

# HALCO

**HIV & AIDS Legal Clinic Ontario**

65 Wellesley Street East, Suite 400, Toronto, Ontario M4Y 1G7

November 21, 2011

Honourable Dalton McGuinty  
Premier of Ontario  
Legislative Building  
Queens Park  
Toronto, ON M7A 1A1

Dear Premier McGuinty:

**Re: Criminalization of HIV non-disclosure**

Please accept this letter on behalf of the Ontario Working Group on Criminal Law and HIV Exposure (CLHE). CLHE has been working for the last five years to confront the growing crisis of criminal prosecutions of HIV positive people in this province. In September 2010, CHLE launched a public campaign to call for the development of prosecutorial guidelines in Ontario for cases of alleged HIV (and other STI) non-disclosure. Guidelines are needed to ensure that prosecutions take into account 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.

Although the Ministry of the Attorney General (MAG) promised, in December 2010, to develop prosecutorial guidelines for Crown prosecutors based on a scientific evaluation of significant risk (which currently triggers the legal duty to disclose); although leading figures from science, medicine, law and civil society have supported the call for such guidelines; and although CLHE provided MAG with a *Report and Recommendations* regarding the development of such guidelines, MAG has still not even offered us the courtesy of a response to the *Report*, nor has it informed CLHE when it will be honouring its commitment to develop guidelines.

In September we learned, on the contrary, that MAG's intervention materials in the upcoming Supreme Court of Canada matters of *R. v. Mabior* and *R. v. D.C.* advocate not for a scientific evaluation of significant risk, but rather for the elimination of the current significant risk test altogether. This would mean that there would be a duty to disclose HIV status to a partner regardless of the risk of HIV transmission no matter how insignificant or trivial. In practice, this position will mean that every person living with HIV in Canada who does not disclose his/her HIV-positive status would be at risk of prosecution for aggravated sexual assault – which carries a maximum penalty of life imprisonment - even if they used protection and no transmission occurred. It also means people who do not disclose before kissing might be at risk of prosecution.

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Such a position makes the issue of prosecutorial guidelines irrelevant since it effectively criminalizes all people living with HIV unless they disclose (*and* can prove they disclosed) their HIV status at all times. While HIV is a very difficult virus to transmit, it is never possible to say that there is absolutely no risk of transmission. Such a position, if adopted by the Supreme Court on the basis of your government's arguments, will effectively open the way for a witch hunt of people living with HIV. It will not only disrupt countless lives but it will cause irreparable harm to the fight against AIDS in Ontario.

During the election, former Attorney General, Minister Chris Bentley, assured us, through a third party, that Ontario's intervention at the Supreme Court of Canada would not be that outlined in its request for intervener status, and that it was the intention of MAG to seek the maintenance of the significant risk test and to request that the Supreme Court provide clarification as to the interpretation of the test.

MAG's factum in *R. v. Mabior* and *R. v. D.C.* is due on December 20, 2011, but despite repeated requests for meetings with the present Attorney General and senior MAG officials to clarify Ontario's position, we still have not received confirmation that MAG has, as the former Attorney General promised, amended its argument so that it is clear that they are seeking the maintenance and clarification of the significant risk test. The verbal assurances from the former Minister, in the light of the actions of MAG, no longer have much credibility. This credibility is further strained by the fact that the new Attorney General refuses to even confirm the receipt of our repeated requests for a meeting, or to issue any public policy statement on the matter.

People living with HIV and those working in AIDS service organizations feel betrayed by your government. We have entered into negotiations in good faith. We have presented you with evidence-based policy recommendations. But we have received only empty promises, silence and stonewalling in return.

We are requesting your personal intervention to facilitate a meeting between former Attorney General Chris Bentley, current Attorney General John Gerretsen, those responsible for the Ministry's Supreme Court intervention, and representatives from CLHE. We request that this meeting take place before the Supreme Court factum is submitted, in the hopes of avoiding an absolute disaster for the fight against HIV in this province.

We look forward to hearing from you shortly.

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 Honourable Chris Bentley, Minister of Energy  
The Honourable John Gerretson, Attorney General  
The Honourable Glen Murray, Minister of Training, Colleges and Universities