Canadian legislation on organ trafficking and mandatory reporting

(*Remarks prepared to delivery to the Canadian Transplant Summit Kidney Working Group, Banff, Alberta, October 16, 2019*)

by David Matas

I am an international human rights lawyer based in Winnipeg. I approach the issue of organ transplant abuse with a particular focus.

In 2006, former Canadian cabinet minister David Kilgour and I were asked to investigate whether practitioners of the spiritually based set of exercises Falun Gong were being organ harvested in China, killed through organ extraction. We came to the conclusion that this was indeed happening.

Our continuing research as well as the work of others has led us to conclude that this is still happening, not just to practitioners of Falun Gong but also to other prisoners of conscience, particularly Uyghurs. How we and others came to this conclusion is a long story all of which is publicly available, both on the internet and in published books.

One of the reasons, though far from the only, we came to the conclusion that we did was that there was nothing to stop this abuse, either in China or abroad. The inevitable follow up to our research in which we engaged was to attempt to fill the remedy gap by advocating for remedies of prevention and punishment. It this attempt which brings me here today.

I appreciate the opportunity to address this group because it has among its members several people who are knowledgeable and active on the issue, people who have themselves taken strides to remedy the problem. The October 2010 Policy Statement of Canadian Society of Transplantation and Canadian Society of Nephrology on Organ Trafficking and Transplant Tourism is notable not only in Canada but globally for its detail in addressing this problem.

Several of the co-authors of that statement, including the chair of this session, Jagbir Gill, are present here today . That statement provides in particular that:

> "Patients should be educated about the harms that may come to those who provide organs through transplant tourism. ... organs have allegedly been taken by force, and individuals may even been killed to obtain their organs."[1]

Legislative history

Canadian legislative efforts to penalize complicity in transplant abuse abroad have been fitful. There have been four private members Bills on this subject matter in the House of Commons. None has gone beyond first reading. There was Bill C-500 introduced on February 5, 2008 by Borys Wrzesnewskyj[2], Bill C-381 introduced on May 7, 2009 also by Borys Wrzesnewskyj[3], Bill C-561 introduced on December 6, 2013, by Irwin Cotler[4] and Bill C-350 on April 10, 2017 introduced by Garnett Genuis[5].

Borys Wrzesnewskyj and Irwin Cotler are Liberals. Garnett Genuis is Conservative. So, there was cross party support for the legislation.

The reason the bills did not progress beyond first reading was not so much opposition to the bills as finding Parliamentary time. The House of Commons agenda is almost completely taken up by Government business. Private members bills scramble for the

---

1 https://www.cst-transplant.ca/_Library/_documents/Policy_CST-CSN-2010-Organ-Trafficking-Transplant-Tourism.pdf

2 http://www.parl.ca/Content/Bills/392/Private/C-500/C-500_1/C-500_1.PDF

3 http://www.parl.ca/Content/Bills/402/Private/C-381/C-381_1/C-381_1.PDF

4 http://www.parl.ca/Content/Bills/412/Private/C-561/C-561_1/C-561_1.PDF

5 http://www.parl.ca/Content/Bills/421/Private/C-350/C-350_1/C-350_1.PDF

small remaining time. Because there are so many of these bills, most go nowhere. The Government was never opposed, but did not give the legislation high enough priority to allocate Parliamentary time to it.

The problem of finding time to enact the legislation was eventually addressed through the Senate which is less consumed with Government business than the House of Commons and, with the new appointment system for independent senators, is also less tied up in partisan wrangling. Senator Salma Ataullahjan in October 2017 introduced Bill S-240[6] which passed the Senate and then, with amendments the House of Commons.

The Bill then went back in the Senate for approval of the House of Commons version. However, the election intervened, ending all Parliamentary business.

Different versions of the Bill received unanimous support from both chambers of Parliament. Bills can reinstated by motion at the start of a new session of Parliament at the same stage they had reached at the end of the previous session.[7] The House of Commons version of the Bill is awaiting the post-election session of Parliament for a motion in both chambers to reinstate the bill at the same stage it had reached at the previous session, final Senate approval and passage into law.

After the election, there should be a concerted effort, one in which I invite this group and the Canadian Society of Transplantation to join, to have such a motion passed in both chambers as early as possible. While the passage of such a motion is not inevitable, it seems likely for a bill so far advanced with no opposition. Since no one in either chamber of Parliament opposed the bill, it would be surprising for the majority in either chamber to

---

[6] https://www.parl.ca/DocumentViewer/en/42-1/bill/S-240/third-reading

[7] See https://www.ourcommons.ca/MarleauMontpetit/DocumentViewer.aspx?Sec=Ch08&Seq=7

oppose such a motion.

Issues

The issues that were addressed during debate on the Bill were:

1) The need for the Bill: The issue here is both legal and practical. Why was the current law insufficient? What is happening abroad which makes the Bill necessary?

2) Mandatory reporting: Should health professionals be required to report to health administrators the transplant tourism of their patients? The Senate introduced mandatory reporting by way of amendment. The House of Commons stripped the amendment in passing the Bill. The Senate, if the Bill is to pass, will have to accept this stripping. The question remains whether later legislation should require this reporting.

3) Patient liability: The present Bill imposes potential criminal liability on transplant tourist patients. There were some who took the view that patients should be immune from prosecution.

4) Listing: A requirement to list publicly those involved in organ transplant abuse with consequent adverse impacts for those listed, including freezing of funds and an immigration ban, was in predecessor Bills on the subject matter, but is not in the present Bill. Should a listing requirement be introduced through subsequent legislation?

5) Consent: There was debate as the present Bill went through Parliament about what constituted consent, what threshold had to be met for a determination that the organ source had consented to the organ donation. There were several amendments on this issue.

6) Scope: The Bill applies only to Canadian citizens and permanent residents. Should it

also apply to visitors? Should Canada be able to prosecute visitors for complicity in transplant abuse abroad?

7) Means: Is a law necessary or effective to combat transplant tourism? Are professional ethics sufficient?

In a nutshell, my response to each of these seven issues is this:

1) There is both a practical and legal need for the Bill to combat effectively transplant tourism and organ transplant abuse abroad.

2) There should be subsequent legislation to enact mandatory reporting.

3) Patients should not be immune from liability, although considerations which should apply to their liability would be different from those which should apply to the liability of others. Prosecutorial discretion should be sufficient to prevent inappropriate prosecution of patients.

4) In light of other legislation passed since the predecessor bills were proposed, the Magnitsky law, there is no longer a need for a power in this legislation to list publicly those involved in organ transplant abuse.

5) The form of consent required in the Bill as it now stands is adequate.

6) Subsequent legislation should expand the scope of the Bill to visitors.

7) Professional ethics, though important, are not sufficient in themselves to resolve the problems the Bill addresses. One obvious reason is that professional ethics encompasses only professionals and not brokers.

Each of these seven responses could be elaborated at length. In light of the fact that there seems to be agreement in both chambers of Parliament on more or less everything for now except mandatory reporting and, given the short time I have, I want to address specifically that.

Mandatory reporting

The Senate version of the Bill had a provision on mandatory reporting which required that any medical practitioner

> "who treats a person in relation to an organ transplant must, as soon as reasonably practicable, report to the authority designated by order of the Governor in Council for that purpose the name of that person, if known, and the fact that the person has received an organ transplant."[8]

There were similar provisions in the predecessor House of Commons private members' bills.

Member of Parliament Raj Saini who moved the amendment in the House of Commons to remove the duty to report from the Bill said this in justification of the amendment:

> "I'm going to put on my medical hat for this one. [He is a pharmacist.] I'm proposing that clause 2 be amended by deleting lines 34 to 39 on page 2. It removes the duty to report. There are several issues with this duty to report. When you look at the medical profession, whether you're a doctor, nurse or pharmacist, I don't think you would break your medical privacy code to report to another authority. I don't think that would be possible; neither do I think it's necessary. Also, you are encroaching upon provincial and territorial jurisdiction in regard to health, which would be another issue.
>
> The other thing is that the way it's written, it would broadly capture organ transplants that happened lawfully in Canada and you would have to create

[8] https://www.parl.ca/DocumentViewer/en/42-1/bill/S-240/third-reading

another reporting authority, which I think is unnecessary.

On the duty to report, I'll just give you a very clear answer. If somebody goes to get a transplant in another jurisdiction and they come to Canada and go to see a physician, the physician will not report that. If that patient comes to me, there are very specific, targeted medications for transplant patients. I will, under no circumstances, report it. If the person needs medical care in a hospital and a nurse is involved, there is no way that a nurse is actually going to report that.

This duty to report is not practical. It's going to create another regime, which is obviously going to take up resources. I don't think the duty to report is necessary, so I say we should just remove it."[9]

In a nutshell, his objections were that

a) mandatory reporting violates doctor patient confidentiality,

b) mandatory reporting encroaches on provincial jurisdiction, and

c) the bill required unnecessary reporting, the reporting of transplants which happened lawfully in Canada.

a) Constitutionality

While I question the constitutional law views of Raj Saini, those views should not be an obstacle to mandatory reporting. Mandatory reporting could be legislated provincially. There has already been some interest expressed in the Province of Alberta to enact compulsory reporting for this province.

There is a vast array of provincial medical reporting requirements. To take the example of only one province, Ontario, that province has thirty three different medical reporting requirements.[10] Both self-reporting and reporting on patients is required. Reporting on

[9] https://www.ourcommons.ca/DocumentViewer/en/42-1/FAAE/meeting-130/evidence

patients occurs in situations both where patients are victims and where they are not.

Reporting where patients are victims is required for

1) Child abuse
2) Child neglect
3) Long-term care and retirement homes abuse
4) Long-term care and retirement homes neglect
5) Sexual Abuse of a patient
6) Gunshot wounds
7) Heath facilities incapacity
8) Health facilities incompetence
9) Health facilities sexual abuse
10) Occupational health and safety reporting requirements
11) Preferential access to health care
12) Health card fraud
13) Privacy breaches

Reporting on patients where patients are not victims is required for

14) Impaired driving ability
15) Births
16) Still-births
17) Deaths
18) Communicable diseases
19) Diseases of public health significance
20) Conditions of pilots that is likely to constitute a hazard to aviation safety
21) Conditions of air traffic controllers that is likely to constitute a hazard to aviation safety
22) Maritime certificate holders who have a condition that is likely to constitute a hazard

---

https://www.cpso.on.ca/Physicians/Policies-Guidance/Policies/Mandatory-and-Permissive-

to maritime safety

23) Railway workers, occupying a position that is critical to railway safety, who have a condition that is likely to pose a threat to safe railway operations

24) Correctional facilities illness of inmates

In some of these situations, patients are actual or potential victimizers. Reporting actual and/or potential victimizers arises also with child abuse or neglect where the person responsible for the abuse or neglect seeks treatment for the child. Reporting is required all the same.

Self-reporting is required for

25) Termination of regulated health professionals

26) Restriction of employment, privileges and partnerships of regulated health professionals

27) Offences

28) Professional negligence and malpractice

29) Findings by another professional regulatory body

30) Charges and bail conditions

31) Controlled drugs and substances lost

32) Controlled drugs and substances stolen from the office

33) Community treatment plans

b) Confidentiality

If we take into account that are ten provinces and three territories, each with their own reporting requirements and extrapolate, we are dealing with well over 400 reporting requirements in Canada. To stand against mandatory reporting of transplant tourism in this overall reporting requirement context is anomalous.

Framing the issue as patient confidentiality is a mischaracterization. The question has to be, what is different about transplant tourism that makes patient confidentiality more important in this context than in all other contexts where reporting is required? The answer to the question, put this way, is surely nothing.

The value of say, a defence against gun violence, protection of children from abuse or aviation safety have prevailed over the value of health professional patient confidentiality. It should be the same for organ transplant abuse.

There is some worry in these areas that mandatory reporting may have adverse health effects. However, the decision has been, on balance, that we are better off with mandatory reporting than without it. The overall interest society has in preventing gun battles and child abuse predominates. One can say the same about organ transplant abuse.

In addition to mandatory reporting, legislation also provides for permissive reporting. The reporting is permitted even though, without the permission, the reporting would violate patient confidentiality. In Ontario, for instance, under The Personal Health Information Protection Act, 2004, physicians are permitted to disclose personal health information about an individual if they have reasonable grounds to believe disclosure is necessary to eliminate or reduce significant risk of serious bodily harm to another.[11]

In the case of *Smith v. Jones*, a psychiatrist in 1999, sought a declaration from the court that he could disclose a plan a patient had to kidnap, rape and kill prostitutes. The patient had been referred to the psychiatrist by a lawyer who was defending the person on a charge of aggravated sexual assault on a prostitute. The Supreme Court of Canada, when considering solicitor client privilege, drew an analogy with doctor patient

[11] Section 40(1)

confidentiality and held that the privilege could be set aside if there is an imminent risk of serious bodily harm or death to an identifiable person or group.[12]

The common law test for disclosure set out in the *Smith v. Jones* case is more stringent than the statutory test set out in the Ontario Personal Health Information Protection Act, 2004. In Ontario and any other jurisdiction with a similar law, the statutory test would prevail. Where there is no statutory test, the common law test set out in *Smith v. Jones* would apply.

In my view, information a patient brings about transplant abuse abroad, whether before or after transplant tourism, meets both the statutory and common law tests. Disclosure of transplant tourism to China is necessary to eliminate or reduce significant risk of the continuation of transplant abuse in China. Failure to disclose that information creates an imminent risk of serious bodily harm or death to identifiable groups of persons in China - Falun Gong and Uyghurs.

c) Form of reporting

Though I welcome the insertion of the requirement of mandatory reporting in the amended Senate Bill, I acknowledge the criticism of Raj Saini MP that the form of reporting left a lot to be desired. The mandatory reporting, as drafted, required both too little and too much.

It was too much in the sense that every transplant had to be reported, not just transplants abroad. It was too little in the sense that the name of the patient is not the only information which needs reporting, and not even the most important. What should be reported is the country of transplantation, the hospital of transplantation, and the transplanting doctor or doctors.

---

[12] *Smith v. Jones*, [1999] 1 SCR 455 paragraph 78

The Taiwan Legislature on November 22, 2012 resolved that the Department of Health must require major medical institutions and physicians to record the country of transplant and hospital information (including surgeons) of any patient who received an organ transplant in a foreign country. The recording must be done when the patients apply for postoperative health insurance payment after returning home.[13]

This is a requirement that patients report to doctors and hospitals, not that doctors and hospitals report to health administrators. So, in itself, as a reporting requirement it is not adequate either. What Canada needs is a combination of the Senate proposal and the Taiwan resolution, the type of reporting the Taiwan resolution proposes, but reporting to the authority the Senate bill proposes.

d) Voluntary reporting

The difference between a legislative requirement of reporting and no such requirement is not the difference between confidentiality and an exception to confidentiality. Even without mandatory reporting, the exception to confidentiality exists. The difference is rather that with a requirement to report, disclosure will be comprehensive. Without mandatory reporting, disclosure will be piecemeal. It hard to fathom any justification for piecemeal disclosure.

The Canadian Organ Replacement Register of the Canadian Institute for Health Information in November 2016 set up a voluntary reporting system for out of country transplants.[14] The procedure uses the existing Transplant Recipient Outcome Form. The

[13] https://dafoh.org/taiwan-reacts-to-unethical-organ-harvesting-in-china/

[14] https://www.cihi.ca/sites/default/files/document/corr_foreign_transplant_bulletin2016_en.pdf

instructions state that "in the Transplant Hospital field, enter '88888' to indicate an out-of-country hospital and "include the transplant country in the Other field". The instructions also state that "if no donor information is available, select option '98 Unknown out-of-country transplant"'.

So, the form captures the country of transplant, but not the hospital of transplant or the transplanting doctor. Although data have now been collected for almost three years, there are no aggregate figures posted showing the results of this data collection.

The introduction of voluntary reporting is welcome. The form should capture more information than it does. The aggregate results should be made public. Medical societies and hospitals, even health ministries, should adopt policies that reporting of transplant tourism is not an actionable breach of doctor patient confidentiality.

Yet, even if all that happens such an approach is not likely to lead to reporting every case of transplant tourism. Without mandatory reporting, the black market in organs will continue to be dark.

e) Follow up

Dr. Jagbir Gill, chair of this session, speaking on behalf of the Canadian Society of Transplantation to the Canadian Senate Committee on Human Rights, when considering whether to include mandatory reporting in Bill S-240, said this:

> "I actually think mandatory reporting would work in terms of getting at the numbers. It is something that is required. I am concerned that mandatory reporting in the context of criminal legislation will get a bit dicier, and you will face more resistance from the physician groups.
>
> However, mandatory reporting is critical as a first phase to get at the scope of the problem. The Act, in and of itself, mandates and puts in place a series of steps which requires that education piece to happen, so we have to obtain that

> information. There are mechanisms in existing registries, for example, to actually implement mandatory reporting, at least on a broad scale, to say whether a transplant occurred outside of the country. Even that can be robustly captured. I do actually agree. I think that would be important."[15]

Again here I would encourage this group and the Canadian Society of Transplantation to get involved. I welcome the support of mandatory reporting from the Canadian Society of Transplantation in the Bill hearings, even if it is only support for statistical reporting.

However, now that mandatory reporting has been stripped from the federal legislation in part on constitutional grounds, the terrain of advocacy shifts to the provinces and territories. The Canadian Society of Transplantation should be saying about mandatory reporting to each and every province and territory at least what they said to Parliament.

The current Senate Bill is a positive step in combating Canadian complicity in organ transplant abuse abroad. It is not however a complete legislative answer. Further legislation on the subject matter needs to be enacted.

.....

15 https://sencanada.ca/en/Content/SEN/Committee/421/ridr/29ev-54078-e