

Advocating for Care & Treatment for Prisoners

Canadian HIV/AIDS Skills Building Symposium 2005

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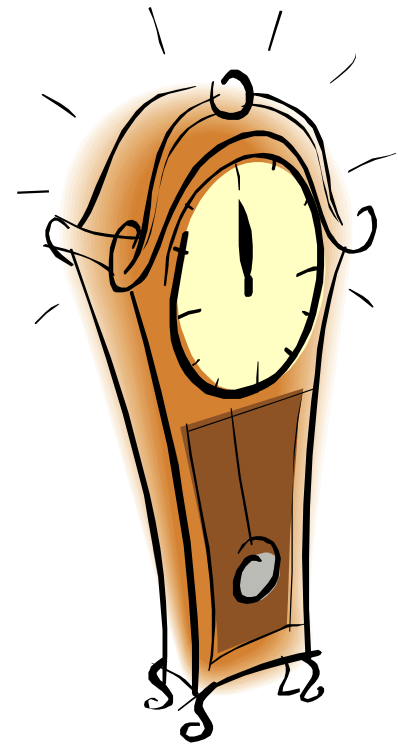


Canadian HIV/AIDS Legal Network		Réseau juridique canadien VIH/sida
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Agenda

- & The Law with Respect to Prisoners
 - & Federal and Provincial Legislation
 - & The "Problem" with Law and Prisons
- & The Right to Medical Care
 - & Specific Problems and Strategies
 - & Denial of Pain Meds
 - & Interruptions in Medications
 - & Accessing Methadone
- & Personal & "Special" Needs
- & Privacy Problems
- & Summary & Resources



The Law & Prison(er)s



& The Canadian government as well as provincial and territorial governments are responsible for prisons and prisoners within their jurisdiction.

& This means that there are 14 prison-specific laws in Canada.

Federal Law & Prison(er)s

& Federal prisons are governed by:

- *Corrections and Conditional Release Act (CCRA)*
- Regulations
- Commissioners Directives (CDs)
- Standard Operating Practices (SOPs)



Federal Law & Prison(er)s

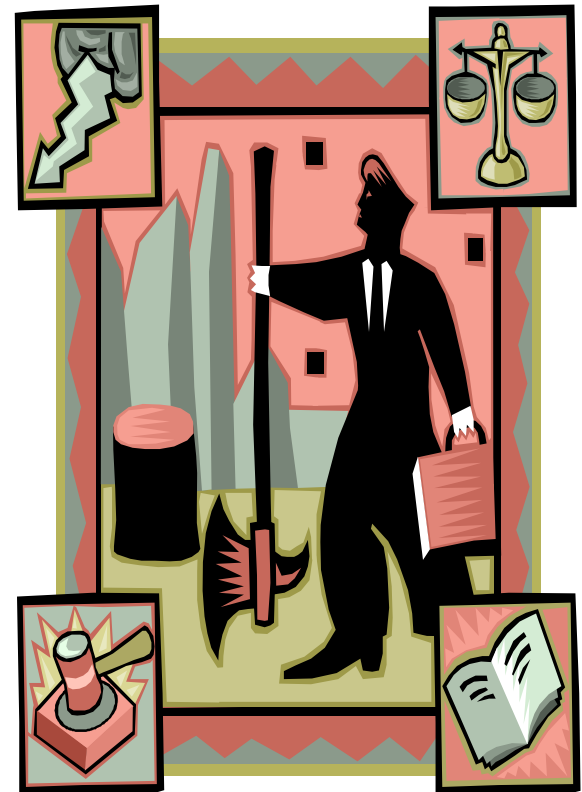
- ⌘ On paper, the *CCRA* is a relatively progressive law.
- ⌘ It sets out prisoners' rights, responsibilities of the Correctional Service of Canada, and establishes an independent office to investigate complaints (the Office of the Correctional Investigator).



Federal Law & Prison(er)s

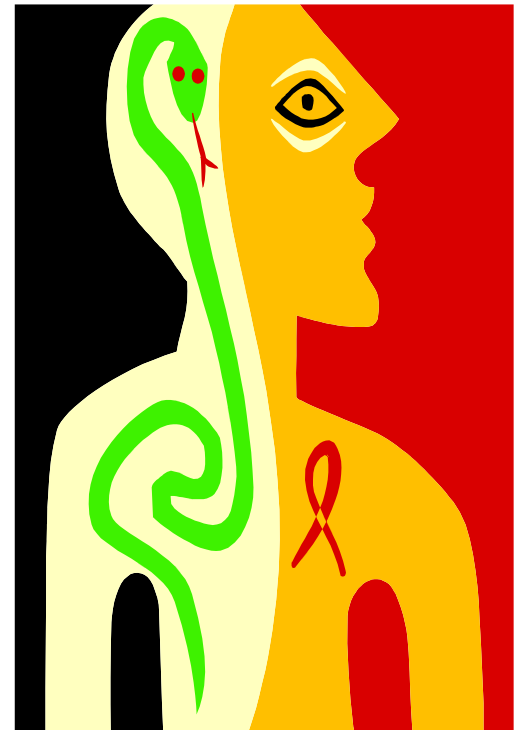
& The regulations and Commissioner's directives establish detailed rules about:

- living conditions
- health care (including harm reduction measures)
- grievance procedures
- contact with the community
- searches and drug testing
- privacy and information management



Federal Law & Prison(er)s

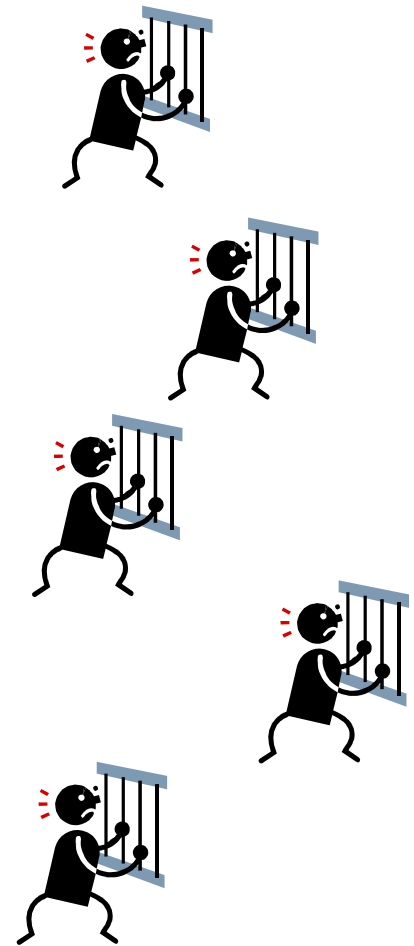
- ⌘ The legislation, CDs and SOPs are available on-line.
- ⌘ These laws and "rules" form a solid foundation for arguments to support prisoners' access to HIV prevention, care, treatment and support services.



Provincial Law & Prisoners

& In contrast, most provincial laws ...

- focus on the administration of prisons
- give great discretion to prison authorities
- do not set out prisoner rights and entitlements to any great extent
- are not elaborated in publicly available policy and procedure



Provincial Law & Prisoners

⌘ As a result of weak provincial legislative and policy frameworks, advocating on behalf of provincial prisoners can be extremely challenging.



The Law & Prison(er)s

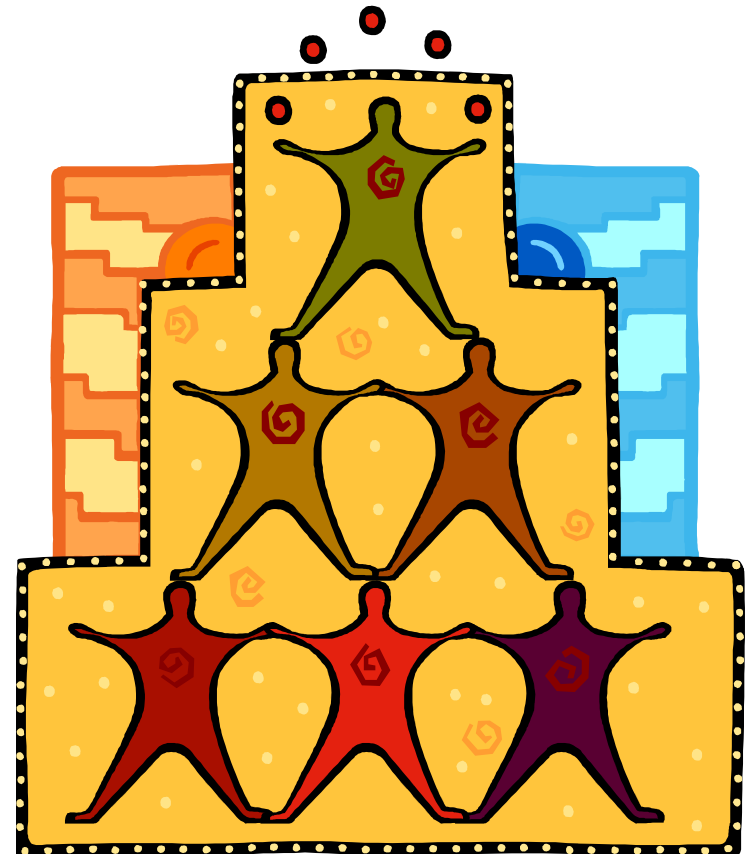
& In addition, generally applicable laws apply to the relationship between prisoners and prison authorities / staff.

- Human rights laws
- Privacy laws
- Laws that regulate professions
- Ombudsman laws
- Principles of administrative law
- The "common law" = laws regarding civil wrongs (called "torts")



Hierarchy of Laws

- ⌘ An important principle to understand about laws is that they are hierarchical.
- ⌘ So laws found higher up in the hierarchy, trump those below.
- ⌘ So following a law lower in the hierarchy may in fact be illegal, if it breaches a law higher up in the pyramid.



Hierarchy of Laws



⌘ The legal hierarchy respecting prisons in Canada looks something like this:

1. The Constitution (including the *Charter of Rights and Freedoms*)
2. Human Rights Codes
3. Statutes (ie, Acts)
4. Regulations
5. Policies and guidelines

The "Problem" ... Flagrant Disregard for the Law

- Even if Canadian laws on prison(er)s reflected all internationally recognized standards, many prisoners would still experience violations of their rights.
- A culture of flagrant disregard for the law is pervasive in many prisons, among all prison staff including health care staff.



The "Problem" ... Flagrant Disregard for the Law



- *"The Rule of Law is absent, although rules are everywhere."* – Madame Justice Arbour, *Report of the Arbour Inquiry* (1996)
- *"In short, it has not simply been the unwillingness of the Correctional Service to accept changes that has stymied attempts to effect them. It has rather been the vacuum within which the Service has been permitted to operate."* – Office of the Correctional Investigator, *Shifting the Orbit* (2004)

The Right to Medical Care



It is a generally accepted principle in Canada that prisoners are entitled to medical care, and that the care they receive should be the same as it would be on the outside.

The Right to Medical Care

& This principle is reflected in law in a number of places...



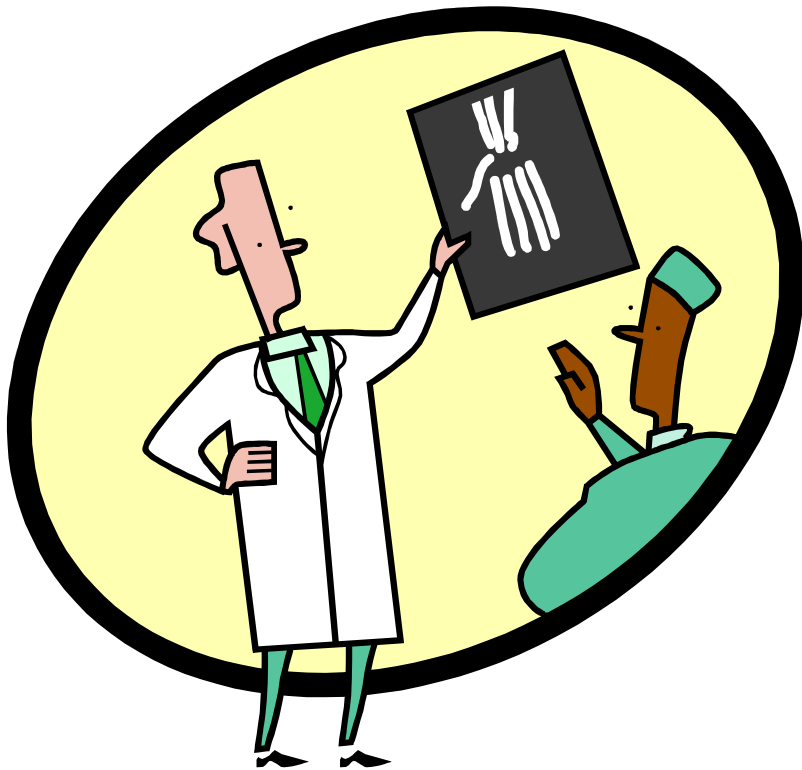
The Right to Medical Care

⌘ On December 18, 1982, the UN General Assembly adopted resolution 37/194 which states in part:

⌘ "Health personnel, particularly physicians, charged with the medical care of prisoners and detainees have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained."



The Right to Medical Care



& The federal legislation, the *CCRA*, sets out this principle in sections 85 to 88.

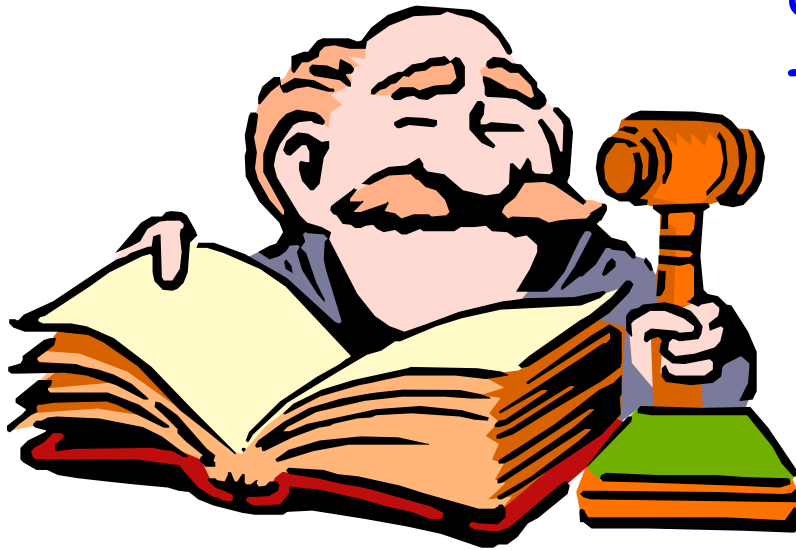
& In addition, there are a number of Commissioner's Directives that touch on the right to health care.

The Right to Medical Care



& There have also been several Federal Court cases where inmates have brought actions alleging that the standard of health care they have received is below the community standards. In these cases CSC consistently argues that the test is "reasonable medical care".

The Right to Medical Care

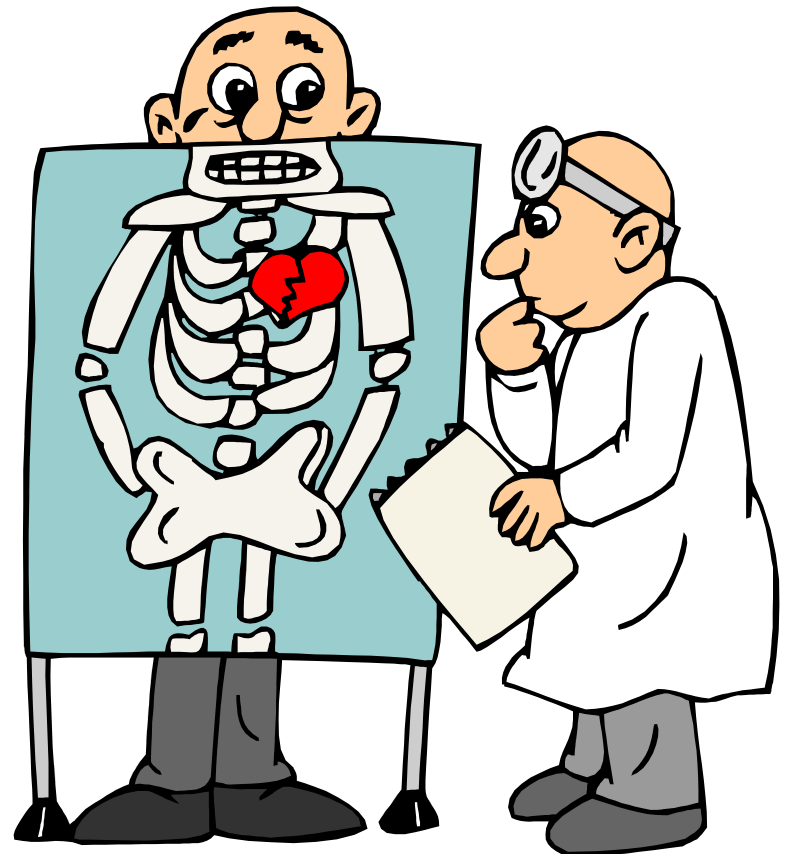


& The Federal Court cases support the following conclusions:

& judicial review is usually not an appropriate remedy for a prisoner complaining about inadequate health care (*Powell v. Canada (Attorney General)*, [2004] FCT No 1566.)

The Right to Medical Care

- ⌘ The Federal Court cases support the following conclusions:
 - ⌘ an action for damages will fail unless you can show that the harm suffered was caused by the negligence of CSC (*Sutherland v. Canada*, [2003] FCT No 1935.)



The Right to Medical Care



& The Federal Court cases support the following conclusions:

& the best remedy is to bring an interlocutory motion asking the court to order CSC to provide the necessary care until such time as the full case can be heard; it is not necessary to file grievances first (*Lavoie v. Canada*, [2002] FCJ No 310.)

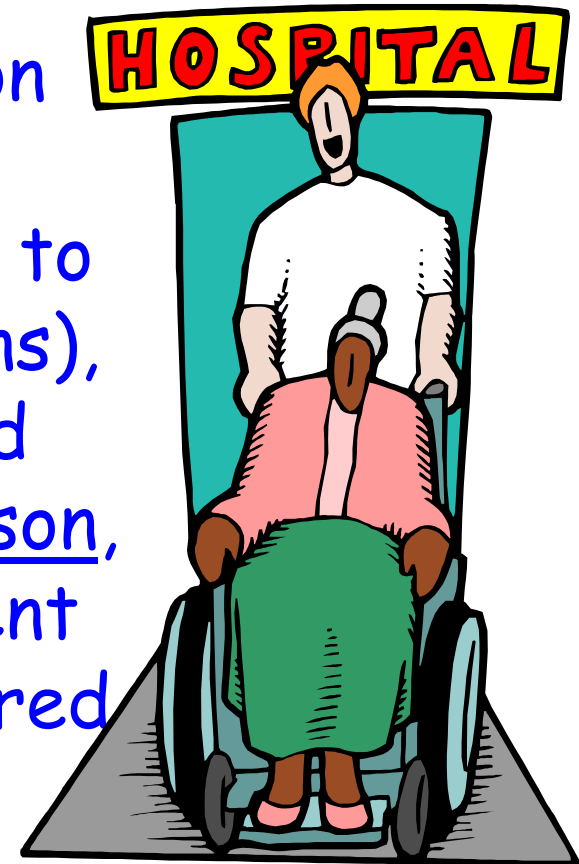
The Right to Medical Care

& In contrast to the federal legislation and international law, provincial legislation governing prisons generally does not set out the rights of prisoners to medical care.



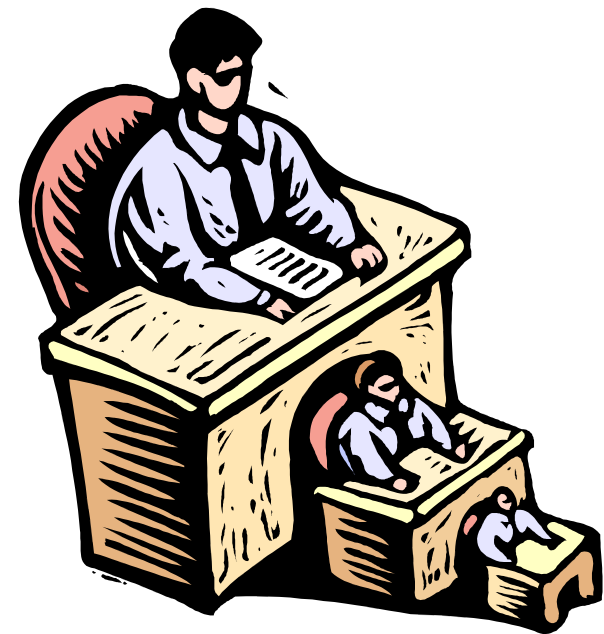
The Right to Medical Care

⌘ Instead, provincial legislation tends to operate on a model where there are duties (e.g. to conduct medical examinations), and rights (e.g. to take blood samples) imposed on the prison, and serious medical treatment is envisioned as being delivered in a hospital setting.



The Right to Medical Care

& Similarly, provincial cases tend to turn on “duties” of prisons (e.g. the duty of care owed by medical staff to patients under negligence law, or the duty to “provide the necessities of life” found in the Criminal Code).



The Right to Medical Care



⌘ So, the legal remedy where provincial prisons fail to provide adequate medical care, usually involves traditional negligence actions.

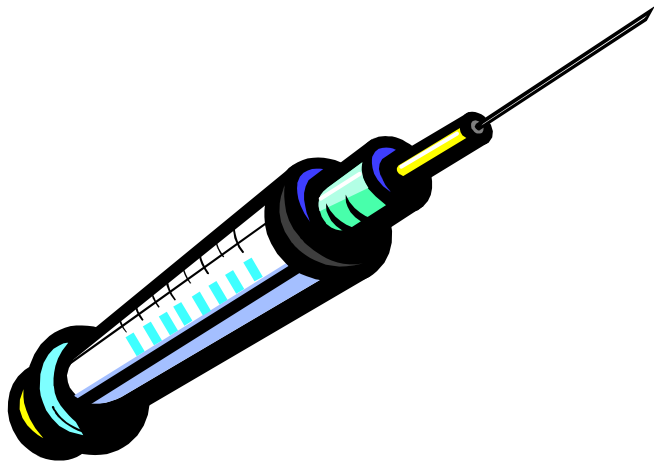
⌘ In the context of court actions, this difference probably has little to no practical impact.

The Right to Medical Care



& Despite the fact that inmates seem to have the right to access medical care to the same standard as someone on the street, it is very common for this not to be the case.

The Right to Medical Care



& Perhaps the most common examples of this include:

& denial of pain medication

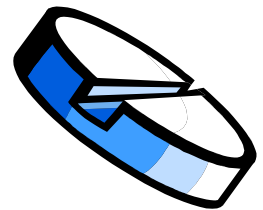
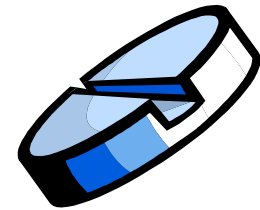
& interruptions in medication including ARV therapy

& denial of methadone maintenance therapy

Denial of Pain Medications

⌘ Although the denial of other kinds of medications happens, this problem occurs most frequently with pain medications.

⌘ In general, prisons are reluctant to give prisoners strong pain medications because they are a valuable commodity in the prison and prisoners have been known to sell them, creating security problems.



Denial of Pain Medications



& When prisoners are suspected of selling their medications, the prison often responds by:

- & cutting off the medication,
- & changing the medication prescribed,
- & decreasing the dosage,
- & or placing the person in segregation.

Denial of Pain Medications



- ⌘ One thing that has frequently happened in Ontario's provincial prisons is that a person will enter the institution with an outside physician who has prescribed pain medication to the patient including opioids.
- ⌘ When the person enters the prison, health care staff refuse to prescribe the same medication and replace it with something non-opioid base.

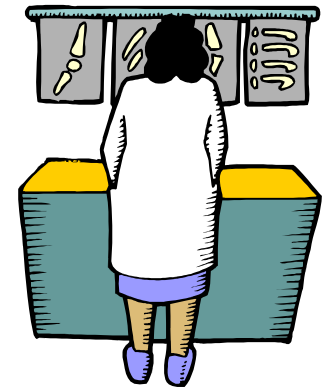
Denial of Pain Medications

& This issue is helped by the fact that there is an outside physician whose medical judgement was that the patient needed the meds. That physician can be an important ally.



Denial of Pain Medications

- ⌘ Unfortunately, outside physicians are reluctant to step on the toes of the inside physician by advocating for their patient.
- ⌘ This is particularly true when the inside physician tells the outside one that the patient is selling their meds.



Denial of Pain Medications

⌘ But one effective strategy can be to call the outside physician and ask him or her to call the medical staff inside the prison to inquire as to the rationale for changing the medication regime.

⌘ The simple fact of prison staff realising outsiders are examining their actions, can significantly help the prisoner and change how they are treated.



Denial of Pain Medications



& Remember that when calling physicians or prisoners, those people will require the consent of the patient to speak to you. Many physicians and prison health units will accept oral consents from the patient.

Denial of Pain Medications



& When making phone calls to prison health care, a good strategy is to sound like you're simply seeking information:

& "Prisoner X says his MS Contin has been taken away from him and you've prescribed Tylenol 2s in its place. Is this true? Can you explain to me why this happened?"

Denial of Pain Medications



& If the phone call "soft" approach does not work, then with the denial of adequate pain control, a common strategy is to complain to the College of Physicians and Surgeons about the prison physician who changed the prescription.



Denial of Pain Medications

- ⌘ If you've dealt with a lot of prisoners and the same thing is happening over and over again, that scenario might lend itself to a human rights complaint.
- ⌘ Such a complaint would basically argue that the impact of the prison's pain meds policy has a negative and differential impact on your clients because of their disability.



Denial of Pain Medications

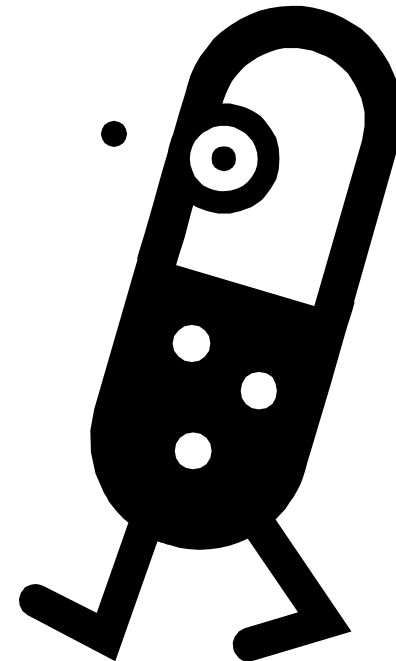


- In 2004 the Alberta superior court ordered a prison to provide pain medication and to allow the prisoner to consult with an outside physician to assess his pain.
 - "... the allegations of unnecessary and wanton infliction of pain involve allegations of deliberate indifference to serious medical needs which engage constitutional considerations." (*Geary v. Alberta*, [2004] AJ No 22; [2004] AJ No 24)



Interruptions in Medication

- ⌘ Interruption of meds is particularly problematic with anti-retrovirals due to the risk of resistance developing.
- ⌘ With pain meds and methadone, it leads to withdrawal in some cases, and that can be very painful and harmful.



Interruptions in Medication

& It is commonplace, particularly in federal prisons, for health care staff to screw up and for prisoners to miss a dosage or several dosages of their medicine.



Interruptions in Medication

- ⌘ Interruptions in medications are often caused by prison administrative problems:
 - ⌘ "We forgot to order the meds from the pharmacy."
 - ⌘ "The prison was in lockdown."



Interruptions in Medication

- ⌘ Legally one can argue such administrative excuses are irrelevant.
- ⌘ The big problem with these cases in terms of legal actions to claim compensation is proving damages.





Interruptions in Medication

- ⌘ The main focus for community-based workers is advocating on behalf of prisoners who are experiencing ongoing interruptions in, or improper administration of, their meds.
- ⌘ This may involve “soft” advocacy (include the specialist or community physicians).
- ⌘ If that fails, or if the problem is chronic, an official complaint is warranted (grievance, ombudsperson, professional college).

Urinalysis & ARV Meds

- ⌘ Prisons routinely conduct drug testing using urinalysis. A positive test for drugs can result in a loss of privileges by a prisoner, being barred from programs, or institutional charges.
- ⌘ The anti-retroviral drug Efavirenz can result in false positive test for THC, the active ingredient in cannabis.



Urinalysis & ARV Meds

- ⌘ Rather than risk losing privileges or access to programs, a prisoner might decide to not take Efavirenz.
- ⌘ A more expensive confirmatory test is required to prove that the positive test resulted from the medication and not THC.



Urinalysis & ARV Meds



⌘ When advocating on behalf of prisoners it is important to present the evidence regarding Efavirenz resulting in false-positive tests, and rely on law/rules regarding urinalysis testing (if helpful).



Accessing Methadone

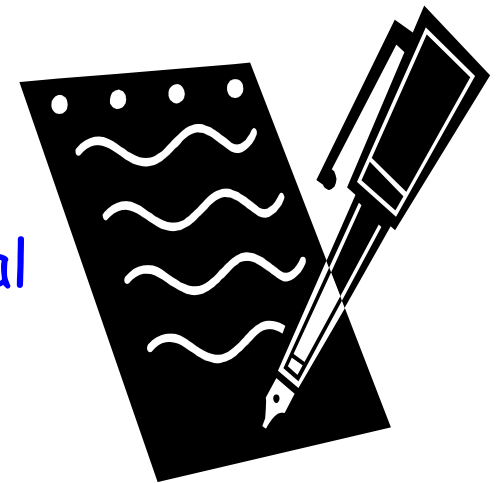
- ⌘ A large number of prisoners enter prison with opiate addiction and can potentially benefit from methadone maintenance therapy (MMT).
- ⌘ Fortunately, prisoners' access to MMT has increased during the past 10+ years.
 - Unfortunately, the increase has resulted largely from litigation, which can be expensive, time consuming and requires willing lawyers.



Accessing Methadone



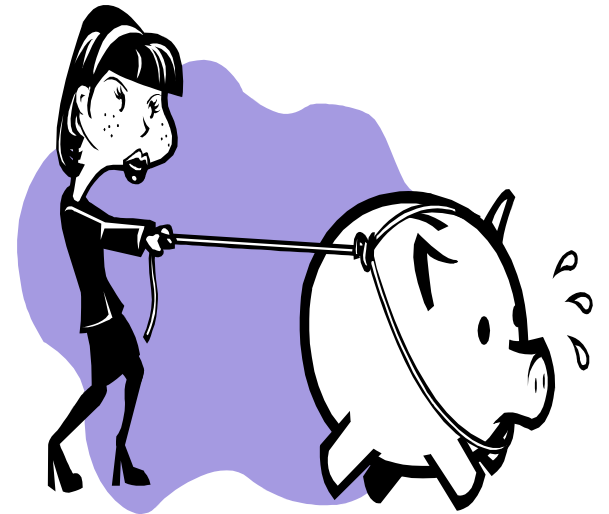
- & Since May 2002, prisoners in the Federal system have had expanded access to MMT under CD 800-1, *Methadone Treatment Guidelines*.
- The *Guidelines* recognize the right of prisoners to receive MMT as "essential health care".
 - The *Guidelines* are based on community standards.



Accessing Methadone

⌘ The problems with MMT in the Federal prisons are often systemic, caused by lack of resources.

- Limited number of prisoners on MMT per institution
- Prisoners on waiting lists
- Need to continue consuming opiates to demonstrate ongoing opiate addiction



Accessing Methadone

- ⌘ Access to MMT within provincial prison systems is inconsistent, and generally lags behind the Federal system.
 - Prisoners on MMT tapered off.
 - Only those who enter on MMT can continue.
 - Few provinces permit initiation of MMT.
- ⌘ Litigation has led to expanded access in BC and Alberta.



Accessing Methadone

⌘ A first step in advocating on behalf of a prisoner trying to access MMT is to determine whether the barrier is systemic or individual.

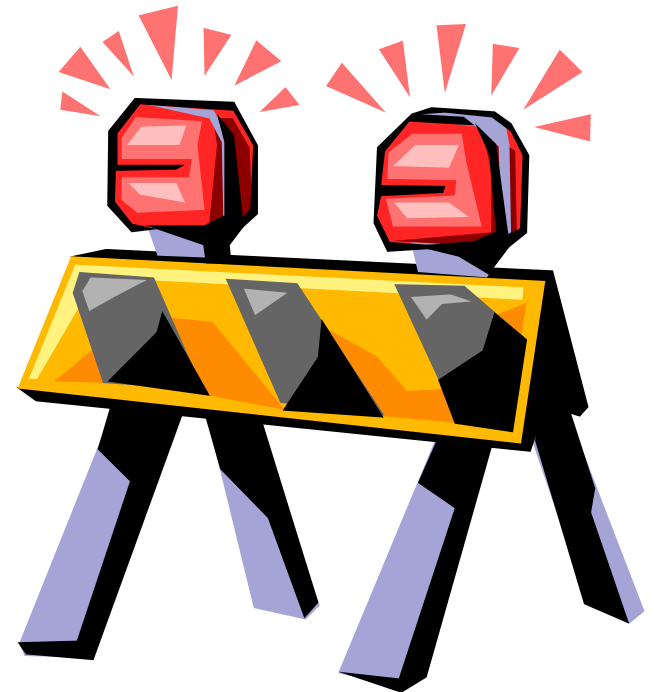
- Where the barrier is specific to the individual prisoner, supportive medical evidence, advocacy with institutional staff, community standards for MMT, and prison grievance procedures all have a role to play in resolving the issue.



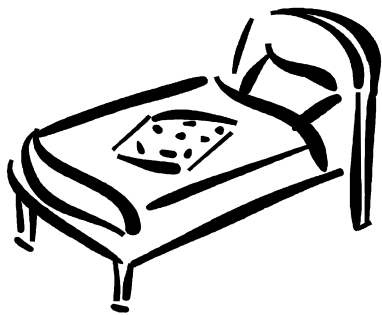
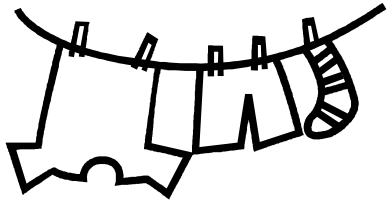
Accessing Methadone



Where the barrier is systemic (ie: MMT not available because of policy or lack of policy) advocacy needs to be systemic, and will likely involve arguments based on *Charter* rights, and litigation or the threat of litigation.



Personal & "Special" Needs



& Adequate food, clothing, and bedding is central to prisoners' dignity and well-being. This is widely recognized in international prison standards.

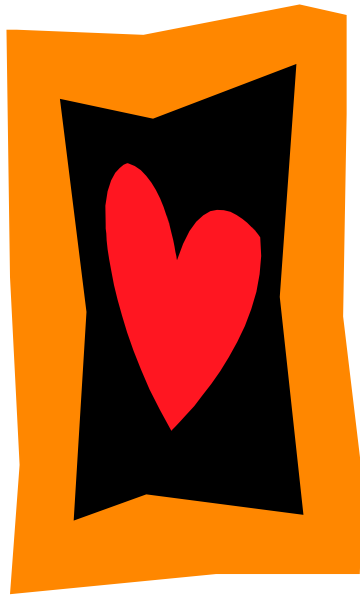
& For prisoners living with HIV/AIDS, these items are especially important to maintaining their health given their weakened immune function and often inadequate medical care.

Personal & "Special" Needs

- ⌘ Legislation in 4 jurisdictions imposes an obligation on prison authorities to provide basic needs like (nutritious) food, or adequate clothing and bedding (Can, Nfld, NS, QC).
- ⌘ Only the CCRA and Alberta and Nova Scotia recognize that prisoners may have "special" needs, because of their medical condition, regarding diet, clothing and bedding.



Personal & "Special" Needs

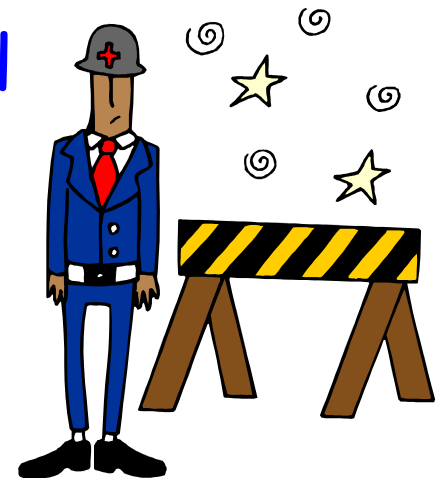


- & Advocating for access to personal and special needs may be particularly difficult since prison staff do not seem to understand the "duty to accommodate" a person's disability.
- & Nor do they want to be seen to be giving "special treatment" to one prisoner, out of fear that they will be asked to address other prisoners' needs.

Personal & "Special" Needs

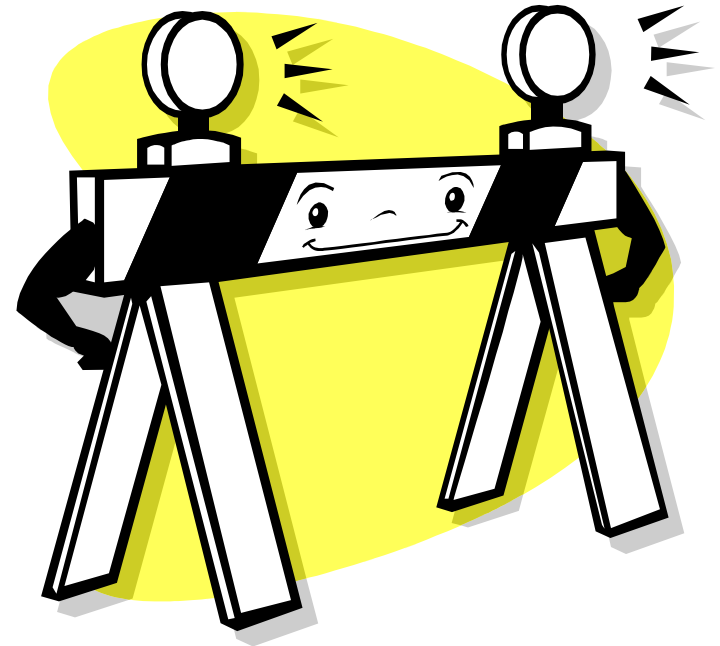
⌘ As with access to pain medication ...

- the problem is often complicated by the involvement of institutional staff (ie, security and other non-health care)
- community physicians may be able to play a supporting role
- the "soft" phone call or letter approach is usually the best place to start



Personal & "Special" Needs

If the "soft" approach is not successful, then internal grievance procedures, ombudsman complaints, or human rights complaints are other options.



Privacy Problems



Because of pervasive AIDS-phobia, stigma, discrimination and violence in prisons, the lack of privacy and confidentiality is a monumental barrier to care, treatment and support for prisoners.

Privacy Problems

- ⌘ Prisoners' privacy and confidentiality are routinely breached.
- ⌘ The unauthorized disclosure of a prisoners' HIV status may result from
 - ...
 - actions of health care staff
 - actions of other prison staff
 - health care and medication dispensing procedures

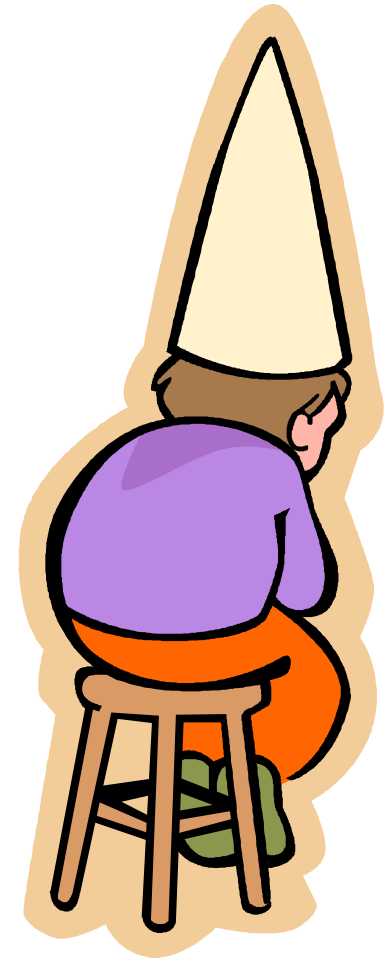


Privacy Problems

⌘ Once a prisoner's privacy is breached, it can never be fully regained.

⌘ The advocacy challenge is to achieve a remedy that will ...

- compensate the prisoner, or make his/her situation more bearable,
- discipline the person responsible, and/or
- change a policy or practice to prevent future breaches.

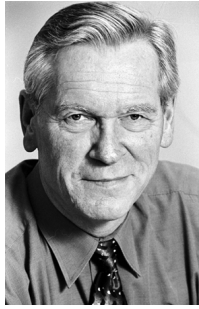


Privacy Problems

& It is unlikely that "soft" advocacy can be relied upon to achieve these types of remedies. So advocates should consider ...

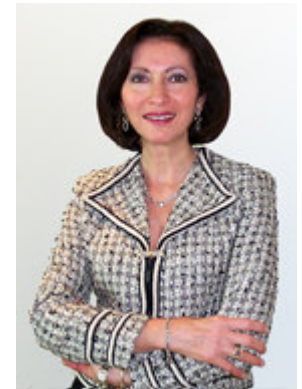
- complaints to professional colleges
- prisoner grievance procedures
- ombudsmen complaints
- small claims court actions for damages (based in tort or on privacy laws).





Privacy Problems

In addition to these strategies, the federal government and all provinces and territories have appointed information and privacy commissioners who have authority to accept complaints regarding breaches of privacy, and at least, make findings and recommendations.



Read a message from the Privacy Commissioner 

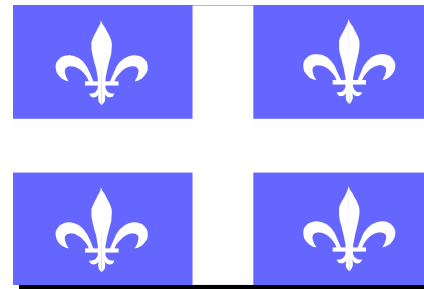
Privacy Problems



Quebec was the first jurisdiction in all of North and South America to have comprehensive privacy laws. Its law contains significant and unique privacy rights, set out in ...

& Civil Code of Quebec

& Quebec Charter of Human Rights and Freedoms



Summary of Advocacy Tools & Strategies

Advocates can rely on a range of strategies and tools to advocate for better HIV/AIDS care and treatment for prisoners, either by “self-helping” or represent prisoners .

1. Phone calls (enlist community physician where possible)
2. Letter to prison (with strategic “CCs”)
3. Grievance (Office of Correctional Investigator / provincial ombudsman)



Summary of Advocacy Tools & Strategies

4. Professional College Complaint (physicians, nurses, psychologists)
5. Human Rights Complaint
6. Privacy Commissioner Complaint
7. Small Claims Court ("torts" for damages)



All of these strategies can be use to advocate on behalf of individual prisoners; some have the potential to improve the situation for many prisoners who face the same issues.

Summary of Advocacy Tools & Strategies



Despite your best efforts, your advocacy will not be successful all the time. This will most often be the case where the issue involves policy, or where prison staff are acting unfairly or without regard for the law. What to do then? ...

Summary of Advocacy Tools & Strategies

- & Court cases are also part of advocacy for medical care and treatment for prisoners.
- & Litigation strategies work best when there has already been community-based advocacy that has created awareness and concern.
- & Individual cases can be highly effective in moving issues forward to a resolution (ie, access to MMT) but without the other advocacy work, seldom succeed.



Summary of Advocacy Tools & Strategies

- ⌘ Although court cases usually require a lawyer's involvement, community-based advocates have a significant and valuable role to play

...

1. Documenting the situation to prepare the "record".
2. Exhausting the lower-level advocacy options, where appropriate.
3. Seeking out lawyers, educating them, and encouraging them to take on cases.



Summary of Advocacy Tools & Strategies



4. Acting as an expert resource on HIV/AIDS and prisons, or finding these experts (i.e. PASAN/Network acted as witness at inquests).
5. Acting as the primary support for the prisoner(s) involved in litigation.
6. Liaising and sharing information with other advocates.
7. Dealing with the press.

Resources

⌘ HIV/AIDS Legal Clinic (Ontario) (www.halco.org)

- *Advocates' Manual*, Chapter 7.

⌘ Prisoners HIV/AIDS Support Action Network
(www.pasan.org)

- *Pros & Cons* (2002)

⌘ Canadian HIV/AIDS Legal Network
(www.aidslaw.ca)

- prisons resources
- privacy of health info resources
- *Policy & Law Review*



Resources

⌘ Prison Networking Group

- Info sharing and networking among prison HIV/AIDS & HCV support workers from across Canada
- Teleconferences and email information, strategizing and "consultations".
- Convened by CAS, contact Claire Checkland clairec@cdnaids.ca for more info.





Canadian HIV/AIDS Legal Network	Réseau juridique canadien VIH/sida
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Thank you.



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