

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

CPHA 2009 Annual Conference, Winnipeg
Pre-Conference Session, 7 June

Jonathan Glenn Betteridge
Legal and policy research
glennbetter@yahoo.com


Canadian
HIV/AIDS
Legal
Network


Réseau
juridique
canadien
VIH/sida




Canadian
HIV/AIDS
Legal
Network


Réseau
juridique
canadien
VIH/sida

Outline

- Disclaimers
- 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

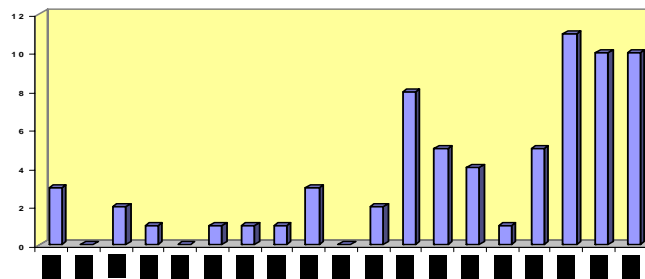
- Approximately **90 criminal prosecutions** for non-disclosure from 1989 to present (that we know about).
- Vast **majority** of charges and convictions in Canada have been against **HIV+ men** who have (allegedly) had unprotected **sex with women**.
- Approximately 10 cases of HIV+ women who have had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

Canadian HIV/AIDS Legal Network, 2008.



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**.

7



The leading cases

- Supreme Court of Canada, Canada’s highest court, has decided two cases dealing with the **criminal law and HIV non-disclosure**.
 - Cuerrier (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.

8



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.

11



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.

12



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 Cuerrier

- 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**

15



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

16



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

17



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.

18



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.

29



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 **detering** 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 Cuerrier (Supreme Court of Canada, 1998)*

30



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.

33



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.**

34



Canadian HIV/AIDS Legal Network

- Global and Canadian leader in 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.

35



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 criminallaw@aidslaw.ca.

36



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 **Cuerrier** 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.cdn aids.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
- UNAIDS. 2008. Criminalization of HIV Transmission Policy Brief. www.unaids.org
- Open Society Institute. 2008. *Ten reasons to oppose the criminalization of HIV exposure or transmission.* www.soros.org
- Burris, S. and Cameron, E. 2008. The case against criminalization of HIV transmission. *Journal of the American Medical Association.* 300(5): 578-580. <http://jama.ama-assn.org>





Contact

CATIE

www.catie.ca

Canadian HIV/AIDS Legal Network

www.aidslaw.ca