Criminal law & HIV (non) disclosure: an introduction to law & policy

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Outline

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• By the numbers
• Reviewing Cuerrier
• Recent developments
• Client confidentiality & disclosure to prevent harm
• Outlining public policy - health & human rights?
• Questions & discussion
• Resources & contact
Our disclaimer

• This presentation is NOT legal advice. It is legal information.
• The difference between legal information and legal advice is important.
  • Legal information can help you understand the law and legal options, but it is general.
  • Legal advice is specifically about your situation and can help you to decide what to do.
• If you want legal advice you should talk to a lawyer.

Your disclaimer

• In Canada lawyers are regulated and licensed under provincial / territorial laws.
• Only a lawyer is legally entitled to give advice or counsel to persons about legal rights and responsibilities.
• So you should get used to saying
  “I am not a lawyer. Only a lawyer can give you legal advice. I can only provide you with legal information. If you need a lawyer ….”
Criminal law & HIV by the numbers

- Approximately 90 criminal prosecutions for non-disclosure from 1989 to present (that we know about).
- Vast majority of charges and convictions in Canada have been against HIV+ men who have (allegedly) had unprotected sex with women.
- Approximately 10 cases of HIV+ women who have had sex with men.
- Approximately 10 cases against HIV+ men who have had sex with men.

Criminal law & HIV by the numbers (2)

Criminal charges laid from 1989-2007


Numbers are on the rise in 2008 and 2009.
Criminal law “101”

Crime (offence) = criminal act + guilty mind

- Most crimes (criminal offences) are written in the Criminal Code, a federal law passed by the Parliament in Ottawa.
  - Courts called on interpret Criminal Code offences and apply to different, sometimes new, factual situations—like HIV exposure.
- To convict a person, Crown Prosecutor must prove all elements of an offence beyond a reasonable doubt.

The leading cases

- Supreme Court of Canada, Canada’s highest court, has decided two cases dealing with the criminal law and HIV non-disclosure.
  - Cuérrier (1998)
  - Williams (2003)

- The Supreme Court has interpreted and applied the Criminal Code offences of assault (aggravated, sexual) and common nuisance to the circumstance of HIV exposure / non-disclosure.
Reviewing Cuerrier

- Supreme Court confirmed PHAs have a duty to disclose HIV status where there is a significant risk of serious bodily harm to another person.
  - “Serious bodily harm” means HIV infection/transmission.
  - Unprotected sexual intercourse carries a “significant risk” of HIV transmission.
- Cuerrier “clarified” the law. Since Cuerrier …
  - PHAs have been charged with and convicted of aggravated assault or aggravated sexual assault for not disclosing their HIV status to sex partners.

Reviewing Cuerrier (2)

- **Assault** (Criminal Code 265(1))
  - “A person commits an assault when … without the consent of another person, he applies force intentionally to that other person, directly or indirectly.”
  - maximum 5 years imprisonment

- **Consent** (Criminal Code 265(3)(c))
  - “For the purposes of this section, no consent [to physical contact] is obtained where the complainant submits or does not resist by reason of … fraud.”
  - fraud vitiates consent
Reviewing Cuerrier (3)

- **Aggravated assault** (Criminal Code 268)
  - “Everyone commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.”
  - maximum 14 years imprisonment.

- **Aggravated sexual assault** (Criminal Code 273)
  - “Everyone commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.”
  - maximum life imprisonment.

Reviewing Cuerrier (4)

- To secure a conviction for aggravated (sexual) assault, the prosecution must prove beyond a reasonable doubt 4 essential elements:

  1. PHA knew HIV status and knew that HIV can be transmitted sexually.
     - *Williams case raises the possibility of charges and conviction where undiagnosed PHA is “aware of a risk that he or she has contracted HIV.”*

  2. Fraud Part I: An act that a reasonable person would see as dishonest. Before sex ...
     - Person did not disclose HIV status.
     - Person did not tell the truth about HIV status.
Reviewing Cuerrier (5)

3. Fraud Part II: A harm or risk of harm as a result of the dishonesty.
   - Exposure to HIV carries a significant risk of serious bodily harm.

4. The dishonest act “caused” the person to consent.
   - The person would not have consented but for the dishonest act.

* NB: Transmission is not required.

Reviewing Cuerrier (6)

- The condom “defense” to assault charges?
  - “…the careful use of condoms might be found to so reduce the risk of harm that it could no longer be considered significant ….” – Mr Justice Cory, R v Cuerrier (Supreme Court of Canada, 1998)

- Four trial courts have accepted (explicitly or implicitly) that there is only a duty to disclose where sex is “unprotected” (ie: no condom used). (Nduwayo, Smith, Charron, Edwards)

- No appeal courts decisions yet; the law is still developing.
Beyond Cuierrier

- What does significant risk of HIV transmission mean for sex?
  Three cases being appealed:
  - Mabior & Wright cases (viral load, condoms, broken condoms)
  - Trott (unprotected anal sex as an HIV positive bottom)
  - D.C. (women’s risk of passing on HIV; condom plus disclosure)
- Murder charges & conviction (Aziga)
- The duty to disclose and …
  - Sharing injecting equipment
  - Pregnancy, birth & infants

Mabior case & significant risk

- HIV positive man faced charges related to his failure to disclose his HIV status to numerous HIV negative girls & women prior to sexual intercourse.
- Most thorough analysis by a court of what “significant risk” means.
- The judge examined in detail evidence about:
  - Condoms (effectiveness of condoms, proper use)
  - Viral load (Swiss Statement and reaction to it)
  - Mabior’s medical & treatment history
Mabior case & significant risk (2)

- Court decided there was no duty to disclose HIV before intercourse where condom used and undetectable viral load.
- Will this become the law in Canada? Not clear because …
  - decision of a Manitoba court
  - trial court decision—being appealed
  - other courts are still free to interpret “significant risk of serious bodily harm” differently

Aziga case & murder

- First murder charges (Feb 2005)
  - Man charged with aggravated sexual assault for alleged failure to disclose status in relation to 11 women.
  - Two women alleged to have been infected by Aziga die, allegedly from HIV-related illnesses, before trial.
  - Regarding two deceased, aggravated sexual assault charges automatically elevated to first degree murder charges because death ensued from alleged aggravated sexual assault (Criminal Code 230 & 231).
    - Max life imprisonment without parole for 25 years.
Aziga case & murder (2)

- New issue raised by the case
  - Is it murder where PHA does not disclose, sex partner is infected and subsequently dies of HIV-related illness?
  - What is the element of causation that the Crown has to prove?

- Outcome
  - Guilty of 2 charges of first degree murder, 10 counts of aggravated sexual assault, 1 of attempted aggravated sexual assault.
  - Sentencing delayed pending expert reports.

Addressing client myth-information about HIV, sex & criminal law

- “Don’t assume that the person knows that you have HIV.”
- “Exposing someone to a significant risk of HIV infection is the crime … you can be charged and convicted even if you don’t pass on HIV.”
- “It doesn’t matter to the criminal law
  - Where you met the person
  - What they “are” to you (spouse, date, trick, anonymous)
  - Whether the sex is for fun, money, drugs
  - That you are scared the person will tell other people”
- “Ignorance of the law is not a defence.”
- “If I don’t get tested for HIV I can’t be criminally charged.”
Injecting and needle sharing

• Is it illegal to share injection equipment without disclosing HIV?
  • Sharing without disclosing could be a crime.
  • An assault or an aggravated assault, or another criminal offence.

• No decided cases about this… so law is not clear.

Legal duties of pregnant women and mothers

• Do pregnant women have a legal duty under the criminal law to disclose their HIV status to their medical team (doctors, nurses, mid-wife)?
  • One case where Crown Prosecutor laid charges.
  • Disclosure so medical team can treat child to reduce the risk that child will be HIV positive.

• Do mothers have a legal duty under the criminal law not to breast-feed their newly born children?
  • One case where Crown Prosecutor laid charges.
  • Breast milk can pass HIV from the mother to the child.
Client confidentiality & preventing harm

- The duty of confidentiality is one way the law protects a person’s right to keep personal information private.
  - Professionals (like physicians, nurses, registered social workers) are bound by a legal duty not to disclose confidential client information.
  - Professionals are also bound by an ethical duty not to disclose information (ethical duty of confidentiality).

Client confidentiality & preventing harm (2)

- Limits to confidentiality
  1. HIV/AIDS case reporting under provincial / territorial public health laws
  2. Criminal investigation & prosecution
  3. Disclosure to prevent harm to a third party (aka “duty to warn”)
  4. Mandatory blood sample / testing laws (AB, SK, MB, ON, NS)

- Disclosure of information under 1, 2 & 4 are required by law.
- Disclosure of information under 3 is permitted by law and/or ethical principles, under certain circumstances.
Client confidentiality & preventing harm (3)

- Public safety exception … a duty to prevent harm?
  - The criminal law does not impose any obligation on public health to inform police or public health about an HIV positive client who is engaging in activity that poses a significant risk of transmitting HIV.
    - Under criminal law, no duty, no "shall", not mandatory…
  - Under civil law / civil liability, no clear rule for HIV cases. Calls for exercise of discretion by public health and other health care professionals.

Client confidentiality & preventing harm (4)

- Confidentiality may be breached (and otherwise confidential information may be disclosed without consent) where there is:
  - a clear risk to an identifiable person or group and
  - the risk is serious bodily harm or death and
  - the danger is imminent

- But any disclosure should be limited as much as possible so as to minimally impair the person’s privacy right.

Source: Supreme Court of Canada, Smith v Jones [1999].
Client confidentiality & preventing harm (5)

- Provincial laws often contain public safety exceptions to the duty of confidentiality; permit specific people to disclose confidential information without a client's consent
  - Professional codes
  - Public health laws
  - Privacy of health information laws
  - Police laws
  - Freedom of Information & Access laws

Client confidentiality & preventing harm (6)

- Professionals may have an ethical obligation to protect a third party from harm by revealing otherwise confidential client information.
  - disclosure to the sexual partner of a PHA "may not be unethical and may be indicated" where a PHA is unwilling or unable to inform the person at risk
    - Canadian Medical Association
    - Canadian Association of Social Workers
Client confidentiality & preventing harm (7)

- Hospitals, psychiatrists, social workers and police have all been found in some circumstances to have a duty to warn someone they can identify as being at risk of harm
  - requires (in limited circumstances) disclosure of personal information even where there is a competing duty to keep the information confidential

- No decided HIV cases, yet!
  - Four multi-million civil lawsuits in Ontario arising out of the Aziga and Leone cases.
  - Police and public health units among those being sued for not warning or taking steps to prevent harm.

Outlining public policy – health & human rights?

- Presumption that the criminal law and public health law contribute to HIV prevention
  
  "...the criminal law does have a role to play both in deterring those infected with HIV from putting the lives of others at risk and in protecting the public from irresponsible individuals who refuse to comply with public health orders to abstain from high-risk activities. This case provides a classic example of the ineffectiveness of the health scheme. …Through deterrence it [criminal law] will protect and serve to encourage honesty, frankness and safer sexual practices."

  – Mr Justice Cory, R v Cu eerier (Supreme Court of Canada, 1998)
Outlining public policy – health & human rights? (2)

• But we have virtually no evidence about …
  • use of public health case management to reduce HIV risk behaviours
  • criminal law’s power to reduce HIV risk behaviours
  • impact of criminal law on whether (and how) people access HIV testing, care, treatment and support
  • impact of the criminal law on the health and well-being of people living with HIV
• And there has been minimal public policy debate about the wisdom of criminalizing HIV non-disclosure.

Outlining policy public – health & human rights? (3)

• Consider three “policy positions” on the use of criminal law. The criminal law is …

1. appropriate where a person living with HIV knowingly puts another person at high risk of getting HIV. There is a duty to disclose. Legal duty only on people living with HIV.

2. never appropriate where the sex was otherwise consensual. There is no duty to disclose. Everyone is ethically and legally responsible for their own sexual health.
Outlining public policy – health & human rights? (4)

- The criminal law is …

3. only appropriate where a person living with HIV intended to infect another person and that person is infected. Punish malicious intent with result.

- Some people have suggested that the criminal law is being unfairly (discriminatorily) used against PHAs.
  - Suggest that Parliament should enact a law that applies to all communicable diseases and people infected.

The HIV community responds

- Some PHAs, community activists and lawyers are working to restrict the scope and use of the criminal law.
- The current, expansive use of the criminal law increases stigma and discrimination against PHAs and makes disclosure more difficult.
  - Likely having a negative impact on PHA’s health and well-being.
- We do not think that the criminal law is an effective way to prevent HIV transmission.
  - It may result in more cases of HIV.
Canadian HIV/AIDS Legal Network

- Global and Canadian leader is community-based response to criminalization of HIV/AIDS—informing policy debate and formulation, and undertaking advocacy.
- In Canada … leading role for over 15 years
  - Case-tracking, research, analysis, writing and publishing on the legal, ethical, public health and human rights issues involved.
  - Advocacy, including intervention in numerous cases at Supreme Court and provincial Courts of Appeal.
  - Leader in capacity-building and community development/response.
  - Expert info and support to PHAC, FPT AIDS, OACHA, ASOs and defence counsel.

Canadian HIV/AIDS Legal Network (2)

- The Legal Network wants to hear from you …
  - If you or a client of your organization is being investigated by police, has been criminally charged by police, or has been convicted and is considering an appeal.
  - To track cases in order to better understand and respond to trends and legal developments.
  - To provide background materials and information to assist accused persons and their lawyers.
- Please send relevant information and inquiries to criminallylaw@aidslaw.ca.
British Columbia PWA Society

- British Columbia PWA Society lodged a complaint about Vancouver Police’s disclosure in a press release of a person’s HIV status (2006)
  - “... the constraints on the VPD making public individuals’ HIV status seemed to have loosened to the point on complete ineffectuality.”
  - Request VPD to adopt policy permitting release of HIV status only where PHA putting public at risk through ongoing reckless personal behaviour.

British Columbia PWA Society (2)

- Vancouver Police Department response
  - Reviewed policies re: public communication of info regarding an individual’s health status and communicable disease.
  - Concluded that no change in policy required.
  - OK to release info for legitimate investigative purposes.
  - Crime was essentially about non-disclosure of HIV.
  - People would only be able to identify themselves as victims of crime if accused’s HIV status was disclosed in media release.
  - BCPWA appealed to BC Privacy Commissioner.
British Columbia PWA Society (3)

- BCPWA has participated in court cases, in an attempt to restrict the scope of the criminal law related to HIV non-disclosure.
  - Made arguments to the Supreme Court in *Cuereir* case.
  - Made arguments to the BC Court of Appeal in the recent *Trott* case, which may be appealed to the Supreme Court, on the issue of “significant risk.”

Articles, updates and editorials in *Living Positive* magazine to increase PHA awareness.

Ontario Working Group Criminal Law and HIV Exposure

- The Working Group has
  - Developed a Position Statement*
  - Produced Media Speaking Points*
  - Held a public forum in Toronto
  - Begun to work with criminal defence lawyers (exploring legal strategies)
  - Engaged with the media

- For more info about the Working Group and documents*, see the Action Alert in CAS January member mail-out.
  www.cdnaids.ca
COCQ-Sida (Quebec)

- Community has come together to fight criminalization of PHAs
  ... Diane's case
  - Diane's spouse, when explaining in court why he assaulted
    Diane and her teenage son, said that he was angry because
    she did not disclose her HIV status ... 4 years earlier, when
    they first had sex.
  - Diane was then charged by police with aggravated sexual
    assault, and found guilty.
  - COCQ-Sida and community members outraged by the
    injustice, have organized and raised funds to defend Diane
    and to appeal her conviction.

Questions & discussion
Resources for more info

- Canadian HIV/AIDS Legal Network [www.aidslaw.ca/criminal](http://www.aidslaw.ca/criminal)
Contact

CATIE
www.catie.ca

Canadian HIV/AIDS Legal Network
www.aidslaw.ca