

30 MAR 2010



Canadian HIV/AIDS Legal Network	Réseau juridique canadien VIH/sida
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March 29, 2010

The Honourable Chris Bentley  
Attorney General  
Ministry of the Attorney General  
720 Bay St., 11<sup>th</sup> floor  
Toronto, ON M5G 2K1

Dear Minister Bentley:

**Re: Policy to inform prosecution of cases of alleged HIV non-disclosure**

We write on behalf of the Ontario Working Group on Criminal Law and HIV Exposure, the HIV & AIDS Legal Clinic (Ontario) (“HALCO”) and the Canadian HIV/AIDS Legal Network, following up on our earlier correspondence regarding the question of policies governing the use of the criminal law to deal with prosecutions for alleged non-disclosure of HIV-positive status. We kindly wish to request a meeting to review policy options for how to deal with such circumstances, informed by the best available scientific evidence and by consideration of the impact of such prosecutions.

As noted in our previous letter of January 13, 2010, we are very pleased to note that you agree that the policies of the Attorney General need to change or evolve in keeping with current societal views – and reiterate that this is particularly pertinent in the context of prosecutions for HIV non-disclosure, as both the law and the relevant science continue to evolve. As you noted, the issue of the consistent use and interpretation of scientific and medical evidence in cases involving HIV non-disclosure is part of the larger question of ensuring the consistent and appropriate use of expert scientific evidence in the criminal justice system more generally.

You also invited us to provide you with any material that we feel may assist Crowns in their use of expert evidence. As you know, in a landmark decision in 1998, *R. v. Cuerrier*, [1998] 2 S.C.R. 371, the Supreme Court of Canada clarified that, for the purposes of the aggravated (sexual) assault provisions of the *Criminal Code*, there must be a “significant risk of serious bodily harm” before a duty to disclose something such as HIV-positive status arises. This “significant risk” test has, ever since, been at the heart of a great deal of uncertainty about the scope of the law and, consequently, of inconsistent and sometimes inappropriate pursuit of charges against people living with HIV. There have been a number of developments in the jurisprudence in this area over the last 12 years. In addition, as you may know, a research project

funded by the Ontario HIV Treatment Network, which will provide a thorough review of scientific research on the risks of sexual transmission of HIV and insights from a range of actors, is nearing completion.

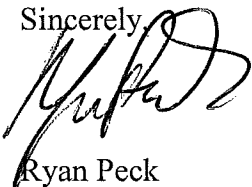
Given the evolving science and law and the uncertainty of the current legal standard, there is both real and potential unfairness arising from the ad hoc and inappropriate application of the criminal law to deal with the difficult issue of HIV non-disclosure. This raises not only concerns about individual cases of injustice, but also risks undermining broader efforts at protecting public health through proven, effective programs and measures to prevent the spread of HIV and ensure care, treatment and support for those living with HIV. Therefore, in our view it is important that the Ministry of the Attorney General establish a process for developing some policy guidance for Crown counsel in Ontario in determining the appropriate parameters of the application of the criminal law in such cases.

We therefore respectfully request an opportunity to meet with the appropriate decision-makers within the Ministry of the Attorney General to provide the most up-to-date information and discuss policy options.

HALCO and the Legal Network have for many years been providing information to communities and service-providers and monitoring legal developments in this area, as well as intervening in several appeals on these matters and, most recently, providing some training for federally-appointed judges in collaboration with the National Judicial Institute. The Ontario Working Group on Criminal Law and HIV Exposure consists of AIDS service organizations, people living with HIV/AIDS and other front-line service providers from across the province. Ryan Peck, Executive Director of HALCO, is co-chair of the Working Group.

We look forward to hearing from you regarding our request and thank you kindly for your attention to this matter.

Sincerely,



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