HIV LEGAL NETWORK | RÉSEAU JURIDIQUE VIH

Study on HIV Infections in Canada

Brief submitted by the HIV Legal Network

Presented to:
the House of Commons Standing Committee on Health / HESA

November 9, 2026



Background

The Government of Canada plays a critical role in advancing access to HIV prevention, testing, treatment, and care while upholding the human rights of people living with and affected by HIV. This includes signing on to UNAIDS' "95-95-95" targets of ensuring that 95% of people living with HIV know their status, 95% of people who know their status receive treatment, and 95% of people who are on treatment have suppressed viral loads.[1] **However, we have yet to attain these goals and will certainly fall further behind without a meaningfully resourced, rights-based response.**

A rights-based approach is essential because it enables the conditions for successful HIV responses and affirms the dignity of people living with and affected by HIV.[2] Importantly, UNAIDS' targets also include a commitment to creating an enabling legal environment by 2025 such that less than 10% of countries globally have restrictive legal and policy frameworks that lead to the denial or limitation of access to services;[3] less than 10% of people living with HIV or key populations experience stigma and discrimination; and less than 10% of women, girls, and people living with HIV or key populations experience gender inequality and violence.[4] **On these metrics, Canada is also failing.**

Our commitments related to HIV are complex and require the expertise of a strong and well-resourced AIDS Service Organization (ASO) sector. This sector, which is also largely tasked with responding to the toxic drug crisis, is under great strain — hampering HIV treatment, care, and prevention efforts at a time when the average lifetime cost of each new HIV infection is $1.44M.[5] **Against the backdrop of increasing HIV infections, Canada cannot afford its further erosion.**

Recommendation 1: End the criminalization of HIV non-disclosure

In Canada, people living with HIV can be charged, prosecuted, convicted, and imprisoned for not disclosing they have HIV before sex — often under the charge of aggravated sexual assault, one of the most serious offences in the *Criminal Code*. If convicted, they can face a life sentence and mandatory registration as a sex offender. No other medical condition is treated in this way.[6]

This ongoing threat prosecution continues to have massive impacts on the lives of people living with HIV. Fear of prosecution can also dissuade people from getting tested, disclosing their status, or seeking care, directly contradicting public health goals. More than 200 people have been charged to date in relation to HIV non-disclosure.[7] HIV criminalization infringes the human rights of people living with HIV, who are often also members of other marginalized, stigmatized, and/or criminalized communities:

- Black people make up 4.3% of the population in Canada but represent at least 22% of those criminally charged in cases of alleged HIV non-disclosure.[8]
- Many of the women who have been charged are Indigenous. Some are survivors of sexual violence, revealing how HIV criminalization compounds existing inequities and violence against people living with HIV.[9]

There is no specific offence of "HIV non-disclosure" in the *Criminal Code*. Instead, courts have interpreted non-disclosure before sex that poses a "realistic possibility" of transmission as possibly invalidating consent. This legal test has been applied inconsistently across provinces, and prosecutors have not always kept pace with scientific advancements showing that individuals on effective treatment or using prevention methods pose no realistic risk of transmission.[10]

The federal government has acknowledged the harms of over-criminalization and has taken measures to limit criminal prosecutions[11] and some provinces have adopted guidance, including BC, Alberta, Ontario, and Quebec.[12]

While prosecutorial guidelines can help prevent some arbitrary arrests and prosecutions, it is crucial that the federal government adopt *Criminal Code* reforms that remove HIV non-disclosure from sexual assault law and align the law with current science and human rights standards.

The HIV Legal Network echoes the calls of advocates, including the Canadian Coalition to Reform HIV Criminalization (CCRHC),[13] urging Canada to:

1. **Remove non-disclosure, exposure, or transmission of HIV or other sexually transmitted and blood-borne infections (STBBI)s from the reach of sexual assault laws, including designation as a sex offender.** The law must prohibit prosecutions for sexual assault where HIV non-disclosure takes place in the context of sex among otherwise consenting adults. Charging people with sexual assault in these circumstances harms people living with HIV or other STBBIs while further undermining the law of sexual assault as a means of addressing sexual violence.

2. **Ensure that prosecution under any offence in the *Criminal Code* should be limited to the very rare cases of actual, intentional transmission.**

3. **End the deportation of non-citizens following conviction.** Non-citizens who are convicted under HIV non-disclosure laws face almost certain deportation post-conviction, which is a practice that is racist in its effect.

4. **Review past convictions.** The law should create an opportunity for past convictions to be reviewed and for a conviction to be expunged if it does not fit within the new limitations on the scope of criminalization.

Recommendation 2:
Decriminalize people who use drugs and support harm reduction

In Canada, drug use continues to be largely treated as a criminal law issue with immediate impacts on the health of people who use drugs. Since 2016, more than 57,500 people have died from the toxic, unregulated drug supply.[14] Criminalizing people who use drugs also threatens Canada's HIV, hepatitis C (HCV), and STBBI response. In Manitoba, where a public health emergency was recently declared because of exploding HIV rates, 70% of new HIV infections were reported to be related to injection drug use.[15] Nationally, nearly 30% of new HIV diagnosis among women are attributed to injection drug use.[16]

Extensive evidence shows that reliance on criminal law enforcement carries enormous financial and human costs and only fuels the spread of HIV and HCV. It pushes people to use drugs in isolation, compromises their ability to take vital safety precautions, and deters people from essential health and harm reduction services.[17] Incarceration further increases risks associated with HIV and HCV. People in prison are continuously denied equivalent access to healthcare and harm reduction measures available in the community. Access to sterile drug equipment is extraordinarily limited[18] and the federal Correctional Service Canada (CSC) has recently imposed harmful new restrictions on Opioid Agonist Therapy (OAT)[19] — creating great distress among patients in prison and increasing risks of HIV, HCV, and toxic drug injury or death.

More broadly, measures have been taken by all levels of government to limit access to harm reduction, an evidence-based, public health approach that reduces the health, social, and economic harms associated with substance use, including HIV, HCV, and other STBBIs. It is a vital component of Canada's HIV response and integral to the *STBBI Action Plan 2024-2030.*[20]

Supervised consumption services (SCS), for instance, provide safe, hygienic spaces where people can use drugs under the supervision of trained staff or volunteers. These evidence-based health services prevent overdose deaths; reduce HIV and HCV transmission through harm reduction education and supplies; and connect clients to health and social support services. They also lessen public drug use and discarded drug use equipment. But access across Canada has deteriorated sharply.[21] Some provincial governments have withdrawn funding and/or passed restrictive legislation, forcing sites to close and preventing new sites from opening.[22] In Ontario, most of the 25 SCS operating in 2024 have since been shut down. Federally, plans to develop a new regulatory framework for SCS have stalled and Health Canada has reportedly imposed new requirements for exemption applications, making it more difficult to implement SCS.

Moreover, and despite the fact that needle and syringe programs (NSPs) are among the most effective and well-established harm reduction programs in the world, some provinces have adopted new restrictions limiting their operation and effectiveness.[23] These measures undermine Canada's public health commitments and threaten to reverse hard-won progress in preventing HIV, HCV, and overdose deaths.

Therefore, we call on Canada to:

- **Decriminalize the possession of all drugs for personal use** and activities related to safe drug supply and distribution and remove all sanctions for such activities.
- **Ensure federal laws and policies** facilitate access to harm reduction services, including by streamlining the current exemption process for supervised consumption services.
- **Implement or remove barriers to key health and harm reduction measures in all prisons** and other places of detention, including:
  - needle and syringe and other drug equipment distribution programs
  - opioid agonist therapy
  - condoms and other safer sex supplies
  - programs to address tattooing, piercing, and other forms of skin penetration
  - overdose prevention services

  and ensure such programs are culturally appropriate and gender-specific.

Recommendation 3:
Renew the Community Action Fund and Harm Reduction Fund

Canada's ASO sector operates in a perpetually under-resourced state. Despite decades of repeated calls to increase HIV funding, Canada has failed to deliver promised funds. Such calls began in 2003, when the House of Commons Standing Committee on Health unanimously recommended that annual HIV funding be doubled to $85M.[24] In 2004, the former Liberal government committed to meeting this funding target, but the subsequent Conservative government halted planned increases in 2007. Funding has since remained largely stagnant.

In 2019, the Standing Committee unanimously recommended increasing funding for HIV alone to $100M annually, including an increase to the Community Action Fund (CAF).[25] In 2020, the Senate adopted a motion urging the government to follow through on this recommendation. This $100M — and more to adjust for inflation and current needs — is now required as a lifeline for the HIV response.

Community-based programs are essential in providing HIV prevention, treatment, and care. Investment in community-based HIV prevention programs ultimately save costs for the health system. For example, every dollar invested in community-based HIV prevention programs in Ontario saved approximately $5 in HIV treatment costs (from 2005-2011). Community-based programs helped to prevent an estimated 16,672 HIV infections (from 1987-2011) and are also well positioned to lead HIV efforts because they reach key populations.[26]

Therefore, we call on Canada to:

- **Renew the CAF and Harm Reduction Fund (HRF)** after the current funding cycle ends in March 2027 for at least five years.

- **At minimum, increase HIV funding to $100M annually** including a total increase for the CAF and HRF, even if the decision is made to merge the funds.

Respectfully submitted,

Janet Butler-McPhee & Sandra Ka Hon Chu
Co-Executive Directors, HIV Legal Network

Mission
The HIV Legal Network promotes the human rights of people living with HIV or AIDS and other populations disproportionately affected by HIV, punitive laws and policies, and criminalization, in Canada and internationally. We do this through research and analysis, litigation and other advocacy, public education, and community mobilization.

ENDNOTES

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[3] Ibid.

[4] UNAIDS, *Global AIDS Strategy: 2021-2026, End Inequalities. End AIDS., 2021*, available at https://www.unaids.org/sites/default/files/media_asset/global-AIDS-strategy-2021-2026_en.pdf.

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