

ONTARIO WORKING GROUP ON CRIMINAL LAW + HIV EXPOSURE



November 30, 2016

Honourable Glen Murray
Minister of the Environment and Climate Change
11th Floor, Ferguson Block
77 Wellesley Street West
Toronto, Ontario M7A 2T5

Dear Minister Murray,

Re: Ministerial Roundtable on Criminal Law and HIV

On behalf of the Ontario Working Group on Criminal Law and HIV Exposure (CLHE), we thank you for organizing the Ministerial Roundtable on Criminal and HIV on December 5th, 2016.

We note that attention to Canada's approach to HIV non-disclosure is growing, including internationally. The Canadian Government recently welcomed *The Just Society Report* released by Egale Canada Human Rights Trust on June 10, 2016 to denounce discrimination against LGBTQI communities. The report specifically "exhort[s] federal and provincial Attorneys General to take action to limit the scope and application of the criminal law, in keeping with best practice, and international, evidence-based recommendations".¹ On November 18, 2016, the United Nations Committee on the Elimination of Discrimination against Women recommended that Canada "limit the application of criminal law provisions to cases of intentional transmission of HIV/AIDS, as recommended by international public health standards."²

We are very much looking forward to the Roundtable where we expect to discuss concrete steps to prevent unjust HIV-related prosecutions in Ontario. You will find attached a brief being shared with each Minister participating in the event. The brief provides an overview of the issues and some recommendations to move forward that we hope your Ministry will support.

Thank you for your continuing interest in this issue of great importance to people living with HIV and the LGBTQI community.

¹ See, "Prime Minister announces Special Advisor on LGBTQ2 issues", News Release, Ottawa, Ontario November 15, 2016. *The Just Society Report* is available online at egale.ca/wp-content/uploads/2016/06/FINAL_REPORT_EGALE.pdf.

² See, 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.

Sincerely,



Ryan Peck

Barrister & Solicitor, Executive Director, HIV & AIDS Legal Clinic Ontario
Co-Chair, Ontario Working Group on Criminal Law and HIV Exposure



Valérie Pierre-Pierre, Director, African and Caribbean Council on HIV/AIDS in
Ontario

Co-Chair, Ontario Working Group on Criminal Law and HIV Exposure

Enclosure

- Exploring avenues to address problematic prosecutions against people living with HIV in Ontario: Ministers Roundtable (Ontario Working Group on Criminal Law and HIV Exposure, November 30, 2016)
- 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

ONTARIO WORKING GROUP ON CRIMINAL LAW + HIV EXPOSURE



November 30, 2016

VIA ELECTRONIC MAIL

Honourable Tracy MacCharles
Ontario Women's Directorate
10th Floor, Hepburn Block
80 Grosvenor Street
Toronto, Ontario M7A 1E9

Dear Minister MacCharles,

Re: Ministerial Roundtable Criminal Law and HIV

Please accept this letter on behalf of the Ontario Working Group on Criminal Law and HIV Exposure (CLHE).

We thank you in advance for participating in the Ministerial Roundtable on issues surrounding criminal law and HIV, taking place on December 5, 2016. In addition to the Ontario Women's Directorate (OWD), participating will be: (i) Ministry of the Attorney General; (ii) Ministry of the Environment and Climate Change; (iii) Ministry of Community Safety and Correctional Services; and (iv) Ministry of Health and Long-Term Care.

As background, it is important to note that CLHE has been working for many years to confront the growing crisis of criminal prosecutions of people living with HIV in Ontario.¹ Since 2010, CLHE has been in discussions with the Ministry of the Attorney General (MAG) to ensure that the manner in which such prosecutions occur 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.

In December 2010, CLHE was very pleased that then Attorney General Chris Bentley agreed to develop, with the input of CLHE, guidance for Crown prosecutors in relation to HIV non-disclosure, and to share a draft with CLHE. In summer 2011, CLHE provided MAG with a *Report and Recommendations*² based on community and expert consultations conducted by CLHE around the province with people living with HIV, communities affected by HIV, legal, public health, criminal justice and scientific experts, health care providers, and advocates for women's rights in the context of sexual violence and the criminal justice system.

¹ Please see <http://clhe.ca/advocacy-timeline> for the history of the written record of discussions.

² Please see <http://clhe.ca/wp-content/uploads/CHLE-guidelines-report.pdf>.

In May 2014, over 75 leading scientific experts signed the Canadian Consensus Statement on HIV and its Transmission in the Context of Criminal Law (Consensus Statement), which details the science surrounding HIV transmission and raises serious concerns with the manner in which criminal prosecutions are taking place.³ The statement was sent to MAG by Drs. Mona Loutfy and Mark Tyndall, co-chairs of the scientific expert team who developed the Consensus Statement.

Although the above material was provided to MAG, and although discussions have been taking place for six years, appropriate guidance has not been developed and the scope of the problem continues to escalate. People living with HIV continue to be charged with *aggravated sexual assault* – one of the most serious offenses in our Criminal Code – even where there is no intent to cause harm, no transmission occurs and the risks of transmission are negligible if not zero.

Canadian women’s rights advocates are also expressing concerns about the current use of the criminal law against people living with HIV.⁴ Criminalization is often described as a tool to protect women from HIV infection and enhance women’s dignity and autonomy in sexual decision-making. This perception is reinforced by (i) the fact that the vast majority of people who have been charged to date are men who had sex with women and (ii) the application of sexual assault law in those cases. However, a gendered analysis of the current use of the criminal law with respect to HIV reveals that criminalization is a blunt, punitive and inflexible approach to HIV prevention that does little to protect women from HIV infection, violence, coercion or sexual objectification. Moreover, the use of sexual assault law in the HIV non-disclosure context — where the sexual activity is consensual — is a poor fit and can ultimately have a detrimental impact on sexual assault law as a tool to advance gender equality and renounce gender-based violence.⁵

Women living with HIV may not be in a position to disclose and/or impose the use of a condom, which could put them at high risk of being criminalized. In particular, the criminalization of HIV non-disclosure can have a serious, adverse impact on women living with HIV, especially if facing challenges due to their socioeconomic status, discrimination, insecure immigration status, or abusive or dependent relationships.⁶ An

³ M Loutfy, M Tyndall, J-G Baril, JSG Montaner, R Kaul, C Hankins. Canadian consensus statement on HIV and its transmission in the context of criminal law. *Can J Infect Dis Med Microbiol* 2014;25(3):135-140, at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4173974/>

⁴ 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). Available online at www.consentfilm.org

⁵ Canadian HIV/AIDS Legal Network, *What does consent really mean? Rethinking HIV non-disclosure and sexual assault law meeting report*, 2014. Available at www.consentfilm.org/resources-and-publications/.

⁶ P. Allard, C. Kazatchkine and A. Symington, “Criminal prosecutions for HIV non-disclosure: Protecting women from infection or threatening prevention efforts?” in J. Gahagan (ed.), *Women and HIV Prevention in Canada: Implications for Research, Policy, and Practice* (Toronto:Women’s Press, 2013): pp. 195–218.

overly broad use of the criminal law puts women at increased risk of violence⁷ and prosecution by providing a tool of coercion or revenge for vindictive partners. As illustrated by the D.C. case in Quebec⁸ (where the defendant turned to the police for protection from her violent partner prior to the allegation of HIV non-disclosure), the criminalization of HIV non-disclosure can affect women in abusive relationships or who occupy marginalized positions in society.

Some of the women prosecuted for HIV non-disclosure and/or other HIV-related criminal offenses in Canada, including in Ontario, are survivors of violence and/or sexual violence; some are living in socioeconomic insecurity; some have insecure immigration status or are members of Indigenous and racialized communities who continue to suffer from the effects of colonization, slavery and racism.⁹ In 2016, at least one woman living with HIV has been charged in Ontario. Two weeks ago, an Aboriginal woman, who endured an extremely difficult childhood, received an 18-month suspended sentence for spitting at a man. The media headlines described her as an “HIV-infected spitter.” In 2013, a woman living with HIV in Ontario was convicted and sentenced to 36 months in prison for not disclosing her status before one instance of casual sex without a condom. Her viral load at the time was undetectable and the risk of transmission was therefore close to zero if not zero.

Research on the impact of the criminalization of HIV non-disclosure on women living with HIV is currently ongoing in Canada. In particular, researchers are studying the impact of HIV criminalization on women’s access to care, treatment and support, and women’s decisions to engage in sexual relationships. Evidence already suggests that the criminalization of HIV non-disclosure may represent a structural barrier to health care engagement for some people living with HIV in Canada, discouraging access to HIV testing and linkage to HIV care services required to achieve viral suppression, which is important to promote both individual and community health.¹⁰ Studies have also reported high rates of sexual abstinence among women living with HIV associated with high HIV related-stigma.¹¹

⁷ 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, Report on the 14th session, UN General Assembly, agenda item 3, UN Doc. A/HRC/14/20, April 27, 2010. Available at www.aidslaw.ca/site/wp-content/uploads/2014/02/4_R.Special2010EN.pdf, at para. 71.

⁸ *R. v. D.C.*, 2012 SCC 48; B. Myles, « De bourreau à victime; de victime à criminelle », *Le Devoir*, February 15, 2008.

⁹ See, for instance, C. Kazatchkine and L. Gervais, “Canada’s newest sex offenders,” *Winnipeg Free Press*, March 8, 2016; Canadian HIV/AIDS Legal Network, “Women and the Criminalization of HIV Non-Disclosure,” info sheet, 2012.

¹⁰ 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. Available at <http://jiasociety.org/index.php/jias/article/view/20572>

¹¹ A. Kaida et al., “Sexual inactivity and sexual satisfaction among women living with HIV in Canada in the context of growing social, legal and public health surveillance,” *Journal of the International AIDS Society* 18, Supplement 5 (2015): 20284. Available at <http://jiasociety.org/index.php/jias/article/view/20284>.

The criminalization of HIV non-disclosure undermines the rights of women living with HIV and public health as recognized by the UN Committee on the Elimination of Discrimination against Women in its concluding observations released on November 18, 2016 and following its review of Canada's compliance with the *Convention on the Elimination of All Forms of Discrimination against Women*.¹² In particular, the Committee recommended that Canada limit the application of criminal law provisions to cases of intentional transmission of HIV, as recommended by international public health standards. It noted the need for a review of the concerning application of harsh criminal sanctions, such as aggravated sexual assault, to women for not 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.

It is our understanding that representatives of the HIV community have already met with you to discuss the issue of the overly broad use of the criminal law against people living with HIV and its implications for women.

We look forward to the Roundtable where we expect to discuss concrete steps to prevent unjust HIV-related prosecutions in Ontario. Attached is a brief being shared with each Minister participating in the event. The brief provides an overview of the issue and some recommendations to move forward.

Given the particular impact of HIV-related prosecutions on women living with HIV, the OWD has an important role to play in supporting measures to protect human rights and public health by limiting the use of the criminal law in cases of HIV non-disclosure. In particular, we urge OWD to work with CLHE to:

- Call for a limiting use of the criminal law and for a limiting use of the law of sexual assault in the context of HIV non-disclosure.
- Contribute to the development and delivery of evidence-based resources and trainings for Crown prosecutors, police forces and prison guards on HIV and on violence against women.
- Contribute to the development and implementation of alternatives to criminal charges and prosecutions to limit the use of the criminal law against people living with HIV especially where there is no alleged transmission and/or malicious intent to transmit HIV.
- Help ensure potential complainants receive appropriate support and referrals in cases of HIV non-disclosure.

¹² 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

- Take measures to protect women living with HIV from violence, harassment and domestic abuse including through the threat of HIV non-disclosure charges.

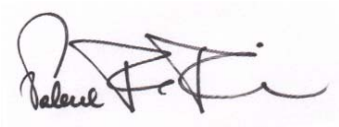
Thank you for your attention to this matter, and we look forward to the Roundtable followed by further engagement.

Sincerely,



Ryan Peck

Barrister & Solicitor, Executive Director, HIV & AIDS Legal Clinic Ontario
Co-Chair, Ontario Working Group on Criminal Law and HIV Exposure



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

Encl

- Exploring avenues to address problematic prosecutions against people living with HIV in Ontario: Ministerial Roundtable (Ontario Working Group on Criminal Law and HIV Exposure, November 30, 2016)
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ONTARIO WORKING GROUP ON CRIMINAL LAW + HIV EXPOSURE



November 30, 2016

Honourable Eric Hoskins
Ministry of Health and Long-Term Care
10th Floor, Hepburn Block
80 Grosvenor Street
Toronto, Ontario M7A 2C4

Dear Minister Hoskins,

Re: Ministerial Roundtable on Criminal Law and HIV

Please accept this letter on behalf of the Ontario Working Group on Criminal Law and HIV Exposure (CLHE).

We are looking forward to the Ministerial Roundtable on December 5, 2016 on issues surrounding criminal law and HIV. In addition to your Ministry, participating will be: (i) Ministry of the Attorney General; (ii) Ministry of the Environment and Climate Change; (iii) Ontario Women's Directorate; and (iv) Ministry of Community Safety and Correctional Services.

We look forward to the Roundtable where we expect to discuss concrete steps to prevent unjust HIV-related prosecutions in Ontario. Attached is a brief being shared with each Minister participating in the event. The brief provides an overview of the issue and some recommendations to move forward.

Given the negative public health impacts of an overly broad use of the criminal law against people living with HIV, the Ministry of Health and Long-Term Care has a central role to play in supporting and implementing measures to protect human rights and public health by limiting the use of the criminal law in cases of HIV non-disclosure.

In particular, we urge the Ministry of Health and Long-Term Care to work with CLHE to:

- Call for a limiting use of the criminal law against people living with HIV.
- Contribute to the development and delivery of evidence-based resources and trainings for Crown prosecutors, police forces and prison guards on HIV.
- Contribute to the development and implementation of alternatives to criminal charges and prosecutions to limit the use of the criminal law against people living with HIV especially where there is no alleged transmission and/or malicious intent to transmit HIV.

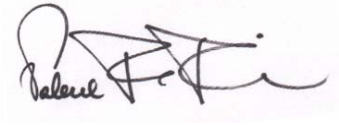
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Sincerely,



Ryan Peck

Barrister & Solicitor, Executive Director, HIV & AIDS Legal Clinic Ontario
Co-Chair, Ontario Working Group on Criminal Law and HIV Exposure



Valérie Pierre-Pierre, Director, African and Caribbean Council on HIV/AIDS in Ontario

Co-Chair, Ontario Working Group on Criminal Law and HIV Exposure

Enclosure

- Exploring avenues to address problematic prosecutions against people living with HIV in Ontario: Ministerial Roundtable (Ontario Working Group on Criminal Law and HIV Exposure, November 30, 2016)

ONTARIO WORKING GROUP ON CRIMINAL LAW + HIV EXPOSURE



November 30, 2016

Honourable David Oraziatti
Ministry of Community Safety and Correctional Services
18th Floor, George Drew Building
25 Grosvenor Street
Toronto, ON M7A 1Y6

Dear Minister Oraziatti,

Re: Ministerial Roundtable on Criminal Law and HIV

Please accept this letter on behalf of the Ontario Working Group on Criminal Law and HIV Exposure (CLHE).

We thank you in advance for participating in the Ministerial Roundtable on issues surrounding criminal law and HIV, taking place on December 5, 2016. In addition to your Ministry, participating will be: (i) Ministry of the Attorney General; (ii) Ministry of the Environment and Climate Change; (iii) Ontario Women's Directorate; and (iv) Ministry of Health and Long-Term Care.

As background, it is important to note that CLHE has been working for many years to confront the growing crisis of criminal prosecutions of people living with HIV in Ontario.¹ Since 2010, CLHE has been in discussions with the Ministry of the Attorney General (MAG) to ensure that the manner in which such prosecutions occur 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.

In December 2010, CLHE was very pleased that then Attorney General Chris Bentley agreed to develop, with the input of CLHE, guidance for Crown prosecutors in relation to HIV non-disclosure, and to share a draft with CLHE. In summer 2011, CLHE provided MAG with a *Report and Recommendations*² based on community and expert consultations conducted by CLHE around the province with people living with HIV, communities affected by HIV, legal, public health, criminal justice and scientific experts, health care providers, and advocates for women's rights in the context of sexual violence and the criminal justice system.

¹ Please see <http://clhe.ca/advocacy-timeline> for the history of the written record of discussions.

² Please see <http://clhe.ca/wp-content/uploads/CHLE-guidelines-report.pdf>.

In May 2014, over 75 leading scientific experts signed the Canadian Consensus Statement on HIV and its Transmission in the Context of Criminal Law (Consensus Statement), which details the science surrounding HIV transmission and raises serious concerns with the manner in which criminal prosecutions are taking place.³ The statement was sent to MAG by Drs. Mona Loutfy and Mark Tyndall, co-chairs of the scientific expert team who developed the Consensus Statement.

Although the above material was provided to MAG, and although discussions have been taking place for over six years, appropriate guidance has not been developed and the scope of the problem continues to escalate. People living with HIV continue to be charged with *aggravated sexual assault* – one of the most serious offenses in our Criminal Code – even where there is no intent to cause harm, no transmission occurs and the risks of transmission are negligible if not zero.

We look forward to the Roundtable where we expect to discuss concrete steps to prevent unjust HIV-related prosecutions in Ontario. Attached is a brief being shared with each Minister participating in the event. The brief provides an overview of the issue and some recommendations to move forward.

From the laying of charges and issuance of press releases, to the treatment of people with HIV in correctional institutions, the Ministry of Community Safety and Correctional Services has a central role to ensure that the use of the criminal law is based on up-to-date science and human rights principles. To this end, in 2013, the Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic Ontario provided submissions and recommendations to the Ontario Association of Chiefs of Police (OACP) Diversity Committee.⁴ An adapted version of the submission was included in the OACP's *Best Practices in Policing and LGBTQ Communities in Ontario* (November 2013).⁵

CLHE echoes the police-related recommendations in above submissions and report, and further recommends initiatives in relation to correctional institutions. We urge the Ministry of Community Safety and Correctional Services to work with CLHE to:

- Develop resources and training for police forces on handling matters of alleged non-disclosure, including the issuance of press releases, HIV non-disclosure prosecutions, HIV transmission, occupational exposure to HIV, post-exposure prophylaxis, HIV testing, and HIV medical care.
- Develop resources and training on the realities of living with HIV, as well as HIV and human rights, privacy and confidentiality.

³ M Loutfy, M Tyndall, J-G Baril, JSG Montaner, R Kaul, C Hankins. Canadian consensus statement on HIV and its transmission in the context of criminal law. *Can J Infect Dis Med Microbiol* 2014;25(3):135-140, at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4173974/>

⁴ Please see <http://tinyurl.com/zf2dddt>.

⁵ Please see <http://tinyurl.com/kb273px>.

- Develop resources and training for police to provide support to potential complainants in cases of HIV non-disclosure and appropriate referrals.
- Develop resources and training for police on sexual violence, abuse and harassment against people living with HIV, especially women.
- Develop resources and training for corrections staff on HIV transmission, occupational exposure to HIV, post-exposure prophylaxis, HIV testing, and HIV medical care.
- Develop resources and training for corrections staff on the realities of living with HIV, as well as HIV and human rights, privacy and confidentiality.
- Take measures to prevent any interruption of treatment in detention and correctional facilities and guarantee access to care.
- Take measures to reduce the use of segregation against people living with HIV and protect prisoners against discrimination and violence.

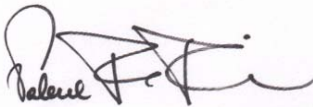
Thank you for your attention to this matter, and we look forward to the Roundtable followed by further engagement.

Sincerely,



Ryan Peck

Barrister & Solicitor, Executive Director, HIV & AIDS Legal Clinic Ontario
Co-Chair, Ontario Working Group on Criminal Law and HIV Exposure



Valérie Pierre-Pierre, Director, African and Caribbean Council on HIV/AIDS in Ontario
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Enclosure

- Exploring avenues to address problematic prosecutions against people living with HIV in Ontario: Ministerial Roundtable (Ontario Working Group on Criminal Law and HIV Exposure, November 30, 2016)

**ONTARIO WORKING GROUP ON
CRIMINAL LAW +
HIV EXPOSURE**



November 30, 2016

VIA ELECTRONIC MAIL

Honourable Yasir Naqvi
Attorney General
Ministry of the Attorney General
720 Bay Street, 11th Floor
Toronto, ON M5G 2K1

Dear Minister Naqvi,

Re: Ministerial Roundtable on Criminal Law and HIV

Please accept this letter on behalf of the Ontario Working Group on Criminal Law and HIV Exposure (CLHE).

We thank you in advance for participating in the Ministerial Roundtable on issues surrounding criminal law and HIV, taking place on December 5, 2016. In addition to your Ministry, participating will be: (i) Ministry of Community Safety and Correctional Services; (ii) Ministry of the Environment and Climate Change; (iii) Ontario Women's Directorate; and (iv) Ministry of Health and Long-Term Care.

We note that attention to Canada's approach to HIV non-disclosure is growing, including internationally. On November 18, 2016, the United Nations Committee on the Elimination of Discrimination against Women recommended that Canada "limit the application of criminal law provisions to cases of intentional transmission of HIV/AIDS, as recommended by international public health standards."¹

We have been in discussions with your Ministry since 2010 and as mentioned at our meeting with Delia Greco, Senior Policy Advisor, and in our letter of November 15, 2016, we expect to discuss concrete steps to prevent unjust HIV-related prosecutions in Ontario at the Roundtable. Attached is a brief being shared with each Minister participating in the event. The brief provides an overview of the issue and some recommendations to move forward.

The Ministry of Attorney General (MAG) has a central role to play in taking measures to protect human rights and public health by limiting HIV-related prosecutions. In particular, we urge MAG to work with CLHE to:

¹ 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.

- Develop policy directives for HIV-related prosecutions to limit the use of the criminal law in cases of HIV non-disclosure and safeguard the rights of people living with HIV at all stages of criminal proceedings, including at bail and sentencing.
- Explore and implement alternatives to criminal charges and prosecutions to limit the use of the criminal law against people living with HIV especially where there is no alleged transmission and/or malicious intent to transmit HIV.
- Develop and deliver evidence-based resources and trainings for Crown prosecutors on HIV, its transmission and the reality of living with HIV in collaboration with the community and scientific experts.
- Track HIV-related prosecutions in a transparent manner.

As indicated in our letter of November 15, 2016, we are available to discuss these recommendations in advance of the Roundtable.

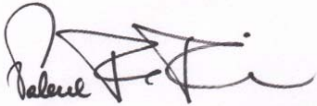
Thank you for your attention to this matter.

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Ryan Peck

Barrister & Solicitor, Executive Director, HIV & AIDS Legal Clinic Ontario
Co-Chair, Ontario Working Group on Criminal Law and HIV Exposure



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