HIV and Human Rights: Policy Watch

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Up Front

HIV non-disclosure: two landmark cases before the Supreme Court

In February, the Supreme Court of Canada heard two landmark appeals on the issue of HIV non-disclosure in *R v. Mabior* and *R v. D.C*. The Court's decision will have profound implications not only for people living with HIV (PLHIV), but also for Canadian public health, police practice and the criminal justice system.

The Canadian HIV/AIDS Legal Network, an intervener in the joint appeal, is extremely concerned about the escalation and severity of criminal charges involving HIV non-disclosure. Currently, Canadian criminal law requires PLHIV to disclose their status before engaging in behaviour that involves a "significant risk" of transmitting the virus. Among the PLHIV charged, there have been numerous cases in which their activity posed no significant risk of HIV transmission. Indeed, prosecutors, juries and judges have reached different conclusions about how to apply what is supposed to be the same law. Such application contributes to a climate of anxiety, fear, stigma and misinformation that puts all Canadians at greater risk.

A blanket criminalization of HIV non-disclosure also poses real concerns from a public health perspective. There is no evidence to suggest that the threat of criminal charges encourages people to disclose their status, seek HIV counselling and education, and discuss preventive measures. In fact, many health and service providers have raised concerns, based on their regular experience that criminalization can contribute to driving the epidemic and PLHIV underground.

In our view, at a minimum, the courts need to confirm that PLHIV are not criminals for not disclosing their serostatus in cases where the threshold of significant risk is not met - including cases where condoms are used or an HIV-positive person has a low or undetectable viral load (e.g., because of effective treatment with antiretroviral drugs). The law should instead seek to protect and uphold the human rights of all people, including PLHIV, and be guided by the best available scientific evidence.

A ruling is expected in these cases in the latter half of 2012. In the meantime, the Legal Network and other partners are active in other court cases and on other fronts to limit the unjustified expansion of the criminal law. Most recently, the Legal Network has produced a documentary, *Positive Women: Exposing Injustice*, which tells the story of four Canadian HIV-positive women and how criminalization affects them. It shows the human side of this complex issue. Please watch for screenings and panel discussions in your area by visiting

our "Stop the Criminalization of HIV non-Disclosure!" Web page.

Further reading:

- Briefing Note: Criminalizing non-disclosure of HIV status
- Criminal prosecutions for HIV non-disclosure: two cases before the Supreme Court of Canada
- Criminal Law and HIV Non-Disclosure in Canada: Questions and Answers
- Criminal Law and HIV

Fast Facts[1]:

- Number of people living with HIV in Canada charged in the past 15 years: more than **130**
- Number of those individuals convicted: **65**
- Estimated risk of HIV transmission via unprotected female-to-male intercourse (per act): **0.04%**
- Estimated risk of HIV transmission via unprotected male-to-female intercourse (per act): **0.08%**
- Estimated risk of HIV transmission via unprotected receptive anal intercourse (per act): **1.7%**
- Percentage by which risk of HIV transmission is reduced from a HIV-positive to HIV-negative person if the former is on antiretroviral therapy: **96**
- Estimated risk of HIV transmission via protected female-to-male intercourse (per act): **0.008%**
- Estimated risk of HIV transmission via protected male-to-female intercourse (per act): **0.016%**
- Estimated risk of HIV transmission via protected receptive anal intercourse (per act): **0.338%**

In Focus

Senate hearings on Bill C-10 wrap up; bill expected to become law this month

In February, the Senate Committee on Legal and Constitutional Affairs wrapped up hearing on Bill C-10, the *Safe Streets and Communities Act*. Among other things, the bill would impose mandatory minimum prison sentences for a range of drug offences, including in circumstances giving rise to considerable concern about the over-extension of the law, with various negative consequences.

Many experts and organizations, including the Canadian HIV/AIDS Legal Network, maintain that mandatory minimum sentences for drug offences will result in prison overcrowding, backlogged courts and potential miscarriages of justice. It is expected that, as is currently the case, the impact of heightened levels of incarceration will fall disproportionately on Aboriginal people. There are also public health fears, particularly in regard to sentences for drug offences. Mandatory sentences as contemplated in these cases will further increase the already high rates of incarceration among people with addictions. Because a significant portion of people inject drugs while incarcerated

- often with shared, used equipment - the risk of transmission of HIV and hepatitis C is significantly heightened. Indeed, prevalence of both diseases is much higher among people in Canadian prisons than the public as a whole, which mirrors the situation in prisons in many other countries.

Speculation that mandatory minimum sentences might eventually face a constitutional challenge under the *Canadian Charter of Rights and Freedoms* was underscored in February when an Ontario Superior Court judge refused to impose a mandatory three-year sentence on a man accidentally caught with a loaded handgun, calling it "cruel and unusual punishment" in the circumstances of the case.

Bill C-10 was introduced at a time when statistics show that the rate of violent crime in Canada is at its lowest level since 1973, and public opinion polls show most Canadians think the emphasis should be on prevention, not punishment. There is also no evidence to indicate that this punitive approach to crime has workedelsewhere.

Bill C-10 is expected to become law this month.

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Bill seeking reforms to Canada's Access to Medicines Regime introduced

Bill C-398, a slightly modified version of an earlier private member's bill that seeks to streamline Canada's Access to Medicines Regime (CAMR), was introduced in the House of Commons on February 16. The bill will attempt to cut red tape in the Patent Act that prevents generic companies from producing brand-name medicines for HIV and other public health problems for those needlessly suffering in developing countries because they cannot afford the price of life.

An identical bill had been passed - with support from MPs representing all parties - by the previous House of Commons in March 2011. It arrived in the Senate just before the election call last spring and died on the Order Paper.

This time, and with continued support across party lines, Bill C-398 could see Canada finally fixing Canada's moribund law - and doing so with a very positive global precedent about how to use "flexibilities" in the World Trade Organization (WTO) treaty on patents to get life-saving, affordable medicine to those in need. A similar piece of legislation may also be introduced in the Senate soon.

When Bill C-398 was introduced, more than 100 Canadian civil society organizations endorsed a call for fixing CAMR, saying that the need for access to affordable medicines remains as urgent as ever. Although 15 million people with HIV in low- and middle-income countries need treatment, only 6 million are receiving it. For children with HIV, access to treatment is even worse. Roughly half of all children born with HIV will die before reaching their second birthday if they do not have the medicines they need.

In 2004, Parliament unanimously passed legislation creating CAMR. However, since that time, it has resulted in only one licence being issued to authorize the export of one order of one AIDS drug to one country (Rwanda).