

## Case Studies

# Human rights-based approaches to HIV/AIDS

# 1

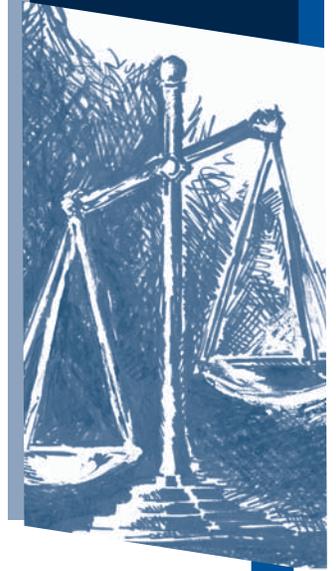
This is one of a series of case studies outlining how laws and policies dealing with various aspects of HIV/AIDS can and should be based on human rights laws and principles.

### 1 Criminalization of sex work(ers): The human rights case for law reform

- 2 Pregnancy and HIV testing policy: The need to respect and protect human rights
- 3 HIV prevention services for people who use drugs: the human rights case for harm reduction measures

# Criminalization of sex work(ers): The human rights case for law reform

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



## Background: the case of Roberta T.

In a poorly lit parking lot on the outskirts of Vancouver, Roberta T., a 29-year-old sex worker, waits for clients among the commuters who come back to their cars after a late drink with co-workers. Roberta T. used to work from an apartment she shared with two other sex workers, but the police closed it down some weeks ago, citing a law she knew nothing about. She would rather be in a better part of town – she has already been through a couple of ugly incidents of having been beaten up by clients near the parking lot. But other sex workers told her that the police have been going after people working on the street in the commercial districts of town. They said that if you show any sign of looking for clients or get them to stop their cars to talk to you, you can be arrested.

## Current Canadian laws on sex work

Roberta T.'s work is not illegal in Canada. But practicing sex work day to day is hard to do without colliding with the law. Several sections of Canada's *Criminal Code* (sections 210 through 213) dealing with "prostitution" make illegal virtually every activity related to sex work in almost every public or private place where it might occur, and heighten the risks to both the health and the human rights of sex workers.

### Laws against "bawdy-houses"

Under the *Criminal Code* (section 210) a person who lives in, runs or is present in an establishment of any kind, including a private residence, that is used purposefully for "prostitution or... acts of indecency" can be fined or imprisoned for up to two years. If, as in the case of Roberta T. and her co-workers, the sex workers are not

the owners of the property, the law says the owner or landlord must be notified if the sex worker is convicted. The owner or landlord must take steps to prevent the further use of the space for prostitution or indecent acts or face criminal prosecution. In addition, the *Criminal Code* (section 211) makes it illegal to transport or direct a person to a "bawdy-house". Effectively, the bawdy-house laws mean that unless sex workers can keep their place of business a secret, they are forced to work on the street.

But, unfortunately for Roberta T., the parking lot is not a good alternative. The time with clients would have to be in cars or in the dark bushes nearby, and it would probably be quick since commuters at this hour would be in a hurry. These things make it harder to get the clients to use condoms. If a client became violent, there is often nobody nearby to hear her call for help or who would be likely to respond. And under the broad wording of the *Criminal*

*Code*, even a parking lot can be deemed a “bawdy-house” if it is used habitually for prostitution or indecent acts; police crackdowns are always a possibility.

### **Law against “communicating for purposes of prostitution”**

The “communicating” provision of the *Criminal Code* prohibits any kind of public solicitation for sex work. Section 213 makes it illegal to stop, attempt to stop, or otherwise get in the way of pedestrian or car traffic for any purpose having to do with sex work. Any kind of communication or overt enticement for the purpose of contacting or attracting a client in a “public place” is forbidden. “Public place” is very broadly defined to include any place to which the public has a right of access, including motor vehicles. Someone found guilty of communicating can be fined and/or imprisoned for six months.

Roberta T. and other women who work on the street have to walk a tightrope of doing legal work that involves being in public places but being unable legally to engage in conversation with potential clients in public view. Fear of arrest by police officers posing as clients can also hinder open discussion about condom use and safer sex, because this conversation could be used as evidence against them in a prosecution for “communicating”.

For Roberta T. and many others, the threat of arrest on “communicating” charges creates pressure to avoid centrally located residential or commercial neighbourhoods in favour of more remote locations where they are less likely to be seen by the police or by people other than potential clients. But being in a more remote location carries a risk she fears – nowhere to run for help. Like every sex worker in Vancouver,

Roberta T. is only too aware of the risk not just of violence and assault but of losing her life. In Vancouver, over 60 sex workers have gone missing or been killed in the last five years, including 22 for whom one man has been charged with the murder – the biggest such case in Canadian history. Half a dozen women in the sex trade have been found dead in the Edmonton area since 2002.

### **Law against “living off the avails” of prostitution**

A third provision of the *Criminal Code* (section 212) prohibits “living off the avails” of prostitution. This section makes it illegal to entice a person into sex work or to make one’s livelihood off money earned through sex work. It was intended especially to protect children and others from being trafficked or otherwise drawn into prostitution. For adult sex workers like Roberta T., though, it can mean that her roommates, spouses and other intimate partners or family members may be presumed by the police to be dependent for their livelihood on the “avails” of sex work, putting them at risk of criminal prosecution. The burden of proof is on the sex worker to show that there is no “parasitic” relationship; it is one of the few cases in Canadian law where the burden of proof is not on the state to prove the guilt of a person presumed innocent.

### **Laws are selectively enforced, largely ineffective, and even harmful**

For Roberta T., one of the tricky aspects of her job is that these laws related to sex work are not enforced uniformly or predictably. Police may crack down when they get complaints from residents and neighbours, but sometimes they just look the other way. Research

in many Canadian cities has shown that these laws have done little to affect the numbers of people practicing sex work, but the available evidence indicates they increase the risks that sex workers face, including the risk of sexually transmitted diseases and of violence and assault.

### **Criminalization of sex workers: a human rights analysis**

Sex workers have the same rights as other workers and other people. In Canada, the *Criminal Code* provisions related to sex work undermine sex workers’ ability to realize their human rights in a number of ways. These rights are guaranteed by international human rights treaties such as the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) to which Canada is a party, as well as by the *Canadian Charter of Rights and Freedoms* (“the *Charter*”).

### **Liberty and security of the person**

Every person has the human rights to liberty and security of their person (ICCPR, Article 9; *Charter*, section 7). The government must justify the serious infringement of liberty involved in imprisoning sex workers. But the evidence does not show that Canada’s laws on prostitution effectively address the nuisances they supposedly target; and they carry serious consequences for the health and welfare of sex workers, far out of proportion to the purported benefits to communities. And it should be remembered that prostitution itself is not illegal in Canada, so imprisoning sex workers by criminalizing them indirectly is even more offensive to human rights principles.

Sex workers in Canada are forced by law and social pressure to work in conditions in which they are at high risk of violence and even violent death. To the extent that the bawdy-house or communicating provisions of the *Criminal Code* contribute to this risk, the state plays a direct role in adding to the risk of abuse. In addition, women sex workers face higher risk of assault and violence than men who engage in sex work. Canada has not only an ethical, but also a legal, obligation to ensure the personal security of all Canadians, and that women do not face discriminatory barriers to protection of their personal security.

### **Rights to health and to a safe workplace**

Every person has the right to the highest attainable standard of health (ICESCR, Article 12), which includes the right to be protected from important infectious diseases. Everyone also has the right to “safe and healthy working conditions” (ICESCR, Article 7). To the degree that sex workers are forced by law or social pressures to work in conditions that make it difficult, or sometimes impossible, to protect themselves from HIV or other diseases, their right to health and to a safe workplace is not protected. The government has an obligation to take steps to ensure these rights. To the degree that the law undermines fulfilment of such rights, the government is directly complicit in undermining sex workers’ right to health. In Canada, there are very few public health programs designed specifically to reach sex workers and to address their special health needs; these certainly do not counterbalance the health threats posed by the *Criminal Code* provisions.

### **Presumption of innocence**

Every person has the right to be presumed innocent of a crime until proven guilty (ICCPR, Article 14; *Charter*, section 11d). The *Criminal Code* says that the fact of living with, or being regularly in the company of, a sex worker is sufficient to be guilty of “living on the avails of prostitution”. This law turns the presumption of innocence on its head, without any adequate justification, particularly given the serious consequence of years of possible imprisonment.

### **Freedom of association, including the right to form a union**

Every person has the right to freedom of association (ICCPR, Art. 22; *Charter*, section 2). Because of the “living on the avails” provision in the *Criminal Code*, sex workers effectively cannot safely associate to operate their own businesses without running the risk that their place of association will be designated a bawdy-house and be subject to closure. The bawdy-house provision undermines sex workers’ right to associate with each other and to form a trade union. The right to form a trade union is enshrined in human rights law (ICCPR, Art. 22). This limitation on their human rights as workers also undermines their ability to ensure safe conditions of work.

### **Freedom from arbitrary interference with one’s privacy, family or home**

The “living on the avails” section of the *Criminal Code* also limits the associations that sex workers can make in their personal lives. Fear of prosecution may keep family members or intimate partners of sex workers from living with them. This constitutes an unacceptable interference with the right of sex workers to privacy and to be free from arbitrary

interference with their family and home (ICCPR, Article 17). It also infringes sex workers’ rights to marry and found a family (ICCPR, Article 23).

### **Freedom of expression**

Both international law (ICCPR, Article 19) and the Canadian constitution (*Charter*, section 2) guarantee freedom of expression. The communicating provision of the *Criminal Code* clearly limits the freedom of expression of sex workers, arguably without adequate justification. People should be allowed to speak of their work and, if their work is legal – as is the case with sex work in Canada – to attract customers to their enterprise. While reasonable limits on expression may be justifiable, the evidence does not show that Canada’s laws on prostitution effectively address the nuisances they supposedly target or that the infringement of sex workers’ expression is necessary to achieve those ends. Furthermore, they carry serious consequences for the health and welfare of sex workers, far out of proportion to the purported benefits.

### **Freedom from discrimination**

Freedom from discrimination is a fundamental principle running throughout international human rights law (ICCPR, Articles 2, 14 and 26; ICESCR, Articles 2 and 3) and in the Canadian constitution (*Charter*, section 15). The *Criminal Code* provisions reinforce a social perception of sex workers as criminals even though their profession is legal. This reinforcement is one of the most effective ways to ensure that sex workers are stigmatized and marginalized in society. The “living off the avails” provision further directly marginalizes sex workers socially, as persons who are close to them may be subject to

prosecution, an impediment to establishing normal human relationships. The available evidence seriously calls into question the argument that the very broad sweep of this provision is necessary in order to protect sex workers from exploitation.

## Human rights and the way forward

Canadian appellate courts have considered a number of cases in which some of the *Criminal Code* provisions have been challenged as unconstitutional. Unfortunately, the courts have allowed the laws to stand. However, some aspects of the laws remain unchallenged, and there are ample reasons to consider that some previous decisions could be revisited. New research has demonstrated the negative impact of the laws on the health and security of sex workers, and the spate of murders and disappearances of sex workers in Vancouver and Edmonton has raised awareness of both the public and the courts of the risks faced by sex work. In addition, case law on *Charter* rights is more developed than when many of these court decisions were first made.

### Key principles for reform

Most countries have laws or regulations of some kind on sex work. There are a number of ways in which the state can regulate sex work without undermining the human rights of sex workers, including their right not to face threats to their health and security. In this regard, some general principles are important and pertinent to the case of Canada's criminal law on prostitution:

### *Involvement of sex workers and their organizations*

Government policies on sex work will have the best chance of being human rights-based if sex workers themselves have a clear and consistent voice in decision-making related to these policies. A Parliamentary subcommittee is investigating the prostitution laws and heard from many sex workers in its hearings. The subcommittee should urge the government to establish a permanent consultative body or other mechanism that would ensure representation of sex workers in decision-making on government action related to prostitution.

### *Recognize inappropriateness of criminalization approach*

The UN's *International Guidelines on HIV/AIDS and Human Rights* suggest that for "adult sex work that involves no victimization," it is useful to review criminal law with the aim of decriminalizing sex work as much as possible. Criminal laws that raise the risk of HIV/AIDS or that otherwise contribute, directly or indirectly, to threats to the health and safety of sex workers should be repealed.

### *Recognition of sex work as work and rights of workers*

Workers in the sex trade should enjoy the benefits of occupational health and safety regulations that other workers enjoy. Government policy should improve, not undermine, their ability to enforce condom use among their clients. They should be able to associate and form trade unions. Sex workers should have easy access to health services that address their particular needs without moral judgment.

### *Learning from other jurisdictions*

A number of countries have decriminalized sex work or many elements of sex work as a matter of law. A 2003 law in New Zealand, for example, decriminalized prostitution and instituted a number of measures meant expressly to protect the human rights of sex workers. In New Zealand, brothel-based sex work is treated as a profession subject to a system of normal licensing and regulation that enables the state to ensure, for instance, that children are not engaged in sex work and allows adult sex workers to enjoy social security benefits. Occupational health and safety standards also apply to sex work, and operators of sex trade businesses are required to take reasonable steps to ensure that sex services provided are as safe as possible. The law also mandates consultation with sex worker organizations in review of prostitution law and policy.

### Recommendations

- Repeal the bawdy-house and communicating provisions of the *Criminal Code*.
- Review the *Criminal Code* provision on "living off the avails", including the aspect that undermines the right to be considered innocent until proven guilty.
- Evaluate the experiences of cities which are experimenting with licensing escorts or non-street-based sex workers, including assessing whether these approaches respect, protect and fulfil the human rights of sex workers.

- Review the experiences of other jurisdictions that have decriminalized sex work(ers) in amending Canadian laws to better protect the health and human rights of sex workers.
- Federal, provincial/territorial and municipal governments should make resources available to ensure meaningful participation of sex workers in decision-making on policies, laws and programs related to their work.

## Additional resources

Canadian HIV/AIDS Legal Network. *Sex, work, rights: reforming Canadian criminal laws on prostitution* (2005). Report and info sheets available via [www.aidslaw.ca](http://www.aidslaw.ca).

Pivot Legal Society. *Voices for Dignity: A Call to End the Harms Caused by Canada's Sex Trade Laws* (2004). Available via [www.pivotlegal.org](http://www.pivotlegal.org).

Commercial Sex Information Service. *Trials of the Sex Trade: A Survival Guide to Canada's Legal Jungle* (1995). Six-booklet set available at [www.walnet.org/csis/legal\\_tips/trials/index.html](http://www.walnet.org/csis/legal_tips/trials/index.html).

International Committee for Prostitutes' Rights. *World Charter for Prostitutes' Rights* (1985). Available at [www.walnet.org/csis/groups/icpr\\_charter.html](http://www.walnet.org/csis/groups/icpr_charter.html).

Jo Bindman, Anti-Slavery International. *Redefining prostitution as sex work on the international agenda* (1997). Available at [www.walnet.org/csis/papers/redefining.html](http://www.walnet.org/csis/papers/redefining.html).

*Research for Sex Work.* Annual journal available via [www.nswp.org](http://www.nswp.org).

Sex Trade Advocacy and Research (STAR). University of Windsor research team and publications. See: <http://web2.uwindsor.ca/courses/sociology/maticka/star/index.html>.

World Health Organization. *Sex Work Toolkit: Targeted HIV/AIDS Prevention and Care in Sex Work Settings* (2004). Available at <http://who.arvkit.net/sw/en/index.jsp>.

## Websites

Network of Sex Work Projects  
[www.nswp.org](http://www.nswp.org)

International Union of Sex Workers  
[www.iusw.org](http://www.iusw.org)

Walnet Institute  
[www.walnet.org](http://www.walnet.org)

Travail du Sexe  
[www.travaildusexe.com](http://www.travaildusexe.com)

Commercial Sex Information Service  
[www.walnet.org/csis/](http://www.walnet.org/csis/)

Sex Professionals of Canada  
[www.spoc.ca](http://www.spoc.ca)

Coalition for the Rights of Sex Workers  
[www.lacoalitionmontreal.com](http://www.lacoalitionmontreal.com)

Canadian Guild for Erotic Labour  
[www.eroticguild.com](http://www.eroticguild.com)

Stella (Montréal)  
[www.chezstella.org](http://www.chezstella.org)

Maggie's & Prostitutes' Safe Sex Project  
[www.walnet.org/csis/groups/maggies/](http://www.walnet.org/csis/groups/maggies/)

Sex Trade Workers of Canada  
[www.sextradeworkersofcanada.com](http://www.sextradeworkersofcanada.com)

Sex Workers Alliance of Vancouver  
[www.walnet.org/csis/groups/swav/](http://www.walnet.org/csis/groups/swav/)

Stepping Stone (Halifax)  
[www.supercity.ns.ca/~stepping](http://www.supercity.ns.ca/~stepping)

Sex Workers' Alliance of Toronto  
[www.walnet.org/csis/groups/swat](http://www.walnet.org/csis/groups/swat)

PEERS (Victoria)  
[www.peers.bc.ca](http://www.peers.bc.ca)

PEERS Vancouver  
[www.peersvancouver.org](http://www.peersvancouver.org)

Prostitution Research Page (John Lowman)  
<http://mypage.uniserve.ca/~lowman/>

# 1

Reproduction of this info sheet is encouraged, but copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source.

*Ce feuillet est également disponible en français.*

Funding to produce this info sheet was provided by the Public Health Agency of Canada. The opinions expressed in this publication are those of the authors and do not necessarily reflect the official views of the Public Health Agency of Canada.

© Canadian HIV/AIDS Legal Network, 2005.



Canadian  
HIV/AIDS  
Legal  
Network

Réseau  
juridique  
canadien  
VIH/sida

## Case Studies

# Human rights-based approaches to HIV/AIDS

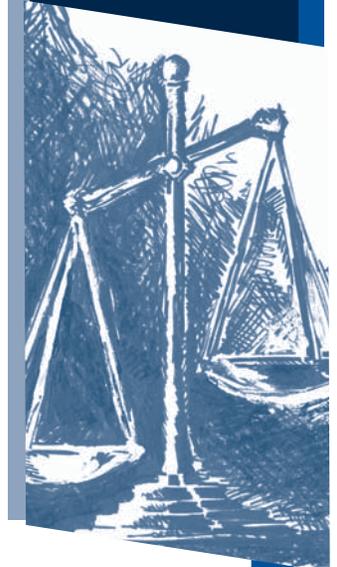
# 2

This is one of a series of case studies outlining how laws and policies dealing with various aspects of HIV/AIDS can and should be based on human rights laws and principles.

- 1 Criminalization of sex work(ers): The human rights case for law reform
- 2 **Pregnancy and HIV testing policy: The need to respect and protect human rights**
- 3 HIV prevention services for people who use drugs: the human rights case for harm reduction measures

# Pregnancy and HIV testing policy: The need to respect and protect human rights

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



## Background: The case of Nadine C.

The clinic in her town in central Alberta looked imposing to 22-year-old Nadine C. even though it wasn't very big. This was her first pregnancy and her first pre-natal visit. She didn't really know what to expect, although she hoped the doctor could suggest something for her morning sickness. While waiting to see the doctor, Nadine C. filled out what seemed like mountains of forms, giving her health history as well as she could piece it together. She gave a urine sample, and then a nurse came to take blood. The nurse reeled off a long list of tests that would be done on the blood and asked if there were any questions. Nadine C. felt like she didn't know enough to ask a question about anything the nurse had mentioned. Later, when they told her she was HIV-negative, Nadine C. couldn't remember if "HIV" had been mentioned before her blood was drawn or had been noted on one of

the many forms she had filled out. But she had been nervous and not concentrating as well as she might have. She wondered, though, whether this meant that every pregnant woman's file recorded her HIV status. Nadine C. also thought that if she had heard the offer clearly, she might have refused the test just because she thought it so unlikely that she could be HIV-positive.

## Canadian policy on HIV testing for pregnant women

*A move away from the consensus in favour of voluntary counselling and testing*

Nadine C. didn't know that since 1998 Alberta has had a policy of routinely testing every pregnant woman for HIV during prenatal care unless she "opts out" by explicitly refusing the test. In most of Canada, pregnant women are *routinely offered* an HIV test,

with the goal of ensuring that all women, and not just those perceived as being at "high risk" of HIV infection, are given the choice to find out their status. But in some provinces and territories – including Alberta, Manitoba, Northwest Territories, Newfoundland & Labrador, and Nunavut – the "default" option is to be tested unless the woman explicitly says she will not be tested.<sup>1</sup>

This new policy in some provinces and territories is a departure from the policy that has long been recommended by the World Health Organization and other international agencies and that has been the official policy of many countries and sub-national jurisdictions. It has been widely accepted that **voluntary counselling and testing (VCT)** should include the following elements:

- HIV testing initiated by the person to be tested;

- pre-test counselling that includes basic information about HIV/AIDS, the advantages and disadvantages of being tested (or not), the range of measures that can decrease the risk of mother-to-child HIV transmission, and an opportunity for the person being tested to ask questions;
- the person to be tested gives voluntary, specific and informed consent;
- post-test counselling – for those who test negative, information about how to stay negative; for those who test positive, information on care, treatment and support and on what to expect from HIV/AIDS, and references to other services; and
- confidentiality of test results.

In Canada, a broad consensus in favour of VCT with these elements emerged in the late 1980s and existed until recently.

#### *The importance of ensuring access to HIV testing for pregnant women*

Since the mid-1990s it has been known that an HIV-positive woman can greatly reduce the risk of passing HIV to her foetus or newborn baby by taking anti-retroviral drugs (ARVs) during pregnancy. The risk may also be lowered further by practices such as delivering by caesarian section (“C-section”), which avoids exposing the foetus to HIV in the birth canal. Some women may also choose to end their pregnancies. Having these choices depends on a woman’s knowing that she is HIV-positive. This is why there is such importance placed on pregnant women finding out their HIV status.

But how the test is offered and how consent is obtained remain matters of debate. At its 2002 annual

meeting, the Canadian Medical Association (CMA) recommended that pregnant women in Canada be tested for HIV as a “routine” part of prenatal care. CMA members said the absence of a standard federal or provincial policy on testing of pregnant women was contributing to a situation of too many preventable instances of perinatal HIV transmission. CMA recommended that the HIV test be included on laboratory forms along with the many other tests normally given in prenatal facilities. Pregnant women would have the chance to “opt out” of the test when they would be asked for their general consent for all the tests.

#### **Opt-out HIV testing: a human rights analysis**

From a human rights perspective, consent for an HIV test should be specific to that test and should be informed by pre-test counselling, as noted above in the description of VCT which reflects “best practices”. It is not clear to what degree the provinces and territories with routine opt-out testing policies are taking shortcuts on giving women all the information that should be part of pre-test counselling and giving women the chance in a private setting to ask questions on their minds.

The voluntary counselling and testing model is based on a number of important principles of human rights and ethics. Canadian policies on HIV testing must respect international human rights treaties to which Canada is a party, such as the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), as well as the constitutional rights protected by the *Canadian Charter*

*of Rights and Freedoms* (“the Charter”). Opt-out testing policies challenge these principles in a number of ways.

#### *Security of the person: informed consent*

Informed consent, a feature of VCT, is based in part on the human right to security of person (ICCPR, Article 9; *Charter*, section 7) – that is, the right of every person to control what happens to his or her body and, to some extent, those things that affect his or her psychological integrity. Informed consent cannot be implied or presumed. It involves a process of learning about a medical procedure, weighing the benefits and disadvantages, listening and asking questions. The principle of informed consent to medical procedures has been upheld repeatedly by Canadian courts. As one 1993 decision noted, the *Charter* right to security of the person embodies the idea of “control over one’s bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress.”<sup>2</sup> The inconvenience or slowness of pre-test counselling and of seeking explicit informed consent is not an adequate justification to undermine this fundamental human right. Pre-test counselling is essential to ensuring that the “informed” part of informed consent is a reality. Jurisdictions with “opt-out” testing policies are in breach of their human rights obligations if they take shortcuts in such counselling, whether deliberately as a matter of policy or by failing to address the likelihood that, in practice, this is a very likely consequence of an opt-out approach.

## Right to health and health information

Human rights experts have repeatedly noted that the right to information about health and medical procedures is an important component of the human right to the highest attainable standard of health (ICESCR, Article 12).<sup>3</sup> Pre-test counselling, which is normally done in a private setting one-on-one, is an ideal way of conveying information about HIV/AIDS and HIV testing. Any model of testing that compromises the delivery of adequate information to ensure informed consent does not reflect this human rights obligation.

### *Security of the person: rights of the woman vs. rights of the foetus*

Some argue that if the health of the foetus may be affected by a decision of the woman carrying the foetus, such as whether to get an HIV test, the woman may lose the right to make that decision against her doctor's judgment. Some have argued for wider use of HIV testing without informed consent on the basis that the most important objective is to protect the foetus from HIV transmission. But this is not the position of Canadian law. In a 1997 decision, the Supreme Court of Canada made it clear that the *Charter's* guarantee of the right to security of the person (section 7) guarantees women the right to exercise informed consent to a proposed medical procedure that may benefit the foetus.<sup>4</sup> She may accept or decline any such procedure and may not be obliged by the state either way. This principle has not been tested with explicit reference to HIV testing, but the 1997 decision indicates that compelling HIV testing of pregnant women would be found unconstitutional in the courts.

### *Freedom from discrimination*

Freedom from sex discrimination is a fundamental principle running throughout international human rights (ICCPR, Articles 2 and 26; ICESCR, Articles 2 and 3). The CMA recommendation on routine, opt-out HIV testing, and the state policy in those provinces/territories with opt-out testing, applies only to pregnant women. But women do not lose their full entitlement to all human rights by virtue of their pregnancy; Canadian law recognizes discrimination based on pregnancy as sex discrimination (*Charter*, section 15). For the state to adopt a policy or practice that results in the denial of women's rights such as to security of the person or to health information is to also engage in illegal sex discrimination.

## Human rights and the way forward: key principles and recommendations

HIV testing of pregnant women is an important element of an effective response to HIV/AIDS. But a response based on human rights must include explicit protections of women's rights. The protections built into voluntary and confidential counselling and testing are no less important today than they were at the beginning of the HIV/AIDS epidemic. All jurisdictions that set HIV testing policy in Canada should reflect the following conditions in their policies and should take steps to ensure these conditions are implemented in practice:

- HIV testing of pregnant women must be voluntary in all circumstances – that is, no woman is tested against her will, and no woman is tested without

knowledge of the test; lack of knowledge of the test makes her consent impossible.

- All pregnant women and all women considering pregnancy must be offered an HIV test, preferably as early in pregnancy or in the process of considering pregnancy as possible.
- All physicians and other health professionals must be required to obtain the voluntary, specific and informed consent of pregnant women before conducting an HIV test, through quality pre-test counselling. This must include providing information that allows the woman to understand the purposes, risks, harms and benefits of being tested or not tested, for them and for their foetuses, as well as a fair and accurate summary of all interventions available to reduce the risk of perinatal HIV transmission.
- Physicians or other health professionals must provide quality post-testing counselling.
- HIV testing of pregnant women will not be designated as “routine” or “default” because this undermines the principle of informed consent and the importance of pre-test counselling.

## Additional resources

Canadian HIV/AIDS Legal Network. *HIV testing and pregnancy: medical and legal parameters of the policy debate* (1999). Available via [www.aidslaw.ca](http://www.aidslaw.ca).

Canadian Medical Association (Expert Working Group). *Counselling Guidelines for HIV Testing* (1995). Available at [www.hivpositive.com/f-TestingHIV/CanadaGuidelines/prelim.htm](http://www.hivpositive.com/f-TestingHIV/CanadaGuidelines/prelim.htm).

## Notes

<sup>1</sup> Public Health Agency of Canada. *HIV/AIDS Epi Update*. May 2005, p. 41.

<sup>2</sup> *Rodriguez v AG (BC)* [1993] 3 SCR 519 at 588.

<sup>3</sup> See also UN Committee on Economic, Social and Cultural Rights. General Comment No. 14: The right to the highest attainable standard of health, Art 12, E/C.12/2000/4, 11 August 2000.

<sup>4</sup> *Winnipeg Child and Family Services (Northwest Area) v DFG.*, [1997] 3 SCR.

# 2

Reproduction of this info sheet is encouraged, but copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source.

*Ce feuillet est également disponible en français.*

Funding to produce this info sheet was provided by the Public Health Agency of Canada. The opinions expressed in this publication are those of the authors and do not necessarily reflect the official views of the Public Health Agency of Canada.

© Canadian HIV/AIDS Legal Network, 2005.

## Case Studies

# Human rights-based approaches to HIV/AIDS

# 3

This is one of a series of case studies outlining how laws and policies dealing with various aspects of HIV/AIDS can and should be based on human rights laws and principles.

- 1 Criminalization of sex work(ers): The human rights case for law reform
- 2 Pregnancy and HIV testing policy: The need to respect and protect human rights
- 3 **HIV prevention services for people who use drugs: the human rights case for harm reduction measures**

# HIV prevention services for people who use drugs: the human rights case for harm reduction measures

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



## Background: the case of Bernard H.

Bernard H., 26 years old, barely remembers how he first started using cocaine. He wishes he could stop using, especially since he started injecting. He went to three different detox programs in the previous five years, but he couldn't manage to stop for a long period. Some days, he needs to inject more than a dozen times. Luckily, in the centre of Montreal where he lives, there are all-night pharmacies where he can get syringes. But sometimes he has a hard time scraping together the money to buy syringes. At those times, he has often used the syringe exchange at CACTUS, a downtown agency. The workers there always have a good word and don't judge him. They let him exchange as many needles as he has and sometimes he can get a few more if he needs them. They also give him advice and know where to send him for other things he might need.

In the last few weeks, however, Bernard H. hasn't seen the needle exchange as an option. Every time he goes near, he sees a police car sitting within a few metres of the door of the building. He's heard that residents and businesses nearby are upset about having a syringe exchange in their neighbourhood. One time when Bernard H. didn't see the police outside the building, he went in and asked why the police were there so often. One of the workers said that changes in the city centre had a lot to do with it. With more luxury condominiums being built and more lower-income people being priced out of the centre, there is less tolerance in the population to having services "in their backyard" for people who use drugs and others coming to CACTUS for the services it provides.

Bernard H. doesn't want to reuse needles or share needles with others, but running into the police is no good either. Bernard H. thought that having a clean syringe

was not a crime, but he's heard of lots of people who were stopped and arrested just for having syringes. One of the workers at CACTUS told him that he isn't the only person who has said that he had shared needles because he wanted to avoid the police. But she encouraged him to try to come anyway to get clean needles and said they were trying to get the police to stop parking outside their door. One of Bernard H.'s other problems is throwing away his used syringes in a safe place where they won't get picked up by someone else, who might either try to use them or might get stuck accidentally. He knows that if he leaves them at CACTUS, they will be disposed of safely.

Recently, CACTUS and other community organizations, along with staff from the Quebec Ministry of Public Health, met with a high-level police official to present the concern of a heavy police presence keeping drug users away from the clean syringes that can save their lives. The public

health officials shared data showing that HIV and hepatitis C transmission is increasing in the centre of Montreal. The police official suggested meetings with other supervisory-level officers and said he would look into the patrolling practices in CACTUS' neighbourhood. But, he said, the police are required to respond to residents' complaints and calls. He also said the police know that just the fact of having a syringe is not cause for arrest or detention but suggested that there are often other factors in play when police stop drug users.

## Drug law enforcement and access to health services: a human rights analysis

*Syringe exchange programs: a necessary and proven measure to prevent HIV*

People who inject drugs are at particularly high risk of blood-borne diseases, including HIV/AIDS. Syringe exchange, which is helpful to Bernard H., is one of the world's most widely studied public health interventions. Virtually all studies show that syringe exchange is both effective in preventing HIV/AIDS among drug users and in reducing unsafe disposal of syringes, as well as very cost-effective. Studies also show that syringe exchange services do not "promote" drug use or in any way cause people to initiate drug use if they are not already using drugs. Provincial and territorial governments in Canada not only permit but in many cases fund syringe exchanges.

*The right to health: ensuring access to HIV services without discrimination*

People who use drugs have the same human rights as everyone

else, such as the right to the highest attainable standard of health, which is recognized in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR, Article 12). Canada has ratified the ICESCR, meaning it has a legal obligation to take steps to fulfil this right for everyone. This includes taking the necessary steps to prevent epidemic and other diseases, such as ensuring access to the things people need to protect themselves against getting HIV.

The UN's human rights expert committee on the ICESCR has reminded states that they have an obligation to establish HIV prevention programs.<sup>1</sup> It has also explained that states must ensure accessibility to health facilities, goods and services for everyone, "especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination."<sup>2</sup> Discriminating against people based on a disability – such as drug addiction – is prohibited. Canadian law also prohibits discrimination: the *Canadian Charter of Rights and Freedoms* ("the *Charter*", section 15) means that the government cannot discriminate based on disability in access to health services.<sup>3</sup> It would be unthinkable in Canada to deny people with diabetes the access to syringes they need for insulin injection. People with drug dependencies also have a chronic disease; the law in some countries, including Canada, recognizes drug dependence as a disability. Police action that limits access to life-saving services for persons dependent on drugs amounts not only to a violation of their right to health under international law but also discrimination contrary to the *Charter*.

The UN's *International Guidelines on HIV/AIDS and Human Rights*

remind states that their criminal laws should not hinder states' measures to reduce the risk of HIV transmission among injecting drug users, including syringe exchange programs.<sup>4</sup> In addition, states should support specially designed and targeted HIV prevention and care programs for those with less access to mainstream programmes because of social or legal marginalization, including people who inject drugs.<sup>5</sup>

*Government has to justify actions that undermine human rights*

International human rights law recognizes that achieving the highest attainable standard of health for everyone is something that takes time. However, states are immediately obliged to address discrimination and to move as quickly and effectively as possible toward *fulfilling* the right to health for all.<sup>6</sup> Furthermore, taking "retrogressive" measures – actions that backtrack on achieving this goal – is generally against international law, and the government has to prove that such measures have only been taken after carefully considering all alternatives.<sup>7</sup> Funding important health services such as syringe exchange programs is consistent with Canada's human rights obligations under international law; policies that undermine these efforts to protect and promote the health of some of society's most marginalized and vulnerable are not.

Under the ICESCR, the government has to *respect* the right to health by not interfering, directly or indirectly, with people's enjoyment of this right; it must also *protect* this right against interference by others.<sup>8</sup> If a heavy police presence or other actions of the police keep people from using life-saving services such as syringe exchanges, the state is violating

the right to health of Bernard H. and many others in his situation. If the government acts in a way that damages people's right to health – such as adopting policies or practices that effectively keep people away from health services – then it has to demonstrate that this action is justified. Under the ICESCR, the government must show that it is pursuing some legitimate objective and its actions are strictly necessary to promote “the general welfare”.<sup>9</sup> Canadian law also recognizes that there are situations in which the government can legitimately limit or deny some constitutional rights. But if the state – or its agents, such as police – violate a right, it must show that: this is being done to achieve some particularly important and legitimate objective (such as protecting public security); that the action taken is not arbitrary; that the state is impairing constitutional rights as little as possible; and that the harm to the person's rights is in proportion to the benefits that are achieved by limiting those rights.<sup>10</sup>

#### *Drug laws and heavy policing can hinder syringe exchanges' health protection work*

It is not clear that the human rights standards described above are being met in Montreal. CACTUS has been providing syringe exchange services in the city centre for over 15 years with no threat to public security. Even the police do not try to make an overall public security argument as they park their cars outside CACTUS' door; they say only that they are being responsive to complaints of the neighbours. But these concerns of the neighbours do not justify the disproportionate response such as the heavy police presence in front of the syringe exchange program, which effectively undermines access for those who need this health service.

In this case, if anything requires urgent public action, it is the public health authorities' worrying assessment that HIV/AIDS is on the increase in the heart of Montreal.

The fear of being arrested, prosecuted or even just searched by the police because of having used or clean syringes is a barrier to using syringe exchanges by people who inject drugs. In Canada, the law and court decisions have not made it clear whether syringe possession is a crime. The *Controlled Drugs and Substances Act* (section 2) defines “controlled substance” very broadly and makes it a crime to possess not only drugs themselves but also “any thing that contains or has on it a controlled substance and that is used or intended or designed for use...in introducing the substance into the human body.” Some experts believe that the courts would – and should – treat the possession of a clean syringe by a drug user (or of the minute amount of residue of a drug in a used syringe) as exception to the law. But that view remains to be tested.

In short, drug users have the right – and, because of their vulnerability, an urgent need – to be protected from HIV/AIDS and other blood-borne diseases. Syringe exchange has proven effectiveness as a tool of HIV/AIDS prevention, and it is supported by health authorities in Canada. Syringe exchanges in Canada have not presented a threat to public security. A heavy police presence near the entrance to a syringe exchange facility, or other aggressive policing against drug users in the neighbourhood of the syringe exchange, is likely to discourage use of a life-saving service and thus undermines the human right to health of people who inject drugs.

## **Human rights and the way forward**

Numerous measures can be taken to protect the human rights of Bernard H. and others in his situation with respect to HIV/AIDS prevention:

### *Legal measures to protect and promote public health*

The UN's *International Guidelines on HIV/AIDS and Human Rights* recommend that governments review their criminal laws to consider “the repeal of laws criminalizing the possession, distribution and dispensing of needles and syringes.”<sup>11</sup> Canada should heed this recommendation. Drug paraphernalia laws impede the functioning and effectiveness of syringe exchange in many countries; Canada should ensure that it is not in that situation. The law should explicitly note that a police search to find or seize a syringe from an individual constitutes “unreasonable search and seizure” under the terms of the *Charter*. It would also be possible to legislate explicit protection for the work of syringe exchanges with their non-profit public health role so they are clearly not affected by by-laws meant to control exploitative big-money drug dealers and traffickers. Municipal regulations could provide legal protections for syringe exchange services, including protection from being zoned out or otherwise forced out of neighbourhoods based on unfounded claims of nuisance or security threats.

### *Approaches to policing: ensuring communication, respect for health services and users*

In many communities around the world, syringe exchange providers have been able to strike deals with the police to facilitate their work.

For example, the police may agree that unless they are answering a call in the immediate vicinity of the syringe exchange, they will allow a buffer zone of no or minimal police presence around the entrance to the facility so as not to intimidate those who seek to use it. CACTUS had an agreement such as this with the Montreal police department for much of the 15 years of its work.

Syringe exchange providers may also have regular meetings with the police so that they are informed of changes in police practices or policy and the police are informed of their concerns. Service providers may provide training at police academies or refresher courses for the police or for new recruits on the importance of HIV/AIDS prevention among drug users, or may work regularly with a community liaison officer designated by the police. For some time, CACTUS had an arrangement whereby they could contact a senior-level officer at any time if they were concerned about the actions of police patrols in the vicinity of their facility.

The police and public health officials should have regular contact, and the police's view should not automatically take precedence over public health concerns. It would be helpful for high-level public health and law enforcement officials to have regular exchanges of information and for the public health service to do surveillance and make public reports on the health impact of police actions. It is also important for police and public health officials to meet regularly with syringe exchange providers and, where feasible, with representatives of the people who use the service to communicate concerns. Police and public health officials need to be public

supporters of the value of syringe exchange programs as a health measure reaching some of the most vulnerable.

## Additional resources

Canadian HIV/AIDS Legal Network. *Injection Drug Use and HIV/AIDS: Legal and Ethical Issues* (1999). This report, as well as a set of background papers and a series of info sheets on the same subject, are available via [www.aidslaw.ca/Maincontent/issues/druglaws.htm](http://www.aidslaw.ca/Maincontent/issues/druglaws.htm).

WHO/UNAIDS/UNODC. *Policy brief: Provision of sterile injecting equipment to reduce HIV transmission* (2004). This brief is one of several in a series of briefs presenting the "evidence for action" on HIV/AIDS and injecting drug use prepared by three UN bodies – the World Health Organization, the UN Joint Programme on HIV/AIDS, and the UN Office on Drugs and Crime. The whole series is available at [www.who.int/hiv/pub/idu/idupolicybriefs/en/index.html](http://www.who.int/hiv/pub/idu/idupolicybriefs/en/index.html).

WHO. *Effectiveness of Sterile Needle and Syringe Programming in Reducing HIV/AIDS among Injecting Drug Users* (2004). This is a lengthy paper in the WHO's "Evidence for Action" series of publications, and provides a more detailed review of the evidence supporting programs that ensure access to clean syringes. It is available at [www.who.int/hiv/pub/idu/pubidu/en/index.html](http://www.who.int/hiv/pub/idu/pubidu/en/index.html).

Canadian Centre on Substance Abuse. *Needle Exchange Programs (NEPs): Frequently Asked Questions* (2004). Available via [www.ccsa.ca](http://www.ccsa.ca) (under "Publications").

Human Rights Watch. *Abusing the User: Police Misconduct, Harm Reduction and HIV/AIDS in Vancouver* (2003). Available via [www.hrw.org](http://www.hrw.org) (under "HIV/AIDS").

Human Rights Watch. *Injecting Reason: Human Rights and HIV Prevention for Injection Drugs Users – California: A Case Study* (2003). Available via [www.hrw.org](http://www.hrw.org) (under "HIV/AIDS").

Human Rights Watch. *Lessons Not Learned: Human Rights Abuses and HIV/AIDS in the Russian Federation*. New York: HRW, April 2004.

*Harm Reduction Journal*. An open-access, peer-reviewed online journal available for free at [www.harmreductionjournal.com](http://www.harmreductionjournal.com).

*Drug War Chronicle*. International drug policy newsletter, available for free on-line at [www.stopthedrugwar.org](http://www.stopthedrugwar.org).

## Websites

Vancouver Area Network of Drug Users (VANDU)  
[www.vandu.org](http://www.vandu.org)

Unified Networkers of Drug Users Nationally (UNDUN)  
[www.freewebs.com/undun](http://www.freewebs.com/undun)

Canadian Harm Reduction Network  
[www.canadianharmreduction.com](http://www.canadianharmreduction.com)

Canadian Foundation for Drug Policy  
[www.cfdp.ca](http://www.cfdp.ca)

Canadian Centre on Substance Abuse  
[www.ccsa.ca](http://www.ccsa.ca)

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

Pivot Legal Society (Vancouver)  
www.pivotlegal.org

North American Syringe Exchange  
Network (NASEN)  
www.nasen.org

Human Rights Watch  
(HIV/AIDS & Human Rights)  
www.hrw.org

International Harm Reduction  
Association  
www.ihra.net

Forward Thinking on Drugs  
www.forward-thinking-on-drugs.org

Drug Policy Alliance (US)  
www.drugpolicy.org

International Harm Reduction  
Development @ OSI  
www.soros.org/harm-reduction

Joint UN Programme on HIV/AIDS  
(UNAIDS)  
www.unaids.org

World Health Organization  
www.who.int

Exchange: Tools for Harm  
Reduction  
www.exchangesupplies.org

The Users' Voice (UK)  
www.usersvoice.org.uk

## Notes

<sup>1</sup> UN Committee on Economic, Social and Cultural Rights. General Comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4 (2000), para. 16.

<sup>2</sup> *Ibid*, para. 12.

<sup>3</sup> *Eldridge v. British Columbia*, [1997] 3 SCR 624.

<sup>4</sup> *HIV/AIDS and Human Rights: International Guidelines*. UN Joint Programme on HIV/AIDS & Office of the UN High Commissioner for Human Rights, UN Doc. HR/PUB/98.1 (1998): Guideline 4. para. 29d.

<sup>5</sup> *Ibid*, Guideline 8, para. 38j.

<sup>6</sup> General Comment No. 14, paras. 30 & 31.

<sup>7</sup> *Ibid*, para. 32.

<sup>8</sup> General Comment No. 14, para. 33.

<sup>9</sup> ICESCR, Article 4; CESCR, General Comment No. 14, para. 28.

<sup>10</sup> *R v. Oakes*, [1986] 1 SCR 103.

<sup>11</sup> International Guidelines, para. 29d.

# 3

Reproduction of this info sheet is encouraged, but copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source.

*Ce feuillet est également disponible en français.*

Funding to produce this info sheet was provided by the Public Health Agency of Canada. The opinions expressed in this publication are those of the authors and do not necessarily reflect the official views of the Public Health Agency of Canada.

© Canadian HIV/AIDS Legal Network, 2005.



Canadian  
HIV/AIDS  
Legal  
Network

Réseau  
juridique  
canadien  
VIH/sida