

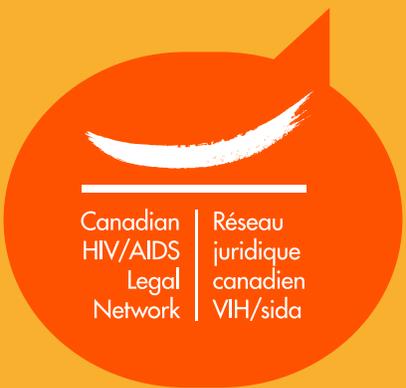


8TH SYMPOSIUM
ON HIV,
LAW AND
HUMAN RIGHTS

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REPORT/SUMMARY

AUGUST 2019



Canadian
HIV/AIDS
Legal
Network | Réseau
juridique
canadien
VIH/sida



On June 14, 2019, the Canadian HIV/AIDS Legal Network held its 8th Symposium on HIV, Law and Human Rights. The biannual symposium serves as one of Canada's seminal events regarding HIV and human rights advocacy and provides an opportunity for education and networking among advocates, survivors and academics. Focusing on the pressing issue of HIV criminalization in Canada, this year's symposium provided a forum for survivors of HIV criminalization to share their stories, as well as for experts in the field to present updates on the current status of HIV criminalization in Canada, the latest science surrounding HIV transmission and the future of advocacy efforts in the country.

Remarks from Honourable David Lametti

The Honourable David Lametti, federal Minister of Justice and Attorney General of Canada, opened the symposium by thanking the Legal Network for its advocacy and acknowledging the significant work still to be done to eliminate HIV stigma. Minister Lametti stated that the Government of Canada is committed to eliminating the over-criminalization of non-disclosure of HIV, recognizing that it is primarily a matter of public health and not criminal law.

In 2017, Justice Canada released a report, *Criminal Justice System's Response to Non-Disclosure of HIV*, after conducting a review of the criminal justice system's response to non-disclosure of HIV with the assistance of the Public Health Agency of Canada, provincial justice department counterparts and various stakeholders. One year later, the government issued a federal directive based on the findings in the report. The directive applies to federal prosecutions for HIV non-disclosure and therefore is limited to the territories. The directive requires federal prosecutors to take new scientific improvements and findings into account. Minister Lametti stated that this directive is an example of how a scientific approach can inform the criminal law and proves that improvements can be made with cooperation. Further work will need to be done to develop similar directives in the provinces and the federal government will continue to work with their provincial counterparts to achieve that goal. The recent report by the Standing Committee on Justice and Human Rights, released June 17th, will also inform their way forward with regard to law reform.

Minister Lametti expressed that ensuring the responsiveness of the criminal law to the latest scientific findings, as well as to the experiences of those living with HIV, is a priority.



Panel 1

Personal impact: Working to end HIV criminalization while criminalized

Alexander McClelland, a doctoral student at Concordia University, presented findings from his research examining firsthand experiences of people living with HIV who have been charged with aggravated sexual assault for HIV non-disclosure in Canada. “It is important to centre the lived experiences of those living with HIV to understand the concerns that arise surrounding transmission and apprehensions of the law,” said Alex, who is himself openly living with HIV.

Alex interviewed five women and eleven men, many of whom are gay, trans and/or live in poverty. All the women in the study had a history of sexual abuse by men and discussed the complexity of disclosing their HIV status due to their lack of power in the relationships. One woman reported being gang-raped at knifepoint, after which her rapists threatened to have her charged with non-disclosure. Many had partners who lied about disclosure not taking place.

Three participants had been threatened with criminal charges by the police and 13 were formally charged with non-disclosure. The vast majority indicated that this was their first-ever criminal charge. The charge of aggravated sexual assault was extremely confusing for people, as they understood the sex they had to be consensual. Five pleaded guilty because they felt coerced by their lawyer, were ashamed, missed their families, or were fearful of their HIV status being made public; they then received sentences ranging from 2.5 to 15 years. Intensified and prolonged forms of punishment included denial of bail due to “severity of the charge,” and extraordinary release provisions involving presenting themselves to police 24 hours before having sex and requiring their partner to confirm awareness of their HIV status in front of the police.

Many participants cited police and prison staff’s lack of knowledge about current viral load science as a factor that enables stigma. In prison, having HIV and being convicted of sexual assault were seen as worse than being a murderer. Respondents also spoke of multiple violent beatings from other inmates, being denied access to health care, discriminatory comments about their HIV status, and missing important life events with family outside.

Even once they were released, their past charges led to economic insecurity in their daily lives. Many experienced regular denial of housing, education and employment, identifying their sex offender designation as a major barrier. A landlord refused housing to one participant, stating, “We don’t rent to rapists.” Some had a hard time coping with being labelled a violent rapist, experiencing long periods of suicidal ideation and PTSD. “As a result of ongoing stigma, those who have served their time, or had their charges stayed or dropped, still state that the past case impacts their present lives,” explained Alex.

“I have never understood my sexual life outside of the criminal justice system.”

ALEX



Following Alex's presentation, a survivor of HIV criminalization, Michelle Whonnock, spoke of her experiences as a former sex worker in Vancouver, convicted and imprisoned for aggravated sexual assault as a result of the criminal laws concerning HIV non-disclosure. She had always used a condom with her ex-boyfriend, except on the night he raped her when she was sleeping. When she attempted to leave the abusive relationship, her boyfriend retaliated by going to the police and alleging she had not disclosed her HIV-positive status to him. She is now a registered sex offender. Michelle's honesty, strength and resilience brought the room to a standing ovation.

Women, ART, and the Criminalization of HIV (WATCH) Study — “The law is a bigger threat to us than HIV”

Alison Symington and Marvelous Muchenje, from Women's Health in Women's Hands Community Health Centre, presented the Women, ART, and the Criminalization of HIV (WATCH) Study, a three-year community-based research study funded by the Canadian Institute of Health Research. The study examined how women living with HIV across Canada understand and experience the criminalization of HIV non-disclosure. The women recounted how feelings of being watched and worries about the impact of disclosure on relationships with friends, family and potential sexual partners all affected their views of the criminal law, as well as how they access health, legal and social services. Marvelous described living with day-to-day surveillance as, “every move that you make, it's almost like someone is watching you. Sometimes it's self-inflicted thinking, ‘is that person looking at me because I'm HIV positive?’”

The WATCH study also engaged women living with HIV in a series of workshops to explore HIV criminalization through body mapping. Sixty percent of the women in the study

were Indigenous and fifteen percent were Black. Two themes emerged: a lack of understanding of the law of HIV non-disclosure, and feelings that the law is inherently unjust. For these women, the law served to both marginalize them and expose them to an increased risk of violence. Because of the inherent power imbalance in many of their sexual relationships, the requirement to disclose their HIV status to their partners resulted in a sense of fear and confinement. HIV criminalization and gender-based violence are impossible to separate for this reason. Stories of abstaining from sex when possible or putting a condom in the fridge as proof that one was used indicate this fear and the confusion about what women need to do to protect themselves from criminalization. The body-mapping project was used as a way to share and explain their emotions, which ranged from anger and sadness to feelings of joy and resilience. These body maps also showed what these women wanted the public to know about HIV and the impact that stigma has on their lives. Not everything was negative; themes of resilience, resistance, and feeling involved in the movement against HIV criminalization were also strong. As Michelle Whonnock said about her body map, “It's about letting go and honouring my past.”

“Every move that you make, it's almost like someone is watching you.”

MARVELOUS MUCHENJE



Panel 2

The Movement to End HIV Criminalization: Where are we now?

Janet Butler-McPhee, Director of Communications and Advocacy at the Legal Network, presented the Legal Network's [new bilingual public service announcement](#) on HIV criminalization in Canada. This infographic video provided context on the state of the law and advocacy in Canada. After it was shown, the panel gave an update on the progress of HIV decriminalization efforts in Canada and internationally.

Edwin J. Bernard of HIV Justice Worldwide confirmed that 75 countries and more than 100 jurisdictions around the world continue to have HIV-specific laws and at least 37 countries have used general laws to prosecute cases of non-disclosure. He stressed that Canada remains one of the worst offenders globally for both the rates and severity of HIV criminalization, with HIV non-disclosure being prosecuted here as aggravated sexual assault. Despite this, Edwin wished to highlight that advocacy efforts in Canada have led to notable progress, stating, "The legal environment for HIV criminalization [in Canada] remains one of the worst in the world. However, the ... [Canadian Coalition to Reform HIV Criminalization] has done amazing work and things are changing." Edwin confirmed that Canada has since dropped from its previous position as the global leader in the annual number of HIV non-disclosure prosecutions to now fifth globally, attributing this in part to advocacy and the recent federal directive and provincial prosecutorial guidelines.

Ryan Peck of the HIV & AIDS Legal Clinic Ontario (HALCO) provided an update on the Canadian situation, highlighting the decades-long struggle of community organizations against HIV criminalization and for the development of prosecutorial guidelines. He discussed the significant developments that have occurred since World AIDS Day 2016. He particularly emphasized the impact of the [prosecutorial guidelines](#) that were (finally) developed in Ontario in 2017 on prosecutions in cases where the accused person had a suppressed viral load. He made a point of stressing, however, that while recent prosecutorial guidelines or policies developed in Ontario, B.C. and Alberta are welcome progress, they remain insufficient to end unjust prosecutions. For example, the prosecutorial guidelines in Ontario do not preclude prosecutions against people who use condoms — even though condoms prevent transmission. In light of these shortcomings, Ryan underscored that legislative reform is ultimately required to ensure HIV-positive individuals are spared from criminalization and drew attention to the fact that the under the current law, "People who are unable to suppress their viral load are still treated more or less like sexual predators."



Focusing on the situation in Quebec, Léa Pelletier-Marcotte of COCQ-SIDA affirmed that while there are still no official prosecutorial guidelines in Quebec regarding HIV non-disclosure and while prosecutions continue in the province, there have been some encouraging signs of change. Following provincial lobbying efforts, l'Institut National de Santé du Québec recently published an [article](#) stating that there should *generally* be no charges for non-disclosure cases where the viral load is below 200 copies per milliliter of blood, where a condom is used, or where only oral sex is involved. As well, while clear official prosecutorial guidelines continue to be delayed, it is encouraging to note that the prosecutions office in Quebec has dropped charges for non-disclosure in cases where the accused had a viral load of less than 200 copies/ml.

In addition, while prosecutorial guidelines have remained the focus of recent advocacy efforts, criminal attorney Wayne Cunningham presented two important cases currently challenging a strict and outdated interpretation of *Mabior*. In the first case, Wayne's client is appealing a conviction of non-disclosure because he used a condom for every sexual act. In the second case, his client is appealing a conviction because he had a naturally suppressed viral load (i.e. without taking medication). If successful, these appeals will be meaningful strides towards using current science to prevent unjustified prosecutions of people living with HIV.

Finally, HIV activist Chad Clarke shared his experience of becoming an advocate for decriminalization and helping form the Canadian Coalition to Reform HIV Criminalization. When asked about their major successes thus far, Chad highlighted the success the Coalition has had in engaging and educating politicians on the issue. He stressed that regardless of the changing political climate, activists will continue to fight and will succeed in reforming HIV criminalization across Canada.

Panel 3

Using science in our advocacy: new tools and pitfalls

Misconceptions about the risk of transmission and prejudice against HIV have been major drivers in HIV criminalization. Although HIV is difficult to transmit, it is criminalized more than any other health condition. Dr. Mona Loutfy, from Women's College Research Institute, Women's College Hospital, University of Toronto and Maple Leaf Medical Clinic, explained that HIV science has developed rapidly since 1998 and is outpacing Canadian laws as more is known about HIV transmission. Dr. Loutfy was part of a team that undertook a systematic review released in 2013 to answer the question, "what is the risk of transmission when the person is taking antiretroviral therapy and has a fully suppressed viral load?". As Dr. Loutfy explained, there have been five cohort studies since 2010, including a landmark study in 2011 called HPTN 052, which proved that when an infected partner has a fully suppressed viral load, linked transmission rates are zero. Therefore, someone with an undetectable viral load cannot transmit HIV.

Physicians and scientists working in HIV transmission were thrilled about the findings of the HPTN 052 study. So when the Supreme Court of Canada released its 2012 *Mabior* decision suggesting that a person living with HIV would be criminalized for non-disclosure before sex unless they had a low viral load *and* used a condom, Dr. Loutfy described the collective feeling as shock.

In response, physicians and scientists developed a [2014 Canadian consensus statement on HIV and transmission in the context of criminal law](#). One of the most important things that the statement did was to depart from public health risk categories (high risk to low risk) which were traditionally used to describe HIV transmission risks. It also confirmed that

scientists are rallying together and mobilizing with the expert opinion that HIV is difficult to transmit sexually.

Using the Canadian consensus statement as a framework, 20 eminent international HIV experts, including Nobel Prize recipient Professor Françoise Barré-Sinoussi, developed a global consensus statement on the science of HIV in the context of criminal law. The statement was published in the peer-reviewed *Journal of the International AIDS Society*. The statement has also been endorsed by the International AIDS society (IAS), the International Association of Providers of AIDS Care (IAPAC) and the Joint United Nations Programme on HIV/AIDS (UNAIDS) as well as more than 70 additional experts from around the world known for their expertise in HIV. It reinforces and complements the Canadian statement. In particular, "the global statement declared that the correct use of a condom, either male or female, prevents the risk of 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," stated Dr. Loutfy. Additionally, the global consensus statement clarified that biting, spitting and contact through environmental surfaces such as chairs and toilets, hugging, sharing household objects and communal eating present no possibility of transmission. It also discusses phylogenetic evidence and issues related to the proof of transmission

Cécile Kazatchkine, from the Canadian HIV/AIDS Legal Network, explained that the Canadian and global consensus statements can combat misconceptions and prove that there is no reason to single out HIV and impose harsh punishments on people living with HIV, stating, "The consensus statements



work to bring rationality into the debate and help re-clarify what the science says. They describe HIV transmission and the risk of it, in very clear terms in a way purposely meant to inform members of the judiciary and avoid misinterpretations.”

“The science can — and should — confirm that, if a person with HIV has a suppressed viral load or correctly uses a condom, HIV cannot be transmitted. But we continue to see prosecutions and convictions even in these circumstances. We have landed in this absurd situation where basic universal prevention tools, such as condoms, that have been recognized as effective to prevent HIV for more than 30 years are not valid defences in cases of HIV non-disclosure. Let’s remember that the legal test has never been zero risk of transmission but that the crown must prove a ‘significant risk of serious bodily harm’ (i.e. a realistic possibility of HIV transmission),” said Cécile.

Science confirms that U does equal U

HPTN 052 was a randomized controlled trial evaluating the effectiveness of antiretroviral therapy in preventing sexual transmission of HIV between serodiscordant couples. Couples where the infected partner was in early (immediate) treatment were compared with those who delayed treatment to determine the linked transmission rates to the uninfected partner. The study found that, out of nearly 900 couples in early treatment, there were no transmissions between partners when one was on antiretroviral therapy with a fully suppressed viral load. Only one transmission occurred after the start of antiretroviral therapy, within the first three months, when the viral load was detectable. This study showed a 96 percent reduction of HIV transmission with antiretroviral therapy. In 2016, following up on HPTN 052 and the 1,763 participating couples, a final data cut showed there were zero linked transmissions when viral load was undetectable.

In 2016, the same year as the final data from HPTN 052 was released, the PARTNER Study (2016) was published, involving 58,000 sexual acts without condoms (40 percent of couples being same-sex male couples). There were zero linked HIV transmissions in cases with undetectable viral loads. Finally, in 2018, the OPPOSITES ATTRACT Study involving 16,800 acts of condomless anal intercourse between exclusively gay male couples was published. Once again there were zero linked HIV transmissions, which demonstrated the similar impact of viral load on HIV risks of transmission in the context of both vaginal and anal sex. The PARTNER study was extended even further to 77,000 condomless sexual acts between same-sex male couples (PARTNER-2 Study). Once again, zero linked transmissions occurred when a person’s viral load was fully suppressed.

Eight hundred and fifty organizations from nearly 100 countries have endorsed the Undetectable = Untransmittable (U=U) consensus statement, including the Government of Canada, which was the first country to support U=U in 2018.

The unforeseen consequences of the public health radar

Over the past five years, there has been success in reducing criminal prosecutions by using science. Communities of people living with HIV and advocates have pushed for HIV to be recognized as a public health issue rather than a criminal one. But now that the public health system is focusing on suppressed viral loads, Khalid Janmohamed, from HALCO, outlined the importance of examining how public health interventions may translate into invasive monitoring and stigmatizing surveillance of people living with HIV in Ontario.

Under public health legislation, public health units have the authority to prevent infectious diseases and promote the health of people living in the province. Under this mandate, Public Health Ontario has jurisdiction over HIV prevention in Ontario. When someone is diagnosed with HIV or another sexually transmitted infection (STI), that result will be reported to Public Health, usually by the lab or practitioner. “It is possible to get an anonymous test, but if the person then goes and receives follow-up care from their doctor in their name, that can be reported to Public Health,” said Khalid, although HALCO can provide help with some ways to maintain confidentiality in Ontario. Once a person is known to Public Health, the agency becomes involved in viral load reporting, counseling and contact tracing. Contact tracing is a process to get in touch with recent sexual partners of a person who has tested positive for HIV to encourage them to get tested. The process is meant to be confidential, but in some cases, identities can be inadvertently revealed depending on how many other partners the person receiving the call has had recently. This is where the public health sphere can intersect with the criminal justice system. If a person is inadvertently outed to a previous sexual partner through contact tracing, that person could potentially be charged with non-disclosure.

Additionally, if Public Health believes that the behaviour of a person with HIV may pose a risk to other people in their jurisdiction, they may issue a public health order compelling them to do or not do certain things. “Historically, these orders have not been connected to science and require higher obligations than the criminal law calls for,” explained Khalid. For example, the orders may require a person to *always* disclose to a partner *and* use a condom for all anal and vaginal sex. The orders can be unlimited in time, with no expiry, and if a person is found to be in breach of the order, Public Health can issue a

fine of up to \$5,000 dollars a day. In extremely rare instances, the order can also be converted into a court order at Public Health’s discretion, which HALCO has appealed on behalf of clients.

These orders can effectively compel people to stay on treatment. “We will want to be vigilant in doing our best to have a sense of what information Public Health Units are accessing without consent, how they’re accessing it, and where that access may not align with the science or with their mandate and authority,” said Khalid. The viral underclass, meaning those who cannot access medications or cannot achieve viral suppression due to societal and economic barriers or other reasons, will be those most affected.

The gendered nature of the current law

Disclosure and the risks of disclosure are gendered. “Science alone does not flush out the gendered aspect of disclosure and non-disclosure,” said Andrea Krüsi from the University of British Columbia. Andrea described the intersection of criminalization and violence against women. Disclosure is often viewed as an all-or-nothing event, but in reality, it is a much more complicated process that is linked to incredible risks of violence for women. Condom negotiation is also inherently more difficult for women. Having to insist that your partner uses a condom rather than actually putting on a condom yourself can be problematic. As Andrea noted, “It can lead to the partner accusing the woman of infidelity or the partner perceiving the request as the woman accusing him of having an STI. Additionally, a woman might think a man has put on a condom because she asked him to, but in reality, he did not.”

Andrea described a study where 450 women living with HIV were followed over a six-year period from 2010 to 2016. The study highlights that at least 48% of women living with HIV are at risk for criminal prosecution because they don’t maintain a suppressed viral load (<200 copies/ml) based on the legal test as suggested in the Supreme Court decision of *Mabior*. Women most likely to not reach that goal were those recently incarcerated, women involved in sex work, younger women and those with housing instability. “Alongside the science of transmission risks, we need to go further than focusing on low viral load and examine how the law and prosecutorial guidelines affect the most marginalized populations,” stated Andrea.

The Sexual Health and HIV/AIDS: Women’s Longitudinal Needs Assessment (SHAWNA) Project: “What I want to leave here is fear, and what I want to take from here is all the stuff I learned from the law”

The SHAWNA Project was a five-year community and arts-based photovoice project that involved cis and trans women in Metro Vancouver living with HIV. Flo Ranville, a SHAWNA peer mentor, described the fear in women’s eyes when they learned about the HIV non-disclosure law. The women were asked to make collages from pre-cut images to illustrate their feelings about the law. Many collages presented jail bars and red ribbons. Over the next few weeks, women used cameras to capture what HIV, the law and stigma looked like to them. The photos were printed, and the women were then able to pick their top three or four and narrate what they represented. The photovoice provided comfort and motivation and by the fourth week, many of the women who at first had been too shy to share their experiences were able to come together and speak openly about their thoughts and feelings.



Panel 4

What's next? Pushing for law reform

Eric Mykhalovskiy, York University professor in social sciences and member of the Canadian Coalition to Reform HIV Criminalization, moderated the final panel discussing the outlook and strategy of future decriminalization efforts in Canada.

The panel began with a video from California Senator Scott Weiner. Senator Weiner shared his experience of championing a successful bill reforming California's HIV-specific law in 2017. The resulting new law limiting HIV criminalization to intentional transmission as per international recommendations will make prosecutions extremely rare. In describing how he navigated the difficult legislative reform process, Senator Weiner highlighted that while reform efforts were initially challenging due to the limited information and dated preconceptions that most legislators had of HIV, when he appealed to the fact that the previous law discriminatorily criminalized a health condition and disproportionately affected women and racialized individuals, legislators better understood the harm. Naina Khanna, of the U.S. Positive Women's Network, who also helped advocate for the bill's passage, affirmed this struggle, stating, "Part of what we found was that state legislators did not know much about HIV or their knowledge was stuck in the 90s." She stressed that presenting evidence and data to legislators was essential to demonstrating and contextualizing the need for reform. Naina also emphasized how important it was to the reform effort that the assembled community-based decriminalization coalition created a unified strategy ahead of lobbying efforts, which allowed them to hash out differences beforehand and champion the bill as a unified front.

Recognizing California's experience as a potential model for reform in Canada, the panel then turned to Canadian law reform efforts and the upcoming release of the federal Justice Committee's report *The Criminalization of HIV Non-Disclosure in Canada*. Richard Elliott, the Legal Network's executive director, stressed that removing HIV non-disclosure offences from sexual assault law is a top priority as illustrated by the 2018 Community consensus statement on HIV criminalization. He saw the potential for the report's recommendations to be an important stepping stone for sound *Criminal Code* reform. He cautioned, however, that advocates must continue to pursue legislative reform with their eyes open to potential compromises, in particular in the event the political landscape changes in October with a new federal government. He urged the government to continue consulting with the HIV community and other relevant stakeholders as they draft legislative amendments.



A fruitful discussion followed about the impact that the criminalization of HIV non-disclosure can have upon different communities across Canada. Karen Segal of the Women's Legal Education and Action Fund (LEAF) presented LEAF's position on HIV criminalization and confirmed community calls for removing HIV non-disclosure from the law of sexual assault. She then stressed the need to focus advocacy efforts, including from the HIV community, on making sexual assault laws a useful tool to combat sexual violence and on promoting gender-equality rights. She stressed the importance of continuing to provide legal recourse for women when their bodily autonomy is violated by maintaining the strength of sexual assault law more generally.

During further discussions, Liberal MP Iqra Khalid, who sat on the Standing Committee on Justice and Human Rights, shared that although she was bound by confidentiality, she was certain the community would be pleased with the Justice Committee's upcoming report and thought it was an excellent step forward in HIV advocacy. NDP MP Randall Garrison, who also sat on the committee for the study, said that it was important for advocates to reach out to their MP to ensure the issue remains high on the agenda. Also bound by confidentiality, he said he supported decriminalization of HIV and that he was opposed to expanding criminalization to other diseases as a way to "de-stigmatize" HIV.

Snapshot

R v. Ndhlovu (2018)

Toronto criminal lawyer Matthew Gourlay is challenging the mandatory sex offender registration requirement under Section 7 of the *Charter* in a (non-HIV related) case before the Court of Appeal in Alberta called *R v. Ndhlovu* (2018). Many survivors of non-disclosure convictions have characterized this requirement as the most harmful result of their conviction, preventing them from seeking employment or travelling following their sentence. The appeal will be heard at the end of October 2019. For more info on Sexual Offender registries and the consequences of registration, see the Canadian HIV/AIDS Legal Network's fact sheet.

