Ending Unjust HIV Prosecutions in British Columbia: Modernizing prosecutorial policy

Submission to the Attorney General of British Columbia

January 2019

Published by the
Canadian HIV/AIDS Legal Network
1240 Bay Street, suite 600
Toronto, Ontario
Canada M5R 2A7

Telephone: +1 416 595-1666
Fax: +1 416 595-0094

www.aidslaw.ca

The Canadian HIV/AIDS Legal Network promotes the human rights of people living with, at risk of or affected by HIV or AIDS, in Canada and internationally, through research and analysis, litigation and other advocacy, public education and community mobilization.

Le Réseau juridique canadien VIH/sida fait valoir les droits humains des personnes vivant avec le VIH ou le sida et de celles qui sont à risque ou affectées autrement, au Canada et dans le monde, à l'aide de recherches et d'analyses, d'actions en contentieux et d'autres formes de plaidoyer, d'éducation du public et de mobilisation communautaire.

Contents

Introduction and background 1
Deficiencies in current BC Prosecution Service policy 3
Elements for an Attorney General's directive to the BC Prosecution Service 5

Introduction and background

The Canadian HIV/AIDS Legal Network submits this brief to supplement previous correspondence and submissions to the Honourable David Eby, Attorney General of British Columbia, for the purpose of assisting with the **development of a directive from the Attorney General to the British Columbia Prosecution Service** that appropriately limits the use of criminal charges to prosecute allegations of HIV non-disclosure, potential or perceived exposure, or transmission. In particular, this brief:

- provides **commentary on specific aspects of the current policy of the BC Prosecution Service** that require substantive revision and improvement; and

- sets out a number of **specific elements that should be reflected in a directive** from the Attorney General.

As noted in previous submissions, the continued overly broad use of the criminal law in cases of alleged HIV non-disclosure, including serious charges such as aggravated sexual assault, leads to unjust prosecutions, further stigmatizes people living with HIV, and creates additional barriers to people seeking testing and treatment. As we have laid out in previous correspondence and submissions, there are good scientific, public health and human rights rationales for ending the overly broad and unjust use of the criminal law in relation to HIV non-disclosure, exposure and transmission in Canada.

The Legal Network and other members of the HIV community have, therefore, been encouraged by the following developments, which are of relevance to the request before the BC Attorney General to develop a directive to the BC Prosecution Service:

- ☐ On World AIDS Day 2016 (December 1st), the Minister of Justice and Attorney General of Canada recognized the problem of the "overcriminalization of HIV," declared that "the criminal justice system must adapt to better reflect the current scientific evidence on the realities of this disease," and committed to examining this problem.[1]

- ☐ The work subsequently undertaken by Justice Canada resulted in the report released on World AIDS Day last year, entitled *Criminal Justice System's Response to the Non-Disclosure of HIV*.[2] We welcomed that report and its recommendations, which in our view provide a solid basis for further measures, by both federal and provincial governments, aimed at limiting the misapplication of the criminal law in Canada against people living with HIV. We have also been clear, as have other community advocates, that both federal and provincial governments have roles to play in ensuring more evidence-based, just approaches to the criminal law in this area — including, in the case of provincial Attorneys General, adopting sound guidance governing the conduct of provincial prosecutors, who handle the large majority of prosecutions across the country.

- ☐ In July 2018, leading HIV scientists from around the world, the International AIDS Society, the International Association of Providers in AIDS Care and UNAIDS released the international, peer-reviewed ***Expert consensus statement on the science of HIV in***

***the context of the criminal law*,** published in the *Journal of the International AIDS Society*.[3] Among the statement's authors and endorsers were leading Canadian HIV scientists and clinicians: Dr. Julio Montaner of the BC Centre for Excellence in HIV/AIDS, Dr. Mark Tyndall of the BC Centre for Disease Control and Dr. Mona Loutfy of Women's College Hospital in Toronto. (We have previously shared the Expert Consensus Statement, as well as its executive summary and the full list of endorsers.)

- On World AIDS Day 2018, the Attorney General of Canada announced that she would issue a directive[4] governing federal prosecutors that will implement some limits on HIV criminalization, reflecting the conclusions in the Justice Canada report. That directive to the Director of the Public Prosecution Service of Canada (PPSC) was officially published in the *Canada Gazette* on December 8, 2018.[5] Among other things, the Attorney General's directive recognizes that:

    - "HIV is first and foremost a public health issue, and public health authorities' efforts to detect and treat HIV have resulted in significantly improved health outcomes for those living with HIV in Canada, as well as prevention of its onward transmission;"

    - "persons from marginalized backgrounds such as, for example, Indigenous, gay and Black persons, are more likely than others to be living with HIV in Canada such that criminal laws that apply to HIV non-disclosure are likely to disproportionately impact these groups;"

    - "the issue of whether sexual activity poses a realistic possibility of transmission is to be determined on the basis of the most recent medical science on HIV transmission", and "the most recent medical science shows that the risk of HIV transmission through sexual activity is significantly reduced where: the person living with HIV is on treatment; condoms are used; only oral sex is engaged in; the sexual activity is limited to an isolated act; or, the person exposed to HIV, for example as a result of a broken condom, receives post-exposure prophylaxis".

  In the operative provisions, the Attorney General directs as follows:

    a) "The Director shall not prosecute HIV non-disclosure cases where the person living with HIV has maintained a suppressed viral load, i.e., under 200 copies per ml of blood, because there is no realistic possibility of transmission.

    b) The Director shall generally not prosecute HIV non-disclosure cases where the person has not maintained a suppressed viral load but used condoms or engaged only in oral sex or was taking treatment as prescribed, unless other risk factors are present, because there is likely no realistic possibility of transmission.

    c) The Director shall prosecute HIV non-disclosure cases using non-sexual offences, instead of sexual offences, where non-sexual offences more appropriately reflect

the wrongdoing committed, such as cases involving lower levels of blameworthiness.

d) The Director shall consider whether public health authorities have provided services to a person living with HIV who has not disclosed their HIV status prior to sexual activity when determining whether it is in the public interest to pursue a prosecution against that person."

As we have discussed, this directive by the Attorney General of Canada governs all federal Crown attorneys, who are responsible for prosecutions in the territories (Yukon, Northwest Territories and Nunavut). People living with HIV in Canada's provinces continue to face the threat of unwarranted, unscientific prosecution in the absence of similar action at the provincial level. This certainly remains the case in British Columbia, given the current, deficient BC Prosecution Service policy and the absence of a sound directive from the provincial Attorney General.

Deficiencies in current BC Prosecution Service policy

On March 1, 2018, the BC Prosecution Service released its current policy on HIV-related prosecutions: "Sexual Transmission, or Realistic Possibility of Transmission, of HIV" (Crown Counsel Policy Manual, Policy Code SEX 2).[6] The policy relates specifically to complaints of aggravated sexual assault under s. 273 of the *Criminal Code* where there is an allegation that consent to a sexual act was obtained by "fraud" (i.e. HIV non-disclosure or deceit) and that act has resulted in an actual transmission or a "realistic possibility" of transmission of HIV.

We have identified several concerns with the current policy, deficiencies that can and should be rectified via a directive from the Attorney General:

1. **Current policy does not provide guidance to limit prosecutions:** As we have discussed, while the current state of Canadian law (and particularly the leading Supreme Court of Canada decision in *R* v. *Mabior*, 2012 SCC 47) may *permit* conviction for aggravated sexual assault in a number of circumstances, nothing *requires* prosecution in every such circumstance. Indeed, such a conclusion would deny the existence and exercise of prosecutorial discretion. It is entirely within the power of the BC Prosecution Service, and the Attorney General of British Columbia, to determine that refraining from prosecution is warranted, for various reasons, in certain circumstances. The overly broad use of the criminal law against one singled-out and already marginalized community is harmful to both public health and human rights. HIV non-disclosure is foremost a public health issue. Cases of HIV non-disclosure are complex and sensitive and require caution and restraint. However, the current policy **does not set out clearly any instances in which Crown Counsel should *refrain* from prosecution, even where there would be good reason, as a matter of policy, to do so.** In fact, as described in more detail below, the current policy's discussion of the assessing the "public interest" *encourages* a wide application of criminal charges. As illustrated by the directive of the Attorney General of Canada, a directive from the Attorney General of British Columbia on HIV non-

disclosure related cases should provide clear guidance about circumstances in which prosecution is not warranted and will not proceed. Below, we set out specific circumstances in which a directive could and should clearly exclude prosecution.

2. **Bias toward prosecuting widely:** In its discussion of "The Public Interest Test," the current policy states "it will generally be in the public interest to proceed with a prosecution" where one or more of the following factors apply: actual transmission of HIV; repeated sexual acts with one, or more than one, complainant in a manner that significant increased the opportunity for transmission; the accused actively deceived or misled the complainant. The policy goes on to state that *even where none of these factors are present*, Crown Counsel should still "consider whether the public interest nonetheless requires a prosecution, including to address the harm done to the victim(s)" or whether the "risk to the public" posed by the accused, and "the general public interest," can be or is being addressed through proactive measures by the accused. **In other words, even if there was but a single sexual act with a single partner, towards whom there was no deceit, and there was no transmission, Crown Counsel are still encouraged to consider prosecution**. The policy appears to encourage prosecution for a single act, without deceit and without transmission. This notably contradicts medical evidence demonstrating minimal risk of HIV transmission through one single act of sex. Conversely, the current policy does not take into account public health and human rights considerations that require a limited use of the criminal law nor, as discussed further below, does it take into account "public interest" factors that are specific to HIV non-disclosure cases.

3. **Lack of guidance regarding "realistic possibility of transmission":** As noted, the current policy simply restates the 2012 *Mabior* ruling of the Supreme Court of Canada — namely, that that the Crown is required to prove either actual transmission or a "realistic possibility" of transmission. The policy also states that, in assessing this, Crown Counsel "should consider the available medical information specific to the accused and the facts of the case." However, at this point, there is substantial scientific evidence about the zero, negligible or low possibility of HIV transmission in various circumstances — e.g. the international Expert Consensus Statement noted above — and policy governing BC prosecutors can and should clearly state that the science has evolved and does not warrant prosecution for various activities under various circumstances. Yet it does not currently do so. In contrast, the recently issued directive of the federal Attorney General to the PPSC adopts such an approach, as seen in the operative provisions reproduced above. So, too, does the current prosecutorial policy issued by the Attorney General of Ontario, at least with respect to excluding prosecutions in the case of a person with a suppressed viral load (i.e. under 200 copies/ml).[7] The current BC Prosecution Service policy states that regard should be paid to scientific evidence, but it then fails to explicitly rule out prosecution in certain circumstances in line with that very evidence — thereby leaving the threat of prosecution hanging over all people living with HIV in the province. By merely reciting elements of the *Mabior* decision from 2012, the policy fails to provide clarity about what is and is not potentially subject to criminal prosecution.

4. **Limited understanding of the "public interest":** In every case, Crown Counsel must decide whether pursuing a prosecution is in the public interest. Yet the current policy on HIV non-disclosure prosecutions *de facto* defines the public interest solely by the perceived possibility of HIV transmission posed by the accused. None of the other public interests at play, which might warrant limiting prosecutions (e.g. to instances of alleged intentional transmission), are considered or drawn to the attention of Crown Counsel for consideration — including, for example:

    - the stigmatization and harm done to all people living with HIV by prosecuting cases where there was no transmission and a negligible possibility of it;
    - the harm done to an individual accused prosecuted in a case where there has been no transmission and a negligible risk of transmission, including the lifetime designation as a sex offender if convicted, likely loss of employment and possibly housing, and the lasting damage arising from media coverage of the prosecution (whether convicted or acquitted);
    - the harm done by the expansive use of criminal charges to public health efforts to educate about HIV and to encourage HIV testing, when being diagnosed as HIV-positive then exposes a person to potential prosecution in a wide range of circumstances;
    - the continuing inequalities (of gender, race, class and other factors) when it comes to accessing health services and treatment that could suppress a person's viral load and thereby prevent transmission; and
    - the gender dynamics that may prevent some women living with HIV from disclosing their status or using condoms.

Elements for an Attorney General's directive to the BC Prosecution Service

The Legal Network and other advocates have urged the Attorney General of BC (and of every province) to work with community organizations and scientific experts to adopt directives to their provincial prosecutors that at a minimum reflect the limits on the use of the criminal law that have been articulated by the federal Attorney General in her directive to the PPSC. In fact, as we have submitted in previous correspondence dated December 2018, following the publication of the federal Attorney General's directive, **there is the opportunity for the BC Attorney General to improve upon the standard established by the federal directive**.

Specifically:

1. We urge that a directive to the BC Prosecution Service **limit criminalization to cases where it is alleged that there has been intentional transmission**, i.e. where it is alleged that a person knows his or her HIV positive status, acts with the intent to transmit HIV, and does in fact transmit it. Adopting such a prosecutorial policy is entirely within the purview of the Attorney General or Prosecution Service; it is not precluded by any aspect of current Canadian law. It is an appropriate limit on the criminal law in keeping with

recommendations, which we have shared previously, from UNAIDS, the Global Commission on HIV and the Law, and the UN Committee on the Elimination of Discrimination Against Women in its most recent review of Canada.[8]

2. A directive should **preclude prosecutions for alleged HIV non-disclosure where, based on medical and scientific evidence, there is no significant risk of transmission. The directive should state, clearly and without caveat, that based on the most recent scientific evidence, this includes cases of:**

    - **oral sex;**
    - **anal or vaginal sex with a condom;**
    - **anal or vaginal sex without a condom while having a low viral load or while on treatment; or**
    - **spitting and biting.**

    In our view, the caveat in the federal Attorney General's directive that criminal charges "generally" should not apply in cases where a person uses a condom or only engages in oral sex is unnecessary — (1) for reasons of science, as articulated in the international Expert Consensus Statement, which describes the risk in such a case as ranging from "none" to "negligible" at the most; and (2) for reasons of public policy, i.e. that the harsh tool of the criminal law should not be deployed against the person who has taken the long-recommended step of ensuring condom use, as this circumstance not only demonstrates the opposite of the moral blameworthiness required in order to potentially justify a criminal conviction but also it at odds with the public health effort to encourage condom use. This is a deficiency in the federal directive that the BC Attorney General can and should avoid. It would be preferable for **any BC directive to be less equivocal on this point, and to clearly rule out prosecution not only in cases of a suppressed or low viral load but also in cases of condom use or oral sex**; such limits on resorting to criminal law would be well supported by the international Expert Consensus Statement (cited above) and good public policy considerations.

    A clear exclusion of prosecution in such circumstances would be the best approach. A lesser alternative would be to consider including in a directive language (e.g. in relation to condoms, oral sex) that makes it clear that if a prosecution is to proceed in such a circumstance, it should be an exceptional case and the Crown should have in hand some "clear expert opinion" that contradicts the general, evidence-based proposition that the risk of HIV transmission is zero or negligible at most in such cases. For example, language such as the following could be incorporated into a directive (and note that the underlined text is taken verbatim from the international Expert Consensus Statement's section on the impact of condoms reducing the possibility of HIV transmission):

    > **Use of condoms in HIV non-disclosure cases**: Correct use of a condom (either male or female) prevents HIV transmission because the porosity of condoms is protective against even the smallest sexually transmissible pathogens, including HIV; latex and polyurethane condoms act as an impermeable physical barrier through which HIV cannot pass. Correct condom use means the integrity of the

condom is not compromised and the condom is worn throughout the sex act in question. Correct use of a condom during sex means HIV transmission is not possible. Therefore, in the absence of credible evidence that a condom was not used or, if it was used, that it was not used correctly, a charge should not be laid, and if already laid, should be withdrawn, unless there is some clear expert opinion to the contrary that could establish that, in the specific circumstances of the case, there was a realistic possibility of transmission.

Broken condom during a sexual encounter in which HIV has not been disclosed in advance: Condoms occasionally break or slip off during sex. Regardless of a person's viral load, if that person has not disclosed their status before engaging in vaginal or anal sex with a condom, but discovers that the condom is no longer in place or intact during or after vaginal or anal sex, there will be no prosecution where the accused disclosed his or her HIV status upon discovering this. This disclosure encourages their sexual partner to seek emergency medical advice and, where medically indicated, start on anti-HIV medications that can further reduce the (already small) possibility of transmission (known as post-exposure prophylaxis or PEP). This disclosure should, therefore, be facilitated and encouraged by refraining from prosecution in such a circumstance.

3. In addition, a directive should clearly state that there will be **no prosecution in the following circumstances, where the person living with HIV:**

    - **did not understand how the virus is transmitted;**
    - **disclosed their status to their sexual partner or reasonably believed their sexual partner was aware of their status through some other means;**
    - **did not disclose their status because they feared violence or other serious negative consequences would result from such disclosure; or**
    - **was forced or coerced into sex.**

4. As has been recognized by the Attorney General of Canada, including in her directive to the PPSC, the use of the law of sexual assault in cases of HIV non-disclosure is also of concern. It is harmful to people living with HIV (including as a result of mandatory, lifetime designation as a sex offender following conviction) and it undermines the law of sexual assault as a means of addressing sexual violence.[9] A provincial directive should **limit the use of sexual assault charges** in cases of HIV non-disclosure, directing that, in those limited circumstances in which a prosecution may proceed, prosecutors should use non-sexual offences, rather than sexual assault charges or other sexual offences.

5. Finally, a directive should **include "public interest" factors that are specific to cases of alleged HIV non-disclosure**, including:

    - the absence of transmission of HIV to the complainant;
    - a limited number of encounters posing a realistic possibility of transmission;

- non-disclosure was an isolated incident and there was no evidence of a history of non-disclosure placing sexual partners at a significant risk of serious bodily harm;
- compromised physical and mental health of the accused, especially an accused living with HIV;
- the potentially unduly harsh or oppressive consequences of prosecutions and a conviction for the accused, in particular the health and safety risks that incarceration poses for people living with HIV and the impact of a criminal conviction on someone's immigration status;
- the possible power imbalance in intimate relationships, where the accused was in a position of less power and greater vulnerability;
- the potentially unduly harsh consequences of prosecutions for alleged non-disclosure for women living with HIV, who are often at increased risk of violence, harassment or other abuse by a partner;
- the potential for overly broad use of criminal charges for HIV non-disclosure to allow an abusive partner to use HIV criminalization as a tool of coercion (i.e. by threatening to allege HIV non-disclosure, even if untrue, thereby triggering possible criminal prosecution), and to discourage women living with HIV from reporting sexual assault, for fear of being accused of non-disclosure by assailants; and
- the staleness of the alleged offence in situations where past sexual partners come forward alleging non-disclosure.

6. Some of the harm associated with overly broad application of criminal charges in cases of alleged HIV non-disclosure arises from media coverage of such charges and trials — and this harm is done, and irreparable, even if charges are withdrawn or stayed or there is an acquittal at trial. Furthermore, media coverage of the fact that serious criminal charges have been laid for alleged HIV non-disclosure often reinforces misinformation and misperceptions about the ostensible risk of HIV transmission associated with certain acts — and this impact is greatest when charges are laid based on alleged acts that pose a very low or negligible possibility of transmission. Such media coverage thereby also contributes to continued HIV stigma, based on such misperceptions of risk. A directive from the Attorney General could also **address the conduct of prosecutions with a view to avoiding these harms to the individual and to the public interest**. For example, it could direct as follows:

   > Crown counsel should keep in mind the negative impacts of publicly disclosing a person's HIV-positive status given the high level of stigma experienced by people living with HIV. Crown counsel should ensure that the privacy of both the accused and the complainant, including with regard to their HIV status, is respected to the greatest extent possible.

7. As the current BC Prosecution Service Policy addresses sentencing, a directive from the Attorney General should also **include directives on sentencing, as well as bail,** along the lines of the following:

- Given the constitutional presumption in favour of bail ("judicial interim release") and the disproportionate health consequences for people in custody who are living with HIV, the Crown should strongly consider consenting to the release of people charged with offences involving HIV non-disclosure. Only in rare cases should the Crown oppose bail. Crown counsel should ask for bail conditions that are proportionate and rationally linked to the alleged offence. Bail conditions should not disproportionally violate an accused's right to privacy, and sexual and physical integrity.

- Criminal prosecutions can have a severe impact on the accused's health, including depression or interruption of HIV treatment. Crown counsel should consider the offender's health at the time of bail and sentencing, and potential negative health and safety consequences of incarceration.

---

[1] Government of Canada, Statement: "Minister Wilson-Raybould Issues Statement on World AIDS Day," 1 December 2016, online: https://www.canada.ca/en/department-justice/news/2016/12/minister-wilson-raybould-issues-statement-world-aids.html.

[2] Justice Canada, *Criminal Justice System's Response to Non-Disclosure of HIV*, 1 December 2017, online: http://www.justice.gc.ca/eng/rp-pr/other-autre/hivnd-vihnd/index.html.

[3] F. Barré-Sinoussi et al., "Expert consensus statement on the science of HIV in the context of criminal law," *Journal of the International AIDS Society* 2018; 21: e25161 (25 July 2018), online: https://onlinelibrary.wiley.com/doi/full/10.1002/jia2.25161.

[4] Government of Canada, "Attorney General of Canada to issue Directive Regarding Prosecutions of HIV Non-Disclosure Cases," 1 December 2018, online: https://www.canada.ca/en/department-justice/news/2018/12/attorney-general-of-canada-to-issue-directive-regarding-prosecutions-of-hiv-non-disclosure-cases.html.

[5] Attorney General of Canada, Directive to Director of the Public Prosecution Service, *Canada Gazette*, Part I, Vol. 152, December 8, 2018, online: http://gazette.gc.ca/rp-pr/p1/2018/2018-12-08/html/notice-avis-eng.html#nl4.

[6] BC Prosecution Service, "Sexual Transmission, or Realistic Possibility of Transmission, of HIV," *Crown Counsel Policy Manual*, Policy Code SEX 2, 1 March 2018, online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/sex-2.pdf.

[7] Government of Ontario, "D.33: Sexual Offences Against Adults – Sexually transmitted infections and HIV exposure cases," *Crown Prosecution Manual*, updated 1 December 2017, online: https://www.ontario.ca/document/crown-prosecution-manual/d-33-sexual-offences-against-adults#section-0.

[8] UNAIDS, *Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations* (2013), online: http://www.unaids.org/en/resources/documents/2013/20130530_Guidance_Ending_Criminalisation; Global Commission on HIV and the Law, *Risks, Rights & Health* (2012), online at https://hivlawcommission.org/report/; UN Committee on Elimination of Discrimination Against Women, *Concluding observations on the combined eighth and ninth periodic reports of Canada*, UN Doc. CEDAW/C/CAN/CO/8-9 (18 November 2016), paras. 43-44, online: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fCAN%2fCO%2f8-9&Lang=en.

[9] See, e.g., Women's Legal Education and Action Fund, *A Feminist Approach to Law Reform on HIV Non-Disclosure* (Toronto, January 2019, online: https://www.leaf.ca/leaf-proposes-a-feminist-approach-to-law-reform-on-hiv-non-disclosure/).