

Exploring avenues to address problematic prosecutions against people living with HIV in Ontario

Ontario Ministers Roundtable

December 5, 2016 at 9:00 a.m.
Government Caucus Room (Room 247)
Main Legislature at Queen's Park, Toronto

List of Attendees

Ministers

Hon Tracy MacCharles, MPP, Minister Responsible for Accessibility and for Women's Issues

Hon Glen Murray, MPP, Minister of the Environment and Climate Change

Hon Yasir Naqvi, MPP, Ministry of the Attorney General

Hon David Oraziotti, MPP, Minister of Community Safety and Correctional Services

Hon Eric Hoskins, MPP, Minister of Health and Long-Term Care (represented by his policy director)

Civil society

Dr. Mona Loutfy, MD, FRCPC, MPH, infectious diseases specialist and clinical researcher; Scientist, Women's College Research Institute; Staff Physician, Women's College Hospital; Associate Professor, Department of Medicine, University of Toronto; Research Director, Maple Leaf Research

Valérie Pierre-Pierre, Director, African and Caribbean Council on HIV/AIDS in Ontario (ACCHO); Co-Chair, Ontario Working Group on the Criminal Law and HIV Exposure

Ryan Peck, barrister and solicitor; Executive Director, HIV & AIDS Legal Clinic Ontario (HALCO); Co-Chair, Ontario Working Group on the Criminal Law and HIV Exposure

Tim McCaskell, advocate living with HIV

Marvelous Muchenje, Community Health Coordinator, Women's Health in Women's Hands Community Health Centre

Lenore Lukasik Foss, Director, SACHA (Sexual Assault Centre Hamilton)

Cécile Kazatchkine, Senior Policy Analyst, Canadian HIV/AIDS Legal Network

Ontario Working Group on Criminal Law and HIV Exposure

The Ontario Working Group on Criminal Law and HIV Exposure (CLHE) came together in 2007 to oppose the expansive use of the criminal law to address HIV non-disclosure. We are people living with HIV, representatives from many community-based AIDS organizations, lawyers and academics from across Ontario. We support a comprehensive evaluation of how Canada's criminal law is being applied in Ontario. We advocate for sound policy responses to HIV prevention and transmission — based on the best available evidence and up-to-date science, grounded in proven HIV prevention, care, treatment and support programs, and respectful of the human rights of people living with and affected by HIV.

The law

Canada has the dubious distinction of being one of the world “leaders,” after Russia and the United States, of prosecuting people living with HIV. In 1998, the Supreme Court of Canada (SCC), in *R. v. Cuerrier*, decided that people living with HIV have a legal duty to disclose their HIV-positive status to sexual partners before having sex that poses a “significant risk” of HIV transmission.¹ In 2012, in *R. v. Mabior*, the SCC ruled that people living with HIV have a legal duty to disclose before having sex that poses a “realistic possibility of HIV transmission.” The court stated that “as a general matter, a realistic possibility of transmission of HIV is negated if: (i) the accused’s viral load at the time of sexual relations was low *and* (ii) condom protection was used.”² The Crown must also prove that the complainant would not have consented to sex if they had known about their partner’s HIV-positive status.

In Canada, people who face criminal charges related to HIV non-disclosure are typically charged with aggravated sexual assault. Charges continue to be brought against people living with HIV who have no intent to transmit HIV; who engage in behaviours that, based on medical evidence, effectively pose negligible to no risk of transmission; and who do not transmit HIV to their sexual partners. Aggravated sexual assault is one of the most serious offences in the Criminal Code: it carries a maximum penalty of life imprisonment and registration as a sexual offender for a minimum of 20 years, if not for life. In Canada, people also have been charged and prosecuted in relation to spitting or biting although saliva cannot transmit HIV.

HIV and its transmission

The treatment and transmission of HIV have drastically changed since the 1998 SCC decision, but the law has yet to catch up with the science. The following is now clearly established:

- HIV is a chronic manageable illness.
- Treatments not only allow people to live long and healthy lives but also prevent HIV transmission.
- Vaginal or anal sex without a condom poses negligible to no possibility of transmission when the HIV-positive partner is under effective antiretroviral therapy.³
- When used correctly and no breakage occurs, condoms are 100% effective at stopping the transmission of HIV.
- Oral sex poses no to negligible possibility of HIV transmission.
- Being spat on by an HIV-positive individual poses no possibility of transmitting HIV.
- Being bitten by an HIV-positive individual poses a negligible possibility of transmitting HIV when the

biting breaks the other person’s skin and the HIV-positive individual’s saliva contains blood. Otherwise, being bitten by an HIV-positive individual poses no possibility of transmitting HIV.

In 2014, six eminent Canadian HIV experts developed the “Canadian consensus statement on HIV and its transmission in the context of the criminal law” out of a concern that the criminal law was being used in an overly broad fashion against people living with HIV because of, in part, a poor appreciation of the scientific understanding of HIV and its transmission. The statement was published in the *Canadian Journal of Infectious Diseases and Medical Microbiology* and endorsed by over 70 additional experts from across the country.⁴

Why is HIV criminalization harmful?

- People living with HIV continue to be criminally charged, prosecuted and imprisoned when there is minimal to no risk of HIV transmission.
- The law of sexual assault is a poor fit to deal with HIV non-disclosure. The law is extremely stigmatizing and has very severe implications for people living with HIV. The law of sexual assault as a tool to advance gender equality and renounce gender-based violence is also undermined as a result.⁵
- Convictions rates are much higher than in cases of non-HIV-related sexual assault.
- HIV is singled out from among other communicable diseases for criminal law regulation; the law profoundly stigmatizes people living with HIV.
- The criminalization of HIV non-disclosure disproportionately impacts marginalized people living with HIV including racialized people, migrants, women (including Indigenous women and women experiencing intimate partner violence) and gay men.
- A large body of research conducted in multiple jurisdictions using multiple research methods and indicators of HIV prevention failed to demonstrate that HIV criminalization had any significant HIV prevention benefit. In fact, the research shows that HIV criminalization impedes access to HIV prevention by increasing HIV-related stigma, discouraging HIV testing for some individuals, hindering access to and eroding trust in voluntary approaches to HIV prevention, including HIV counselling, and spreading misinformation about the nature of HIV and its transmission. The current use of the criminal law also compromises the ability of people living with HIV to engage in the care they need to stay healthy by preventing them from talking openly with health care providers because of fear that their HIV and other test results and discussions with medical professionals may be used as evidence against them in criminal proceedings.⁶
- The criminalization of HIV non-disclosure has

resulted in serious invasions of privacy (e.g., use of medical records in criminal proceedings, people's HIV status made public in the media including through police press releases) and bodily integrity (e.g., forced treatment).

International guidance on HIV and the criminal law

Because of the numerous human rights and public health concerns associated with HIV-related prosecutions, the Joint United Nations Programme on HIV/AIDS (UNAIDS) and the United Nations Development Programme (UNDP),⁷ the UN Special Rapporteur on the right to health,⁸ the Global Commission on HIV and the Law,⁹ the UN Committee on the Elimination of Discrimination against Women,¹⁰ and leading Canadian feminist legal academics,¹¹ among others, have all urged governments to limit the use of the criminal law to cases of intentional transmission of HIV (i.e., where a person knows his or her HIV-positive status, acts with the intention to transmit HIV, and does in fact transmit it). Moreover, experts recommend that no prosecutions take place when the person used a condom or had a low viral load or practiced oral sex.¹²

“The Committee welcomes that [Canada] intends to review the use and application of criminal norms to certain HIV/AIDS issues. This review will include the concerning application of harsh criminal sanctions (aggravated sexual assault) to women for non-disclosing their HIV status to sexual partners, even when the transmission is not intentional, when there is no transmission or when the risk of transmission is minimal. The Committee recommends that [Canada] limit the application of criminal law provisions to cases of intentional transmission of HIV/AIDS, as recommended by international public health standards.”

Committee on the Elimination of Discrimination against Women, Concluding observations on the combined eighth and ninth periodic reports of Canada, CEDAW/C/CAN/CO/8-9, November 18, 2016.

HIV prosecutions in Canada

- More than 180 people have been charged to date for not disclosing their HIV positive status.
- The impact of prosecutions on African, Caribbean and Black (ACB) communities is particularly concerning.¹³ Out of at least 35 ACB men charged to date in Canada, 23 were charged in Ontario (66%).
- While most of the cases are against men who have sex with women, cases against gay men are increasing.

- In 2015 and 2016, at least 12 individuals were charged in Canada (including 8 in Ontario): 5 were Black men and 5 were gay men.
- At least 18 women have been charged to date for HIV non-disclosure, 6 of whom are Indigenous (33%).
- The criminalization of HIV non-disclosure is of particular concern to Indigenous and ACB communities that are facing alarming rates of HIV and/or continue to experience systemic discrimination as well as extremely high rates of incarceration in Canada.

Engaging with the Ontario Ministry of Attorney General on HIV criminalization

- With more than 90 people charged to date, Ontario is leading the way in terms of HIV prosecutions in Canada and the situation is not improving. CLHE is aware of at least five new cases in 2016, four of which are taking place in Ontario.
- In British Columbia, we are aware of no new prosecutions since civil society members met with the Assistant Deputy Attorney General in April 2015.
- In Quebec, a working group has been established to foster dialogue on HIV criminalization between representatives of the Quebec Ministry of Justice, Quebec Ministry of Health and Social Services, l'Institut national de santé publique du Québec, and civil society.

Since 2010, CLHE has been in discussions with the Ontario Ministry of the Attorney General (MAG) with the goal of ensuring that prosecutions for HIV non-disclosure are informed by a complete and accurate understanding of current medical and scientific research about HIV, and are compatible with broader scientific, medical, public health and community efforts to prevent the spread of HIV and to provide care, treatment and support to people living with HIV. In particular, discussions have focused on the development of prosecutorial guidelines for Crown prosecutors handling alleged HIV non-disclosure matters.

In December 2010,¹⁴ Attorney General Chris Bentley agreed to develop guidelines with the input of CLHE. To this end, and because MAG refused to engage in a meaningful consultation with the HIV community and other stakeholders proposed by CLHE, in mid-2011, CLHE in good faith provided MAG with *Report and Recommendations*¹⁵ based on comprehensive community consultations it conducted around the province. Unfortunately, since that time, that good faith has not been reciprocated by MAG.

In April 2013, MAG informed CLHE that it was in the process of developing guidelines but would not engage in further consultations or meetings. In December

2013, MAG offered to share draft guidelines with three lawyers involved in CLHE, but only if they agreed never to disclose the contents of the draft guidelines (effectively, a “gag order”). Ultimately, the three lawyers and CLHE had to request that the guidelines not be adopted given their unacceptable content. It was evident to them that the guidelines encouraged an overly broad application of the criminal law. In December 2015, MAG confirmed to CLHE that the draft guidelines would not be issued to all Crown counsels. Since then, MAG has failed to take any measure to limit unjust prosecutions in Ontario.

The absence of efforts to meaningfully engage with CLHE and others in the HIV community and to limit prosecutions is deeply problematic and stands in stark contrast to efforts undertaken in British Columbia, Quebec and abroad (e.g., England, Wales and Scotland in the U.K.; Switzerland; Colorado, U.S.A.; Victoria, Australia; and Denmark).

Examples of problematic prosecutions and practices in Ontario

- Since the SCC released its decision in *Mabior* in 2012, we have seen at least 10 cases involving an undetectable viral load, 8 of which occurred in Ontario.
- In Ontario, people continue to be charged for oral sex. In 2013, Crown prosecutors refused to drop charges against a woman living with HIV in Barrie. J.M. was notably charged for receiving oral sex while her viral load was undetectable. The Crown’s expert testified that “you have a better chance of having a piano fall on your head than you do contracting HIV through oral sex.”¹⁶ J.M. was eventually acquitted on the oral sex charge.
- People living with HIV in Ontario continue to be charged in relation to spitting and biting despite the extremely low, if any, risk of transmission.
- Some people have been placed under extremely strict bail conditions including mandatory HIV treatment or an obligation to inform authorities about potential new sexual partners.

Some positive developments post-*Mabior* that need to be generalized

Although the number of people charged with aggravated sexual assault in relation to HIV non-disclosure continues to grow, including in circumstances where the risk of transmission is negligible, some positive developments post-*Mabior* prove alternatives are possible. These developments should be generalized.

- A lower court in Nova Scotia concluded, based on the expert scientific evidence before it, that having a low viral load is sufficient to negate a “realistic possibility of transmission.”¹⁷

- In at least one Ontario case involving condomless sex with an undetectable viral load, the Crown invited the judge to enter an acquittal.
- In at least two cases involving an undetectable viral load in Ontario, charges were withdrawn before the trial.
- In one recent case in Ontario involving condomless sex, an accused pled guilty to “false pretense” and received an absolute discharge.

Measures should be taken

- to ensure HIV-related prosecutions are conducted with restraint and caution;
- to ensure HIV-related prosecutions are informed by complete, accurate and comprehensive understanding of the science surrounding HIV, risks of HIV transmission, and the reality of living with HIV;
- to exclude the use of the criminal law against people living with HIV who used a condom OR practiced oral sex OR engaged in condomless sex with a low or undetectable viral load;
- to limit the use of the criminal law in cases of HIV non-disclosure where there is no alleged transmission and/or malicious intent to transmit HIV;
- to prevent an accused’s HIV-positive status to be taken into account in prosecutions related to spitting or biting;
- to limit the use of the law of sexual assault in cases of HIV non-disclosure;
- to provide potential complainants with the support they need (both in terms of counselling and medical care);
- to protect the rights of people living with HIV to be free from discrimination. Their rights to privacy, to liberty and security of the person, to sexual and reproductive health and physical integrity must also be protected; and
- to protect people living with HIV, particularly women living with HIV, against violence, harassment and domestic abuse.

Avenues to be explored at the roundtable

The roundtable is a unique opportunity to identify specific measures that can be taken in Ontario to protect human rights and public health by limiting HIV-related criminal prosecutions, including

- by setting useful policy directives for HIV-related prosecutions;
- by exploring alternatives to criminal charges and prosecutions;
- by providing support to potential complainants in cases of HIV non-disclosure;
- by developing training and resources on HIV for police, Crown prosecutors and prison staff;
- by protecting women living with HIV from violence, harassment and domestic abuse; and
- by protecting Indigenous and racialized people from systemic discrimination including disproportionately high rates of incarceration.

1. *R. v. Cuerrier*, [1998] 2 SCR 371 (Supreme Court of Canada).
2. *R. v. Mabior*, 2012 SCC 47 (Supreme Court of Canada); and *R. v. D.C.*, 2012 SCC 48 (Supreme Court of Canada).
3. For the most recent data on treatment and HIV risks of transmission, see A.J. Rodger et al., “Sexual activity without condoms and risk of HIV transmission in serodifferent couples when the HIV-positive partner is using suppressive antiretroviral therapy,” *Journal of the American Medical Association* 316, 2 (July 12, 2016): pp. 171–181 (PARTNER study). The study found zero transmissions in over 58,000 individual times that people had sex without condoms.
4. M. Loutfy, M. Tyndall et al., “Canadian consensus statement on HIV and its transmission in the context of the criminal law,” *Canadian Journal of Infectious Diseases and Medical Microbiology* 25, 3 (2014): pp. 135-140. Available at www.ncbi.nlm.nih.gov/pmc/articles/PMC4173974/.
5. See the perspectives articulated by women’s rights advocates in the documentary film *Consent: HIV non-disclosure and sexual assault law* (Goldelox Productions & Canadian HIV/AIDS Legal Network, 2015); and Canadian HIV/AIDS Legal Network, *What does consent really mean? Rethinking HIV non-disclosure and sexual assault law meeting report*, 2014. Both the film and the report are available at www.consentfilm.org.
6. S.E. Patterson et al., “The impact of criminalization of HIV non-disclosure on the health care engagement of women living with HIV in Canada: a comprehensive review of the evidence,” *Journal of the International AIDS Society* 18, 1 (2015): 20572; E. Mykhalovskiy, “The public health implications of HIV criminalization: past, current, and future research directions,” *Critical Public Health* 25, 4 (2015): pp. 373–385.
7. UNAIDS/UNDP, *Policy brief: Criminalization of HIV Transmission*, August 2008. Available at www.aidslaw.ca/site/wp-content/uploads/2014/02/1.UNAIDSUNDPposition.pdf.
8. UN General Assembly, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover*, Human Rights Council, Fourteenth session, Agenda item 3, A/HRC/14/20, April 27, 2010. Available at www.aidslaw.ca/site/wp-content/uploads/2014/02/4_R.Special2010EN.pdf.
9. Global Commission on HIV and the Law (UNDP HIV/AIDS Group), *HIV and the Law: Risks, Rights & Health*, July 2012. Available at www.hivlawcommission.org/index.php/report.
10. Committee on the Elimination of Discrimination against Women, Concluding observations on the combined eighth and ninth periodic reports of Canada, CEDAW/C/CAN/CO/8-9, November 18, 2016.
11. *Supra*, note 5.
12. UNAIDS, *Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations*, 2013. Available at www.unaids.org/sites/default/files/media_asset/20130530_Guidance_Ending_Criminalisation_0.pdf.
13. The impact of HIV related prosecutions on ACB communities is reinforced by media coverage of cases involving Black men. A recent pioneering study of Canadian media, focusing on newspaper coverage of HIV non-disclosure and transmission cases, found a clear pattern of racism towards Black men in Canadian mainstream newspaper articles from 1989–2015. See E. Mykhalovskiy, C. Hastings, C., Sanders, M. Hayman and L. Bisailon, ‘*Callous, Cold and Deliberately Duplicitous*’: *Racialization, Immigration and the Representation of HIV Criminalization in Canadian Mainstream Newspapers*, November 22, 2016. Available at SSRN: <https://ssrn.com/abstract=2874409>.
14. Please see <http://clhe.ca/advocacy-timeline> for a complete overview of CLHE’s engagement with the provincial government.
15. *Consultation on Prosecutorial Guidelines for Ontario Cases Involving Non-disclosure of Sexually Transmitted Infections: Community Report and Recommendations to the Attorney General of Ontario*, submitted by the Ontario Working Group on Criminal Law and HIV Exposure, June 2011. Available at <http://clhe.ca/wp-content/uploads/CHLE-guidelines-report.pdf>.
16. T. McLaughlin, “‘Extremely low’ chance of getting HIV through oral sex: Expert,” *Toronto Sun*, July 10, 2013. Available at www.torontosun.com/2013/07/10/extremely-low-chance-of-getting-hiv-through-oral-sex-expert.
17. *R. v. J.T.C.*, 2013 NSPC 105 (Nova Scotia Provincial Court).

