

Canadian HIV/AIDS Legal Network
Submission to the Global Commission on HIV and the Law

CANADA
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Introduction

The Canadian HIV/AIDS Legal Network (www.aidslaw.ca) promotes the human rights of people living with and vulnerable to HIV/AIDS, in Canada and internationally, through research and analysis, advocacy and litigation, public education and community mobilization.

1. Laws and practices that criminalize people living with HIV and vulnerable to HIV

A. People who use drugs

Insite, Vancouver's **supervised injection facility**, has decreased rates of syringe-sharing and deaths from overdose, reduced the risk of HIV and hepatitis C (HCV) transmission and increased the chances of directing drug users to addiction treatment services.¹ In 2008, a trial court judgment protected Insite from closure, thus enabling the facility to operate without fear of users or staff being criminally prosecuted.² This decision was affirmed by that province's appellate court in 2010.³ However, the federal government appealed the decision to the Supreme Court of Canada (decision pending) and maintains a moratorium on considering new applications to open any other such facilities.

In 2011, the federal government announced its intention to introduce legislation that would impose **mandatory minimum sentences for certain drug offences**, despite a Department of Justice review that concluded that mandatory minimum sentences for drug offences have little impact on crime and two decades of disastrous experience in the United States with similar legislation.⁴ Such legislation would incarcerate more people who are already vulnerable to HIV and HCV infection, where drug use will continue, but often with even higher risks for transmission of such blood-borne infections because prisoners lack access to sterile injection equipment.

B. People in prison

In Canada, estimates of HIV and HCV prevalence in prisons are at least ten and thirty times, respectively, the reported prevalence in the population as a whole.⁵ A 2007 national survey revealed that 15 percent of people incarcerated in federal prisons reported having injected an illegal drug since arriving at their current institution and almost half of those injected with a needle already used by someone else.⁶ To date, prison-based needle and syringe programs (PNSPs) have been introduced in over 60 prisons in 11 countries,⁷ and evaluations of PNSPs have consistently demonstrated that they reduce the use of non-sterile injecting equipment and resulting blood-borne infections, do not lead to increased drug use or injecting, reduce drug overdoses, facilitate referral of users to drug treatment programmes and have not resulted in needles or syringes being used as weapons.⁸ Moreover, such programs have been supported by numerous organizations in Canada, including the Canadian and Ontario Medical Associations, the Correctional Investigator of Canada (federal prisons ombudsman) and the Canadian Human Rights Commission. Yet, federal, provincial and territorial governments have to date failed, or explicitly refused, to authorize PNSPs in their institutions, preferring to focus almost exclusively on drug interdiction.

C. Sex workers

While prostitution is legal in Canada, certain provisions of the *Criminal Code* make illegal virtually every activity related to prostitution and render sex workers vulnerable to violence and HIV. Sections 210 to 213 of the *Criminal Code* criminalize keeping or transporting a person to a “bawdy house”, “living on the avails” of prostitution by someone else, and “communicating in public for the purposes of prostitution.” The preponderance of credible evidence demonstrates that these provisions contribute to sex workers’ risk of experiencing violence and other threats to their health and safety by preventing them from adequately screening clients and from working indoors in a protected environment and in association with others (including bodyguards), forcing them to work in more secluded areas to avoid police detection and prosecution, and impeding their access to health services.⁹ These risks are borne disproportionately by street-based sex workers, who are disproportionately transgender persons, Aboriginal persons or people with drug dependence. In 2010, an Ontario trial court struck down these *Criminal Code* provisions as violating constitutional rights to freedom of expression and to security of the person — the latter because those provisions force sex workers into more dangerous situations and contribute to a greater risk of violence and other threats to their health and safety, thereby impermissibly violating constitutional rights to liberty and to security of the person.¹⁰ The federal government chose to appeal the decision, which is currently before the Ontario Court of Appeal.

D. Criminalization of HIV non-disclosure

Although there is no evidence that criminalizing HIV non-disclosure can play any significant role in HIV prevention, the number of prosecutions against people living with HIV (PLHIV) continues to increase in Canada. With a total of 130 people charged (at time of writing) for not disclosing their HIV-positive status to sexual partners,¹¹ Canada is considered a world leader in prosecutions against PLHIV.¹² There are no specific HIV-related crimes in the *Criminal Code*. Rather, existing *Criminal Code* offences have been applied to HIV non-disclosure. Increasingly, defendants are facing charges of aggravated sexual assault, which carries a maximum penalty of life imprisonment¹³ and for which conditional sentencing (i.e., serving a sentence of imprisonment in the community under certain restrictions, e.g., house arrest) is not an option.¹⁴ Persons convicted are also recorded on a sex offender registry.¹⁵ In 2009, a person living with HIV was convicted for the first time in Canada (and possibly the world) of first-degree murder for not disclosing his HIV status before having unprotected sex.¹⁶ (A few more people have since been charged with attempted murder.¹⁷) In August 2011, he became the first person in Canada declared a “dangerous offender” for conduct related to HIV non-disclosure.¹⁸ Under the current law, PLHIV have a duty to disclose their HIV-positive status before engaging in conduct that poses a “significant risk” of transmitting the virus.¹⁹ However, what constitutes a “significant risk” has as yet to be clarified by the Court. The law’s uncertainty has led to inconsistent decisions across the country and facilitated an extensive use of the criminal law. Some people have been charged and/or convicted for having protected or oral sex alone while others have been acquitted.²⁰ In two recent decisions, the Courts of Appeal of Manitoba and Quebec ruled that when a condom is used or when a person has an undetectable viral load there is no significant risk of transmission and thus, no duty to disclose should be required.²¹ The Supreme Court of Canada is scheduled to hear the prosecution’s appeal in at least one (and perhaps both) of these cases in 2012.

2. Laws and practices that facilitate or impede HIV-related treatment access

A. Canada's Access to Medicines Regime

Created by legislation passed unanimously in Canada's Parliament in May 2004, Canada's Access to Medicines Regime (CAMR) was intended to allow compulsory licensing of pharmaceutical products patented in Canada for the limited purpose of authorizing Canadian generic drug manufacturers to legally produce and export lower-cost versions of patented, brand-name medicines to developing countries. The Government claimed at the time that CAMR would "go a long way toward improving global health."²² Yet more than seven years later, CAMR has been used only once by a single generic manufacturer (Apotex Inc.) for a single authorization to produce one order of a fixed-dose combination antiretroviral AIDS drug for export to a single country (Rwanda).²³ The current CAMR has been widely criticized as imposing a number of unnecessary requirements on both importing countries and Canadian generic manufacturers that have hindered the ability to provide an efficient solution to public health crises in the developing world.²⁴ The sole generic manufacturer that used CAMR has stated its unwillingness to do so again in its current form, while developing countries have repeatedly pointed out how Canada's law does not accommodate their practical realities of drug procurement.²⁵ Recommendations for reform have come not only from diverse civil society organizations and international legal experts, but also from within Parliament itself, including a Senate committee.²⁶ Many of CAMR's current limitations are not required by the World Trade Organization's (WTO) *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) and the subsequent WTO General Council Decision of August 30, 2003 upon which CAMR is based.

In 2009, two bills were introduced in the Canadian Senate and House of Commons, respectively, each proposing identical reforms to streamline CAMR and make it easier to use.²⁷ Central to the proposed amendments was the introduction of a "one-licence solution" permitting a generic manufacturer to supply multiple eligible countries, in the quantities they identify as necessary over time, under a single licence. One bill passed with a strong majority in the House of Commons in March 2011, but opposition by the federal government delayed its passage in the Senate until it died on the Order Paper two weeks later. In order to meet its stated intention of assisting developing nations with access to affordable life saving medicines, Canada needs to simplify CAMR. Failure to take such action, in line with Canada's legislatively stated commitment to improving access to medicines, is to disregard its obligation of international assistance and cooperation in realizing the right to the highest attainable standard of health under the *International Covenant on Economic, Social and Cultural Rights* (Articles 2 and 12).

¹ E.g., see *Vancouver's INSITE service and other Supervised Injection Sites: What has been learned from research?* Final Report of the Expert Advisory Committee, 31 March 2008 at http://www.hc-sc.gc.ca/ahc-asc/pubs/_sites-lieux/insite/index-eng.php; T. Kerr *et al.*, "Impact of a Medically Supervised Safer Injection Facility On Community Drug Use Patterns: A Before and After Study," *British Medical Journal* 2006; 332: 220–222.

² *PHS Community Services Society v. Attorney General of Canada*, 2008 BCSC 661 (B.C. Supreme Court).

³ *PHS Community Services Society v. Canada (Attorney General)*, 2010 BCCA 15 (B.C. Court of Appeal).

⁴ T. Gabor & N. Crutcher, *Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures*, Department of Justice Research and Statistics Division, Government of Canada, January 2002.

⁵ D. Zakaria *et al.*, Summary of Emerging Findings from the 2007 National Inmate Infectious Diseases and Risk-Behaviours Survey (Correctional Services of Canada, March 2010).

⁶ Ibid. For first-hand accounts of sharing injection equipment inside prisons, from people currently or formerly incarcerated, see S. Chu & K. Peddle, *Under the Skin: A People's Case for Prison Needle and Syringe Programs* (Canadian HIV/AIDS Legal Network, 2010), on-line via www.aidslaw.ca/undertheskin.

⁷ R. Lines *et al.*, *Prison Needle Exchange: Lessons from a comprehensive review of international evidence and experience*, (2nd ed.), Canadian HIV/AIDS Legal Network, 2006; R. Jürgens, *Interventions to Address HIV/AIDS in Prisons: Needle and Syringe Programmes and Decontamination Strategies* (Geneva; WHO, UNODC and UNAIDS, 2007).

⁸ Lines, *ibid.*; Jürgens, *ibid.*; H. Stöver & J. Nelles, "10 years of experience with needle and syringe exchange programmes in European prisons: A review of different evaluation studies," *International Journal of Drug Policy* 2003; 14: 437–444; Public Health Agency of Canada, *Prison needle exchange: Review of the evidence* (April 2006).

⁹ G. Betteridge, *Sex, work, rights: reforming Canadian criminal laws on prostitution* (Canadian HIV/AIDS Legal Network, 2005); Pivot Legal Society, *Voices for dignity: a call to end the harms caused by Canada's sex trade laws* (2004).

¹⁰ *Bedford v. Canada*, 2010 ONSC 4264 (Ontario Superior Court of Justice).

¹¹ This information is based on the tracking of cases conducted by the Canadian HIV/AIDS Legal Network.

¹² GNP+, *2010 Global Criminalisation Scan Report*, July 2010, available at www.gnpplus.net.

¹³ *Criminal Code*, section 268.

¹⁴ *Criminal Code*, sections 742.1 and 752.

¹⁵ In some provinces, registration on the provincial sex offender registry can be mandatory when a person is convicted of a sexual offence.

¹⁶ S. Chu and R. Elliott, "Man convicted of first-degree murder sets disturbing precedent," *HIV/AIDS Policy & Law Review* 14(2) (2009): pp 42–43.

¹⁷ This information is based on the tracking of cases conducted by the Canadian HIV/AIDS Legal Network. See also N. McKinnon, "Two new complainants come forward in Ottawa HIV case," *Xtra!*, September 23, 2010 (on-line edition).

¹⁸ P. Edwards, "HIV killer declared dangerous offender," *Toronto Star*, 3 August 2011.

¹⁹ *R. v. Cuerrier*, [1998] 2 S.C.R. 371. On-line: <http://www.aidslaw.ca/EN/lawyers-kit/documents/1.Cuerrier1998judgment.pdf>.

²⁰ E. Mykhalovskiy, G. Betteridge, and D. McLay, *HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario*, August 2010. A report funded by the Ontario HIV Treatment Network. On-line: http://www.aidslaw.ca/EN/lawyers-kit/documents/6_EMikhalovskiy-EN.pdf.

²¹ *R. v. Mabior (C.L.)*, 2010 MBCA 93; *R. c. D.C.*, 2010 QCCA 2289. On-line: http://www.aidslaw.ca/EN/lawyers-kit/documents/5-6_MabiorCA2010-EN.pdf.

²² Government of Canada, "Jean Chrétien Pledge to Africa Act Approved by Parliament," Press release, 13 May 2004.

²³ R. Elliott, "Delivery past due: global precedent set under Canada's Access to Medicines Regime," *HIV/AIDS Policy and Law Review* 2008; 13(1): 1, 5-12, on-line via www.aidslaw.ca/review.

²⁴ E.g., Médecins Sans Frontières, *Neither Expeditious, Nor a Solution: The WTO August 30th Decision is Unworkable – An Illustration Through Canada's Jean Chrétien Pledge to Africa*, August 2006.

²⁵ Apotex, Inc., "Canada's Access to medicines Regime Must Be Fixed," Press release, 8 March 2011, on-line: <http://www.apotex.com/global/about/press/20110308.asp>.

²⁶ Senate Standing Committee on Foreign Affairs and International Trade, "Overcoming 40 Years of Failure: A New Road Map for Sub-Saharan Africa", February 2007, p. 117, on-line: <http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/fore-e/rep-e/repafriFeb07-e.pdf>. It is important to note that, consistent with the outcome of WTO negotiations on which it is based, CAMR has never been, and should not be, limited to simply responding to the need for AIDS drugs in African countries, but is more broadly applicable to address public health problems in a wide range of eligible countries.

²⁷ See briefs to Parliamentary committees and other materials by Canadian HIV/AIDS Legal Network on Bills S-232 and C-393 on-line via www.aidslaw.ca/camr.