



4 February 2013

Ms. Mary Nethery
Director, Criminal Law Policy Branch
Ministry of the Attorney General
McMurtry-Scott Building
720 Bay Street, 9th Floor
Toronto, ON M7A 2S9

Dear Ms. Nethery,

Re: HIV & the criminal law

On behalf of the Ontario Working Group on Criminal Law and HIV Exposure (CLHE), I would like to thank you for meeting with us on 15 January 2013 to discuss the development of prosecutorial guidelines for Crown prosecutors handling matters of alleged non-disclosure of HIV and other sexually transmitted infections (STI).

For almost three years, CLHE has been discussing this issue with the Ontario Ministry of the Attorney General (MAG). In December 2010, then Attorney General Chris Bentley agreed to develop guidelines with the input of CLHE, and share draft guidelines with CLHE. To this end, in summer 2011, CLHE provided MAG with a *Report and Recommendations* based on comprehensive community consultations conducted around the province. Unfortunately, the development of guidelines was subsequently suspended by MAG pending the release of Supreme Court of Canada decisions in two landmark cases relating to HIV non-disclosure (*R. v. Mabior* and *R. v. D.C.*). Now that the Supreme Court decisions have been released, we hope that the dialogue between CLHE and MAG will be restored and prosecutorial guidelines developed as soon as possible.

Prosecutorial guidelines remain urgently required in Ontario. Because the Supreme Court decisions concerned only vaginal sex, a number of uncertainties remain regarding the new “realistic possibility of HIV transmission” test. It is unclear, for example, how the law will be applied by Crown prosecutors in relation to other sexual activities such as oral sex. Such uncertainties have already resulted in inconsistencies in the application of the law across Ontario - for example, while some prosecutions are proceeding in relation to non-disclosure involving oral sex, others are being withdrawn because of the low risks of transmission associated with such activity. The spectre of unjust and unfair prosecutions continues to be of great concern in Ontario, and judging from the constant stream of questions and concerns we continue to receive, it remains one of the top preoccupations for people living with HIV and those working in HIV prevention and care – particularly in the wake of the Supreme Court rulings.

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More generally, we are very concerned that the “realistic possibility” test will result in an overly-broad use of the criminal law in relation to HIV non-disclosure and consequent unfairness, if not applied with great caution and restraint. We have known for a number of years that condom use is a highly effective tool for HIV prevention. When used properly and consistently, condoms are essentially 100% effective in preventing HIV. We also know that anti-retroviral treatment reduces viral loads (the amount of HIV virus in blood) to levels where the risk of transmission is negligible. Prosecuting people who use precautions to protect their partners, or people who have a low viral load, is not only unfair, but also counterproductive in terms of HIV prevention.

There is serious concern that prosecutions against individuals who take precautions will have a disproportionate impact on the most marginalized and vulnerable of persons living with HIV, including those who may not have access to medications or sustained health care, such as racialized newcomers and First Nations persons. Similarly, there is great concern that an application of the “realistic possibility” test without great caution and restraint will have a disproportionate impact on vulnerable women living with HIV who are in abusive relationships and/or cannot safely impose condom use nor disclose their HIV status to sexual partners. More generally, an overly broad use of the criminal law undermines the public health response to HIV by creating disincentives for individuals to seek HIV testing and to talk openly with health care providers, due to the fear that, one day, their test results and/or discussions with medical professionals will end up as evidence against them in a criminal court.

In light of the foregoing, there ought to be a strong presumption against prosecution in circumstances where a condom or other safe sex measures are used or where the person has a low viral load.

For these reasons, we trust that Minister Gerretsen will fulfill the promise of his predecessor and develop prosecutorial guidelines through a process that includes meaningful consultation with CLHE. The *Report and Recommendations* previously prepared by CHLE remain thoroughly relevant to that process after the Supreme Court decisions in *R. v. Mabior* and *R. v. D.C.*. As noted in the *Report*, particular attention should be paid to the following issues/recommendations:

- Prosecutions relating to HIV non-disclosure to sexual partners are highly sensitive and very complex. Prosecutions should be conducted with restraint and caution;
- Approval of the Crown Attorney or Deputy Crown Attorney should be required before proceeding with an HIV non-disclosure prosecution. The Crown Attorney or Deputy in each jurisdiction should record such approvals and report on an annual basis to the Regional Director of Crown Prosecutors;
- Crown Counsel must take care not to prosecute cases in a manner that would reinforce societal prejudices, preconceptions, and irrational fears regarding HIV, or undermine public health efforts to prevent the spread of HIV and other STIs;
- The Crown must, at the very least, establish a “realistic possibility of HIV transmission” whether a person is charged with aggravated (sexual) assault or sexual assault *simpliciter*. When transmission is alleged, Crown Counsel must bring forth scientific/medical evidence as well as additional evidence, including evidence of past sexual contacts of the complainant, in order to establish actual transmission;

- Prosecutions must be informed by complete, accurate and comprehensive understanding of the science surrounding HIV, risks of HIV transmission, and the reality of living with HIV;
- Crown Counsel have an obligation to seek out, at the earliest possible occasion, an expert scientific/medical opinion from a properly qualified expert based on the best available evidence;
- When prosecuting cases involving non-disclosure of HIV or other sexually transmitted infections, Crown Counsel should be mindful of the recommendations of the Report of the Inquiry into Pediatric Forensic Pathology in Ontario (the Goudge Inquiry);
- HIV and other sexually transmitted infection non-disclosure prosecutions are distinct from other sexual assault prosecutions involving coercion, force and violence because the sexual activity involved is consensual but for the alleged non-disclosure. When lack of consent results from non-disclosure, Crown counsel should consider proceeding with a Criminal Code offence that does not include a sexual element, and should not rely on CPM Policy “*Sexual Offences*” (March 21, 2005) or PM 2006 No. 9 “*Sexual Assault and other Sexual Offences*”;
- Scientific knowledge of the sexual transmission of HIV is complex and evolving. However, there is significant scientific consensus on certain key issues. For example, HIV is not easy to transmit during sex. A number of factors affect the risk of HIV transmission during sex. Condoms substantially reduce the risk of HIV transmission, and effective treatment with HIV anti-retroviral medications can render a person living with HIV non-infectious to a sexual partner;
- Crown Counsel should consider public interest factors that are specific to cases of alleged HIV and other STIs non-disclosure (see p. 19 of the report);
- Prosecutions in cases where a condom has been used or the person living with HIV’s viral load was low or undetectable or practiced oral sex are unlikely to meet the public interest requirement. There should be a strong presumption against prosecution in these circumstances [see Scotland guidelines, below];
- Crown counsel should keep in mind the negative impacts of publicly disclosing a person’s HIV positive status given the high level of stigma experienced by people living with HIV. Crown counsel should ensure that the privacy of the accused’s and the complainant’s HIV status is respected to the greatest extent possible;
- Given the constitutional presumption in favour of bail, and the disproportionate health consequences for persons in custody who are living with HIV/AIDS, the Crown should strongly consider consenting to the release of persons charged with offences involving HIV non-disclosure. It should only be in rare cases that the Crown would oppose bail;
- Crown Counsel should consider the offender’s health at the time of sentencing, and potential negative health and safety consequences of incarceration; and
- Measures should be taken to ensure that Crown counsel have access to properly qualified experts, receive training to support the implementation of prosecutorial guidelines and that the guidelines are regularly reviewed.

Attached are materials that we discussed during our meeting, in addition to other materials relevant to the development of prosecutorial guidelines in Ontario:

- UNAIDS, [Policy brief: criminalization of HIV transmission](#), August 2008. As

- mentioned during our meeting, UNAIDS will soon publish (in spring 2013) additional guidance on this issue;
- UNAIDS, [*Expert Meeting on the Scientific, Medical, Legal and Human Rights Aspects of Criminalization of HIV Non-Disclosure, Exposure and Transmission*](#), meeting report, Geneva, 31 August – 2 September 2011. This meeting is informing the development of the upcoming UNAIDS guidance. The paragraphs of particular interest with regard to the development of prosecutorial guidelines in Ontario are: 24, 26, 28 43(h), 48, 80(b)(c);
 - Crown Prosecution Service for England and Wales (CPS), *Intentional or Reckless Transmission of Sexual Infection and Policy for prosecuting cases involving the intentional or reckless sexual transmission of infection* (Originally published 2008; updated 15 July 2011) at http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/ and <http://www.cps.gov.uk/publications/prosecution/sti.html>;
 - Crown Office and Procurator Fiscal Service of Scotland, *Guidance on intentional or reckless sexual transmission, or exposure to, infection*, May 2012, at <http://www.crownoffice.gov.uk/sites/default/files/Final%20Policy%201%20May%202012.pdf>. While the law in Scotland differs from England and Wales (the latter focussing on actual transmission rather than exposure and transmission), the Scotland guidance notes the following: “While recognising that culpable and reckless conduct to the danger of others is potentially criminal, in cases involving exposure to sexually transmitted infections, **where there has been no resultant transmission of the infection, prosecution for the crime of culpable and reckless conduct would only be contemplated in exceptional circumstances.**” “In cases of exposure alone, and in view of the negligible risk of transmission, there is a very strong presumption against prosecution” when “the person infected is receiving treatment and been given medical advice that there is a low risk of transmission or that there was only a negligible risk of transmission in some situations or for certain sexual acts”, or “the person infected took appropriate precautions such as using a condom or other safeguards throughout the sexual activity.” (see pp. 5 & 6);
 - The British HIV Association (BHIVA) and the Expert Advisory Group on AIDS (EAGA), *Position statement on the use of antiretroviral therapy to reduce HIV transmission*, January 2013, at <https://www.wp.dh.gov.uk/publications/files/2013/01/BHIVA-EAGA-Position-statement-on-the-use-of-antiretroviral-therapy-to-reduce-HIV-transmission-final.pdf>;
 - Letchumanan M, Wu W, Bondy L, et al, *Systematic review of HIV transmission between heterosexual serodiscordant couples where the HIV-positive partner is fully suppressed on ART* (forthcoming; data originally presented at 3rd International Workshop on HIV and Women, January 2013, Toronto, online: http://natap.org/2013/HIVwomen/HIVwomen_01.htm); and
 - A DVD of a 45-minute documentary on the impact of criminalization of HIV non-disclosure on women with HIV. The film, *Positive Women: Exposing Injustice* tells the personal stories of four women living with HIV in Canada — a woman in Quebec who was charged for not disclosing to her partner that she had HIV at the beginning of an ultimately abusive relationship (and who was the

accused in the matter of *R. v. D.C.* before the Supreme Court), a young woman who chose not to pursue charges against the man who infected her, an Aboriginal woman who has personally faced extreme stigma and threats, and a Latina woman who describes the challenges of disclosure and intimate relationships for women with HIV.

Thank you again for meeting with us. We very much look forward to providing further input into the development of prosecutorial guidelines for Crown prosecutors handling matters of alleged non-disclosure of HIV and other STIs. To this end, we would like to request that you kindly provide us, by February 25, 2013, a timeline according to which we can work together to develop these urgently needed guidelines.

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

Enclosures

c.c. The Honourable John Gerretsen, Attorney General
The Honourable Deborah Matthews, Minister of Health and Long-Term Care
Patrick Monahan, Deputy Minister, Ministry of the Attorney General