

## The legal right of offenders to refuse treatment

Politicians, victims' rights groups and members of the public have often raised the possibility of mandatory treatment for sex offenders. This type of treatment could arguably range from counselling to castration. Still, the public perception that sex offenders will recidivate spurs the cries for mandatory treatment.

However, sex offender treatment is only one issue. There are countless other mental and physical infirmities that offenders could develop that also raise the spectre of mandatory treatment. Can offenders be forced to receive treatment against their wishes?

Consider the following scenario. After serving his full 10-year sentence, a sex offender who refused all rehabilitative treatment is released. The Correctional Service of Canada held the offender as long as legally possible, but he is now completely free to move about as he pleases and the chances are good that he will reoffend.

The Service no longer has jurisdiction over the offender, but would/should it have been possible for the Service to have forced treatment on the offender while he was incarcerated? Apart from practical considerations that make mandatory offender treatment of questionable value, there are significant legal impediments to mandatory treatment of any kind for any person, including sex offenders. The rights of offenders Paragraph 4(e) of the Corrections and Conditional Release Act states that offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of that sentence."<sup>(2)</sup>

Clearly, an inmate's sentence necessarily restricts his or her freedom of movement. However, the legislation does not seem to suggest that incarceration removes an individual's basic right to refuse unwanted treatment. Offenders still have the right to self-determination.

Subsections 88[1](a)/(b) of the Corrections and Conditional Release Act further state that an inmate shall not receive treatment, or continue to receive it once it has started, unless the inmate voluntarily gives informed consent. An inmate has the right to refuse or withdraw from treatment at any time.

This position is qualified somewhat by subsection 88[5] which allows that treatment may be administered without consent when the inmate does not have the capacity to give informed consent. However, this is consistent with provincial standards for the administration of treatment to persons unable to give informed consent.

There are specific provincial legislative provisions that outline the circumstances where treatment may be administered, without consent, to an individual who lacks the mental capacity to consent. Generally, the legislation allows "substitute" decision-makers to provide the necessary consent.

The Service's regional psychiatric hospitals are governed by the applicable provincial mental health act and are, therefore, able to treat offenders who are not mentally capable of giving informed consent. An

individual's right to refuse medical treatment. With the exception of treatment of mentally incompetent persons and those with communicable diseases, any medical treatment administered without the consent of the recipient is battery.

No one has the right to touch another person without that person's consent. The right to make choices about one's own body is deeply rooted in our common law and is now protected by the Charter of Rights and Freedoms.

Section 7 of the Charter guarantees everyone the right to life, liberty and security of the person, as well as the right not to be deprived of these guarantees except in accordance with the principles of fundamental justice. Any attempt to impose treatment without the consent of the offender would likely violate this provision.

Further, the forced treatment of an offender could be cruel and unusual punishment, which is contrary to section 12 of the Charter.

The courts have given great deference to the individual's right to autonomy and bodily integrity free from the interference of the state - even if this may result in the death of the individual.<sup>(3)</sup>

In 1991, the Ontario Court of Appeal discussed, at length, an individual's right to refuse treatment.<sup>(4)</sup> A mental patient, while competent, had asked that he not be given certain drugs when he became incompetent.

The court ruled that legislation authorizing a board of review to override such a request was contrary to the Charter. The fact that serious risks or consequences could result from a refusal of medical treatment does not vitiate the individual's right to medical self-determination.

The court argued that few medical procedures are more intrusive than the forcible injection of mind-altering drugs, which are often accompanied by severe and sometimes irreversible adverse side effects.

To force patients to submit to such medication against their competent wishes, or without the consent of their legally appointed substitute decision-makers, clearly infringes on their Charter right to security of the person.

In a similar case, the British Columbia Court of Appeal ruled that a probation order requiring an accused individual to submit to psychiatric treatment or medication was an unreasonable restraint on the liberty and security of the person.<sup>(5)</sup>

Therefore, although the courts have consistently held that offenders under sentence have fewer liberty rights than individuals who are merely accused, it is doubtful that the courts would endorse legislation that interferes with an offender's right to choose whether to receive medical or psychological treatment.

The National Parole Board can, however, require an offender to consent to treatment as a condition of conditional release. This is not considered forced treatment because the offender obtains a benefit in exchange for his or her compliance.

This reasoning is also tied to risk management, because the offender would presumably pose too much of a risk to be released without the treatment.

The situation can, therefore, be distinguished from probation. A probation order is punishment, as opposed to a benefit exchanged for an offender's agreement to meet release conditions. Infectious and contagious diseases Provincial laws authorize the compulsory treatment of persons with communicable diseases (such as tuberculosis), overriding the individual's right to refuse treatment.

For example, Ontario's Health Protection and Promotion Act authorizes the Medical Officer of Health to apply for a court order requiring anybody inflicted with a deadly disease to place himself or herself under the care of a doctor.

Refusal to comply with such an order can result in hospital detention and forced treatment.

This infringement is justified by arguing that the individual's liberty interest must come second to public safety.

In other words, public interest prevails over the rights of the individual in the case of communicable diseases.

However, this narrow exception does not affect the individual's right to refuse any other treatment.

There is no equivalent federal legislation allowing for compulsory medical treatment, although the Quarantine Act does allow for the quarantine of persons infected with a deadly disease. A fundamental right Control over one's body is one of the most fundamental rights protected by our legal system.

This right can only be limited in very narrow circumstances when mental incompetence prevents an individual from giving informed consent to treatment or when the person has a communicable disease covered by provincial legislation.

An attempt under any other circumstance to infringe on this deeply entrenched principle of self-determination would meet much scepticism in the courts.

As such, any legislation permitting the forced treatment of mentally competent individuals would have little chance of surviving a legal challenge.

Such legislation would have a chance only in very narrow and well-justified situations, where the public interest in seeing treatment administered is highly compelling, such as in the case of a deadly infectious disease.

In short, the right to determine the fate of one's own body is a fundamental tenet of our society.

This right will be limited only in the most narrow of circumstances where individual rights must necessarily give way to the collective interests of society.

The mandatory treatment of offenders probably does not meet this test.

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- (1) Legal Services, Correctional Service of Canada, 4E-340 Laurier Avenue West, Ottawa, Ontario K1A 0P9.
- (2) This codified the Supreme Court of Canada decision in *Solosky v. The Queen* (1979), 50 C.C.C. (2d) 495.
- (3) *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.
- (4) *Fleming v. Reid* (1991), 82 D.L.R. (4th) 298 (Ont. C.A.).
- (5) *R. v. Rogers* (1991), 2 C.R. (4th) 192 (B.C. C.A.).