October 10, 2013

The Hon. Kathleen Wynne
Premier of Ontario
Legislative Building
Queen's Park
Toronto ON M7A 1A1

Canadian HIV/AIDS Legal Network | Réseau juridique canadien VIH/sida

Dear Premier:

Re: Criminal prosecutions for HIV non-disclosure

On behalf of the Canadian HIV/AIDS Legal Network, and the Ontario Working Group on Criminal Law and HIV Exposure of which we are an active member, thank you again for meeting with me and Stephen Lewis recently to discuss the concern of many in the HIV community about the overly broad use of the criminal law to prosecute people living with HIV. I know your schedule is very busy, and we appreciate you making the time to discuss this troubling and complex issue.

As Stephen noted, in his capacity as a former Commissioner, the Global Commission on HIV and the Law heard and received extensive submissions on this issue from around the world. It concluded, in its report released last year, that it was imperative to limit carefully the scope of the criminal law in this area. He noted, in particular, recommendations 2.2 and 2.4 of the Commission's report, which urge states as follows:

> *2.2 Law enforcement authorities must not prosecute people with HIV in cases of non-disclosure or exposure where no intentional or malicious HIV transmission has been proven to take place. Invoking criminal laws in cases of adult private consensual sexual activity is disproportionate and counterproductive to enhancing public health.*
>
> *2.4 Countries may legitimately prosecute HIV transmission that was both actual and intentional, using general criminal law, but such prosecutions should be pursued with care and require a high standard of evidence and proof.*

As I also noted at our meeting, UNAIDS and UNDP have urged a similarly limited resort to the criminal law, in a policy brief a few years ago and the most recent UNAIDS guidance document issued just earlier this year. In addition to the Global Commission's report, I was pleased to leave a copy of this recent UNAIDS guidance, with the most relevant portions highlighted, with you and your office.

Yet as we discussed, Ontario has been leading the way in Canada in prosecuting allegations of HIV non-disclosure, and doing so very aggressively, far beyond the scope of the limited approach recommended as best practice by such international bodies. A very recent example was the decision by the Ontario crown, contrary to all the medical evidence provided about the lack of risk, to maintain aggravated sexual assault charges against "J.M.", a woman in Barrie, simply for receiving oral sex without disclosing her status and even though she had an

1240 Bay Street, Suite 600, Toronto, Ontario, Canada M5R 2A7
Telephone: +1 416 595-1666 Fax: +1 416 595-0094 info@aidslaw.ca www.aidslaw.ca
Charitable Registration #141110155 RR0001

undetectable viral load at the time of the encounter. The risk of transmission in such a case is zero. We are relieved that the trial judge ultimately acquitted her on this charge, yet deeply disturbed that she was convicted in relation to other counts based on two brief encounters involving vaginal sex. On the facts of her case – including her undetectable viral load – charges should not have been laid in the first place, let alone conviction for aggravated sexual assault, one of the most serious crimes in the Criminal Code, and the Crown's subsequent position that it would seek to have her declared a dangerous offender or long-term offender.

We appreciate that, last year, the Supreme Court of Canada issued its rulings in the companion cases of *R. v. Mabior* and *R. v. D.C.* (As noted, the story of "D.C.", or "Dianne," is featured in the documentary film *Positive Women: Exposing Injustice*. I hope you may find time to view the copy I left, as I think it illustrates rather powerfully the ongoing reality of HIV stigma and the harms that overly broad criminalization of HIV does to women.) As discussed, it is our firm view that the Supreme Court erred wildly in the conclusion it ultimately adopted, casting the net of potential criminal prosecution far too widely in a decision that has been strongly condemned for its internal contradictions, its failure to even consider precedent cases decided on critical matters such as condom use and low viral load, and its divergence from what medical experts have to say about the extremely low risks of transmission in circumstances where a condom is used *or* a person has a low viral load.

I'm taking the liberty of enclosing a judgment released just this week in Nova Scotia, by one of Canada's most well-known feminist legal minds, in the matter of *R. v. Carroll*. As you can see (at paras. 14-19, 53-70), while she is bound by the Supreme Court's rulings in *Mabior* and *D.C.*, the Hon. Anne Derrick is highly critical of those rulings and their impact in further over-extending the criminalization of people living with HIV. Also enclosed is a series of short commentaries, by feminist lawyers, on those Supreme Court decisions, highlighting some of their deficiencies. As some proponents of a very broad and absolute criminalization of HIV non-disclosure advance that approach – including Crown prosecutors in Ontario courts – ostensibly in the name of protecting women's autonomy and well-being, we urge a more nuanced and careful analysis of how the misuse of the law is not only fuelling HIV-related stigma and undermining public health, but also how it is unhelpful and even harmful to women.

It is for these reasons, and others, that the CLHE has been urging, for years, **the development of prosecutorial guidelines by the Ontario Attorney General that would circumscribe in critical ways the use of criminal charges in cases of alleged HIV non-disclosure.** As I stressed at our meeting, the mere fact that the Supreme Court has authorized a very wide application of the criminal law in no way mandates that prosecutors seek to apply it to the fullest possible extent (or even seek to exceed it, as has been the case in a number of Ontario prosecutions). Not only must prosecutors consider in each case whether there is a reasonable prospect of conviction, but also whether it is in the public interest to pursue one. While naturally prosecutors must retain discretion in each individual case, there are very good reasons for the Attorney General to adopt some clear guidance for prosecutors that can indicate factors where prosecutions are not warranted and, where a case does go forward, the care that should be taken in handling it. There is ample precedent for such guidance already in the existing Crown Policy Manual.

It is, therefore, troubling to hear, from the Ministry of the Attorney General, simply that the policy being developed "will be consistent with the principles articulated by the Supreme Court of Canada in *R. v. Mabior* and *R. v. D.C.*" – as was communicated to us most recently by the Assistant Deputy Attorney General at the end of April of this year. While it is unclear exactly what this might mean, given the deficiencies of those rulings in casting the net of criminalization exceedingly widely, guidelines for prosecutors would be of little use if they simply encourage prosecution in line with the Supreme Court's interpretation of the notion of a "significant risk of transmission." It falls to the Attorney General of Ontario, in the adoption of such policy, to consider the strong justifications for exercising restraint in the resort to criminal prosecutions, to be guided by scientific evidence and to consider the broader public interest (including avoiding unjust prosecutions and undermining HIV prevention and treatment efforts that are in fact the things that have a positive impact on the health of Ontarians).

As you know, in 2011, in response to the commitment by the then Attorney General to develop guidelines that were informed by consultations with the HIV community and experts, CLHE prepared a report with numerous recommendations drawn from consultations around the province. Among the many important substantive and procedural recommendations about handling cases of alleged HIV non-disclosure, let me highlight again three that were mentioned at our meeting and which it is critical to include in any guidance to prosecutors in Ontario – namely, that **prosecutions for non-disclosure should not proceed (1) simply on the basis of oral sex; (2) if a condom or other latex barrier is used for vaginal or anal sex; or (3) if the HIV-positive partner had a low viral load.** Even with these three limitations, the law in this jurisdiction would still extend significantly beyond the narrow confines recommended by international experts and agencies.

Such limitations on prosecutions are advisable as a matter of avoiding unjust conviction and are well grounded in the scientific evidence we have today about HIV. As I mentioned in passing at our meeting, we are aware that leading Canadian medical experts concerned about the ongoing expansion of criminal prosecutions are in the process of reviewing the available scientific literature on HIV, including its risk of transmission via certain acts, and preparing an **expert scientific statement** on the subject. As you know, we and other members of CLHE have consistently taken the position that, since Canadian law on the matter of sexual assault has positioned the significance of the risk of transmitting HIV as a key element in determining when there may be criminal liability for non-disclosure, decisions about when to apply or pursue criminal charges must be based, among other considerations, on the best available scientific evidence about those risks. It would, therefore, be most appropriate to ensure that such medical expertise is considered in the process of drafting guidelines for crown prosecutors.

Finally, we discussed the importance of ensuring meaningful consultation with the HIV community, including the scientific experts just mentioned, but also people living with HIV, service providers, and legal experts working in this field. CLHE is the umbrella body in Ontario bringing together these parts of the HIV community to focus on this issue that is of widespread concern within the community. As CLHE has urged before, we ask that the Working Group have the opportunity to review and provide input on any draft guidelines. We have requested of the Ministry of the Attorney General that, in the interests of meaningful engagement in this discussion, we have two weeks' time to review a draft before a delegation from CLHE meets in

person to discuss the contents, and that one month be given after that meeting to provide input. CLHE includes a broad range of expertise and experience, and can select an appropriate and appropriately-sized delegation for such consultation, which we hope the Attorney General agrees should be transparent in formulating public policy that has very real consequences for public health and for human rights.

My CLHE colleagues and I would, of course, be happy to meet with you and your staff for further discussions as this initiative moves forward. Thank you again for taking the time to meet and to understand the serious human rights and public health concerns at play.

Sincerely yours,

Richard Elliott
Executive Director

Cc: Stephen Lewis, Commissioner, Global Commission on HIV and the Law
Ryan Peck, Co-Chair, Ontario Working Group on Criminal Law and HIV Exposure