

ONTARIO WORKING GROUP ON
**CRIMINAL LAW +
HIV EXPOSURE**



22 June 2012

The Honourable John Gerretsen
Attorney General
Ministry of the Attorney General
McMurtry-Scott Building
720 Bay Street, 11th Floor
Toronto, ON M7A 2S9

Dear Minister Gerretsen:

Re: Non-disclosure of HIV-positive status: The Crown's position in the *R v. Felix* and *R v. Mekonnen* appeals

We are writing to you to express our utter dismay at and profound sense of betrayal by the Ministry of the Attorney General. We read with deep concern the Crown's submissions in *R v. Felix* and *R v. Mekonnen* [C51878 and C54210], which cases are scheduled to be heard together before the Court of Appeal for Ontario on Monday and Tuesday, 25–26 June 2012.

The position put forward in the Crown's submissions amounts to bad faith on the part of your Ministry, as well as a total repudiation of the process of engagement that you and your predecessor have conducted with the Ontario Working Group on Criminal Law and HIV Exposure (CLHE) and other community members. The Crown is effectively seeking to criminalize *all* people living with HIV unless they disclose their status (and can prove they have done so) to *all* sexual partners, at *all* times, regardless of the HIV transmission risk associated with the act. With these submissions, the Ministry of the Attorney General has turned its back on people living with HIV, reneged on its commitment to draft prosecutorial guidelines and effectively intensified its assault on people living with HIV in Ontario.

The Crown's position makes the issue of prosecutorial guidelines largely irrelevant. As you know, in December 2010, your predecessor, the Honourable Chris Bentley, agreed to develop guidance materials for Crown attorneys for criminal cases involving allegations of non-disclosure of sexually transmitted infections, including HIV. In good faith, we undertook extensive provincial consultations and came forward with a detailed report proposing various elements of such guidelines for discussion.

We have met with you and discussed the need for such guidance. We wholeheartedly supported and publicly applauded your December 2011 decision to withdraw the Ontario Attorney General's proposed intervention in the *Mabior* and *DC* cases before the Supreme Court of Canada, where a similar position was to be advanced, because such a position was at odds with a commitment to develop guidelines against the misuse of the criminal law.

Up until now, we have been committed to working with the Ministry of the Attorney General to ensure that the prosecution of HIV non-disclosure cases is based on the best available evidence and a concern for the impact on public health and human rights. However, with the extreme position now being advanced by your Ministry before the Court of Appeal for Ontario, we must question whether there is good faith on the part of the Crown. These submissions indicate that your Ministry has no intention of pursuing a measured, just and evidence-informed approach to the complex legal and social issues presented by HIV non-disclosure.

The Crown's position, if adopted by the Court of Appeal for Ontario, will effectively authorize a witch-hunt against people living with HIV. Indeed, that attack is well underway: there are already numerous instances in which your Crown prosecutors, contrary to the law articulated by the Supreme Court of Canada, are pursuing convictions against people whose conduct does not pose a significant risk of HIV transmission, and in some circumstances, no risk at all. The Crown's position, if adopted, will disrupt many lives and further undermine the fight against HIV in Ontario. There is mounting evidence of the detrimental effects of over-criminalization on public health efforts to prevent HIV transmission and on the psychological and physical health of people living with HIV in Ontario. Is it lost on your office and your prosecutors that stigmatizing all people living with HIV as potential criminals — even those who take precautions by practising safer sex in accordance with long-established public health advice — will only make it even less safe for people to identify themselves as HIV-positive?

In the hopes that it will impress upon you a greater appreciation of the need for a more nuanced understanding of the pitfalls of misusing the criminal law, we invite you to view the documentary on the enclosed DVD, which explores the experiences of women living with HIV. *Positive Women: Exposing Injustice* premiered in Toronto last week to a full house, and the fear and anger of those in attendance was palpable. We will be screening the film and further engaging communities across Ontario and across the country in the months ahead to raise awareness of the injustices already arising out of the misuse of criminal prosecutions and to mobilize that concern to seek change. While we remain accountable to the communities we represent, it would appear that your Ministry has chosen to ignore the concerns that have been raised and the evidence of the harm being done by an overly broad use of the criminal law. In such circumstances, continued cooperation with your Ministry risks breaching the trust

and faith placed in us by people living with HIV in Ontario, and by the over 1000 people who have signed the CLHE's Campaign for Prosecutorial Guidelines.

Your government's position is a complete rejection of current scientific research that unequivocally demonstrates that HIV is an extremely difficult infection to transmit. This holds true not only for activities such as oral sex, but also for sexual intercourse when condoms are used or a person's HIV viral load is low or undetectable. The Crown's position is also a total repudiation of international expert guidance on this issue, and reinforces Canada's shameful, growing record as an international pariah committed to placing the criminal law at the centre of the state's response to HIV prevention. UNAIDS has called for a restrained use of the criminal law —i.e., only in exceptional circumstances where someone intends to infect another person and does so — in keeping with proven public health and human rights-based approaches to addressing the HIV epidemic. The Global Commission on HIV and the Law is expected to urge similar restraint in a few weeks' time with the release of its long-awaited report at the United Nations in New York by the UN Secretary General and heads of UN agencies. Yet Ontario seems determined to lead the charge in the opposite direction.

The Crown's absolutist position is especially troubling given the context and realities of HIV non-disclosure prosecutions. It is not surprising to us that people from African, Caribbean and Black communities, many of whom are immigrants and refugees, have been prosecuted in significant numbers by your government and vilified publicly in the media as a result. The systemic and institutional racism in Ontario's criminal justice system is well documented. The number of women living with HIV facing criminal prosecutions has been steadily increasing, and a growing number of feminist commentators are pointing out the troubling distortion of sexual assault law at play, even as sexual violence against women continues to be epidemic and often poorly handled by the criminal justice system. Gay men in Ontario continue to bear a disproportionate burden of HIV infections. In recent years, the number of HIV non-disclosure prosecutions involving gay men has increased both in number and in the severity of criminal charges faced. This is not surprising given the historic, and ongoing, mistreatment of the LGBT community in the criminal justice system, typified by the Toronto bathhouse raids in the 1980s.

Make no mistake, this witch-hunt against people living with HIV will bite at the core of "polite society" and will not be restricted to people who have been socially marginalized by HIV. To date, it has been almost exclusively people with HIV singled out for prosecution, with Ontario accounting for roughly half the cases to date in the country. Yet the Crown argues not only that every person with HIV who does not disclose is guilty of sexual assault, regardless of the risk of transmission, but indeed that prosecution should be applied to other sexually transmitted infections as well. In effect, the Crown seeks to establish the criminal justice system as arbiter and enforcer of sexual health and sexual relations in Ontario. Given the high rates of sexually transmitted infections in this province,

is your Ministry seeking to prosecute ever-growing numbers of people? Many Ontarians may have had little concern as long as it was only “those people” with HIV being criminalized, but they will soon realize that a much wider swath of the population is open to prosecution. Or is the plan simply to focus police and prosecutorial resources on further targeting people living with HIV using some of the most serious offences in the *Criminal Code*?

Our communities have taken to the streets in the past to protest frontal assaults on our rights visited on us by governments — make no mistake, we will do so again if necessary. People living with HIV formed a powerful movement in the late 1980s, in the face of government neglect and indifference to their fundamental rights and their very lives. We have also organized opposition to the health care system’s indifference to people living with HIV, and its established ways of conducting HIV prevention and of providing care. With the Crown’s position we are quickly returning to the time when an HIV-positive antibody test was the modern equivalent of a scarlet letter and subjected people to government-sanctioned persecution and discrimination. To those of us who have been advocating on behalf of people since the early days of the HIV epidemic, this social climate is startlingly reminiscent of the 1980s when fear, stigma and discrimination were pervasive. Why would anyone want to take an HIV test in such a social climate? Is it your Ministry’s intent to return us to the days in which community organizations were compelled to caution people against seeking testing or sharing information with health professionals because of the potential repercussions, which now include the risk of years in jail and lifetime designation as a sex offender even in such cases where condoms are used?

We call on you, as Minister, to withdraw the absolutist position put forward by the Crown. We further call on you to instruct the Crown to take a position before the courts grounded in the significant risk test and an appreciation of our current scientific understanding of HIV infection and HIV transmission. We welcome the opportunity for further discussion of these issues — but a deliberate, anti-scientific attack on all people living with HIV in the province only invites further confrontation, rather than respectful collaboration, with our communities.

We look forward to your immediate response.

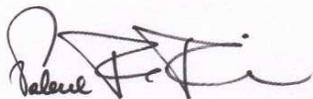
Sincerely,

A handwritten signature in black ink, appearing to read 'Ryan Peck', written in a cursive style.

Ryan Peck
Barrister & Solicitor, Executive Director, HIV & AIDS Legal Clinic Ontario
Co-chair, Ontario Working Group on Criminal Law and HIV Exposure



Richard Elliott
Executive Director, Canadian HIV/AIDS Legal Network



Valérie Pierre-Pierre
African and Caribbean Council on HIV/AIDS in Ontario



Shannon Thomas Ryan
Executive Director, Black Coalition for AIDS Prevention

cc:

The Hon. Dalton McGuinty, Premier of Ontario

The Hon. Deb Matthews, Minister of Health and Long-Term Care

The Hon. Chris Bentley, Minister of Energy

The Hon. Glen Murray, Minister of Training, Colleges and Universities

The Hon. Kathleen Wynne, Minister of Aboriginal Affairs and Minister of
Municipal Affairs and Housing

The Hon. Laurel Broten, Minister of Education and Minister Responsible
for Women's Issues

The Honourable Eric Hoskins, Minister of Children and Youth Services

Dr. Arlene King, Chief Medical Officer for Health for Ontario

Dr. Mandeep Dhaliwal, UNDP, Global Commission on HIV & the Law

Dr. Michel Sidibé, Executive Director, UNAIDS

Mr. Stephen Lewis, Commissioner, Global Commission on HIV & the Law

Ontario Advisory Committee on HIV/AIDS