

Legal Issues

Ideally, a lawyer should be an active participating member of the inter-disciplinary Palliative Care team. He/she should understand HIV legal issues and the circumstances of the individual with AIDS.

For referral to a lawyer, or for legal information and advice, consult:

- legal licensing bodies
- legal professional associations, i.e. provincial branches of the Canadian Bar Association or others
- legal clinics
- legal aid programs
- national and local AIDS organizations

In Palliative Care, several issues must be considered:

CONFIDENTIALITY

Confidentiality is a basic ethic and understanding for health professionals, and is an expectation of those receiving care. It is required by professional codes of practice, licensing bodies, institutions and statutes. It is recognized under the Charter of Rights and Freedoms' guarantee of a person's right to security. Confidentiality may be breached only with consent of the competent person, by rule of law in provinces governed by common law or by special dispositions of the law in Quebec.

For a non-competent person, information is released to next of kin, as defined by relevant statute or common law and practice. An individual may, by power of attorney, define persons who are to receive information should the individual become incompetent. This is an important aspect of advance planning.

Confidentiality is important in Palliative Care, especially HIV/AIDS care, as unauthorized or inadvertent release of information may go against the person's wishes and result in unexpected stigmatization, isolation, financial consequences, or job loss.

Numerous specific statutes speak to disclosure or breaching of confidentiality. Each refers to a particular circumstance and specifies the information to be disclosed and to whom. For example, provincial public health legislation may require physicians to report an AIDS or TB diagnosis to a local Medical Officer of Health.

Common-law doctrine has also developed that if substantial danger to an identified person or persons exists, required confidentiality may be breached to protect public interest. However, under Quebec Civil Law, it is illegal to divulge confidential information to a third party, even if this party is the partner, unless every effort has been made to have the person communicate this information themselves. In providing care, confidentiality about an individual's HIV status can be maintained, if everyone is taught and practises the universal application of body substance precautions.

Laws in Canada vary from province to province. This section is intended to provide guidance on issues about which caregivers should be aware. For specific problems or situations, persons living with HIV/AIDS, families and caregivers are actively encouraged to seek advice from a lawyer knowledgeable about relevant local laws

Persons living with HIV/AIDS should be encouraged to consider whether disclosure will have negative or positive consequences for them. For some, lack of disclosure leads to isolation where support would have been possible, if others were informed.

For information regarding disclosure and confidentiality guidelines in your area, contact your local Department of Public Health.

MENTAL COMPETENCY

Competency is a state in which the person is capable of taking legal acts, consenting or refusing treatment, writing a will or power of attorney.

Elements Required for Fully Informed Consent

A person must know:

- *action to be taken and reasonable alternatives if they exist*
- *reasons for undertaking this act, expected outcomes, and effects of not undertaking the act*
- *complications which frequently occur, even if minor and transient in nature*
- *serious complications which may endanger life and organ system, even if rare*
- *specific circumstances relevant to their own individual situation*
- *full answers to all questions asked*

Competency is fundamental to the ability to consent and the exercise of personal autonomy. It involves doing or deciding a specific thing, at a specific time. Thus, it can vary from time to time and according to the act or decision undertaken. Other than with children, there is a basic presumption that a person is competent. This assumption may be refuted by facts.

To facilitate the exercise of autonomy and to forestall inappropriate challenges (which may be lengthy, expensive and exhausting), caregivers should be familiar with various standards for competency. When significant decisions are being made, i.e. making a will, power of attorney, or disposing of property, caregivers should make specific written note of their observations and questioning of the decision-maker. Legal authorities may request a medical certificate attesting to the person's capacity. Therefore the medical chart or files must contain all pertinent information. When competency is questioned, the decision is always made retrospectively, so documentary evidence from the time of the action is important.

The legal test for competency to create a valid will requires that the person making the will must understand:

- the nature and effect of a will
- the extent of property involved
- that claims and expectations may arise from those close to the testator
- that there must be no disorder of the mind which prevents exercise of natural decision making faculties

These specific tests of competency may be generalized and applied to other decision making assessments:

- does the decision maker know the nature and effect of the decision to be made?
- does the decision-maker appreciate the consequences on his/her own circumstances?

Competency is a complex matter. Some intellectual functions are readily quantifiable, i.e. with Mini-Mental Status examination. But, the emotional and lifestyle effects of HIV disease are profound, and the impact of illness, drug use, discomfort, depression, weakness and process of dying may be hard to measure.

As a rule of thumb, a competent decision is one consistent with an individual's lifestyle, history, previous actions and best interests.

SUBSTITUTE DECISION MAKER/LIVING WILLS

*"I'm most happy as a human being when I have autonomy, choices and information."
– one voice –*

If a person is not competent, a substitute decision-maker may be identified for certain purposes by statute or by court application. When individuals anticipate loss of competency, decisions about finances, care and treatment will need to be made. Individuals should address the following issues while still able (see *Advance Planning*):

- advance directives
- power of attorney for financial matters
- power of attorney for care and treatment

These formal statements of preferences in care and financial management, along with information from informal conversation, will help ascertain the individual's wishes should he/she lose competency.

For specific information on competency and substitute decision making guidelines in your province, contact your provincial branch of the Canadian Bar Association.

INFORMED CONSENT

To ensure informed consent, the treating health professional must communicate:

- on a level which the person can appreciate
- in a culturally appropriate manner
- repeatedly
- with tests of understanding

Several interviews may be necessary. Written recording of the process is advised

The informed consent to treatment of a competent person is another basic legal and social expectation in the exercise of autonomy. Individuals have the right to accept or reject treatment in almost all circumstances. The right to refuse treatment, even life sustaining treatment, is recognized in common law and enforceable by seeking damages.

In general, Canada has evolved consent law based on an individual's own wishes and circumstances. Thus, information given while informing for consent must be individualized. Standard informational tracts may help but are not sufficient. The Supreme Court of Canada set forth elements required for fully informed consent.

One cannot consent to a vague, imprecise course of treatment, nor to treatment when there is the possibility that circumstances may change. Consent may be evidenced by a simple act of compliance, for example, offering an arm for a blood test, or by a signed consent form. Although forms are required in some circumstances, such as consent to surgery in hospital, it is the individual's consenting state of mind which is crucial, not the fact of a signed form.

Consent to research requires a higher standard of information. While consent to research was formerly completely separate from consent to therapy, advanced therapy may be sought within an AIDS research project.

ASSISTED SUICIDE / EUTHANASIA

“If palliative care were more available, there would be fewer people considering euthanasia”
– one voice –

After the Supreme Court of Canada decision regarding Rodriguez, debate on the issue of assisted suicide continues. Individuals have the legal right to refuse specific treatment. However, assisted suicide/euthanasia involving a physician or other party, is an illegal act (see *Ethics*).

Through the use of appropriate advance directives and substitute decision-makers, the perceived need by some for assisted suicide may be reduced.

DISCRIMINATION

“Many don’t want to work with those who they know are infected.”
– one voice –

Discrimination can limit access to service, immigration, employment, housing, domestic relations, inheritance and tax treatment, among others.

Because HIV/AIDS was linked very early to homosexual orientation, discrimination against those with HIV/AIDS has been based on issues of sexual orientation, relationship status and disability. Provincial human rights codes currently proscribe discrimination on the basis of sexual orientation in seven provinces and the Yukon Territories (not included are Alberta, Newfoundland, Prince Edward Island, and the Northwest Territories). While the Canadian Human Rights Act does not explicitly include this prohibition, the Act has been interpreted by courts to include it.

Discrimination on the basis of disability is more settled and better understood by analogy to other disabilities. Enforcement, however, may be difficult. Provincial or federal human rights commissions may provide advice, assistance, and a formal adjudication process. Practically, time delays should be expected.

UNSAFE ACTIVITIES

Unsafe activities can be reduced through education, implementation of body substance precautions, and safe sexual practices. Criminal and civil law may be used to compensate for, control or deter unsafe activities. Where appropriate, caregivers should warn an individual who is at risk of serious harm, and involve local public health officials.

CROSSING INTERNATIONAL BORDERS

Regulations for individual countries regarding visitation, work entry and immigration should be considered in advance of international travel. Some countries require HIV testing for immigration or prolonged visits. Practical approaches and advanced consideration may prevent delays or refusal. Check legal and regulatory process of the country involved.

PROVINCIAL HEALTH CARE ELIGIBILITY

Before moving to another province check for relevant eligibility criteria.

There are no restrictions on Canadians moving between provinces. Access to basic health care is provided to all Canadian residents regardless of the province they are in. However, guidelines may restrict coverage for certain types of care until specified eligibility criteria have been met. There are significant differences between provinces regarding access to, and eligibility criteria for, drugs, home-care services, etc.