



October 12, 2012

VIA ELECTRONIC & LETTER MAIL

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: HIV & the criminal law

On behalf of the Ontario Working Group on Criminal Law and HIV Exposure (CLHE), please accept this request for a meeting to discuss the development of prosecutorial guidelines for Crown prosecutors handling allegations of HIV non-disclosure.

As you know, in December 2010, your predecessor, the Honourable Chris Bentley, agreed to develop guidance materials for Crown prosecutors.

As you also know, in June 2011, CLHE provided the Ministry of the Attorney General with a *Community Report and Recommendations* document. Following the delivery of this document, CLHE was informed, via letters dated February 8, 2012 and July 6, 2012, that the “Crown will await the ruling from the Supreme Court of Canada in the *R v Mabior/D.C.* cases before addressing the matter of prosecutorial guidelines.”

As you are likely already aware, the Supreme Court of Canada last Friday released two decisions regarding the criminal law and HIV non-disclosure.

The decisions clarify somewhat the legal test from the Court’s 1998 *Cuerrier* case (“significant risk” of HIV transmission) for certain types of sex, in certain circumstances. However, the Court imposed an unnecessarily strict standard—disclosure is legally mandated unless a condom is used **and** the HIV-positive person has a “low” viral load. This is an extremely onerous standard, and is completely out-of-step with overwhelming medical and scientific evidence about the exceedingly low risk of sexual HIV transmission where condoms are used, **or** where the person living with HIV has a low HIV viral load in their body.

Moreover, the Supreme Court decisions will fuel uncertainty among people living with HIV regarding their legal obligations under the *Criminal Code*.

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What does the new test (“realistic possibility” of HIV transmission) mean in practice; what constitutes a “low” viral load; how will oral sex be assessed under the “realistic possibility” test; does the condoms **and** low viral load requirement apply equally to anal intercourse?

We have significant concerns about the potential negative impact of the decisions, and continuing uncertainty, for the health and human rights of people living with HIV, and public health in general.

Now that the Supreme Court has spoken, prosecutorial guidelines for HIV non-disclosure cases are urgently needed to mitigate uncertainty, avoid unfairness and discrimination in the application of the law, and avoid negative public health outcomes. In particular, we are extremely fearful that the brunt of the negative impacts of the Court’s decisions will be felt by extremely marginalized persons with HIV, including women in abusive relationships, newcomers to Canada, members of African/Caribbean/Black communities, First Nations peoples, and others who face challenges accessing health, social and legal services.

CLHE 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. We very much look forward to meeting with you to discuss the development of prosecutorial guidelines.

We look forward to your immediate response.

Sincerely,



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

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
Mr. Stephen Lewis, Commissioner, Global Commission on HIV & the Law
Ontario Advisory Committee on HIV/AIDS