more general s. 7 right. Section 8, a specific provision, is directly applicable to the issues in question. The specific should be pursued in priority to the general. To a great degree, the specific will exhaust the scope of the general: Aif the legislation passes s. 8 scrutiny, it is a valid means of gathering evidence. As such, it can hardly be said to be contrary to the principles of fundamental justice under s. 7.@[lv] Most if not all of the privacy concerns relevant to this inquiry fit under s. 8. To the extent that s. 7 extends a residue of protection beyond that of s. 8, that residue will be addressed. It should be noted that since (as will be seen below) mandatory testing and disclosure legislation should not permit gathered information to be used in criminal proceedings against a Source Individual, the Aprinciple against self-incrimination@ will not be engaged. This principle falls under the Aprinciples of fundamental

justice@ of s. 7, and (one might argue) should be addressed in assessing the constitutionality of (e.g.) the forensic DNA warrant provisions of the *Criminal Code*.[lvi] This principle and its s. 7 analysis are not germane to the present inquiry.

E. Section 8: AReasonable Expectations of Privacy@[lvii]

21 Section 8 protects Areasonable expectations of privacy.@ This is to say that both privacy claims and claims for limiting privacy must be supported by Areasons.@ Persons should be free from interference with matters in relation to which they have an expectation of privacy (i.e., real property, chattels, the body and its contents, records, or information) unless the reasons supporting interference outweigh the reasons against an interference. AReasonable@ people may differ in their assessments of the reasonableness of a particular proposed interference. Hence, privacy is circumscribed by Areasonable@ limitations, not Adefinite@ or Adefined@ limitations. What will count as good reasons supporting interference and the weight of those reasons will vary with particular circumstances.[lviii]

22 Ordinarily, if State action has limited or will limit privacy (as in this case), a privacy assessment under s. 8 explores whether the claimant has a reasonable expectation of privacy and the strength of that expectation, whether the privacy limitation was authorized by law, whether the law itself was reasonable, and whether the limitation was conducted in a reasonable manner.[lix] Since this paper explores the constitutional possibility of mandatory testing and disclosure legislation, and not a particular search and seizure, I shall focus on the expectations of privacy and the reasonableness of legislative limitations of that privacy.

1. Reasonableness of the Privacy Claim in Context

23 Privacy claims cannot be assessed in the abstract. The strength of a privacy claim (i.e., the reasonableness of preserving privacy against limitation) depends on (a) the nature of the Amatter@ in relation to which privacy is claimed, (b) the relationship between the privacy claimant and the private matter, (c) the privacy claimant=s conduct in relation to the private matter, and (d) the relationship between the privacy claimant and the person seeking to limit

privacy.

(a) nature of the Aprivate matter@

24 As indicated above, some types of privacy interests (e.g. concerning records that reveal intimate details of lifestyle and personal choices) attract strong privacy protection while other types of privacy interests (e.g. concerning electricity consumption records) do not.[lx] It is clear that bodily integrity and the interests in controlling the dissemination of health information should receive and do receive strong privacy protection. One might argue that information about communicable disease status (particularly HIV-positive status) should have even more heightened protection than other types of health information, because of the risks of discrimination in employment, provision of services, or other areas of life, and because of the risk of stigmatization.[lxi] In response, it might be contended that the communicable nature of a disease should reduce the expectation of privacy surrounding infection-status: the disease, by virtue of being communicable, has an unavoidably public aspect or relevance to public health; infected status is not merely a private, personal condition. It might also be contended that issues of stigmatization are not directly relevant to the reasonable expectation of privacy, but to the need to control the disclosure of the information.[lxii] Regardless of whether infected status should have elevated privacy protections, bodily integrity and health information should support significant expectations of privacy, and so weigh against any mandatory testing or information disclosure.

(b) relationship between claimant and private matter

25 The relationship between the privacy claimant and the matter in relation to which privacy is claimed is particularly important in Astanding@cases, when it is not clear whether the expectations of privacy at stake are those of the claimant or a third party. While s. 8 of the *Charter* protects Apersons and not property,@if the matter in question is owned by the claimant, that is a factor supporting a reasonable expectation of privacy.[lxiii] Other similar factors were canvassed in the *Edwards* case, including presence at the time of search for the matter and possession or control of the place where the search occurred.[lxiv] These considerations support privacy protection as against mandatory testing and disclosure. The

bodily substances being sought Abelong@to the Source Individual; they have not yet been extracted from the Source Individual; neither has the medical information resulting from the testing been derived or passed on to another person. Even if the bodily substances or medical information had been transmitted to a health service provider for medical purposes, that would not reduce the Source Individual=s expectation of privacy. Given the legal and ethical restrictions on disclosure applying to health service providers, a Source Individual should be reasonably confident that neither his or her bodily substances nor information would be disclosed for purposes other than those for which they were originally gathered.

(c) claimant=s conduct in relation to the private matter

26 The use to which the claimant puts the private matter or its accessibility to the public may undermine an expectation of privacy. For example, if the claimant were found to have abandoned his or her interests in the private matter (e.g. if the claimant threw it away), at least until the claimant established a new relationship with it, the complainant would have terminated his or her expectation of privacy. If the claimant put into public view what otherwise might be private, the claimant would not have a reasonable expectation of privacy. If a person telephoned a police switchboard and threatened the life of a police officer, it would not be reasonable to expect that the communication would not be listened to or recorded by a person other than the switchboard operator; the communication would not be one in which the caller would have a reasonable expectation of privacy.[lxv] If a person grew marijuana in public view, the person could not claim a reasonable expectation of privacy in relation to that crop.[lxvi] If the privacy claimant voluntarily participated in highly regulated activities and (e.g.) produced records relevant to the claimant=s compliance with regulatory standards, the claimant would have a diminished expectation of privacy in relation to those records. As yet another example, if a plaintiff in a civil action put his or her medical or psychiatric condition in issue (e.g., by claiming damages in relation to mental distress in a civil sexual battery case), the plaintiff diminished the entitlements to privacy that would otherwise protect this information from disclosure.[lxvii] Even conduct that may not directly involve private matters may affect the ability to support a privacy claim. If a person engages in what may be criminal or civilly actionable conduct, the person=s privacy barriers may be lowered. The person may be subjected to criminal search and seizure or civil discovery and production

respecting matters that, outside of litigation, could have remained forever private.[lxviii]

27 Considerations of this sort could be argued to reduce at least some Source Individuals= expectations of privacy as against mandatory testing and disclosure. One might make the following argument: Source Individuals do not display their bodily substances or health information in public, like a marijuana crop exposed to public view or a broadcast communication. Source Individuals, though, have emitted some bodily substances. They caused the exposure. That is what generated Exposed Individuals=fears and their desire to address their fears. In assaultive cases, whether the individuals assaulted are civilian or professional, the Source Individuals intentionally sought to transmit their bodily substances into the bodies of Exposed Individuals. They intentionally created the risk of infection. Source Individuals thereby intentionally put their medical condition in issue. If an individual purposefully transmits bodily substances into another person, creating the risk of infection, it would seem inappropriate for that individual to be permitted to refuse a second transmission of bodily substances (otherwise respectful of privacy interests), so that the extent of the risk could be assessed.[lxix]

28 One could argue that the *Cuerrier* case supports this approach. In a sense, this is a privacy case, since it requires, on pain of conviction for an assault offence, that an HIV-positive individual disclose health information to a sexual partner: Athe primary responsibility for making the disclosure must rest upon those who are aware that are infected.@[lxx] The individual who knowingly creates the risk bears the burden of disclosure. If this reasoning applies when a partner ostensibly consents to sexual contact, it ought to apply all the more when the victim does not.

29 This sort of argument could be offered in partial justification of mandatory testing and disclosure in criminal contexts Bif it were established that the Source Individual had indeed engaged in criminal behaviour. That is, the argument could support testing of those convicted of assault and related offences. But while testing and disclosure following conviction might have some value to an Exposed Individual, the information would come too late for many purposes. Could Acriminal@conduct support testing and disclosure, before conviction?

Would relying on mere allegations affront, in particular, the presumption of innocence, protected by s. 11(d) of the *Charter*?

30 The tendering of mere allegations or assertions of improper conduct should not count in favour of limiting privacy interests. Mere allegations do not count as Areasons,@whether for limiting privacy or for other purposes.[lxxi] Proof that advances beyond mere allegation, however, may support privacy limitations. Plenty of pre-conviction or pre-judgment limitations of persons=privacy, liberty, and security of the person are licit. Search warrants, for example, are obtained and executed before trial. Individuals may be arrested and denied judicial interim release before trial. Individuals may be bound over on peace bonds without a full-blown trial.[lxxii] The mere fact that assaultive conduct has not been established through a trial verdict does not preclude reference to evidence of that conduct in proceedings seeking pre-verdict relief. What is necessary is that proof of the conduct in question come up to the requisite standard of proof, which will be considered below.

31 While the foregoing considerations could be offered to support mandatory testing and disclosure respecting Source Individuals who have engaged in criminal conduct (the second and third Asettings@referred to in paragraph [2]), these considerations apply less well to Source Individuals who have not engaged in criminal conduct. While non-criminal Source Individuals may be the Acause in fact@of the risk of infection to Exposed Individuals, they do not cause that risk intentionally. One might argue, then, that they should not be taken to have put their medical condition in issue, in the same manner as an assaultive individual.

(d) relationship between the privacy claimant and person seeking disclosure[lxxiii]

32 A claimant could not claim a reasonable expectation of privacy in relation to a matter if he or she were bound by contract or were obligated in some other manner to disclose the matter to a third party. Even if a claimant were not bound to disclose a matter, a claimant might disclose some matter (e.g. personal information) in exchange for certain services (e.g. educational services). In these types of cases, the claimant could not claim an expectation of privacy as against the person to whom the claimant was obligated to disclose or had disclosed

the matter.[lxxiv]

33 Outside of express consent circumstances (for which mandatory legislation would not be necessary), no one would claim that Source Individuals have expressly or implicitly Acontracted@to permit testing or information disclosure. Nonetheless, a proponent of mandatory testing and disclosure might argue that Source Individuals= actions have lowered their expectations of privacy in relation to their bodily substances and health information.

34 The Source Individual and the Exposed Individual have a relationship. Because of contact with the Source Individual, the Exposed Individual has been subjected to a risk of contracting an infectious disease. In the case of assaultive exposures, the creation of risk is voluntary; in non-assaultive exposures, it is not Bbut, regardless, the Source Individual is the source of risk. Because the Source Individual is the source of risk, the Source Individual should reasonably expect to have his or her privacy limited, to disclose information bearing on the risk, in response to efforts to address the risk.

35 In non-criminal cases, the professional or a Good Samaritan typically provides health services Boften emergency health services Bfor the Source Individual. It is true that, at least where a professional is the caregiver, providing care is his or her employment obligation. A modest Good Samaritan would admit that providing care is his or her moral obligation. From one perspective, then, Exposed Individuals only discharge their own duties by providing their services. The provision of their services is not a benefit extended in expectation of receipt of a corresponding benefit from Source Individuals. From a Source Individual=s perspective, the benefit received may well be foisted on the Source Individual. He or she may have been unconscious, and unable to consent to treatment or to accept burdens in exchange for treatment benefits.

36 Yet, for all this, there is a common intuition that the provision of an emergency caregiving services imposes a type of moral obligation on the recipient. We might say, AI owe you my life,@to a firefighter who pulls us from a burning building. We would feel gratitude, feel (to use the old word) Abeholden@to someone who treats us. Consider how we would feel

if a firefighter rescued our child from a burning building, or rescued our friend or spouse. These feelings of obligation would not be squelched by the observation that the professional was Aonly doing his or her job.@ We would likely find such an observation to be boorish, insensitive, and unperceptive. If we were saved by another, and shortly thereafter that person were to say, AI was wondering if I could ask a favour of you,@ we would likely say something like, ASure, you name it. Whatever you want.@ If the favour requested did not involve significant cost to us, it would be at least callous, if not morally repugnant, to refuse to provide what was asked for.

37 Opponents of mandatory testing and disclosure point to the high number of Source Individuals who consent to blood testing, in the case of suspected exposures (thereby obviating the need for mandatory measures).[lxxv] The frequency of consent, in hospital or other medical settings, is explained (at least in part) by the preceding observations. Source Individuals recognize that care has been provided to them, recognize that care-givers fear a particular risk, and permit small testing steps to be taken to address caregivers= concerns. Our moral intuitions and our conduct point to a reasonable accessibility to information about individuals who are beneficiaries of services but sources of risk.

38 These considerations do not apply to those who are merely sources of potential infection, as in public transit or workplace settings. Their circumstances do not support the indicated reductions of expectations of privacy relating to particular Exposed Individuals. Of course, they may still pose a risk to the public or a class of the public. It appears that any coercive action respecting them would best fall not under mandatory testing and disclosure legislation, but under public health legislation.

39 The factors bearing on the relationship of the Source Individual and the Exposed Individual have another aspect that may be urged by those seeking to curb privacy limitations. Mandatory testing and disclosure legislation should not be a substitute for training and occupational preparation. Neither should it be a backstop for negligent performance of duties. If the conduct of Source Individuals is relevant to the assessment of their expectations of privacy, then the conduct of Exposed Individuals should also be relevant.

Privacy should not be limited, for example, if the evidence discloses that the Exposed Individual improperly exposed himself or herself to risk. In this sort of case, the Aresponsibility@ for the risk would not be solely the Source Individual=s, but, at least, would be shared by the Source Individual and the Exposed Individual. This mutual responsibility could even the application of the Aresponsibility@ factor between the two parties. Without this factor tilting in favour of the Exposed Individual, it might be found that the Source Individual=s privacy should not be limited. A similar sort of argument could be made if the Exposed Individual did not receive appropriate education or training. The Aresponsibility@ for the exposure in this case, one might argue, is the employer=s, not the Source Individual=s Bor, at least, the employer and the Source Individual share Aresponsibility.@ Again, without this factor operating in the Exposed Individual=s favour, access to private matters could be denied. Hence, supporters of mandatory testing and disclosure legislation should promote the appropriate education and training of potential Exposed Individuals.[lxxvi] As a particular example, a preventative vaccine for Hepatitis B is available that virtually eliminates risk of infection.[lxxvii] If professional potential Exposed Individuals have not been vaccinated, that could count against their ability to access Source Individuals=information in the event of exposure.

2. Reasonableness of Legislative Limitations

40 The reasonableness of a proposed legislative limitation of privacy turns on three groups of factors: (a) the objectives of limiting privacy, (b) the proposed means for limiting privacy, and (c) the process for determining whether or not privacy should be limited.

(a) objectives

41 Arguably, an expectation of privacy should be limited only if the purpose served by the proposed limitation is Apressing and substantial@ A necessary condition for limiting privacy is that the purpose served by the limitation should be, by some measure, significant. Mere curiosity would be insufficient. Thus, for example, in the Freedom of Information and Protection of Privacy legislative context, public bodies are entitled to seek disclosure of

clients= personal information only if the information is relevant to some legitimate operating interest of the public body. In the criminal context, the State relies on its role as law-enforcer, a role performed in the public benefit, in seeking search warrants. An accused is entitled to production of disclosure of complainant=s private records only if the disclosure supports the accused=s right to make full answer and defence. In regulatory contexts, the State limits privacy interests to encourage compliance with regulatory standards. Three types of Aobjectives@issues emerge concerning mandatory testing and disclosure legislation B(i) whose interests are at stake? (ii) what problem (if any) would the legislation address? and (iii) are concerns sufficiently Asubstantial@to warrant privacy limitations?

(i) interests at stake

42 The DNA warrant provisions, which permit mandatory testing and information disclosure, serve valid governmental objectives in enforcing the criminal law and in promoting truth-seeking in the criminal process.[lxxviii] Public health legislation, which may also authorize mandatory testing and information disclosure, serve valid governmental objectives in maintaining public health through controlling communicable diseases. One might concede that mandatory testing and disclosure legislation of the type contemplated serves a health purpose, but argue that it is not public health legislation, but individual health legislation. It serves to promote the health and well-being of Exposed Individuals, as individuals. The legislation does not immediately serve the public, the many, as against the individual whose privacy stands to be limited. One might argue that one person=s health concerns should never outweigh another=s privacy interests. The purpose of the legislation cannot be sufficient to support privacy limitations.

43 A proponent of the legislation might in turn concede that the legislation would not serve a Apublic@purpose, but argue in response that this would not entail that the legislation would be debarred from limiting privacy. Our legal system countenances individuals=interests limiting others=privacy interests. A civil litigant, concerned to vindicate private interests, may engage processes that limit the privacy of those against whom he, she, or it litigates.[lxxix] There is no problem of Astanding,@as if one individual=s concerns could never trump another=s

privacy interests.

44 In any event, a proponent would argue that it would be wrong to characterize the legislation as serving only private purposes. The legislation would promote public health. An Exposed Individual=s illness or potential illness has a social aspect, since that illness would affect others connected with the Exposed Individual as well as the health care system. Moreover, if one sought to justify the limitation of privacy on Autilitarian@grounds, the interests of Exposed Individuals could be aggregated. While a particular limitation of privacy would directly promote one individual=s health, the legislation would create a process that would promote the health of many individuals. I note that similar U.S. legislation has been supported (in part) as serving valid governmental interests in protecting employees=health and safety and in controlling communicable disease.[lxxx] I think it safe to conclude that the purpose of the legislation does not disqualify it from legitimately limiting privacy.

(ii) a Apressing@problem?

45 If there were no or no significant health risks that could be addressed through mandatory testing and disclosure legislation, then enacting the legislation and subjecting Source Individuals to privacy limitations would be pointless and irrational. ARisk@has two components B the severity of the risk, should the risk be actualized (its Agravity@), and the likelihood of the risk being actualized (its Aprobability@).

46 Mandatory testing and disclosure legislation should be directed at addressing health consequences for only serious or severe illnesses. We would not limit privacy to make minor or marginal improvements to others=health. We would not think of imposing mandatory testing on an individual who sneezed in a bus, at least if the only reasonable risk was that he or she may have communicated the common cold. Serious illnesses would include HIV/AIDS, Hepatitis B, and Hepatitis C, as contemplated by Bill C - 217. From the standpoint of public and individual health, it makes sense to go farther, and to address other serious diseases. As contemplated by Bill 105, these might also include illnesses set out in a Ministry of Health schedule of communicable diseases, such as infectious pulmonary

tuberculosis, diphtheria, hemorrhagic fevers, meningococcal disease, plague, and rabies.[lxxxi] Some flexibility is warranted. New diseases may arise or become socially problematic at any time, as we have seen with the recent SARS outbreak. Furthermore (and I will return to this point below), focusing on serious communicable disease rather than on AIDS, HBV, and HCV demonstrates that the legislation is not an attempt to single out specific at-risk populations.

47 The legislation relates to health concerns based on purported disease exposures. Even if Source Individuals had severe illnesses, if there were no or no significant risk of transmission, then privacy should not be limited. The issue of risk of transmission sounds on two levels B the general (could the diseases to which the legislation applies ever be transmitted?) and the particular (could the disease have been transmitted in the circumstances in question?). Whether or not mandatory testing and disclosure legislation can be justified B as opposed to particular applications for orders Bdepends, primarily, on the general risk issue.

48 Opponents of mandatory testing and disclosure legislation have asserted that only a very low number of known cases of occupational transmission of communicable diseases have been documented.[lxxxii] Furthermore, significant evidence shows that HBV, HCV, and HIV are not transmitted casually.[lxxxiii] These are not air-borne viruses.[lxxxiv] Generally, transmission requires that Source Individuals=infected bodily fluids enter the bloodstream of Exposed Individuals. In particular, the primary modes of transmission of HIV for adults are through sexual intercourse or blood transfusions.[lxxxv] The risk of transmission through bites or through spitting is exceedingly remote Bthere is no documented case of transmission through a bite.[lxxxvi]

49 A first response to these assertions is to qualify them. The statistics concerning occupational transmission relate to health service institutions. One might surmise that workers at these institutions are trained to take appropriate protective measures and work in circumstances that allow them to take appropriate preventative measures. These factors may result in the low incidence of transmission. One cannot generalize from the health care institutional context to other contexts (and it is difficult to collect statistics from other

occupational contexts[lxxxvii]).

50 A second response is to accept that these assertions are true, but more limited in their impact than has been contended. For example, while a bite itself or saliva alone may not be HIV transmitters, if the mouth of an HIV-positive Source Individual were bloody and his or her bite pierced the skin of an Exposed Individual, conditions for potential transmission could be met. Note as well that A[a]n exposure that might place [Health Care Providers] at risk for HBV, HCV, or HIV infection is defined as . . . contact of mucous membrane or nonintact skin (e.g. exposed skin that is chapped, abraded, or afflicted with dermatitis) with blood, tissue, or other body fluids that are potentially infectious.@[lxxxviii] Contact of an Exposed Individual=s abraded skin with a Source Individual=s blood could well occur in the course of a violent encounter. And while the risks of HIV transmission may be very low in many circumstances, this does not entail that the risks of transmission of other communicable diseases are equally low.

51 A third response is to contend that these assertions prove the case for mandatory testing and disclosure legislation. Victims of sexual assault, aggravated assault (where consent is vitiated through the accused=s fraudulent non-disclosure of communicable disease-positive status) or criminal negligence in the supply of tainted blood are at significant risk of infection, even of HBV, HCV, and HIV.

52 Finally, the difficulty with communicable diseases is that they are communicable. They are transmitted, and that is why these diseases are public health risks. Mandatory testing and disclosure legislation is not sought because there is an epidemic of occupational transmissions of communicable diseases. It is sought because certain diseases have become socially prevalent, because those diseases could have very serious consequences for Exposed Individuals, and because of the risk (the probabilities of which will vary from case to case) that the conduct of Source Individuals will cause Exposed Individuals to be infected with these diseases.

53 The lesson to be gained for the legislation from the medical evidence is that it should

not specifically refer to suspect modes of transmission, such as biting or spitting. In fact, the legislation should not specify any types of transmission warranting an order for testing and disclosure. Medical research may show that purported modes of transmission bear no risks; alternatively, modes of transmission not mentioned may bear high risks. Legislation B and both Bills adopt this approach B should instead simply require that the Exposed Individual establish that he or she Amay have become infected with a virus that causes a prescribed communicable disease as a result of coming in contact with [a] bodily substance.@[xxxix]

(iii) evidence and proof

54 The difficulties left by the last point are these: what type of evidence should mandatory testing and disclosure evidence require to support an application, and what standard of proof must be satisfied to warrant granting an order for testing and disclosure? It should be abundantly clear, as is always the case in search and seizure cases, that the burden of proof lies on the person seeking to limit privacy. Limitations of privacy rights require Aprior authorization@on the basis of the evidence.[xc]

55 Uninformed speculation by an Exposed Individual or mere judicial notice should not suffice to establish the evidential basis for testing and disclosure. Expert medical evidence, relating to the particular disclosure circumstances, should be required. Thus, Bill 105 requires that an Exposed Individual submit a Aphysician report@in support of the application. The report must be made by a competent expert: Aa physician who is informed in respect of matters related to occupational and environmental health and all protocols and standards of practice in respect of blood-borne pathogens.@[xci] While Bill 105 does not require this, competence could be documented for purposes of an application by including in the report an account of the physician=s qualifications. The report should concern (*inter alia*) an assessment of Athe risk to the health of the applicant . . . as a result of the applicant=s having come into contact with a bodily substance of another person@ in the exposure circumstances.[xcii] Bill C - 217 does not provide this detail about the requisite evidential foundation for the application, although nothing would prevent an applicant from tendering such evidence.

56 The Exposed Individual should not be entitled to an order merely by adducing some evidence supporting the risk of exposure. The evidence must support the inferences of risk according to the requisite standard of proof. In search warrant applications, the constitutional standard of proof to be satisfied by the State is the establishment of reasonable (reasonable and probable) grounds for the search and seizure. Essentially, the State establishes its case for search and seizure on a standard of Areasonable probability,@Acredibly-based probability,@ or a balance of probabilities.[xciii] Both Bills adopt this Areasonable (and probable) grounds@ standard,[xciv] as does the DNA warrant regime.[xcv]

57 An argument may be made that a higher standard of proof should be applied because of the physical and informational intrusiveness of body sample searches.[xcvi] This argument was made respecting the DNA warrant provisions before the Alberta Court of Appeal in *S.A.B.* The majority rejected this argument.[xcvii] Berger J.A. in dissent would maintain the balance of probabilities standard, but require proof by Aclear, cogent and compelling evidence.@[xcviii] This standard of clear and convincing evidence is required, for example, under Indiana mandatory testing and disclosure legislation.[xcix] The Supreme Court has heard the appeal of *S.A.B.* and reserved. We shall soon learn whether the majority or dissenting view shall prevail.

58 But even if the DNA warrant provisions require Aclear and convincing evidence,@it need not follow that the same approach should be adopted respecting mandatory testing and disclosure legislation. A critical distinction between the DNA warrant legislation and this legislation is that the DNA warrant legislation is criminal legislation, the application of which could lead to criminal conviction. Individuals deserve strong protection from the State, so the burden of proof should be correspondingly high.[c] Mandatory testing and disclosure legislation serves only (public) health purposes and, as we shall see below, cannot have any bearing on any criminal prosecution or civil litigation. One might argue, then, that the Areasonable grounds@approach of the Bills exceeds the constitutional minimum for mandatory testing and disclosure legislation. A lesser standard of proof could suffice.[ci]

(b) legislative means

59 For a legislated limitation of privacy to be reasonable, it must (i) support or tend to achieve its legislative objective, (ii) limit privacy as little as possible to achieve the objective, and (iii) not have adverse consequences that outweigh the benefits achieved by the legislation.

(i) connection to objective

60 A good purpose is not a sufficient condition for compelling disclosure of a private matter. For a disclosure to be reasonable, the disclosure of the matter must have some rational connection to the promotion or achievement of the good purpose. This rational connection has two aspects. First, the type of limitation of privacy sought must, in general, promote the good purpose. Second, a particular limitation of privacy sought in particular circumstances must promote the good purpose for the particular Exposed Individual. At this point, we will consider the general level issues B i.e., whether mandatory testing and disclosure could ever, in any or any significant number of cases, promote the health of Exposed Individuals.

61 Proponents of mandatory testing and disclosure legislation argue that information derived from testing will aid in determining appropriate treatment, the termination of treatment,[cii] and appropriate post-exposure conduct with others (precautions respecting secondary transmission); it will also provide Apeace of mind.@

62 Opponents have responded that the provision of information will not undo any harm caused,[ciii] and it will not Aprotect against the possibility of being exposed to disease from contact with someone else=s bodily fluids.@[civ] These observations are irrelevant. The point of the legislation would not be to erase exposures, but to manage or treat them. Neither is the point of the legislation to enhance occupational safety Balthough safe handling of all potential Source Individuals should form part of professionals=training. The point of the legislation would be to provide mechanisms that may be deployed, should a suspected exposure to risk occur.

63 Opponents point to the problems of false negatives and the unreliability of test results. If the Source Individual is in a Awindow@or incubation period, the Source Individual may have the disease and be infectious, but the disease may not be disclosed by testing.[cv] A negative test result, then, would provide a false assurance of safety. The difficulty with this argument is that an Exposed Person could not know the odds of whether a Source Individual was infected but in an incubation period, or not infected at all. One might surmise that the odds that the Source Individual was infected but in a window period would be low. The opponents= argument establishes only that test results must be regarded with caution and cannot be taken as definitive. In a particular case, one would imagine that the test results would be considered along with all other evidence relating to probable infection to determine what steps, if any, should be taken to manage the risk of infection.

64 Opponents also point out that the engagement of mandatory testing procedures and the derivation and communication of information to an Exposed Individual could not, practically, occur quickly enough to obviate the need for treatment. In the case of HIV/AIDS, treatment must be commenced very quickly after exposure, if there is to be a hope of preventing the propagation of the disease.[cvi] The information, then, would be useless. Treatment should be undergone regardless of test results. Furthermore, some diseases, such as Hepatitis C, have no treatment; those with the disease can only be cautioned respecting post-exposure conduct.[cvii] Again, the information about the Source Individual=s infectious disease status would be useless.

65 The opponents may overreach. Assuming that the facts on which they rely are true, what they show is that testing will not provide information that will necessarily determine treatment, at least in the short to mid-terms. The information could have additional uses, though. If it were determined that the Source Individual did not have a communicable disease, that would be some evidence relevant to the determination to terminate treatment and to the Exposed Individual=s modes of contact with third parties. If an Exposed Individual can get confirmation that a Source Individual does not have a communicable disease, that may not establish safety, but it may give hope.[cviii] Furthermore, the claims do not concern all

communicable diseases, but only HIV, HBV, and HCV. Testing information could be relevant to treatment for other diseases.

66 Moreover, opponents discount the issue of the Exposed Individual=s Apeace of mind.@ An aspect of (public) health and well-being to be served by mandatory testing and disclosure legislation is the promotion of the Apeace of mind@of Exposed Individuals. This has been found to be a legitimate objective served by some analogous U.S. legislation.[cix] One might object that this could not be a legitimate purpose served by legislation that limits privacy. Mere Apeace of mind@should never be permitted to trump privacy. Peace of mind alone, however, is not balanced against privacy; it is a factor that should be considered in determining whether mandatory testing and disclosure is warranted. Moreover, the objection overlooks the Supreme Court=s insistence that psychological integrity is protected as part of Asecurity of the person.@ The psychological health of Exposed Individuals should not be undervalued or dismissed. [cx] One might safely generalize that information about our ailments or potential ailments is very important to us. Psychological integrity is protected for accuseds and complainants; opponents of mandatory testing and disclosure legislation assert that the legislation could impair the psychological integrity of Source Individuals; hence the promotion of the psychological integrity of Exposed Individuals should be a legitimate purpose of legislation. In surrebuttal, opponents of the legislation could point out that Exposed Individuals do not face Adeprivation@of their lives or security of their persons through State action. Hence, the s. 7 reference to Asecurity of the person@is inapplicable to Exposed Individuals. This surrebuttal argument is slightly beside the point: while it is true that Exposed Individuals do not confront Source Individuals with constitutional rights, that does not mean that Exposed Individuals may not have highly significant interests that are implicated by the risk of infection.

67 One might suggest that the proper legislative approach in this area is not to dictate to science, but to allow science to speak to the issues. Bill 105, for example, requires the Aphysician=s report@to address the issue of whether Athe order is necessary to decrease or eliminate the risk to the health of the applicant as a result of the applicant=s having come into contact with the bodily substance.@[cxi] The legislation will do its job if it allows the evidence to

establish whether testing and disclosure will promote the health of the Exposed Individual.

(ii) minimal limitation

68 If a limitation on privacy is justified, only that limitation is justified, and no more. Privacy limitations should preserve privacy to the maximum extent reasonably possible; privacy limitations should be as minimal as is reasonably possible. Hence, both testing and information disclosure should be minimized.

69 Mandatory testing would probably entail blood testing. This, arguably, involves only a minimal interference with the body. The physical intrusion is of short duration, imposes only minimal discomfort, is not inhumane or abusive, is not psychologically offensive, and leaves no lasting impression.[cxii] Blood testing has been described as Acommonplace.@[cxiii] On the continuum of physical interferences, it is not an Aultimate intrusion into the sanctity of the body.@ These comments were made respecting the investigative procedures for DNA warrants, which could be viewed as analogous. Testing should not create a health risk for the Source Individual. This is recognized by both Bills.[cxiv] To minimize complications, testing should only be done by qualified persons, as is provided respecting DNA warrants.[cxv] A further condition that may assist Source Individuals could be to require that testing be accompanied by pre-test and post-test counselling for the Source Individual.[cxvi]

70 The dissemination of test results should be as constrained as is reasonably possible. Disclosure should be restricted to the analyst, the Exposed Individual, and the health service providers for the Exposed Individual. The Source Individual should have the right of access to the information, if he or she desires. Bill 105 does a good job of minimizing the number of personnel in the loop of disclosure.[cxvii] All other disclosure should be prohibited. Confidentiality restrictions should be imposed on the records created for transmitting information to the Exposed Individual. Both Bills contain confidentiality protections.[cxviii]

71 An issue connected with both the Arational connection@ and Aminimization@ criteria is whether a requirement of the legislation should be proof that the information was not

available through any other means. If the information were otherwise available, then privacy should not be limited, and the other source should be accessed. This is the Ainvestigative necessity@criterion. This criterion is a statutory (and doubtless constitutional) requirement for wiretap authorizations. Wiretaps have broad reaching impact. They can intercept many private communications of many individuals. It has been held, however, that satisfaction of an investigative necessity criterion is not a general constitutional requirement for all searches and seizures.[cxix] In particular, it is not a requirement for DNA warrants, which are aimed only at single individuals in relation to discrete invasions of bodily integrity. Regardless of whether investigative necessity is a constitutional requirement, it may be satisfied in the present circumstances. For example, both Bill 105 and Bill C - 217 require proof that an analysis of the Exposed Individual=s own blood would not accurately determine, in a timely manner, whether the Exposed Individual had become infected.[cxx] That is, there is no way to obtain the requisite information, save through testing of the Source Individual.

72 A further way in which Bill 105 satisfies any investigative necessity concern is through the requirements that may be imposed on an Exposed Individual. Under s. 22(3), a physician who provides physician report used in the application may require the Exposed Individual himself or herself to submit to an examination, base line testing, counselling or treatment for the purpose of making the report. Conceivably, the Exposed Individual may acquire information that causes him or her to abandon an application. This sort of provision helps ensure that only appropriate applications go forward. Bill C - 217 contains no such provision.

(iii) adverse consequences

73 A limitation of privacy should not have adverse consequences that outweigh the benefits to be achieved through testing and disclosure.

74 A means that Bill 105 uses to maximize the benefits of information transmission is to cause the information to be provided not to the Exposed Individual, but to his or her physician.[cxxi] This helps ensure that the information obtained is put to best use for the

Exposed Individual. Bill C - 217, on the other hand, allows the information to be communicated directly to the Exposed Individual.[cxxii]

75 Another useful means of minimizing harm arising from the testing found in Bill 105 is that the Bill does not require that test results be sent to the Source Individual.[cxxiii] The Source Individual can decide for himself or herself whether to access the information. There may be no reason not to respect the Source Individual=s desire not to be informed.[cxxiv] Bill C - 217, on the other hand, requires delivery of results to the Source Individual.[cxxv]

76 Test results could be relevant to civil or criminal proceedings against the Source Individual. But the information might not have been available outside the mandatory testing and disclosure regime. The legislation could be a means of allowing parties opposed in interest to the Source Individual to obtain what they otherwise could not, or to obtain what they could not obtain without satisfying more stringent tests than those to be met under the legislation. To avoid the potential prejudice to Source Individuals (in addition to confidentiality restrictions) restrictions must be imposed on the uses of the information obtained through testing. Information should not be used for any purposes except for those for which the information was collected; in particular, information should not be used in any other proceedings. Both Bills do contain provisions restricting information use.[cxxvi]

77 A limitation of privacy may have effects beyond those relating to the particular Source Individual. Again, the consequences of a privacy limitation should be assessed in determining whether the limitation is justifiable. A clear example of the relevance of potential adverse consequences of the disclosure of private information respecting third parties is provided in s. 278.5(2) of the *Criminal Code*, concerning the production of records containing complainant=s personal information. Before ordering the production of a record for review or (subsequently) for production to an accused, s. 278.5(2) requires that the judge consider (*inter alia*) Asociety=s interest in encouraging the reporting of sexual offences;@and Asociety=s interest in encouraging the obtaining of treatment by complainants of sexual offences.@If a complainant=s information is disclosed, a consequence may be an adverse impact on third parties. A further mandated consideration respecting adverse impact on third parties is

identified in ss. 276(3)(g) of the *Criminal Code*, which concerns the admissibility of evidence of a complainant=s sexual history (one of the Arape shield@rules). In determining whether the evidence should be admitted, the judge should consider Athe right of every individual to personal security and to the full protection and benefit of the law.@This provision refers to s. 15 of the *Charter*, which guarantees equality and protects against discrimination. If a limitation of privacy, whether by itself or as part of a pattern of limitations, would promote discrimination against a named or analogous grounds group, that would count against the justifiability of the limitation.

78 A particular concern is that mandatory testing and disclosure legislation not be used B whether intentionally or through its effects B as a means of targeting, harassing and stigmatizing individuals with AIDS or individuals at high risk of contracting AIDS.[cxxvii] Discriminatory effects must be monitored in practice. The legislation should concern communicable diseases other than AIDS, as indicated above. The broad scope of the legislation should help to forestall discriminatory applications.

79 To alleviate against adverse impacts arising in particular cases, testing and disclosure could be ordered to be subject to terms and conditions.[cxxviii]

(c) process

80 Even if the mandatory testing of Source Individuals and the disclosure of their health information serves legitimate purposes and is not an excessive intrusion with adverse consequences, the legislation must establish a reasonable process. This will entail, first, that the person adjudicating the privacy issue be independent, impartial, and competent Bcapable of coming to an intelligent determination on the basis of the evidence. Second, the process must accord with natural justice. Third, the process must have appropriate enforcement mechanisms. Finally, appropriate review should be available.

(i) adjudicator

81 Who should decide whether the Source Individual=s privacy should be limited? To the

extent that issues are not settled by the legislation, the decision would be based on the evaluation of medical evidence. This might suggest that an adjudicator with a medical background would be required. Bill 105 thus provides for the testing and disclosure order to be made by a Amedical officer of health.@[cxxix] As against this suggestion, the full scope factors relevant to testing and disclosure must be borne in mind. Many of these factors relate to legal matters or interests falling under legal conceptualization. Many of these factors are very similar to the types of factors considered by judges in other sorts of privacy-limiting contexts, such as the granting of search warrants, the production of complainants=records, and the admissibility of evidence of complainants=sexual history. Furthermore, the task for the adjudicator is not only to settle medical issues, but to balance the variety of factors in the circumstances of the case. The adjudicator will be required to assess evidence and draw inferences. While a capacity to understand medical evidence will be required, having a subject-matter expert sit as adjudicator could import a measure of bias. The parties will be in a position to tender expert evidence; they do not need another expert, in the person of the adjudicator. The danger of the subject-matter expert adjudicator is that he or she would supply his or her own opinion evidence, which may never be disclosed to the parties, and would not be subject to any examination. These considerations suggest that a judge, an independent objective third-party, would be the appropriate adjudicator. Judges hear and cope with expert medical evidence in other cases; if they are capable of using this sort of evidence properly in those cases, they should be capable of using this sort of evidence properly in the present sort of case. Finally, a judge, unlike conceivable candidate medical personnel, would have the structural or occupational guarantees of independence and impartiality that attend members of the judiciary.

82 In contrast to Bill 105, Bill C - 217 allows a Ajustice@to decide the warrant issues.[cxxx] AJustice@includes both a Provincial Court judge and a Justice of the Peace.[cxxxi] One might argue that this assignment goes too far in another direction. Justices of the Peace do not have judges=familiarity with expert evidence. Neither do Justices of the Peace typically engage in balancing of factors, as would be required for testing and disclosure determinations. Justices of the Peace, moreover, tend to have lesser independence protections than judges. Justices of the Peace do not bring an institutional assurance of competence for the tasks to be performed.

One might observe that Justices of the Peace lack both the subject-matter expertise that medically-trained personnel might provide and the process expertise that Judges might provide. I note that Provincial Court Judges, not Justices of the Peace, are authorized to hear DNA warrant applications.[cxxxii]

(ii) natural justice

83 One natural justice issue concerns the appropriate applicant for an order compelling testing and disclosure. It has been contended that the applicant should not be the Exposed Individual himself or herself, but a person with relevant medical training. The use of medical personnel as applicants would prevent applications from being made on the basis of mere fear; applications would have some foundation in scientific legitimacy. This approach, however, would not be fair to Exposed Individuals. There are circumstances in which Arepresentative@ parties have standing, and an affected individual does not. For example, under collective agreements, a union may have standing to grieve but an employee may not. In Arepresentative@circumstances, though, the representative owes a duty of Afair representation@ to the affected individual. Medical personnel would lack this duty. The groundless application problem can be addressed even if the Exposed Individual is the applicant. The Exposed Individual would require some medical evidence to move the application forward; he or she would bear the burden of proof. If the application were groundless, the application may be (as will be seen below) contested by the Source Individual, and the judge could make the appropriate decision. It should not be assumed that Exposed Individuals would abuse their rights, and bring nothing but Afrivolous and vexatious@applications, without the paternalistic intervention of medical personnel.

84 Another natural justice issue concerns the need for a hearing. For search warrants, practicality dictates that applications be held *ex parte*, and, even respecting DNA warrants, hearings on notice have not been held to be a constitutional requirement.[cxxxiii] Outside of criminal searches and seizures, there may be few circumstances requiring *ex parte* applications. Generally, the ordinary rules of natural justice should apply, applications should be made on notice, and Source Individuals should have the right to make full answer and

defence against a proposed privacy limitation. Nonetheless, applications by Exposed Individuals are time-sensitive Bthe sooner the information is received, the sooner appropriate steps may be taken. To resolve this tension, the basic rule could be that the application is on notice to the Source Individual, but that the Exposed Individual is entitled to establish circumstances showing the appropriateness of an *ex parte* procedure. The two Bills contrast in their approaches: Bill 105 provides, along the lines I have suggested, that the judge may hold a hearing, but is not required to do so.[cxxxiv] In contrast, Bill C - 217 is more generous to Source Individuals, and requires a hearing on notice.[cxxxv]

(iii) enforcement

85 Should the Exposed Individual prevail, the Source Individual may not be inclined to comply with an order compelling testing and disclosure. An enforcement mechanism is necessary. There does not appear to be a constitutional impediment to establishing an enforcement mechanism, if the legislation is otherwise constitutionally sound. The Bills display two models for this mechanism. Bill 105 follows, on an abstract level, the Afurther application@public health model: if the Source Individual does not comply with the order, a further application is made for an order compelling compliance.[cxxxvi] Bill 105 does not specify the coercive measures. Presumably police officers could assist in enforcing the compliance order. Bill C - 217 follows a Aone-step@model: a successful application results in a warrant, directed to both to a medical professional and a police officer.[cxxxvii] The virtue of the one-step model is that it saves time B and time is of the essence in exposure circumstances. The virtue of the Afurther application@model is that it allows the Source Individual to choose to comply, and is, to that degree, more respectful of personal autonomy. A middle way may be possible. An Exposed Individual could be entitled to join an application for an order with an application for a compliance order. The Exposed Individual would have to tender evidence supporting the conclusion that the Source Individual would not be likely to comply with the order, without coercion. The judge could impose appropriate terms.

86 A connected issue relates to whether a testing and disclosure order should be

supported by a penalty for failing to comply with the order. What the Exposed Individual wants is information, not punishment. But barring prompt provision of information, penal motivation or urging may be useful. Both Bill 105 and Bill C - 217 provide for offences for non-compliance. Bill C - 217 creates an offence provision (with a 6 month imprisonment maximum penalty) within the Bill itself.[cxxxviii] A fine should be possible in lieu of imprisonment, under general sentencing rules.[cxxxix] Bill 105 relies on the public health approach of a general enforcement provision.[cxl] Non-compliance yields a maximum penalty of $5,000 per day.[cxli] One might observe that if offence provisions should motivate compliance, the Bill 105 approach is more sensible, since financial liabilities manifestly accumulate with non-compliance. While a Bill C - 217 sentence could be approached in the same way, the financial motivation to comply sooner rather than later is not as express as in the Bill 105 case, and to that degree, the Bill C - 217 approach is less effective.

(iv) remedies

87 Both the Exposed Individual and the Source Individual have review remedies under Bill 105; the Exposed Individual may appeal a refusal to grant an order to the Chief Medical Officer of Health;[cxlii] the Source Individual (it appears) may appeal to the Health Services Appeal and Review Board.[cxliii] Bill C - 217 does not contain review provisions. Since appeal is a statutory right, no appeal could be taken from a decision. A decision of a Justice of the Peace or Provincial Court Judge would, however, be subject to judicial review Bwhich is not always an expeditious procedure. Fairness to both parties suggests that some express review procedures be established.

F. Legislative Authority

88 Assume that the *Charter* permits mandatory testing and disclosure legislation. Would Parliament or the Provinces be competent to enact the legislation? The response depends on answers to a two-stage inquiry. The first stage requires determination of the Apith and substance@of the law. The second stage requires classification of the law under the heads of legislative authority in the *Constitution Act, 1867*.[cxliv]

1. Pith and Substance

89 To determine the "pith and substance" of a law, its "matter," "true meaning," "essential character," or "core" must be ascertained, by reference to the law's purpose and effects.[cxlv] Since no particular law is at stake, no documentary evidence of purpose falls to be considered. The "mischief" to be overcome by the legislation is the absence of legal means by which an Exposed Individual can compel a Source Individual to disclose health information. The legislation would regulate the medical testing of Source Individuals and the transmission of their health information to Exposed Individuals. This information would directly benefit Exposed Individuals' physical and psychological health and indirectly promote others' health. In pith and substance, the legislation would promote individual and public health.

2. Mandatory Testing and Disclosure Legislation and the Criminal Law Power

90 Could legislation that promotes health through information transmission fall under the federal criminal law power in s. 91(27) of the *Constitution Act, 1867*? The mere fact that the legislation concerns information collection and use does not make it *ultra vires* Parliament. Parliament has duly enacted legislation such as the *Privacy Act* and *Access to Information Act*, which regulate information collection and use (but which apply only in the federal governmental sphere). Parliament has enacted the *Personal Information Protection and Electronic Documents Act*, which again regulates information collection and use (the Act is doubtless *intra vires* insofar as it regulates the federal private sector; whether it may legitimately extend to the non-federal private sector B as it purports to B remains to be determined). Neither does the mere fact that the legislation concerns health take it outside federal competence B witness, for example, the *Canada Health Act* and the *Food and Drugs Act*. "Health" is not an enumerated subject matter of legislation under the *Constitution Act, 1867*. Both the Provinces and Parliament may legislate in this area. The federal criminal law power has a "health" aspect. "Health" is "one of the 'ordinary ends' served by the criminal law."[cxlvi]

91 Three sets of considerations are relevant to the classification of mandatory testing and disclosure legislation as criminal law B whether the purpose served by the legislation is a Acriminal law purpose,@whether the non-penal nature of the crucial elements of the legislation disqualifies it from criminal law status, and whether exposure circumstances provide a sufficient foundation for characterization as criminal legislation.

(a) Acriminal law@purpose

92 A strong argument may be made that mandatory testing and disclosure legislation does not serve a Acriminal law@purpose. It would not have a national regulatory component. It would not regulate cross-border activities, and would not be aimed at a national problem, such as a cross-country epidemic.[cxlvii] More importantly, it would not target some Aevil or injurious effect upon the public.@[cxlviii] It would not be designed to protect individuals from the hazards of communicable disease. The legislation would have no or no strong deterrent or incapacitating effect on potential Source Individuals. The law would not focus on exposures or transmissions or on reductions of exposures or transmissions. The assumption of the legislation, in fact, would be that exposure has already occurred. The legislation would be concerned to regulate parties after exposure, and to regulate information flowing from post-exposure testing. That is, the legislation would not regulate dangerous activity, but the acquisition and transmission of information alone.[cxlix] The law would ultimately enhance the health of those who have already been exposed. The law would be facilitative or remedial; it would be designed to create a form of legal privilege in aid of health promotion. Mandatory testing and disclosure legislation, then, would differ from criminal Ahealth@legislation like the *Tobacco Products Control Act*, which was aimed at protecting Canadians from the hazards of tobacco consumption.[cl] Mandatory testing and disclosure legislation would differ in its operation from the firearms legislation, since it would not promote public health or safety through the reduction of dangerous conduct.[cli]

93 Better analogies to mandatory testing and disclosure legislation appear in Provincial statutes. Provinces are entitled to legislate respecting public health and respecting health information. Mandatory testing and disclosure legislation would create exceptions to both the

public health and health information statutory regimes; the legislation, one might argue, would fit within a comprehensive regulatory scheme for communicable disease testing and health information disclosure. One might therefore suggest that Ontario=s strategy of incorporating mandatory testing and disclosure provisions in a public health statute (the *Health Protection and Promotion Act*) is constitutionally sensible.

(b) prohibition and penalty

94 Typically, for legislation to fall under the criminal law authority, the legislation must

(i) promote a Acriminal law purpose,@

(ii) establish prohibitions (i.e., rules forbidding conduct contrary to statutory norms), and

(iii) enforce those prohibitions through sanctions.

95 Aside from failing to promote a Acriminal law purpose,@mandatory testing and disclosure legislation would not primarily establish prohibitions backed by sanctions. The legislation would have enforcement provisions, to ensure that Source Individuals would cooperate with court orders, which could include prohibitions and penalties. These would be ancillary to the main purposes of the legislation. Many Provincial Acts contain penal provisions, without thereby exceeding Provincial competence.[cliii] In any event, the prohibitions and penalties would not be aimed at social evils or injurious behaviour; they would be aimed at encouraging Source Individuals to comply with the regulatory scheme created by the legislation. Thus, the scheme of the mandatory testing and disclosure legislation suggests that it falls outside federal criminal law competence.

96 It is true that not all criminal law establishes prohibitions and sanctions. For example, the criminal law has a Apreventative branch@that supports (*inter alia*) the mental disorder and Apeace bond@provisions of the *Criminal Code*.[cliii] The former compensation order provisions

of the *Criminal Code* were supported as criminal legislation through their Arational, functional connection@to the criminal law sentencing regime.[cliv] These types of criminal law, however, are not good analogies for mandatory testing and disclosure legislation.

97 APreventative@legislation is precisely that Bit prevents anti-social conduct, conduct that would be criminal if committed, or conduct that would be criminal if the perpetrator did not have an immunity or lack of capacity, as defined by the criminal law. Testing and disclosure legislation has no such preventative purpose.

98 Restitution or compensation procedures are aspects of the criminal sentencing process. They are a means of Amaking right@or redressing the effects of conduct that has been found, beyond a reasonable doubt, to have been criminal. Testing and disclosure legislation does not depend on a Source Individual having been found guilty of an offence or even having been charged with an offence. Its justification does not lie in reconciling parties, promoting offender responsibility, or enhancing social harmony. It does not involve a Source Individual returning to the Exposed Individual what was his or hers, or returning the value of what was taken or damaged.

(c) exposure conduct

99 In a sense, and in some cases, testing and disclosure does repair the effects of criminal conduct. And, as discussed above, the nature of the relationship between the Source Individual and the Exposed Individual may create a sort of moral obligation that supports information transfer by the Source Individual to the Exposed Individual. Nonetheless, at least respecting non-criminal exposures, the obligation to compensate does not arise out of a criminal act, but out of the legal act of the Exposed Individual. If the exposure is non-intentional (e.g., the exposure is to an accident victim=s blood), and the Exposed Person is a professional (e.g. a firefighter, emergency responder, health services provider, or even police officer) or a AGood Samaritan,@then the regulation of the transmission of the health information could be argued to fall outside any head of Parliamentary legislative authority.[clv] The exposure and treatment would not be connected with any criminal conduct or law

enforcement activity, as traditionally understood.

100 What of intentional exposures of complainants or victims of crime, and of police officers, correctional officers, or other law enforcement officers, where the exposure conduct was or was allegedly criminal?[clvi] May the exposure circumstances attract criminal law jurisdiction? The difficulty with this approach is that the allocation of legislative power under the *Constitution Act, 1867* does not turn on the things or conduct regulated, but on the nature of the legislation about the things or conduct. The issue is not whether the conduct involved might attract valid criminal legislation (it does, criminal offence legislation), but whether the legislation respecting that conduct falls within Parliamentary legislative authority. Mandatory testing legislation, while relating to criminal conduct, is, as I have argued above, not criminal legislation. We might keep in mind that a variety of legal regimes may apply to respecting criminal conduct, without those regimes being classified as criminal law Be.g. employment law (an offender is disciplined by an employer for a criminal act on the worksite), professional regulation (the offender is disciplined by a professional society for the conduct), civil law (the offender is required to compensate the victim through a civil action), or criminal injuries compensation law (the State compensates the victim).

3. Mandatory Testing and Disclosure Legislation and Federal Labour Relations

101 Parliament is entitled to regulate labour relations for the federal public sector.[clvii] In particular, Parliament not the provinces, is entitled to legislate in relation to the occupational health and safety of federal workers.[clviii] An argument may be advanced that if the professionals involved are federal employees, then Parliament should be entitled to enact mandatory testing and disclosure legislation, in furtherance of its obligation to provide safe working conditions for federal employees.[clix] This argument faces two difficulties. First, it would apply only for the benefit of Exposed Individuals who are federal employees. The fact that (e.g.) municipal police officers were carrying out federally-established powers would not transform them into federal employees Bunless the federal government is willing to take over municipal police services=payroll and disability responsibilities. Federal occupational health legislation could not be comprehensive. Second, Source Individuals are not federal

employees and are not engaged in an industry or undertaking over which Parliament has legislative jurisdiction. Mandatory testing and disclosure legislation does not concern the workplace itself, but workers= interactions with third parties. Parliament should not be entitled to extend its labour relations reach to individuals who are not its employees, just because its employees may come in contact with them. Otherwise, Parliament=s ability to regulate non-federal employees would be excessively broad.

102 Hence, it appears that the better view is that mandatory testing and disclosure legislation would properly and primarily fall outside Parliamentary legislative jurisdiction and within Provincial legislative jurisdiction.[clx]

G. Guidelines for Constitutionally-Permissible Mandatory Testing and Disclosure Legislation

103 The preferable view appears to be that the legislation should be Provincially enacted.

104 The legislation should not concern an excessively limited list of diseases. It would be best to rely on a schedule of communicable diseases duly established under public health legislation, or on some prescribed subset of these diseases. The legislation should avoid referring to particular types of exposure as always or never supporting an order for disclosure and testing.

105 The key to *Charter*-compliance for the legislation is the requirement that the adjudicator balance the privacy interests of the Source Individual and the Exposed Individual=s interests in obtaining health information about the Source Individual. The legislation should address the following matters:

(a) The Exposed Individual should establish the circumstances of exposure Bwhich are relevant to reducing the Source Individual=s expectation of privacy.

(b) The Exposed Individual should tender evidence respecting

(i) the gravity of the disease risk and the likelihood of transmission;

(ii) whether the information would reasonably promote the Exposed Individual=s health;

(iii) whether alternative sources of information are reasonably available; and

(iv) whether the proposed testing is a minimum physical intrusion and would be accompanied by appropriate safeguards for the Source Individual.

(c) Any other circumstances relevant to granting or not granting the order should be explored.

(d) The potential adverse effects of testing and disclosure on the Source Individual and third parties should be examined, along with the efficacy of protective terms and conditions.

The Exposed Individual would bear the burden of proof; the adjudicator must be satisfied that Areasonable grounds@exist that support the granting of the order. The legislation should specify that the Exposed Individual must tender medical evidence from a qualified expert to support his or her application.

106 The adjudicator should be a judge. The hearing should be on notice to the Source Individual, unless the Exposed Individual establishes extraordinary circumstances.

107 The information about the Source Individual must be governed by confidentiality requirements, and prohibitions against the use of the information or any physical evidence for any other purposes other than those for which the order was granted.

108 Compulsory process should be available to enforce Source Individual compliance with

orders. Compliance may also be promoted through the establishment of an offence provision; day-to-day accrual of fines seems a sensible penal motivator.

109 The legislation should provide statutory rights of review for both Source Individuals and Exposed Individuals.

110 Legislation with these sorts of features may accommodate both the need to know and privacy. Balancing in particular cases would be difficult. More difficult still would be living with the fear of infection. Most difficult of all would be living with a serious communicable disease. One can hope that the discussion around the legislation will promote understanding, solid health initiatives, and some solace for all to whom the legislation might apply.

* * * *

Schedule A: New Offences?

111 Are new criminal offence provisions required to prosecute certain types of high-risk communicable disease transmission conduct? This question raises four main issues: (1) is the criminal law an appropriate tool for dealing with communicable disease transmission? (2) how are current offence provisions being used? (3) what defects (if any) beset the current offence provisions? and (4) is retaining the current provisions preferable to creating new offences? For present purposes, I will merely outline some elements of responses to these issues.

1. Criminal Law and Communicable Disease

112 Public safety and minimization of disease transmission may be achieved through education, counselling, and support for infected persons, or through public health interventions.[clxi] Criminal prosecutions have been argued to be counterproductive; prosecution exacerbates disease transmission by undermining education, prevention and care programs.[clxii] In *Cuerrier*, Cory J. rejected arguments for the wholesale inapplicability of

criminal law respecting disease transmission conduct. He denied that criminalization deters individuals from seeking testing: AThose who seek testing basically seek treatment. It is unlikely that they will forego testing because of the possibility of facing criminal charges should they ignore the instructions of public health workers.@[clxiii] He did not accept that criminalization Awill undermine the message that all are responsible for protecting themselves against HIV infection,@since Athe primary responsibility for making the disclosure must rest upon those who are aware that are infected.@[clxiv] Finally, Cory J. denied that criminalization results in stigmatization: At cannot be forgotten that the further stigmatization arises as a result of a sexual assault and not because of the disease.@[clxv]

113 Cory J. recognized in *Cuerrier* that some individuals may not conduct themselves within the norms presupposed by non-penal responses. Their conduct attracts the criminal law. He wrote that Athe criminal law does have a role to play both in deterring those infected with HIV from putting the lives of others at risk and in protecting the public from irresponsible individuals who refuse to comply with public health orders to abstain from high-risk activities;@[clxvi] [the criminal law] provides a needed measure of protection in the form of deterrence and reflects society=s abhorrence of . . . self-centred recklessness and . . . callous insensitivity . . . .@[clxvii]

2. Current Offence Deployment

114 Transmission offences occur in two main contexts. First, the conduct through which risk or transmission occurs is illegal B the communicable disease element is an added or aggravating factor. Typically, the conduct would be assaultive, such as biting, spitting, throwing of bodily fluids, or (as alleged in the notorious Edmonton Marilyn Tan/Con Boland case) the intravenous injection of bodily fluids. Transmission or causation of risk could be an aggravating factor considered in sentencing for the offence, or an element of the offence (e.g., the causation of bodily injury or the endangerment of the victim). This type of transmission conduct could be prosecuted as assault causing bodily harm (*Criminal Code* s. 267(b)), aggravated assault (s. 268), administering a noxious substance (s. 245), attempted murder (s. 239), manslaughter (ss. 222 and 234), or murder (s. 229). Convictions for these sorts of

Aassaultive/transmissive@offences have been registered in a few cases: In *Thissen*, the accused bit an arresting officer on the hand and said AThe joke=s on you. I=ve got AIDS.@[clxviii] The accused pleaded guilty to aggravated assault. In an unreported case, a bite by another HIV-positive accused again resulted in an aggravated assault conviction.[clxix] In *Winn*, the accused pleaded guilty to aggravated sexual assault. He knew that he had AIDS. He sexually assaulted the victim and purposefully transferred his bodily fluids into her.[clxx] In *Davanzo*, the accused stuck the victim with a needle and said that he had AIDS. He pleaded guilty to aggravated assault.[clxxi] In another unreported case, the accused spat blood at two prison guards, and was eventually convicted of attempted murder and assault causing bodily harm.[clxxii]

115 Second, the type of conduct through which risk or transmission occurs is legal, but the surrounding circumstances render the conduct illegal. For example, the accused may have had sexual contact with a complainant, to which the complainant ostensibly consented. Ostensible consent may be invalidated by fraud.[clxxiii] Fraud involves dishonesty and deprivation. Dishonesty may be established by an accused=s deliberate dishonesty respecting his or her HIV-positive status, or by the accused=s concealment of or failure to disclose his or her HIV-positive status.[clxxiv] Deprivation may be established if the dishonesty exposed the complainant to significant risk of serious bodily harm: AThe risk of contracting AIDS as a result of engaging in unprotected intercourse would clearly meet that test.@[clxxv] The Crown must also prove that the complainant would have refused to engage in unprotected sex with the accused, if the complainant had been advised that the accused was HIV-positive.[clxxvi] With consent vitiated, the accused is liable to conviction for an assault offence Band, with the addition of proof of endangerment of the complainant, for aggravated assault.[clxxvii] Cory J. held in *Cuerrier* that A[t]here can be no doubt that the respondent endangered the lives of the complainants by exposing them to the risk of HIV infection through unprotected sexual intercourse.@Actual infection is not required.[clxxviii]

116 Alternatively, the conduct could involve blood or other bodily product donation. Again, criminal fault may attach if an accused knew or should have known that he suffered from a communicable disease like AIDS and failed to disclose infected status. The accused

may be convicted of a penal negligence offence, such as common nuisance or criminal negligence causing bodily harm.[clxxix]

3. Reasons for New Offences

117 A difficulty with current offences is that they have no provisions specifically addressing communicable disease. Recourse to the offences and the application of the offences are left to the ingenuity of police, prosecutors, defence counsel and judges. While one could not argue that current offences (such as aggravated assault) are Avoid for vagueness,@ from the perspective of potential offenders and victims, the nature of prohibited conduct may be uncertain. New specific offence provisions could give greater certainty respecting the conduct that is and is not prohibited.[clxxx] New offence provisions could also reflect established research conclusions, so that the application of offence provisions would not governed by bad science (e.g. respecting the Adanger@ posed by certain types of conduct). The law would be based on the Abest available evidence.@[clxxxi]

4. Reasons for Retaining Current Offences

118 The non-specific nature of current offences may be a virtue, rather than a defect. International instruments suggest that Atransmission/exposure offences@ should be generic rather than HIV-specific; general criminal offence provisions should be applied in the exceptional cases in which prosecution is warranted.[clxxxii] This avoids the stigmatization or singling out of people living with HIV, and avoids legislative contributions to discrimination against people living with HIV.[clxxxiii] Practically, the addition of new specific charges might result in the compounding of charges against infected persons Bthey would be charged with both current offences and new offences.[clxxxiv] Finally, conviction for a new offence is not likely to produce any results beyond those that would have been produced on conviction for a current offence.[clxxxv] Thus, there are good reasons for retaining our current offence provisions, which seem to be working.

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Schedule B: Warrant Authority

119 Communicable disease status may be relevant to liability or sentencing. The State may wish to obtain bodily substance evidence or records relating to disease status. Two main contexts are relevant: first, where bodily samples have been extracted or medical records exist, outside of any criminal processes; second, where bodily substances have not been extracted. Three questions arise: (1) in what circumstances are existing warrant provisions available? (2) in what circumstances are existing warrant provisions not available? and (3) would new warrant provisions be constitutional? Again, for present purposes, I will merely outline some elements of responses to these questions.

1. Previously Existing Samples or Information: Availability of s. 487

120 If bodily samples drawn from a suspect or medical information about a suspect have previously been legitimately obtained Be.g. for medical purposes Bthen a warrant might be obtained under *Criminal Code* s. 487, or disclosure might be sought under the applicable provincial health information legislation.[clxxxvi] If the evidence does not already exist, the situation is more complicated.

2. Samples that Must be Extracted: Unavailability of Current Warrant Provisions

121 Bodily samples cannot be legitimately extracted in a search incident to arrest.[clxxxvii] Section 487 does not authorize the extraction of bodily samples. It permits search and seizure of a Abuilding, receptacle or place.@ None of these includes a Ahuman body.@[clxxxviii] The Ageneral warrant@provision are not available to permit the search for and seizure of bodily samples. Subsection 487.01(2) provides that the warrant authority Ashall not be construed as to permit interference with the bodily integrity of any person.@ I assume that procedures required to extract bodily substances for testing are sufficiently significant to amount to Ainterference with the bodily integrity@of a person (as opposed, for example, to mere observation (as in a line-up) or the taking of fingerprints).

122 Perhaps more surprisingly, the Aforensic DNA provisions@may not be available to permit extractions of bodily substances. Some prerequisites for a DNA warrant could be satisfied: A transmission offence could be a Adesignated offence:@s. 487.05(1)(a), 487.04, definition of Adesignated offence.@In such a case, a Abodily substance@would likely be found Aon or within the body of the victim of the offence@or Aon anything worn or carried by the victim at the time when the offence was committed:@s. 487.05(1)(b)(ii), (iii). There would be grounds to believe that the suspect was Aa party to the offence:@s. 487.05(1)(c). The difficulty lies with s. 487.05(1)(d): there must be reasonable grounds to believe that Aforensic DNA analysis of a bodily substance from the person will provide evidence about whether *the bodily substance referred to in paragraph (b) was <u>from</u> that person*@(emphasis added). Forensic DNA testing, then, is aimed at the issue of identity Bi.e, at the issue of whether the suspect was or was not the perpetrator.[clxxxix] Typically, identity is not at issue in a transmission offence. The identity of the alleged perpetrator is known. Instead, the medical condition of the accused would be in issue. If s. 487.05(1)(d) cannot be satisfied, the DNA warrant would not be available.

3. Samples that Must be Extracted: Constitutionality of a New Warrant Provision?

123 If a person is alleged to have committed a transmission offence and the State requires evidence of medical status for prosecutorial purposes, could search warrant provisions permitting physical testing be sustained under the *Charter*? For example, a new authorization provision (either added to s. 487.05 or in a new section) could be devised, expanding the language of s. 487.05(1)(d) to apply if there are reasonable grounds to believe that Aforensic DNA analysis of a bodily substance from the person will provide evidence about whether <u>the person has committed the designated offence</u>.@If the DNA warrant provisions presently before the Supreme Court are upheld as constitutional,[cxc] given that the contemplated expansion of search and seizure authority would be small, new provisions could likely be sustained under the *Charter*. If the Supreme Court identified any constitutional defects with the current DNA warrant provisions, those could be addressed, if they are surmountable. One might speculate that such new provisions would be more likely than civil mandatory testing

and disclosure legislation to pass constitutional muster: one might argue that the State interests would be clear and substantial, the intrusion would be minimal, and the procedure would accord with constitutional requirements.

ENDNOTES

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i.I would like to thank the members of the Blood Samples Act Joint Working Group of the Civil and Criminal Sections of the ULCC for their insightful and provocative comments on earlier drafts of this paper. The opinions expressed in this paper are solely my own.

ii.The circumstances that motivate mandatory testing and disclosure legislation give rise to a cluster of additional issues, which shall not be explored in this paper. In particular, this paper shall not investigate

(a) whether new criminal offences are necessary respecting the transmission of communicable disease (but see the brief comments in Schedule A to this paper);

(b) whether, if infected status is relevant to a criminal charge, the current *Criminal Code* search warrant provisions would authorize warrants to obtain bodily samples for testing (but see the brief comments in Schedule B to this paper);

(c) whether Bill 105 or Bill C - 217(see *infra*, notes 4 and 5) are constitutionally sound;

(d) whether health service professionals and other professionals are obligated to provide services to persons they have grounds to believe are infected with a communicable disease;

(e) whether and in what circumstances health service professionals who are infected are obligated to disclose their medical status to patients;

(f) whether legislation compelling health services professionals to disclose health information about patients is legally or morally sound;

(g) whether health service professionals have ethical obligations (outside of legally-mandated circumstances) to disclose health information about patients (see M. Marshall and B. Von Tigerstrom, APrivacy, Confidentiality and the Regulation of Health Information,@in M. J. Dykeman, gen. ed., *Canadian Health Law Practice Manual* (Markham, Ontario: Butterworths, 2002) 3.01 at para. 3.77); or

(h) whether mandatory testing and disclosure legislation would conform to Canada=s international law obligations (see *Handbook for Legislators on HIV/AIDS, Law and Human Rights*(Geneva, Switzerland: Joint United Nations Programme on HIV/AIDS (UNAIDS), 1999 (99.48E)) 9, 26 [hereinafter *Handbook*]; *HIV/AIDS and Human Rights: International Guidelines* (New York: United Nations, 1996) [hereinafter *Guidelines*], para. 78 at 38.

With respect to point (c), this paper investigates issues at a higher level of generality than that of the drafting of particular provisions of particular legislation. While provisions of Bill 105 and Bill C - 217 are relevant to my inquiry, and while I may refer to or comment on those provisions, I offer no opinion respecting their constitutionality.

iii.In this paper, Acommunicable disease@means Aan illness in humans that is caused by an organism or micro-organism or its toxic products and is transmitted directly or indirectly from an infected person:@see *Public Health Act*, R.S.A. 2000, c. P - 37, s. 1(f).

iv.Bill 105, S.O. 2001, c. 30, which amends the *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7. It was proclaimed in force on May 1, 2003. Bill 105 was a Private Member=s Bill, introduced by Garfield Dunlop.

v.This was also a Private Member=s Bill, introduced by Chuck Strahl on February 5, 2001 (1st Session, 37th Parliament). The Bill was debated and received second reading . It was referred to the Justice and Human Rights Committee in October, 2001, which recommended on March 1, 2002 that the Bill not proceed. To date, it has not.

vi.A further possibility, which I shall not explore, is that an order for testing might be made under Rules of Court. In *D.C.* v. *371148 Ontario Ltd.*, an action for (*inter alia*) sexual battery against Paul Bernardo, E. M. MacDonald J. ordered Bernardo to submit to medical testing for AIDS and other sexually transmitted diseases by providing blood samples. Bernardo did not oppose the order; Corrections Canada (Bernardo was incarcerated at the time) consented to the order: see (1997), 13 C.P.C. (4th) 132, [1997] O.J. No. 2367 (Gen. Div.).

vii.*Public Health Act*, s. 18(1)(a).

viii.*Ibid.*, s. 31(1).

ix.*Ibid.*, s. 47.

x.*Ibid.*, s. 53(1). Under s. 55, it is an offence to knowingly release, publish or disclose information contrary to section 53.

xi.*Ibid.*, ss. 53(4)(a.1) and 53(5)(a.1).

xii.*Ibid.*, s. 53(5)(b).

xiii.One might note that an Exposed Individual would not have a statutory review right respecting disclosure denials. In contrast, the person to whom the information relates would have this right: s. 54. The Exposed Individual could resort to judicial review.

xiv.Canada Communicable Disease Report, Vol. 21 - 19, October 15, 1995 [hereinafter *Protocol Guidelines*].

xv.International Association of Fire Fighters AFL-CIO, CLC, ATestimony before the Standing Committee on Justice and Human Rights: Bill C - 217, the *Blood Samples Act* [hereinafter AIAFF@]; B. W. Moloughney, ATransmission and postexposure management of bloodborne virus infections in the health care setting: Where are we now?@ *CMAJ*, August 21, 2001; 165(4) 445 at 448.

xvi.IAFF, *ibid.*

xvii.Canadian HIV/AIDS Legal Network, Brief to the House of Commons Standing Committee on Justice and Human Rights: Bill C - 217 (A*Blood Samples Act*@), 2.1 [hereinafter ACHALN Brief@]; BC Persons with AIDS Society Submission to the Standing Committee on Justice and Human Rights regarding Bill C - 217, the *Blood Samples Act* [hereinafter ABCPAS@]; M. W. Tyndall and M. D. Schechter, AHIV Testing of Patients: Let=s Waive the Waiver,@*CMAJ* 2000; 162(2): 210 - 211.

xviii.ACMA rescinds controversial policy@*CMAJ* 2000; 163(5): 594; Moloughney, *supra* note 15at 448.

xix.Canadian Police Association, Brief to the Standing Committee on Justice and Human Rights Regarding Bill C - 217@(February 19, 2002) [hereinafter ACPA Brief@].

xx.Moloughney, *supra* note 15 at 449.

xxi.*Guidelines*, *supra* note 2 at F -3; Tyndall and Schechter, *supra* note 17; CMA Policy, AHIV Infection in the

Workplace@(update 2000), available online through: <http://www.cma.ca>.

xxii.*Handbook*, *supra* note 2 at 18, 43.

xxiii.*R.* v. *Cuerrier*, [1998] 2 S.C.R. 371, Cory J. at para. 144.

xxiv.Moloughney, *supra* note 15.

xxv.Being Part I of the *Constitution Act, 1982*, enacted by the *Canada Act 1982* (U.K.) c. 11 [hereinafter the *Charter*].

xxvi.*R.* v. *Carosella*, [1997] 1 S.C.R. 80, L=Heureux-Dubé J. Canadian HIV/AIDS Legal Network, Letter to Minister McLellan Concerning Bill C - 217, February 22, 2001 [hereinafter CHALN, Letter]; CHALN, Brief, *supra* note 17at 3.1.

xxvii.*Hunter* v. *Southam*, [1984] 2 S.C.R. 145, Dickson J., as he then was, at 160.

xxviii.BC Civil Liberties Association, Submissions on Bill C - 217, the *Blood Samples Act*, to the Standing Committee on Justice and Human Rights, February 26, 2002, Parts II and III [hereinafter ABCCLA@.

xxix.I note that research ethics policies, such as the national ATri-Council Policy on Research involving Human Subjects@(followed in most Universities=policies) also protect bodily integrity and personal information, by requiring researchers to obtain approval for research from research ethics boards, before the research is commenced. Policy and the research ethics boards require researchers to provide for informed consent and to protect personal information in the course of research.

xxx.The *Civil Code* references are courtesy of Frédérique Sabourin; again, any miscues are mine.

xxxi.*R.* v. *Dyment*, [1988] 2 S.C.R. 417, La Forest J. at 433; Marshall and Von Tigerstrom, *supra* note 2 at para. 3.40.

xxxii.Medical Research Council of Canada (now Canadian Institutes of Health Research), Natural Sciences and Engineering Research Council of Canada, and Social Sciences and Humanities Research Council of Canada, *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans* (1998), i.5, available online through: <http://www.nserc.ca>.

xxxiii.*R.* v. *Morgentaler*, [1988] 1 S.C.R. 30, Dickson C.J. at 53.

xxxiv.AThe publication of defamatory comments constitutes an invasion of the individual=s personal privacy and is an affront to that person=s dignity:@*Hill* v. *Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, Cory J. at para. 121.

xxxv.*Fleming* v. *Reid* (1991), 4 O.R. (3d) 74 (C.A.) at 88; *Canadian AIDS Society* v. *Ontario*, [1995] O.J. No. 2361 (Gen. Div.), Wilson J. at para. 123; affd. (1996), 31 O.R. (3d) 798 (C.A.) *per curiam*; application for leave to appeal dismissed, [1997] S.C.C.A. No. 33; E. Nelson, AThe Fundamentals of Consent,@in J. Downie, T. Caulfield, and C. Flood, *Canadian Health Law and Policy*, 2nd ed.(Markham, Ontario: Butterworths, 2002) 111; P. Washington, AConsent to Treatment,@in M. J. Dykeman,ed. *supra* note 2, 2.1 at 2.3, 2.45. I note that Ontario has enacted the *Health Care Consent Act, 1996*, S.O. 1996, c.2, Schedule A.

xxxvi.*McInerney* v. *MacDonald*, [1992] 2 S.C.R. 138 at 149 - 150. See articles 1457 and 1458 of the *Civil Code*.

xxxvii.*Criminal Code*, R.S.C. 1985, c. C - 46 [hereinafter the *Criminal Code*].

xxxviii.*Civil Code*, S.Q. 1991, c. 64, arts. 35 and 36; *Charter of Human Rights and Freedoms*, R.S.Q., c. C - 12, s. 5; *R.* v. *O=Connor*, [1995] 4 S.C.R. 411, L=Heureux-Dubé J. at para. 116.

xxxix.In British Columbia, R.S.B.C. 1996, c. 373; in Saskatchewan, R.S.S. 1978, c. P - 24; in Manitoba, R.S.M. 1987, c. P - 125; and in Newfoundland, R.S.N. 1990, c. P - 22 .

xl.*Handbook*, *supra* note 2, Guideline 3(1), pp. 10, 41.

xli.*Ibid*., Guideline 5(3), pp. 12, 27.

xlii.The courts have recognized that some types of matters Be.g. records that tend to reveal intimate details of lifestyle and personal choices Battract strong privacy protection. Other types of matters Be.g. records of electricity consumption Bdo not. *R.* v. *Plant*, [1993] 3 S.C.R. 281, Sopinka J.

xliii.*R.* v. *Pohoretsky*, [1987] 1 S.C.R. 945, Lamer J., as he then was, at 949; *R.* v. *Brighteyes* (1997) 54 Alta. L. R. (3d) 347, [1997] A.J. No. 362 (Q.B.), Murray J. at para. 30.

xliv.*Dyment*, *supra* note 31 at 429; see *R.* v. *Dersch*, [1993] 3 S.C.R. 768, Major J. at 777 - 778.

xlv.*R.* v. *Colarusso*, [1994] 1 S.C.R. 20, La Forest J. at 53.

xlvi. *O=Connor*, *supra* note 38, L=Heureux-Dubé J. at para. 110; *Canadian AIDS Society* v. *Ontario*, *supra* note 35 at para. 125; Marshall and Von Tigerstrom, *supra* note 2 at para. 3.25; ACompulsory HIV testing can constitute a deprivation of liberty and a violation of the right to security of the person:@*Guidelines*, *supra* note 2 at para. 113 at 47.

xlvii.*Fleming* v. *Reid*, *supra* note 35 at 88.

xlviii.*Morgentaler*, *supra* note 33, Dickson C.J. at 55, Wilson J. at 171; *O=Connor*, *supra* note 38, L=Heureux-Dubé J. at paras. 111, 112; *R.* v. *Mills*, [1986] 1 S.C.R. 863, Lamer J. at 920.

xlix.*Re B.C. Motor Vehicles Act*, [1985] 2 S.C.R. 486.

l.Note that the therapeutic abortion provisions, which were found to limit women=s s. 7 rights, did not merely provide legal privileges to women, but created offences for procuring unauthorized miscarriages, thereby potentially depriving women of liberty: *Morgentaler*, *supra* note 33, Dickson C.J. at 55.

li.See *R.* v. *Heywood*, [1994] 3 S.C.R. 761, Cory J. at 802 - 803: AThis Court has expressed doubt about whether a violation of the right to life, liberty or security of the person which is not in accordance with the principles of fundamental justice can ever be justified, except perhaps in times of war or national emergencies.@

lii.Murray J. held in *Brighteyes* that dignity and sanctity of the body are of Asuch importance@that they Acannot be qualified by the principles of fundamental justice:@*Brighteyes*, *supra* note 43 at para. 97. The Alberta Court of Appeal disagreed in *R.* v. *S.A.B.* (2001), 157 C.C.C. (3d) 510 (Alta. C.A.),appeal heard and reserved March 29, 2003, [2001] S.C.C.A. No. 529. Russell J.A. held that a balancing of rights approach is necessary under ss. 7 and 8: at 540 (para. 71).

liii.The s. 8 approach is preferable, for the following additional reasons: The Areasonableness@inquiry is conceptually primary to the s. 1 justification inquiry. It should not be simply assumed that the limitations are unreasonable. When dealing with an Ainternally balanced@right such as s. 8, it makes sense to determine as a first step whether a limitation is acceptable within the scope of that right. Moreover, the reasonableness inquiry is (or should be) contextually more sensitive than the s. 1 analysis. A reasonableness inquiry should be more attuned to the interests behind both privacy claims and privacy limitations than a s. 1 analysis, which focuses more on the social needs justifying a rights limitation. Finally, the assumption of unreasonableness would strongly tilt argument

in favour of privacy interests. If limitations of privacy were unreasonable (i.e., if the limitations were not in accordance with the principles of fundamental justice), proponents of the legislation would have a heavy justificatory onus. In any event, the types of issues that might be considered in a s.1 analysis are similar to the types of issues that might be considered in a s. 8 analysis.

liv.*Handbook*, *supra* note 2 at 25; *Guidelines*, *supra* note 2, Summary, para.15(b) at 10; para. 73 at 37.

lv.*R.* v. *S.F.* (1999), 141 C.C.C. (3d) 225 (Ont. C.A.), Finlayson J.A. at 237 (para. 22); *R.* v. *Mills*, [1999] 3 S.C.R. 668, Iacobucci and McLachlin JJ. at para. 88: "In most respects, s. 7 will not add anything to the specific protections of s. 8;" *R.* v. *Briggs* (2001), 157 C.C.C. (3d) 38 (Ont. C.A.) at 63 (para. 41), application for leave to appeal dismissed [2002] S.C.C.A. No. 31; see also *R.* v. *Beare*, [1988] 2 S.C.R. 387, La Forest J. at 412 (para. 56), quoting Cameron J.A. in the court below: ss. 8 - 14 are "an invaluable key to the meaning of principles of fundamental justice."

lvi.*S.F.*, *supra* note 55; *S.A.B.*, *supra* note 52 at 538 (para. 66).

lvii."Exceptions to voluntary testing, would need specific judicial authorization, granted only after due evaluation of the important privacy and liberty considerations involved:" *Handbook*, *supra* note 2, Guideline 3(b) at 121; *Guidelines*, *supra* note 2, Guideline 3, para. 28(b) at 16.

lviii.*R* v. *Edwards*, [1996] 1 S.C.R. 128, Cory J., para. 45.

lix.*R.* v. *Stillman*, [1997] 1 S.C.R. 607, Cory J., para. 25.

lx.Thus, an individual has a lesser expectation of privacy respecting contraband secreted in his or her body than respecting health information derived from bodily samples: *R.* v. *Monney*, [1999] 1 S.C.R. 652, paras. 41 and 45.

lxi.*Handbook*, *supra* note 2, Guideline 5 at 73; *Guidelines*, *supra* note 2, para. 98 at 44; J. E. DeLine, "Compulsory AIDS Testing of Individuals who Assault Public Safety Officers: Protecting the Police or the Fourth Amendment?" (1991), 39 *Wayne L. Rev.* 461at 480 - 481. The U.S. Court of Appeals, 2nd Circuit, found that a party had a constitutional right to privacy in his HIV-positive status: *Doe* v. *City of New York*, 15 F.3d 264 (2d Cir. 1994), cited Marshall and Von Tigerstrom, *supra* note 2, 3.01 at para. 3.16.

lxii.S. B. Fishbein, "Pre-Conviction Mandatory HIV Testing: Rape, AIDS and the Fourth Amendment" (2000), 28 *Hofstra L. Rev.* 835 at 852; *O'Connor*, *supra* note 38, Lamer C.J.C. and Sopinka J., paras. 31, 32.

lxiii.*Edwards*, *supra* note 58 at para. 45.

lxiv.*Ibid.*

lxv.*R.* v. *Monachan* (1980), 60 C.C.C. (2d) 286 (Ont. C.A.), affd. [1985] 1 S.C.R. 176.

lxvi.*R.* v. *Boesma* (1994), 31 C.R. (4th) 396 (S.C.C.).

lxvii.*A.M.* v. *Ryan*, [1997] 1 S.C.R. 157.

lxviii."It seems to me that a person who is arrested on reasonable and probable grounds that he has committed a serious crime . . . must expect a significant loss of personal privacy:" *Beare*, *supra* note 55 at 413 (para. 59).

lxix.Fishbein, *supra* note 62 at 853 - 854.

lxx.*Cuerrier*, *supra* note 23 at para. 144.

lxxi.see *Criminal Code*, s. 278.3(4), *Mills*, *supra* note 55, para. 117; *Alberta* v. *Alberta Provincial Judges= Association* (1999), 71 Alta. L. R. (3d) 269 (C.A.), application for leave to appeal dismissed, [1999] S.C.C.A. No. 470.

lxxii.*Criminal Code*, ss. 810 - 811.

lxxiii.The application of this factor does not turn on the mere status of the Exposed Individual. That is, an Exposed Individual does not have enhanced rights, and the Source Individual does not have diminished rights, just because (e.g.) the Exposed Individual is a member of an at-risk profession. Hence, a claim like the following is misplaced: AOur emergency service workers protect our homes and save our lives every day. It=s time that we as a society protect those who protect us:@The Honourable Robert Runciman, Minister of Public Safety and Security, quoted in Government of Ontario, ANews Release re Bill 105, November 19, 2002@ Status is irrelevant because it does not bear on a Source Individual=s expectation of privacy Bthe mere fact that others may or may not have a particular status does not affect a Source Individual=s or a third party=s assessment of his or her privacy. Neither, however, would it be legitimate to argue that a Source Individual has enhanced rights, and the Exposed Individual has diminished rights, just because of the Exposed Individual=s status. One might be tempted to argue that, by taking jobs that entail a reasonable expectation of physical hazard (in particular, a reasonable expectation of contact with others=bodily substances), professonals implicitly accept any risk Bthey are paid to accept those very risks. These reflections too are irrelevant to the assessment of a Source Individual=s expectation of privacy. Again, the mere fact that others have a particular status does not affect a Source Individual=s or a third party=s assessment of his or her privacy.

lxxiv.AWaiver@cases may be understood as falling within this set of factors. If a claimant is found to have waived his or her privacy rights in relation to a matter, this will entail that some third party Bthe beneficiary of the waiver B who otherwise would have been bound to respect the claimant=s privacy interests, is no longer obligated to do so. In this type of case, the claimant extends a Aprivilege@to the third party to have access to the matter, and the claimant has no enforceable right to oppose the third party.

lxxv.CHALN Brief, *supra* note 17 at 2.1; BCPAS, *supra* note 17.

lxxvi.G. Radwanski, Privacy Commissioner of Canada, Opening Statement: Appearing before the House of Commons Standing Committee on Justice and Human Rights regarding Bill C-217 (*Blood Samples Act*), February 21, 2002; Canadian HIV/AIDS Legal Network, Memo to Network Membership, April 2001 [hereinafter ACHALN Memo@]; BCPAS, *supra* note 17; BCCLA, *supra* note 28, Part VI; but see CPA Brief, *supra* note 19.

lxxvii.CHALN Brief, *supra* note 17 at 1.2.

lxxviii.*S.F.*, *supra* note 55 at 239 - 240 (para. 27).

lxxix.Discovery has been interpreted as an exception to the right of privacy that litigants enjoy with respect to their personal records: *Home Office* v. *Harman*, [1983] 1 A.C. 280 (H.L.), Lord Diplock at 300, Lord Keith of Kinkel at 308 (ADiscovery constitutes a very serious invasion of the privacy and confidentiality of a litigant=s affairs@); Lord Scarman (dissenting) at 312. See also *Lac d=Amiante du Québec Ltée* v. *2858-0702 Québec Inc.*, [2001] 2 S.C.R. 743, Lebel J., para. 64.

lxxx.DeLine, *supra* note 61 at 475, 480; Fishbein, *supra* note 62 at 854, 845.

lxxxi.IAFF, *supra* note 15. See also the Schedules to the *Communicable Disease Regulation*, made under the *Public Health Act*: Alta. Reg. 238/85.

lxxxii.Radwanski, *supra* note 76; CHALN Brief, *supra* note 17 at 1.1; BCPAS, *supra* note.

lxxxiii.DeLine, *supra* note 61at 462, fn. 8. AAn exposure that might place [Health Care Providers] at risk for HBV, HCV, or HIV infection is defined as a percutaneous injury (e.g. needlestick or cut with a sharp object) or contact of

mucous membrane or nonintact skin (e.g. exposed skin that is chapped, abraded, or afflicted with dermatitis) with blood, tissue, or other body fluids that are potentially infectious . . . . In addition to blood and body fluids containing visible blood, semen and vaginal secretions also are considered potentially infectious . . . . Feces, nasal secretions, saliva, sputum, sweat, tears, urine, and vomitus are not considered potentially infectious unless they contain blood. The risk for transmission of HBV, HCV, and HIV infection from these fluids and materials is extremely low:@ *Updated U.S. Public Health Service Guidelines for the Management of Occupational Exposures to HBV, HCV, and HIV and Recommendations for Postexposure Prophylaxis*, (June 20, 2001) online: <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5011a1.htm> [hereinafter AUS Public Health Service@].

lxxxiv.R. D. Mohr, AAIDS, Gays, and State Coercion@(1987) 1:1 *Bioethics* 35, in U. Schüklenk, ed., *AIDS: Society, Ethics and Law* (Dartmouth: Ashgate, 2001) 153 at 154, 156.

lxxxv.L. Gostin, AThe Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties@(1989), 49 *Ohio State Law Journal* 1017, in U. Schüklenk, ed., *supra* note 84, 111 at 115.

lxxxvi.*Ibid.* at 117; *U.S.* v. *Moore*, 846 F.2d 1163 (8th Cir. 1988).

lxxxvii.But see IAFF, *supra* note 15.

lxxxviii.*U.S. Public Health Service*, *supra* note 83.

lxxxix.Bill 105, s. 22.1(2)(b); Bill C - 217, Part I, s. 3(b); Part II (s. 18), s. 31.02(b).

xc.*Hunter* v. *Southam*, *supra* note 27 at 160. See *Dyment*, *supra* note 31, La Forest J. at 430: Aif the privacy of the individual is to be protected, we cannot afford to wait to vindicate it only after it has been violated. This is inherent in the notion of being secure against unreasonable searches and seizures.@

xci.Bill 105, s. 22.1(1).

xcii.*Ibid.*

xciii.*Baron* v. *Canada* (1993), 78 C.C.C. (3d) 510 (S.C.C.), Sopinka J. at 532.

xciv.Bill 105, s. 22.1(2); Bill C - 217, Part I, s. 3; Part II (s. 18), s. 31.04.

xcv.*Criminal Code*, s. 487.05(1).

xcvi.*Hunter* v. *Southam*, *supra* note 27 at 115.

xcvii.*S.A.B.*, *supra* note 52, Russell J.A. at 529 (para. 31).

xcviii.*Ibid.* at 556 (para. 121).

xcix.DeLine, *supra* note 61 at 486.

c. *Thompson Newspapers Ltd.* v. *Canada*, [1990] 1 S.C.R. 425, La Forest J. at 476 - 7; *Brighteyes*, *supra* note 43 at para. 48.

ci.*Canadian AIDS Society* v. *Ontario*, *supra* note 35 at paras. 155, 159

cii.CPA Brief, *supra* note 19.

ciii.CHALN Memo, *supra* note 76.

civ.Government of Ontario, *supra* note 73.

cv.Radwanski, *supra* note 76; CHALN Letter, *supra* note 26; BCPAS, *supra* note 17; BCCLA, *supra* note 28, Part VI; *Handbook*, *supra* note 2 at 43.

cvi.Radwanski, *supra* note 76; CHALN Brief, *supra* note 17 at 2.2; BCPAS, *supra* note 17; BCCLA, *supra* note 28, Part VI; CMA Policy, *supra* note 21 at 3; Moloughney, *supra* note 15 at 448.

cvii.CHALN Brief, *supra* note 17 at 2.2, 1.3; BC CLA, *supra* note 28, Part VI; Moloughney, *supra* note 15 at 449.

cviii.False fears and false peace of mind should be resisted. Employers do owe their employees and the public does owe to non-professional Exposed Individuals adequate counselling and information: CHALN Brief, *supra* note 17 at 2.4; BCCLA, *supra* note 28, Part VI.

cix.Fishbein, *supra* note 62 at 853.

cx.Fishbein, *supra* note 62 at 862.

cxi.Bill 105, s. 22.1(2)(f).

cxii.*S.F.*, *supra* note 55 at 239 (para. 27).

cxiii.*Brighteyes*, *supra* note 43 at para. 66.

cxiv.Bill 105, s. 22.1(2)(d); Bill C - 217, Part I, s. 5(d); Part II (s. 18), s. 31.04(d).

cxv.*Criminal Code*, s. 487.05(2); Bill 105, s. 22.1(4)(a); Bill C - 217, Part I, ss. 5 and 6; Part II (s. 18), ss. 31.04 and 31.05.

cxvi.CMA Policy, *supra* note 21 at 3.

cxvii.Bill 105, s. 22.1(4)(b)(i). Bill C - 217 is somewhat vague respecting the transmission of samples from the test to the analyst.

cxviii.Bill 105, s. 22.1(12); Bill C - 217, Part I, s. 15; Part II (s. 18), s. 31.14 (prohibitions on use). The C - 217 provisions respecting non-disclosure and confidentiality could be more clear.

cxix.*S.A.B.*, *supra* note 52 at 529 (para. 33); *Brighteyes*, *supra* note 43 at paras. 57, 59; *C.B.C.* v. *Lessard*, [1991] 3 S.C.R. 421, Cory J. at 445.

cxx.Bill 105, s. 22.1(2)(c); Bill C - 217, Part I, s. 3(c); Part II (s. 18), s. 31.02(c).

cxxi.Bill 105, s. 22.1(4)(c)(ii).

cxxii.Bill C - 217, Part I, s. 13, Part II (s. 18), s. 31.13.

cxxiii.Bill 105, s. 22.1(4)(c).

cxxiv.Fishbein, *supra* note 62 at 853. I shall not pursue the ethical or legal obligations of health care providers to disclose health information without patients=consent.

cxxv.Bill C - 217, Part I, s. 13; Part II (s. 18), s. 31.13.

cxxvi.Bill 105, ss. 22.1(11) - (13); Bill C - 217, Part I, ss. 15 and 17; Part II (s. 18), ss. 31.14 and 31.16.

cxxvii.BCPAS, *supra* note 17; BC CLA, *supra* note 28, Part IV; *Handbook, supra* note 3 at 43; *Guidelines, supra* note 2, Guideline 5 at 11.

cxxviii.As provided, for example, under the DNA warrant legislation: *Criminal Code*, s. 487.06(2).

cxxix.Bill 105, s. 22.1(2).

cxxx.Bill C - 217, Part I, s. 3; Part II (s. 18), s. 31.02.

cxxxi.*Criminal Code*, s. 2.

cxxxii.*Ibid.*, s. 487.05(1).

cxxxiii.Even in the case of DNA warrants, applications on notice have not yet been held to be a constitutional requirement, although the judge has the discretion to cause the application to be made on notice: *S.F., supra* note 55 at 244 (para. 39).

cxxxiv.Bill 105, s. 22.1(5).

cxxxv.Bill C - 217, Part I, s. 4; Part II (s. 18), s. 31.03.

cxxxvi.Bill 105, s. 22.1(10); see the *Public Health Act*, respecting Arecalcitrant patients,@and the issuance of certificates and warrants: ss. 39 - 47.

cxxxvii.Bill C - 217, Part I, s. 5; Part II (s. 18). s. 31.04.

cxxxviii.Bill C - 217, Part I, s. 9; Part II (s. 18), s. 31.08.

cxxxix.*Criminal Code*, s. 734(1)(a).

cxl.*Health Protection and Promotion Act*, s. 100(1): AAny person who fails to obey an order made under this Act is guilty of an offence.@

cxli.*Ibid.*, s. 101(1).

cxlii.Bill 105, s. 22.1(9).

cxliii.*Health Protection and Promotion Act*, s. 44(1).

cxliv.*Reference re Firearms Act*, [2000] 1 S.C.R. 783, para. 15.

cxlv.*Ibid.*, para. 16.

cxlvi.*R.J.R-MacDonald Inc.* v. *Canada*, [1995] 3 S.C.R. 199, La Forest J., para. 32, quoting Rand J., *Margarine Reference*, [1949] S.C.R. 1 at 49 - 50.

cxlvii.The *Emergencies Act* applies, *inter alia*, to Apublic welfare emergencies,@one species of which concerns human disease: *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.), s. 5. Apparently, a declaration of a public welfare emergency would be proclaimed only if the emergency exceeded Provincial capacities to deal with it: see s. 3(a). Otherwise, even health emergencies remain within Provincial competence: see s. Part 3 of the *Public Health Act* (ACommunicable Diseases and Public Health Emergencies@).

cxlviii.*RJR-MacDonald Inc.*, *supra* note 147 at para. 28; *Margarine Reference*, *supra* note 147 at 49 - 50. The law would be unlike the former therapeutic abortion provisions, which were aimed at Asocially undesirable conduct:@*R.* v. *Morgentaler*, [1976] 1 S.C.R. 616.

cxlix.AThis argument overlooks the different purposes behind the federal restrictions on firearms and the provincial regulation of other forms of property. Guns are restricted because they are dangerous. While cars are also dangerous, provincial legislatures regulate the possession and use of automobiles not as dangerous products but rather as items of property and as an exercise of civil rights . . . :@*Firearms Reference*, *supra* note 145 at para. 42.

cl.*R.J.R.-MacDonald Inc.*, *supra* note 147 at para. 30.

cli.*Firearms Act Reference*, *supra* note 145 at para. 24. Mandatory testing and disclosure legislation in Washington State was found not to be criminal law, but (*inter alia*), law in relation to victim protection and public health: Fishbein, *supra* note 62 at 844, citing *In re Juveniles A, B, C, D, E* 847 P2d 455 (Wash. 1993).

clii.Indeed, penal enforcement of otherwise valid Provincial legislation is constitutionally authorized: *Constitution Act, 1867*, s. 92(16).

cliii.*R.* v. *Swain*, [1991] 1 S.C.R. 933, Lamer C.J.C.

cliv.P. Hogg, *Constitutional Law of Canada*, 3rd ed. (Scarborough, Ontario: Carswell, 1992) 490; *R.* v. *Zelensky*, [1978] 2 S.C.R. 940, Laskin C.J.C.

clv.See CHALN Brief, *supra* note 17 at 3.4; BCCLA, *supra* note 28, Part V.

clvi.The structure of Bill C - 217 seems to suggest the Aexposure conduct@distinction: Part I of the draft provisions related to non-criminal exposures; Part II (s. 18) related to criminal exposures.

clvii.Hogg, *supra* note 155 at 549.

clviii.*Bell Canada* v. *Quebec*, [1988] 1 S.C.R. 749.

clix.CPA Brief, *supra* note 19.

clx.I understand that the federal Department of Justice has argued that mandatory testing and disclosure legislation, at least in the shape of Bill C - 217, is outside of Parliamentary competence: this provides some support for or comfort respecting my conclusions.

clxi.*Cuerrier*, *supra* note 23 at para. 140; R. Elliott, ACriminal Law and HIV/AIDS: Strategic Considerations@ (2000), 5:4 *Canadian HIV/AIDS Policy & Law Review* 66 at 69.

clxii.*Handbook*, *supra* note 2 at 18.

clxiii.*Ibid.* at para. 143.

clxiv.*Cuerrier*, *supra* note 23 at para. 144.

clxv.*Ibid.* at para. 145.

clxvi.*Ibid.* at para. 141.

clxvii.*Ibid.* at para. 142. *Cuerrier* is arguably consistent with international rules, which do not forbid, but limit transmission/exposure offences: ASuch laws are common . . . but they are not recommended and should only be

used as a last resort:@*Handbook*, *supra* note 2, Guideline 4(1) at 11; AIn exceptional cases involving objective judgments concerning deliberate and dangerous behaviour, restrictions on liberty may be imposed. Such exceptional cases should be handled under ordinary provisions of . . . criminal laws, with appropriate due process protection:@*Guidelines*, *supra* note 2, para. 112 at 47.

clxviii.*R.* v. *Thissen*, [1996] O.J. No. 2074 (Ct. J. (Prov. Div.)), Cadsby Prov. Ct. J.; appeal dismissed [1998] O.J. No. 1982 (C.A.) [no basis for rescinding guilty plea].

clxix.R. Jürgens, ACriminal Law and HIV/AIDS: Final Report Released@(1997), 3:2/3 *Canadian HIV/AIDS Policy & Law Review* 13.

clxx.*R.* v. *Winn* (1995), 25 O.R. (3d) 750 (Prov. Div.), Fairgrieve Prov. Ct. J.; appeal dismissed (1998), 38 O.R. (3d) 159 (C.A.).

clxxi.R. Elliott, ACriminal Law and HIV/AIDS: Update IV@(2000), 5:4 *Canadian HIV/AIDS Policy & Law Review* 22, 23.

clxxii.*Ibid.*

clxxiii.*Criminal Code*, s. 265(3)(c); *Cuerrier*, *supra* note 23. *Cuerrier*-like circumstances might also support convictions for common nuisance or attempted aggravated assault: *R.* v. *Williams*, [2001] N.J. No. 274 (C.A.), appeal heard and reserved December 3, 2002, [2001] S.C.C.A. No. 561.

clxxiv.*Cuerrier*, *supra* note 23 at paras. 124 - 127.

clxxv.*Ibid.*, para. 128.

clxxvi.*Ibid.*, para. 130.

clxxvii.*Criminal Code*, s. 268.

clxxviii.*Ibid.*, para. 95.

clxxix.*R.*. v. *Thornton* (1991), 1 O.R. (3d) 480 (C.A.), appeal dismissed [1993] 2 S.C.R. 445, Lamer C.J. at 445 - 446: ASection 216 imposed upon the appellant a duty of care in giving his blood to the Red Cross. This duty of care was breached by not disclosing that his blood contained HIV antibodies. This common nuisance obviously endangered the life, safety and health of the public.@

clxxx.Elliott, *supra* note 162 at 70; *Handbook*, *supra* note 2 at 51.

clxxxi.Elliott, *supra* note note 162 at 67.

clxxxii.*Handbook*, *supra* note 2, Guideline 4 at 11, 123; *Guidelines*, *supra* note 2, Guideline 4 at 11 and para. 29(a) at 17.

clxxxiii.*Handbook*, *supra* note 2, Guideline 5 at 64.

clxxxiv.Elliott, *supra* note 162 at 69.

clxxxv.*Ibid.*

clxxxvi.A nagging issue is whether provincial legislative restrictions on disclosure could constrain the use of the search warrant provisions Bone might suggest that a province cannot legislate respecting criminal procedure, and

so provincial rules cannot constrain valid federal action. *R.* v. *French* (1977), 37 C.C.C. (2d) 201 (Ont. C.A.), affd. O.G., [1980] 1 S.C.R. 158.

clxxxvii.*Stillman*, *supra* note 59 at para. 42. *Stillman* overrules (in effect) the earlier well-known Alberta case of *Reynen* v. *Antonenko* (1975), 20 C.C.C. (2d) 342 (Alta. S.C.T.D.), MacDonald J.

clxxxviii.*Re Laporte and the Queen* (1972), 8 C.C.C. (2d) 343 (Que. Q.B.), Hugessen J. at 352 - 354.

clxxxix.ADNA typing is a powerful investigative tool that can help to identify with greater certainty those who have committed serious crimes:@Minister of Justice, House of Commons Debates (22 June 1995) at 14489, quoted in *Brighteyes*, *supra* note 43 at para. 25; AThis comparison results in a determination of whether or not the suspect is the same person whose bodily substance was found at or in the other location:@*ibid*. at para. 27. AAn effect, the purpose of such testing is to determine the presence of the suspect at the scene:@*R.* v. *S.F*, [1997] O.J. No. 4116 (Ct. J. (Gen. Div.)), Hill J., revd. *S.F.*, *supra* note 55. AThe underlying purpose of taking DNA is the identification of offenders:@*R.* v. *Briggs*, *supra* note 55 at 55 (para. 24).

cxc. *S.A.B.*, *supra* note 52.