Criminal Law and HIV

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This is one in a series of 5 info sheets on the criminalization of HIV exposure in Canada.

1. **Criminalization of HIV exposure: current Canadian law**
2. Prosecutions under the *Criminal Code*
3. Does criminalizing HIV exposure make sense?
4. Public health laws and HIV prevention
5. Criminalization of HIV exposure: issues for front-line workers

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Criminalization of HIV exposure: current Canadian law

Under Canadian law, a person living with HIV may be guilty of a crime for not disclosing his or her HIV-positive status before engaging in certain activities. Charges have been laid against people living with HIV in numerous cases, particularly cases involving sexual contact. This info sheet outlines the current state of Canadian criminal law regarding HIV exposure.

When does a person living with HIV have to disclose to a sexual partner?

In addition to a number of cases in lower courts, there have been two Supreme Court of Canada decisions on this issue.[1] According to these cases:

- A person has a legal duty to disclose his or her HIV-positive status to sexual partners before having sex that poses a "significant risk" of HIV transmission. This includes anal or vaginal sex without a condom. What else it includes is not fully clear.
- A person can be convicted of a crime for not disclosing his or her HIV-positive status before having sex that poses a significant risk of transmission even if the other person does not actually become infected. The crime is exposure without disclosure.
- A person *may* have a legal duty to disclose his or her HIV-positive status before having sex that poses a significant risk of transmission even if he or she knows that a sexual partner also has HIV.
- A person who knows there is a risk that he or she has HIV (but has not received an actual HIV-positive diagnosis) *may* have a legal duty to tell sexual partners about this risk before having unprotected sex.

Is disclosure required when practicing safer sex?

There is only a duty to disclose when there is a "significant risk" of transmitting HIV. The law is clear that vaginal or anal sex without a condom currently pose a significant risk.

However, the law is unclear about whether a person living with HIV has a duty to disclose his or her status when engaging in other sexual acts with a lower risk of HIV transmission than unprotected anal or vaginal sex. It can be argued that the risk of transmission is low enough in the case of other activities that it should not be considered a "significant risk," and therefore the person has no legal duty to disclose. But this has not yet been confirmed by courts in Canada.

"No risk" and "negligible risk" activities

There is no legal duty to disclose HIV-positive status to partners before engaging in activities that pose "no risk" (e.g., kissing or mutual masturbation). There is almost certainly no legal duty to disclose HIV-positive status in the case of activities posing only a "negligible risk" of HIV transmission (e.g., receiving oral sex while using a condom or other latex barrier).[2]

"Low risk" activities

What about activities considered "low risk," such as receiving oral sex without a condom or other barrier, or having vaginal or anal sex while using a condom?

Oral sex without a condom
In a 2001 trial, the judge noted the prosecutor's position that oral sex without a condom is a low-risk activity, and therefore it would not be the basis for aggravated assault charges against a person for not disclosing his HIV-positive status.[3] This acknowledgment is not law, but other prosecutors could take the same approach. As of this writing, no Canadian court has ruled on this issue.

Vaginal or anal sex with a condom
If a condom is used for anal or vaginal sex, a person living with HIV *may* not have to disclose his or her HIV status to a sexual partner. The Supreme Court of Canada has said that "the careful use of condoms might be found to so reduce the risk of harm that it could no longer be considered significant so that there might

not be either [harm or risk of harm]."[4] So, there *may* be a "condom defence" to criminal charges of assault under Canadian law.

In a 2005 case, the trial judge stated in his instructions to the jury that "[t]here was no legal duty on [the accused] … to disclose his HIV-positive status if he used condoms at all times, as there was no evidence at trial of any significant risk of serious bodily harm that would constitute deprivation [i.e., harm] if he was using condoms."[5] This instruction to the jury was based on the trial judge's interpretation of the Supreme Court of Canada's *Cuerrier* decision. It does not bind other courts, but other judges may adopt the same interpretation.

Do women have the same legal obligations to disclose as men?

Because of physiological differences, the risk of transmitting HIV from a woman to a man through vaginal intercourse is less than from a man to a woman. As of this writing, only a few women have been criminally charged in Canada for sexual activity without disclosing to their male partners. The first high-profile case arose in 2005, when an HIV-positive woman faced assault charges based on alleged vaginal sex with two men.[6] She pleaded guilty and the Court did not consider whether the risk of female-to-male transmission is high enough to support charges. It is safest to assume that women and men living with HIV have the same legal duties of disclosure.

What if disclosing may result in violence toward the person living with HIV?

It could be argued that an HIV-positive person is not required to disclose in circumstances where they fear harm as a result. However, as of this writing no reported Canadian court decision has addressed this issue, so there is no clear answer for the person in this situation.

Is disclosure required outside the sexual context?

Health care settings

In almost all circumstances, universal precautions should suffice to reduce the risk of transmitting HIV so that it is not (legally) "significant". Therefore, an HIV-positive health-care worker would have no duty to disclose to patients, and vice-versa. However, in the case of "exposure-prone" invasive procedures,[7] a court could decide the risk of transmission is "significant" and there is a duty to disclose. This issue has not been addressed in any reported Canadian court decision. In all likelihood, a worker following guidelines or policies developed by their professional regulatory bodies or employers would not be engaging in any procedures posing a "significant" risk of transmission.

Sharing equipment when using drugs

No Canadian court has yet decided whether an HIV-positive person who uses drugs has a legal duty to disclose his or her HIV status to someone with whom he or she is sharing equipment to use drugs (e.g., a needle, crack pipe, etc.). Certain sharing of drug use equipment (e.g., sharing needles and syringes to inject drugs) is a "high risk" activity for transmitting HIV. Therefore, it is safest to assume that this will be considered to pose a "significant risk" of transmission, meaning a person would have a legal duty to disclose his or her HIV-positive status. (Given the high risk of transmitting other blood-borne illnesses such as hepatitis B or C, it is also possible that someone could be charged for sharing needles without disclosing hepatitis C infection, although such a case has not yet come before Canadian courts.)

Taking precautions, such as properly cleaning injection equipment by repeatedly flushing it with bleach between injections, could mean there is a "low risk" of HIV transmission, although studies suggest that in real-life conditions people cannot or do not consistently practise proper disinfecting methods. (Also, bleach is not fully effective in killing the hepatitis C virus.) Depending on the facts, a court may not think that such efforts reduce the risk of transmission enough. Not sharing equipment when using drugs is the only sure way for an HIV-positive person, who does not disclose his or her status, to avoid a criminal conviction.

Transmission of HIV from mother to child

HIV can be transmitted from a woman to a foetus during pregnancy and during childbirth. It can also be transmitted through breast milk. Under Canadian law, the state cannot override a woman's decisions about her own body during pregnancy, and it is only after a child is born alive that criminal law and child protection laws apply. Therefore, criminal charges could not be laid against a woman for failing to take steps to prevent the transmission of HIV during pregnancy or labour (e.g., taking anti-retroviral medications during the pregnancy, delivering by caesarean section). However, if the *Cuerrier* decision were interpreted broadly, an HIV-positive mother who risks transmitting HIV to her child through breastfeeding could potentially face assault charges.

In 2005 in Ontario, prosecutors criminally charged a woman who stopped taking her HIV medications during pregnancy, did not tell the medical team at the birth that she had HIV, and breastfed the child briefly. She pleaded guilty to a charge of "failing to provide the necessaries of life."[8] As of this writing, this is the only case of its kind in Canada and raises new issues regarding an HIV-positive woman's duty to disclose her status to her medical team, the risk of mother-to-child transmission through breastfeeding and the appropriateness of using the criminal law to address risks of mother-to-child transmission. The use of the criminal law in these circumstances could have

enormous public health costs and it seems unlikely that criminal charges against HIV-positive mothers will become common. It is more likely that concerns about the risk of HIV transmission through breastfeeding would be dealt with under child protection laws, when the legal system is involved at all.

How can a person living with HIV avoid criminal charges?

There is no fail-safe way to avoid being criminally accused of exposing someone to HIV. People lie or make mistakes about whether disclosure took place. In some places, police and prosecutors have aggressively pursued charges, including some cases where only "low risk" activity is alleged. However, a person can protect himself or herself by:

- clearly disclosing his or her HIV-positive status before engaging in any activity that risks transmitting HIV, especially unprotected anal or vaginal sex or sharing drug-use equipment;
- avoiding sex that is considered "high risk" for HIV transmission, especially unprotected anal or vaginal sex;
- not sharing needles or other drug-use equipment;
- advising her medical team of her HIV-positive status during pregnancy, labour and delivery; and
- not breastfeeding her infant(s).

Additional information

Canadian AIDS Society. *HIV Transmission Guidelines for Assessing Risk: A Resource for Educators, Counsellors, and Health Care Providers, 5th Edition*. (2004). On-line via www.cndaids.ca.

R. Elliott. *After Cuerrier: Canadian Criminal Law and the Non-Disclosure of HIV-Positive Status*. Canadian HIV/AIDS Legal Network, 1999. On-line via www.aidslaw.ca/criminallaw.

Canadian AIDS Society, Canadian HIV/AIDS Legal Network and AIDS Coalition of Nova Scotia. *Disclosure of HIV Status after Cuerrier: Resources for Community-Based AIDS Organizations*. (2004). On-line via www.aidslaw.ca/criminallaw.

References

[1] *R.* v. *Cuerrier*, [1998] 2 SCR 371 (Supreme Court of Canada); *R.* v. *Williams*, [2003] 2 SCR 134 (Supreme Court of Canada).

[2] See the Canadian AIDS Society's *HIV Transmission: Guidelines for Accessing Risk, 5th edition (2004)*, which rate sexual and drug use activities on a scale of no risk, negligible risk, low risk or high risk based on the likelihood of transmission and evidence of transmission associated with each activity. Available via www.cdnaids.ca > CAS Resources > Reports/Guides.

[3] *R.* v. *Edwards,* 2001 NSSC 80, para. 6 (Nova Scotia Supreme Court).

[4] *Cuerrier*, at 50–51.

[5] *R.* v. *Nduwayo*, original instructions to jury, 12 December 2005; *R.* v. *Nduwayo*, 2006 BCSC 1972, para. 7 (British Columbia Supreme Court).

[6] *R.* v. *J.M.*, [2005] OJ No. 5649 (Ontario Superior Court of Justice).

[7] "Exposure-prone" invasive procedures are those during which there is a greater risk of an injury that could mean the health-care worker's blood is likely to come into contact with the patient's body cavity, tissues under the skin and/or mucous membranes. Examples include some forms of abdominal, gynaecological and heart surgery, and root canals and tooth extractions. See: Health Canada, "Proceedings of the Consensus Conference on Infected Health Care Workers: Risk for Transmission of Blood-Borne Pathogens", *Canada Communicable Disease Report* 1999; 24 (Supp. 4), on-line: http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/98vol24/24s4/index.html.

[8] *R.* v. *J.I.,* 2006 ONCJ 356 (Ontario Court of Justice).

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Prosecutions under the *Criminal Code*

In Canada, there have been several dozen cases in which a person living with HIV has either been charged criminally for conduct that risks transmitting HIV or is perceived to carry such a risk, or in which a person's HIV-positive status has been considered a factor aggravating the seriousness of other criminal charges. This info sheet outlines the relevant criminal offences and sentencing provisions.

Most of the charges and convictions in Canada to date have been against HIV-positive men who have had sex with women. There have been several prosecutions of HIV-positive men who have had sex with men, and a few prosecutions of HIV-positive women who have had sex with men. In general, since the year 2000, there has been a significant increase in the number of prosecutions brought each year.

In Canada, the federal *Criminal Code* defines criminal offences. This law applies across the country. In order to prove that someone is guilty of a crime, the prosecution must prove that the accused committed the prohibited act and also had the required mental element of fault associated with the offence, as defined for each offence in the *Criminal Code*. The prosecution must prove each of these elements beyond a reasonable doubt for the prosecution to be successful.

Not knowing the law is not an excuse for committing a crime (*Criminal Code,* s. 19). A person can be charged with and convicted of a criminal offence even if he or she did not know that what he or she was doing was illegal.

Criminal prosecutions for HIV transmission or exposure

There are no specific HIV-related crimes under Canadian law. Rather, existing *Criminal Code* offences have been applied in the prosecutions that have happened. The following charges have been laid against people living with HIV for conduct that carries a risk of transmitting HIV or is perceived to carry such a risk:

Assault

It is an *assault* to make physical contact intentionally with another person without their consent. Consent to physical contact is not legally valid if it is obtained by "fraud" (*Criminal Code*, s. 265). There is also a more serious offence of *assault causing bodily harm* (*Criminal Code,* s. 267). The most serious is the offence of *aggravated assault*, where an assault "endangers the life of the complainant" (*Criminal Code*, s. 268).

Sexual assault, an assault committed in circumstances of a sexual nature such that it violates a person's sexual integrity, is a separate specific offence (*Criminal Code*, s. 271), as are the more serious offences of *sexual assault causing bodily harm* (*Criminal Code*, s. 272), and *aggravated sexual assault* that endangers the life of the complainant (*Criminal Code*, s. 273).

Currently, the maximum penalties for these charges are as follows:

- *assault*: five years' imprisonment (*Criminal Code*, s. 266)
- *assault causing bodily harm:* 14 years' imprisonment (*Criminal Code*, s. 267)
- *aggravated assault*: 14 years' imprisonment (*Criminal Code*, s. 268)
- s*exual assault:* 10 years' imprisonment (*Criminal Code*, s. 271)
- *sexual assault causing bodily harm*: 14 years' imprisonment (*Criminal Code*, s. 272); and
- *aggravated sexual assault*: life imprisonment (*Criminal Code*, s. 273).

In numerous cases, HIV-positive persons have been charged with one or more of these types of assault for engaging in unprotected anal or vaginal sex without first disclosing their HIV status. Under Canadian criminal law, an HIV-positive person has a duty to disclose his or her HIV status before engaging in conduct that poses a "significant risk" of transmitting the virus to another person.[1]

(See info sheet 1 in this series.) When such a risk exists, lying about or not disclosing HIV-positive status is treated as a "fraud" that makes the other person's consent to sex legally invalid, which means the sexual acts become an assault in the eyes of the law.

Common nuisance

Any person who "does an unlawful act or fails to discharge a legal duty" and, as a result, "endangers the lives, safety or health of the public," commits the offence of *common nuisance*. This offence carries a maximum sentence of two years' imprisonment (*Criminal Code*, s. 180).

This charge has been laid in several cases involving persons living with HIV who have put others at risk of contracting HIV. In the first HIV-related criminal prosecution in Canada, a man living with HIV was charged for donating blood.[2] All other prosecutions for common nuisance have involved sexual activity by HIV-positive persons. In a 1992 decision, an Ontario trial court ruled that sexual relationships with specific individuals did not endanger the health of "the public" generally and therefore dismissed the common nuisance charge.[3] However, in a more recent case, a Newfoundland trial has rejected this conclusion, saying that "specific individuals are members of the public and it matters not whether deliberate unprotected sex is had with one, one thousand, or one million members."[4] In addition, the Court of Appeal in Newfoundland and Labrador has upheld a conviction for common nuisance against a man who, without disclosing his status, had unprotected vaginal sex with just one partner, and this has been approved by the Supreme Court of Canada.[5] Therefore, common nuisance remains a possible charge in cases where someone is exposed to HIV without prior disclosure.

Criminal negligence causing bodily harm

A person is "criminally negligent" if, in doing anything or in omitting to do anything that it is her or his duty to do, she or he "shows wanton or reckless disregard for the lives or safety of other persons" (*Criminal Code*, s. 219). A person is criminally negligent if he or she acts in a way that represents a "marked and substantial" departure from the care that would be exercised by a "reasonable person" in the circumstances.[6] If the negligent conduct causes bodily harm to another person, it is a criminal offence, with a maximum penalty of 10 years' imprisonment (*Criminal Code*, s. 221).

As noted above, under Canadian law a person living with HIV has a duty to disclose this fact before acting in a way that exposes another person to a significant risk of infection — which certainly includes unprotected anal or vaginal sex (although it *may not* include other, lower-risk activity such as sex using condoms or oral sex), and likely includes sharing unclean needles for injecting drugs. Breaching this duty, by not disclosing HIV-positive status, could be the basis for charges of criminal negligence causing bodily harm if the other person is actually infected. Criminal negligence charges have been laid in some cases where a person has not disclosed his or her HIV-positive status to a sexual partner, often in addition to assault charges.

Murder and attempted murder

A person commits a murder if he or she causes the death of another human being, either (a) with the intent to cause death, (b) with the intent of causing bodily harm that she or he knows is likely to cause death, or (c) showing reckless disregard as to whether death ensues from that act or not (*Criminal Code*, s. 229). Attempted murder is also an offence, where a person does something with the intent to cause another person's death (*Criminal Code*, s. 239). Everyone found guilty of murder is sentenced to imprisonment for life as a minimum sentence, and for attempted murder a person can be sentenced to up to life in prison (*Criminal Code*, ss. 235 and 239).

As of this writing, murder charges have been laid in one HIV-related case in Canada. The accused faced 13 counts of aggravated sexual assault and two counts of first-degree murder for not disclosing his HIV status before having unprotected sex. Five of the 13 women complainants contracted HIV and two died of AIDS-related illnesses.[7] The accused eventually pleaded guilty to 15 counts of aggravated sexual assault.

Attempted murder charges have been laid in a few cases in Canada, in which a person has deliberately exposed someone else to blood — although in some cases the risk has been minimal, raising the question of whether such serious charges are appropriate. For example, in one case, an HIV-positive man was convicted of attempted murder for having deliberately cut his finger before engaging in a fistfight outside a bar.[8] In another, an HIV-positive inmate was convicted of two counts of attempted murder for spitting blood at prison guards during an altercation.[9]

Uttering threats

Uttering or conveying a threat to cause death or bodily harm to any person is an offence carrying a maximum penalty of five years' imprisonment (*Criminal Code*, s. 264.1). This charge has been laid alongside assault charges in several cases, including cases in which HIV-positive prisoners have spat at prison guards while threatening they would become infected.[10]

HIV in criminal sentencing

Within the Canadian criminal justice system, the legitimate objectives of sentencing are:

- denouncing unlawful conduct;
- deterring the offender and others from committing offences;
- separating offenders from society;
- rehabilitation;
- providing reparations for harm done; and

- promoting a sense of responsibility in offenders (*Criminal Code*, s. 718).

The fundamental principle of sentencing is that the sentence "must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (*Criminal Code*, s. 718.1). Unless the *Criminal Code* specifies a minimum sentence, the judge has discretion to determine the appropriate sentence, taking into consideration both mitigating and aggravating circumstances (e.g., degree of remorse, past criminal record, extent of the harm caused, etc.). There has been a wide range of sentences imposed in cases where an HIV-positive person has been found guilty of conduct that transmitted or risked transmitted HIV, or was perceived as carrying a risk of transmission; penalties have ranged from suspended sentences to 18 years' imprisonment.

In cases where a person is guilty of a serious personal injury offence and is found by the court to represent "a threat to the life, safety or physical or mental well-being of other persons", an application can be made to have the person declared "a dangerous offender" (*Criminal Code*, s. 753). This designation is intended to protect the public from the most dangerous and violent of offenders. The evidence must establish that the offence for which the person has been convicted, or behaviour associated with that offence, is part of a pattern of repetitive or aggressive behaviour "that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint" (*Criminal Code*, s. 753(1)(a)). If a person is designated as a dangerous offender, the court orders that he or she be held in a prison for an indeterminate period. This designation is relatively rare. As of this writing, only one such application has been brought before the courts (in the case of a man who pleaded guilty to multiple counts of aggravated sexual assault for not disclosing his HIV-positive status before engaging in unprotected sex with 13 women).[11]

References

[1] *R.* v. *Cuerrier*, [1998] 2 SCR 371 (Supreme Court of Canada).

[2] *R.* v. *Thornton,* [1989] OJ No 1814 (Ontario District Court) (QL), affirmed (1991), 1 OR (3d) 480 (Ontario Court of Appeal), affirmed [1993] 2 SCR 445 (Supreme Court of Canada).

[3] *R.* v. *Ssenyonga*, [1991] OJ No. 544 (Ontario Court General Division) (QL) (application for restraining order under HPPA); [1991] OJ No. 1460 (Ontario Court General Division) (QL) (bail review hearing); (1991), 73 CCC (3d) 216 (Ontario Court Provincial Division) (preliminary hearing dismissing charges of common nuisance and administering a noxious thing); (1993), 81 CCC (3d) 257 (Ontario Court General Division) (directed verdict acquitting on assault charges); [1993] OJ No. 3273 (Ontario Court General Division) (QL) (decision not to deliver judgment on criminal negligence charges in light of death of accused).

[4] *R.* v. *Hollihan*, [1998] NJ No 176 (Newfoundland Provincial Court) (QL).

[5] *R.* v. *Williams*, 2001 NFCA 52 (Newfoundland and Labrador Court of Appeal). Although, strictly speaking, the conviction on the common nuisance charged was not an issue in the appeal before the Supreme Court of Canada, it nonetheless endorsed this part of the Court of Appeal's judgment: [2003] 2 SCR 134.

[6] *R.* v. *Hundal*, [1993] 1 SCR 867 (Supreme Court of Canada).

[7] B. Brown and W. Hemsworth, "HIV infection draws first murder charge; Crown using new lab test in HIV-infection murders," *The Toronto Star*, February 25, 2005, p. A1; B. Brown, "Judge refuses to throw out AIDS case," *The Hamilton Spectator*, January 5, 2007, p. A10.

[8] *R.* v. *McKenzie,* (unreported) 31 March 1993, Court of Quebec (Trois-Rivières), Morand J.; see: « Trois ans de prison pour tentative de meurtre par transmission du sida. » *La Presse*, 1 April 1993, p. A 15.

[9] R. Elliott, "Criminal Law and HIV/AIDS: Update V," *Canadian HIV/AIDS Policy & Law Review* 6:1/2 (2001): 19.

[10] See cases summarized in: R. Elliott, "Criminal Law and HIV/AIDS: Update V," *Canadian HIV/AIDS Policy & Law Review* 6:1/2 (2001): 19-20.

[11] C. Thompson, "Leone faces indefinite sentence; Attorney general's office gives OK to hold dangerous offender hearing," *Windsor Star*, 26 October 2007, p. A1.

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Does criminalizing HIV exposure make sense?

Do criminal prosecutions represent a sound policy response to issues of HIV exposure or transmission? How should the criminal law be applied with respect to conduct that risks transmitting HIV? This info sheet presents the public policy implications of criminalizing HIV exposure.

Background

Since the beginning of the epidemic, there have been widespread calls to use the criminal law to deal with conduct that transmits or risks transmitting HIV. Frequently, these calls have been encouraged by sensational media accounts of particular cases and they often reflect or appeal to fears and prejudices about people living with HIV. Concerns have been raised by public health experts, legal experts, people living with HIV, and AIDS service organizations, noting that criminally prosecuting non-disclosure of HIV status might negatively affect the rights of people living with HIV and might also have unintended consequences with respect to HIV prevention.[1] Furthermore, the little evidence there is suggests that criminal prosecutions are unlikely to offer any significant benefit as HIV prevention policy.

Objectives of criminal prosecution

How relevant are the standard objectives of criminal prosecution when considering criminal prosecutions for conduct that transmits, or risks transmitting, HIV?

Deterring risky behaviour

In theory, criminal prosecutions can deter people from conduct that risks transmitting HIV, thereby helping achieve the public health goal of HIV prevention. This is one of the primary arguments put forward in support of criminalizing HIV transmission or exposure. However, the HIV prevention benefit from using the criminal law to deter risky conduct is likely to be limited at best.

What little evidence exists suggests people are guided in their decision making about sexual or other risks more by their sense of what is right or wrong than by what the law says.[2] Also, it is not certain that the threat of criminal charges will be a significant factor in decision making about safer sex or needle sharing "in the heat of the moment," particularly if inhibitions are lowered or judgment is impaired by such things as desire or substance use.

The history of prohibitions on alcohol, drugs, sex between men and prostitution demonstrates that the criminal law is ineffective in deterring such fundamental, complex human behaviour. As for the few who act maliciously or with disregard for the welfare of others, there is little reason to think that a legal prohibition will have much or any deterrent effect. Finally, for people who are unaware of their HIV infection, the threat of criminal prosecution will simply be seen as irrelevant and of no deterrent effect at all. As of November 2007, it was estimated that more than one-quarter of people in Canada infected with HIV were unaware of their infection.[3]

Retribution for blameworthy conduct

Certain conduct is considered so morally blameworthy that it deserves punishment, and this in itself is sufficient reason for criminalizing it. This is the other primary argument put forward by some of those who favour criminal prosecutions for HIV transmission or exposure. This justification for criminal sanctions has nothing to do with deterring the offender or others from engaging in the future in conduct such as unprotected sex without first disclosing HIV-positive status. Rather, it is about punishing past conduct deemed blameworthy. But moral culpability requires a sufficiently "guilty mind". Canadian criminal law generally recognizes different degrees of mental culpability (i.e., intention, recklessness, negligence). Not all will justify criminal prosecutions and penalties; only a limited use of criminal prosecutions

can be justified on the basis of punishing blameworthy conduct, and the retribution of the criminal law should be reserved for the most serious of cases.

Incapacitation to prevent harm

Imprisoning offenders is thought to prevent them from harming others, at least for the length of their sentence. But in the context of HIV transmission, this is a weak justification for criminal penalties. Imprisoning a person living with HIV does little to prevent further exposure. In fact, it may have the opposite effect. Prisons are environments in which high-risk behaviour is common (e.g., unprotected sexual intercourse, both consensual and non-consensual; sharing equipment for tattooing or drug injection).[4] However, prisoners often have limited or no access to HIV prevention measures such as condoms and sterile needles for drug injecting or tattooing, increasing the risks of HIV spreading in prisons.[5] Moreover, in most cases those serving prison sentences are eventually released back into the community, meaning that risky activities within prisons can lead to further transmissions on the outside.

Rehabilitation to motivate behaviour change

Causing individuals to change their behaviour in order to prevent further transmission of HIV is of critical importance to HIV prevention efforts. But most cases of HIV transmission are related to sexual activity and drug use, human behaviours which are complex and difficult to change through blunt tools such as criminal sanctions. Long-term changes in behaviour are more likely to result from other non-coercive interventions, such as education, risk-reduction counselling, support for disclosure and behaviour change, and addressing underlying reasons for engaging in high-risk behaviours.[6]

Other policy considerations

Not only are criminal prosecutions likely to be of limited effectiveness at best for HIV prevention, they may also do more harm than good. Overly broad use of the criminal law raises human rights concerns and could be counterproductive to public health goals.

Hindering HIV testing and other health services

People may hesitate to seek HIV testing and related counselling and support if they fear that knowing their HIV status or providing information to service-providers could lead to breaches of confidentiality, condemnation and possibly criminal charges. Concern that information discussed with a physician or counsellor could be used in a prosecution creates a barrier to seeking counselling or other services that would help in avoiding further risk activities. If medical records of diagnosis or treatment for another sexually transmitted infection could be used as evidence in prosecuting an HIV-positive person for alleged unsafe sex without disclosure, this could be a barrier to seeking treatment. Threats of criminal charges against HIV-positive new mothers for risking transmission to their infants (e.g., through breastfeeding or denying preventative drug therapy to the infant) would be a disincentive for at-risk parents to seek pre- and post-natal services. Nor would such criminal charges likely be in the best interests of the child, which is the overriding concern of child protection laws.

Spreading misinformation about HIV

Inappropriate and overly broad use of the criminal law can contribute to the already extensive public misunderstanding of HIV transmission risks. In Canada, criminal charges have been laid, and inordinately stiff sentences imposed, in cases involving biting, scratching and spitting, despite the extremely low — and in some cases, completely non-existent — risk of transmission. Media coverage of these cases undermines efforts to educate the public about how HIV is, and is not, transmitted.

Creating a false sense of security

There is a danger that criminally prosecuting people for not disclosing their HIV-positive status can encourage a false sense of security among people who believe they are HIV-negative, encouraging riskier practices. Public health messages that *anyone* could be infected, and that *everyone* should practice safer sex and avoid sharing needles, may be undermined by the perception that the risk is isolated to certain categories of people and that disclosure will happen if there is something to be disclosed. This is particularly risky given the percentage of people in Canada with HIV who are unaware of their infection (see note 3).

Increasing stigma and discrimination

Whether justifiable in a given case or not, criminal prosecutions for HIV transmission or exposure — and the often sensational media coverage they generate — can contribute to the stigma and discrimination people living with HIV face. Such cases place the burden of preventing transmission largely or entirely on HIV-positive people. They also risk portraying all people living with HIV as potential criminals. Stigma already disproportionately affects those identified in the public mind with HIV and those subject to social disapproval — sex workers, gay and bisexual men, people who inject drugs, immigrants and prisoners. Increasing stigma and discrimination is counterproductive to efforts to scale up both HIV prevention and treatment.

Invading privacy

Privacy rights of both HIV-positive and HIV-negative people are threatened

by criminalization of HIV exposure and transmission. The privacy of "confidential" medical and counselling records is routinely lost when police search for evidence for a prosecution. Moreover, the HIV-positive status of an accused person may be widely publicized, not only through media coverage of the trial but also when police deliberately issue public releases with a person's name and photograph in seeking more information for a prosecution. Privacy is particularly important to people living with HIV because of the stigma associated with the disease and the discrimination they could face in areas such as housing, employment and family social relationships.

Compounding unfairness of gender inequality

In some cases, a person living with HIV will have limited or no control over whether safer sex is practised with or by a partner. Someone in an abusive relationship, for example, may not be able to insist that her or his male partner wear a condom. For the same reasons, she or he may fear that disclosing infection could lead to violence. Women, particularly those in abusive relationships and those who do sex work, are more likely than men to face sexual or physical violence if they reveal that they are HIV-positive, meaning that criminal liability could have especially harsh impacts on women.

Does criminalization of HIV transmission or exposure make sense?

Any possible (and largely theoretical) benefits to be gained by using the criminal law broadly must be weighed against the costs to public health and human rights. In the big picture, criminal charges do little or nothing to stem the spread of HIV. However, they divert resources and attention away from the policies and initiatives that make a real difference (e.g., education, testing, support services, access to safer sex information and condoms, needle exchange programs, etc.) and from initiatives to address the root causes of people's vulnerability to HIV infection (e.g., stigma, gender inequality, addiction, poverty, violence, discrimination such as homophobia and racism, barriers to education, etc.).

Criminal charges may be justified in some circumstances, such as where a person is aware of his or her status and has acted with the malicious purpose of infecting someone else. However, these cases are rare.

Criminal charges should not be laid in cases where there is no significant risk of HIV transmission. In addition, criminal charges should not be brought against a person if he or she:

- was unaware of his or her HIV infection;[7]
- lacked an understanding of how HIV is transmitted;
- feared harm would result from disclosing HIV-positive status;
- practiced safer sex (e.g., a condom was used, or the acts only posed a "low risk" or even lower risk of HIV transmission);[8] or
- disclosed his or her HIV-positive status to the sexual partner or other person before any act posing a significant risk of transmission (or the other person was in some other way aware of the person's HIV-positive status).

Where criminal charges are laid, they should be the measure of last resort and care should be exercised to avoid unnecessarily and unjustifiably infringing people's rights or undermining other important public policy objectives.

References

[1] E.g., see: AIDS Committee of Toronto, "Policy on the use of criminal sanctions as a response to the transmission of HIV," on-line: www.actoronto.org/website/research.nsf/pages/crimsanct; WHO Europe, *WHO technical consultation in collaboration with European AIDS Treatment Group and AIDS Action Europe on the criminalization of HIV and other sexually transmitted infections* (Copenhagen, 16 October 2006), on-line: www.euro.who.int/Document/SHA/crimconsultation_latest.pdf; *Criminal Law and HIV Transmission: A Policy Option Paper* (Geneva: UNAIDS, 2002); and Canadian HIV/AIDS Legal Network, "Criminal Law", on-line: www.aidslaw.ca/criminallaw; C. Galletly & S. Pinkerton, "Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV," *AIDS Behaviour* 2006; 10: 451–461.

[2] E.g., see: S. Burris et al., "Do Criminal Laws Influence HIV Risk Behaviour? An Empirical Trial," *Arizona State Law Journal* 2007; 39: 467–519.

[3] Public Health Agency of Canada, *HIV/AIDS Epi Updates – November 2007* (Ottawa: PHAC, 2007), on-line: www.phac-aspc.gc.ca/aids-sida/publication/epi/epi2007-eng.html.

[4] Canadian HIV/AIDS Legal Network, "HIV and Hepatitis C in Prisons — Info Sheet 2: High-risk behaviours in prisons" (2008), on-line via www.aidslaw.ca/prisons.

[5] G. Betteridge and G. Dias, *Hard Time: Promoting HIV and Hepatitis C Prevention Programming for Prisoners in Canada* (Toronto: Canadian HIV/AIDS Legal Network & Prisoners' HIV/AIDS Support Action Network, 2007), on-line via www.aidslaw.ca/prisons.

[6] See, e.g., D.R. Holtgrave and J.W. Curran, "What works, and what remains to be done, in HIV prevention in the United States," *Annual Review of Public Health* 2006; 27: 261–75.

[7] Note that in one case the Supreme Court of Canada has suggested that a person who is aware of the risk that they may be infected, with no medical confirmation of the diagnosis, may have a legal duty to disclose this risk: *R.* v. *Williams*, [2003] 2 SCR 134. (See info sheet 1 in this series.) Given the public policy considerations mentioned here, this is not an advisable extension of the law.

[8] At this writing, this point remains unclear in Canadian law, although it has been suggested by the Supreme Court of Canada: *R.* v. *Cuerrier*, [1998] 2 SCR 371. (See info sheet 1 in this series.) Given the public policy considerations mentioned here, courts should not extend criminal law to cases where people practise safer sex.

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Criminal Law and HIV

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Public health laws and HIV prevention

Because preventing HIV transmission is primarily a public health issue, provincial public health law is the most directly relevant body of law for addressing conduct that risks transmitting HIV. This info sheet provides an overview of the public health laws as they apply to HIV exposure.

Public health law: the basics

Public health laws differ in each province and territory. Throughout Canada, however, they have three main functions:

- to classify transmissible diseases and specify rules that apply to them;
- to place a duty on some people (e.g., doctors, nurses, lab technicians) to report known or suspected cases of infection with transmissible diseases, including HIV; and
- to grant health authorities certain powers to protect public health (e.g., health officials may issue orders for an infected person to take treatment and to conduct themselves so as to avoid infecting others).

Provincial and territorial laws grant most public health powers to local authorities known as local health boards, local health units, regional health authorities, or regional health units. The Chief Medical Officer of Health or Public Health Officer oversees and directs the work of public health in their jurisdiction.

HIV prevention measures under public health laws

Partner notification

Public health legislation usually classifies HIV as a "communicable disease", and in every province and territory, both HIV infection and AIDS diagnoses are subject to the reporting requirements and enforcement procedures set out in the public health law. Public health laws give public health officials the power to do *partner notification*, also known as *contact tracing*. Partner notification is a process that involves contacting the sexual or injection-drug partners of a person who has a blood-borne or sexually-transmitted infection (including HIV), in order to tell these "contacts" that they may have been exposed to an infection and to seek testing. Generally accepted principles of good practice mandate that the health-care worker doing the partner notification (e.g., a public health nurse) not reveal the name or other identifying information of the HIV-positive person, although in practice, depending on the circumstance, a partner who is contacted may suspect or be able to figure out the identity of the contact.

Public health orders

Using the authority granted under public health laws, medical officers of health may also address HIV exposure by issuing orders that a person must take certain actions, or refrain from taking certain actions, in order to prevent HIV transmission. These orders can include such things as requiring a person to seek treatment, to disclose his or her HIV-positive status to all partners before engaging in certain sexual activities, and to use condoms consistently.[1] Not complying with a public health order can result in further sanctions, including possibly detention. The decision to issue a public health order is usually made by the local medical officer of health responsible for a particular health unit or region, so there can be considerable variation in when and how such orders are issued, or how much they infringe on a person's privacy and liberty.

HIV prevention: public health powers versus criminal prosecutions

As opposed to criminal prosecutions, do public health laws offer better alternatives for dealing with situations where an HIV-positive person does not take precautions to prevent infecting

others?

Punishing and denouncing certain conduct

Unlike criminal sanctions, punishment is not a goal of public health interventions. Criminal penalties to punish those who intentionally harm others are distinct from public health interventions. Criminal sanctions can open the door further to social prejudices and misinformation. People living with HIV/AIDS are often seen as blameworthy for their own infection, especially if they are men who have sex with men, sex workers, or people who inject drugs. People can be punished for who they are as much as for what they have done. Discrimination and stigma toward communities affected by HIV/AIDS undermine efforts to prevent HIV transmission. Public health approaches, which focus on prevention rather than punishment, are therefore generally a more appropriate response to HIV.

Incapacitating and rehabilitating individuals, and deterring certain conduct

Public health laws are better suited than the criminal law to encouraging sustained changes in risk behaviour, because they are flexible and can be tailored to individual circumstances. Within the public health framework, increasingly coercive interventions can be adopted if less coercive measures fail. Different approaches may be adopted for those whose ability to take precautions is limited (e.g., for reasons of mental illness) or for those who resist taking precautions. Public health interventions can bring about behavioural changes by addressing the reasons why someone engages in activities that risk transmitting HIV, educating them about safer practices and providing them with materials to prevent transmission such as condoms and sterile needles.

In-person contact with a public health worker seems more likely to result in changes in behaviour than the more remote, generalized possibility of criminal prosecution. Moreover, if a person is not deterred from risk activities by a public health order and the threat of detention for breaching that order, then it is unlikely he or she will be any more deterred by the threat of criminal sanctions. Some who favour criminal prosecutions for not disclosing HIV-positive status argue that highly publicized prosecutions and stiff sentences might deter others from engaging in similar conduct. But experience suggests that legal prohibitions are ineffective with respect to sexual activity and drug use, the two activities accounting for most HIV transmissions.

On balance, public health interventions offer a potentially more effective response to activities that risk transmitting HIV than the criminal law. Individualized interventions, which protect the confidentiality of those affected, are also less likely to contribute to misinformation about HIV and how it is transmitted and less likely to further stigmatize all people with HIV/AIDS as "potential criminals" and "dangers to public health" in the public mind.

Appropriate use of public health powers

While public health interventions can be effective in addressing conduct that risks transmitting HIV, they can also be misused or applied in ways that unjustifiably infringe on individual rights. Therefore, interventions should be targeted and appropriately tailored to the individual. In keeping with basic human rights principles, public health authorities should use the "least intrusive, most effective" approach to intervention and any intervention should be proportional to the level of risk posed by the behaviour in question.

Interventions can progress as necessary from the least invasive and least restrictive responses (e.g., counselling and education, ensuring access to safer sex and drug-use materials), to more restrictive and coercive responses (e.g., public health orders prohibiting certain kinds of activities and the enforcement of those orders). This "graduated response" to situations where someone is putting others at significant risk of infection, without disclosing HIV-positive status, should be established in the policies and protocols of local or regional health authorities. For greater effectiveness, interventions should occur, as appropriate, in collaboration with necessary mental health services, social workers, medical services and other community services, as well as perhaps the police — although care must be taken to ensure clear separation between public health officials, social services and law enforcement.[2]

All provinces and territories should implement safeguards in their legislation to prevent the misuse of public health powers and ensure that public health authorities act within their mandate which is to protect people, not to punish them. Public health orders should be time-limited and automatically reviewed by an appeal board. People subject to such orders should be guaranteed the right to a lawyer. In the case of detentions, public health officials should be required to prove beyond a reasonable doubt that detention is necessary to prevent a person from conduct that poses a significant risk to others without disclosure.

Criminal sanctions are increasingly seen by the public and by some prosecutors as the appropriate response to behaviour that risks transmitting HIV. If public health workers become, or are perceived to be, conduits of information to the police and prosecutors, this could undermine their work. A coordinated and principled approach is therefore needed between the criminal justice and public health systems. Criminal charges should be a last resort, only to be used in cases where public health interventions have failed and there is obviously criminal behaviour (e.g., the accused behaves with the intent to transmit the virus).

The most effective measures for controlling the spread of HIV are participation in voluntary testing, education and health promotion programs

for persons or groups who may be at risk. Unwarranted punitive measures in a few difficult cases could impair the general effectiveness of voluntary programs by increasing fear of discrimination and stigma. Moreover, it must be made clear that the primary responsibility of front-line public health workers is to promote HIV prevention and treatment, not to report activity to the police that could potentially be deemed criminal by the courts.

Additional information

"Persons who fail to disclose their HIV/AIDS status: Conclusions reached by an expert working group." *Canada Communicable Disease Report*, March 2005; 31(5): 53–61, on-line: www.phac-aspc.gc.ca/publicat/ccdr-rmtc/05pdf/cdr3105.pdf.

R. Elliott. *After Cuerrier: Canadian Criminal Law and the Non-Disclosure of HIV-Positive Status* (Canadian HIV/AIDS Legal Network, 1999), on-line via www.aidslaw.ca/criminallaw.

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[1] For example, Ontario's public health law grants this power to the medical officer of health where the officer is of the opinion that a communicable disease exists or may exist, that the communicable disease presents a risk to the health of persons in the health unit, and the requirements specified in the order are necessary in order to decrease or eliminate the risk to health presented by the communicable disease: *Health Protection and Promotion Act*, R.S.O. 1990, c.H.7, s. 22. Legislation in other provinces and territories is similar.

[2] One example of this sort of graduated model is that of the Calgary Health Region. It has five levels of intervention for people unwilling or unable to disclose their HIV-positive status, beginning with public health counselling and education as step one, and proceeding through public health order, apprehension orders and isolation orders, where necessary. Step five is criminal prosecution. See *Canada Communicable Disease Report*, Vol. 31, No. 5 (March 2005), pp. 56–60.

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Criminal Law and HIV

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Criminalization of HIV exposure: issues for front-line workers

Criminal prosecutions for HIV exposure without disclosure have implications for organizations and individuals who provide services to people living with HIV. This info sheet discusses some of the challenges and obligations facing community-based organizations, public health workers and other front-line workers.

HIV disclosure: legal duties and practical realities

According to Canadian law, every person living with HIV has a legal obligation to disclose his or her HIV status before any act that poses a "significant risk" of transmitting the virus. However, disclosing one's HIV-positive status is often not easy. It is intensely personal information. Disclosing can be necessary to benefit from certain health or social services, and can have very positive results in overcoming isolation and getting support from family, friends and others. But disclosure can also lead to very negative results, including intense stigma and discrimination in areas such as employment, housing, education and social relationships, abandonment and rejection (including loss of stable income), and in extreme cases, violence. For this reason, people living with HIV need control over who learns of their HIV status and how.

Challenges facing front-line workers

Many people will rely on community-based organizations, including AIDS service organizations, for information and support in deciding if, when and how they will disclose. Both people living with HIV and these service providers need accurate information about what the law in Canada does and does not say. But because some parts of the law remain unclear, it may not always be possible to give people clear answers or guidance. (See info sheet 1 in this series). At the same time, front-line workers may also be faced with competing ethical and legal duties if they are aware that a client is engaging in high-risk activities and has not disclosed her or his status. How should a front-line worker manage these challenges?

Counselling must include a discussion of legal duties

Counsellors are not allowed to give, and should not give, legal advice to clients. But organizations serving people living with HIV do need to keep current with developments in the law so that they can provide their clients with accurate information. Information on HIV and the criminal law needs to be incorporated into client counselling and resource materials, including into the routine counselling that should be given both before and after HIV testing, to people newly diagnosed with HIV infection, and to clients seeking information about sexuality and drug use. Clients need to understand that criminal charges could be laid against them if they know their status and expose someone else to a "significant risk" of infection.

Disclosure obligations don't preclude the right to a full, active and healthy sex life

People living with HIV are entitled to sexuality, sexual expression and to bear children if they so choose, in full equality with anyone else. People living with HIV do not need to refrain from sex, nor do they need to reveal their status to every sexual partner, depending on their sexual activities. Some sexual activities pose no risk or only a "negligible" risk, meaning there is no legal obligation to disclose. Other activities pose only a "low" risk, which could well mean there is no obligation to disclose. The only thing that is clear in the law right now is that there is a duty to disclose before activities carrying a "significant" risk, which definitely includes anal and vaginal sex without a condom.

Confidentiality and record-keeping

For people living with HIV, the confidentiality of personal information is critically important. The duty of health care workers and other service providers to keep clients' personal information

confidential is widely recognized as both a legal and an ethical obligation. As a general rule, those who are members of regulated professions (e.g., doctors, registered nurses, social workers and psychologists) have a statutory duty to maintain client confidentiality. There is also a common law duty of confidentiality owed by all staff and volunteers of community-based organizations to all clients. In Quebec, the *Civil Code of Quebec* and the Quebec *Charter of Rights and Freedoms* protect every person's right to the protection of his or her private life and the right to not have his or her confidential information disclosed. In case of a breach of any of these duties, the client can file a complaint with the profession's governing body (where applicable) and can sue the staff member or volunteer and the organization in civil court.

Those who provide medical or social services to people living with HIV should breach this trust only in exceptional circumstances and under specified conditions. At the beginning of the counselling or service relationship, clients should be told about: the organization's record-keeping practices; applicable public health laws on reporting cases of HIV or AIDS to public health authorities;[1] the organization's policies and practices with respect to disclosing HIV status to prevent harm to others (see below); and what the agency will do if faced with a legal obligation of disclosure such as a search warrant or subpoena (see below). Clients should be made aware that any information disclosed to a counsellor could conceivably be used against him or her in a criminal investigation or prosecution, although this obviously needs to be done with sensitivity and tact.

Organizations should consider what type of information to record in client files. Members of professional organizations are required by law to keep records of their practice in accordance with generally accepted standards of their profession. Some community-based organizations have decided to reduce note-taking to a minimum in order to limit the possibility of client files being used as incriminating evidence against the client. However, in some cases, this may undermine continuity in client services or have the unintended consequence of compromising the organization's legal position in a case involving a client (e.g., if an agency needs to demonstrate that it has informed a client thoroughly and accurately).

Criminal law and service providers

A person living with HIV who does not disclose his or her status before engaging in activities that expose another to a significant risk of HIV transmission can be criminally prosecuted. However, there is no general obligation under the law to report crimes to the police, so counsellors and other front-line workers in community-based organizations cannot be held criminally liable for failing to report a client's potentially criminal behaviour. (In the case of a child "in need of protection", counsellors do have a duty under child welfare law to report the situation to child protection authorities, but not to the police.) Also, front-line workers could first make appropriate use of the more flexible options available under public health law for dealing with cases of conduct that pose a significant risk of transmitting HIV. As a general rule, resorting to more coercive, intrusive measures, including contacting the police, should be considered only when less intrusive public health measures are unsuccessful.

Is there a "duty to warn" someone at risk of HIV infection?

In the course of their work, front-line workers may learn that an HIV-positive person is putting someone at risk of infection through unprotected sex or sharing drug-use equipment without disclosing their status. If the person is unwilling or unable to disclose or take precautions, is there a legal or ethical obligation to breach confidentiality in order to take steps to prevent harm to the person at risk?

Hospitals, psychiatrists, social workers and police have all been found by courts to have a duty in some circumstances to warn someone they can identify as being at risk. As of this writing, no cases specifically related to HIV have been decided. Under current Canadian law, it is not clear whether other counsellors have a legal *obligation* to disclose confidential information about a client in order to prevent harm to another person. However, they do have the *discretion* (i.e., permission) to do so where

- there is a clear risk of harm to an identifiable person or group of persons;
- there is a significant risk of serious bodily harm or death; and
- the danger is imminent.[2]

If all three conditions are met and the counsellor decides to breach confidentiality in order to protect another person, the disclosure of confidential information should be as limited as possible so as to protect the client's confidentiality.

The Canadian Medical Association advises physicians that disclosure to a spouse or sexual partner may be warranted if an HIV-positive patient's partner is at risk of HIV infection, the patient refuses to inform the sexual partner, the patient has refused an offer of assistance to inform the partner on the patient's behalf, and the physician first informs the patient of the intention to contact the partner.[3] The Canadian Association of Social Workers says that the general expectation of confidentiality does not apply when disclosure "is necessary to prevent serious, foreseeable and imminent harm" to others.[4]

Search warrants and subpoenas

Prosecutors could seek evidence from medical or other records in prosecuting a client accused of exposing someone to a risk of HIV infection without disclosing. For example, prosecutors needing to prove that an accused person knew that he or she

was HIV-positive could seek the person's HIV test results from the physician who ordered the test, from the lab that tested the blood sample or from the public health authority's records. Similarly, evidence could be sought from someone who provided counselling or other support services to an accused person and who had knowledge of the person's sexual or drug-use activities. A search warrant to seize those records could be issued or the counsellor could be compelled by a subpoena to testify about discussions with a client. A court might decide this evidence is "hearsay" for some purposes and put limits on how this evidence could be used. Nonetheless, these scenarios may affect what information people choose to discuss with service providers, because as a matter of ethical practice, service providers should make potential clients aware of these possibilities at the outset.

Canadian law does not automatically protect counselling or medical records from being seized by police or introduced as evidence in court. A counsellor or agency could try to protect the client's privacy interests by asserting "privilege" over the confidential information. The legal principle of privilege is a rule of evidence under which, for public policy reasons, the confidentiality of certain communications is protected by preventing that information from being disclosed in a legal case without the consent of the person whose confidentiality is being protected. The classic example is "lawyer-client privilege", which prevents a lawyer from disclosing confidential information received from a client without the client's permission.

A court must determine on a case-by-case basis whether otherwise confidential information is "privileged". If an organization wants to assert privilege over client records, it should seal the record in an envelope marked "Privileged — Do not open", and should inform the police explicitly that it is asserting that the confidential information is privileged. Inform the client of the seizure immediately and consult a lawyer as soon as possible.

Additional information

Canadian HIV/AIDS Legal Network. "HIV/AIDS and the Privacy of Health Information" [info sheets] (2004), on-line via www.aidslaw.ca/privacy.

Canadian HIV/AIDS Legal Network. *Privacy Protection and the Disclosure of Health Information: Legal Issues for People Living with HIV/AIDS in Canada* (2004), on-line via www.aidslaw.ca/privacy.

Canadian HIV/AIDS Legal Network. Canadian AIDS Society & AIDS Coalition of Nova Scotia. *Disclosure of HIV Status after Cuerrier: Resources for Community-Based AIDS Organizations* (2004), on-line via www.aidslaw.ca/criminallaw.

References

[1] Usually community-based organizations and their staff and volunteers do not have any obligation under public health laws to report cases of HIV and AIDS. Public health professionals (e.g., physicians, registered nurses) and labs do have legal reporting obligations under the public health laws of each province and territory. (See info sheet 4 in this series.) To clarify obligations in a particular jurisdiction or case, consult a lawyer.

[2] *Smith* v. *Jones*, [1999] 1 SCR 455 (Supreme Court of Canada).

[3] Canadian Medical Association, *Code of Ethics* (Update 2004), para. 35, on-line: http://policybase.cma.ca/PolicyPDF/PD04-06.pdf; Canadian Medical Association, *CMA Policy: Acquired Immune Deficiency Syndrome* (Update 2000), p. 2, on-line: http://policybase.cma.ca/dbtw-wpd/PolicyPDF/PD01-02.pdf.

[4] Canadian Association of Social Workers, *Code of Ethics 2005*, p. 7, on-line via www.casw-acts.ca.

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