

HIV LEGAL NETWORK'S 10TH SYMPOSIUM ON
HIV, LAW, AND HUMAN RIGHTS



HIV CRIMINALIZATION:

CHALLENGING INJUSTICE IN CANADA AND AROUND THE WORLD



Introduction

On March 22, 2022, the HIV Legal Network hosted its 10th Symposium on HIV, Law, and Human Rights. This international event explores the relationship between HIV and human rights, how criminal laws can be reformed to uphold the rights of people living with HIV, and how those working in the sector can use their work to challenge injustices everywhere. This year, the symposium focused on **HIV Criminalization: Challenging Injustice in Canada and Around the World**, providing a virtual forum for legal experts, people with lived experience of being criminalized, and advocates to share their expertise on the current state of HIV criminalization, the challenges facing law reform efforts, and the impact criminalization has had on the lives of people living with HIV.

Sandra Ka Hon Chu, Co-Executive Director of the HIV Legal Network, opened the symposium by welcoming attendees and panelists and giving an overview of the agenda. Co-Executive Director Janet Butler-McPhee then made a land acknowledgement, paying homage to the Indigenous People on whose land we live and work, highlighting the disproportionate impact HIV criminalization has on Indigenous communities and other people of colour. The land acknowledgement explicitly recognized that many harms and health inequities are the result of the history of colonization and its ongoing impacts, including practices and institutions that must be dismantled and reshaped to respect Indigenous People and Indigenous ways of knowing and being. It was also critical to begin the Symposium by acknowledging the legacy of anti-Black racism and its relationship to HIV criminalization.



Panel 1: Where are we now?

Richard Elliott, former Executive Director of the HIV Legal Network and now a human rights consultant, moderated a panel about the current state of HIV criminalization in Canada. Richard began with a brief overview of HIV non-disclosure law in Canada, explaining the leading Supreme Court decisions in this area and subsequent legal evolutions. He noted that, although the law has caught up with scientific evidence on some points (e.g. undetectable viral loads), it remains out of step with science on others (e.g. condom use).

Colin Hastings, postdoctoral researcher at Concordia University's Department of Sociology and Anthropology, provided an overview of the HIV Legal Network's new publication *HIV Criminalization in Canada: Key Trends and Patterns (1989 - 2020)*, authored by Colin, Richard Elliott, Notisha Massaquoi, and Eric Mykhalovskiy. Colin shared that there have been at least 206 individuals prosecuted, in 224 criminal cases, between 1989 and 2020. The number of prosecutions has declined in recent years, likely because of "sustained advocacy efforts that have been taking place across Canada," said Colin. The vast majority of cases have taken place in three provinces: Ontario, Quebec, and British Columbia.

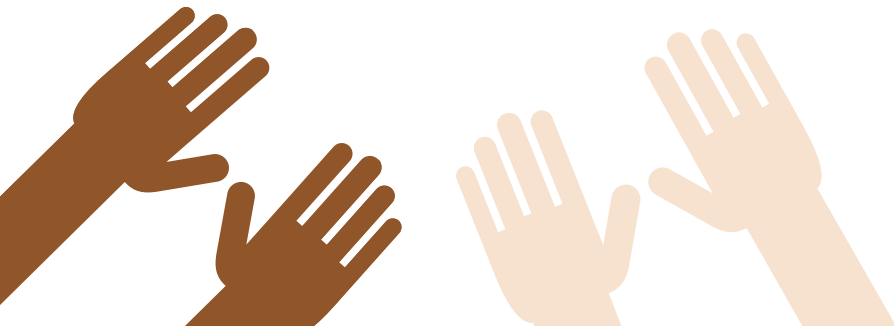
Colin shared that the criminal law continues to be used disproportionately against people living with HIV from some racialized populations, including Black men and Indigenous women. The data shows that there are noticeable differences in the outcome of cases when organized by race. Black and Indigenous people are convicted at a higher rate, acquitted at a lower rate, and are more likely to face prison sentences compared to white people who face similar charges. As well, most HIV prosecutions do not involve HIV transmission, demonstrating that most HIV cases are about alleged or real exposure to the virus, rather than transmission. Finally, there are stable trends that suggest that HIV non-disclosure cases have very high rates of conviction and that a large proportion of cases result in prison sentences.

“Overall, the report highlights the urgent need for the criminal legal system to be better guided by science and human rights principles in responding to HIV, and for immediate government action to end the harms of HIV criminalization in Canada.”

COLIN HASTINGS

Next, Liam Michaud, PhD student in sociolegal studies at York University, spoke about a [recent report](#) he co-authored about the harms of sex offender designation on people convicted of aggravated sexual assault for HIV non-disclosure. Liam wrote the report alongside Alexander McClelland (Carleton University), HIV & AIDS Legal Clinic Ontario (HALCO), and the HIV Legal Network. The report builds off Alex's previous research on the lived experiences of people who had been criminalized for HIV non-disclosure.

In 2011, the *Sex Offender Information Registration Act (SOIRA)* was amended so that people convicted of certain designated offences, including aggravated sexual assault, are automatically required to register as sex offenders. (The Supreme Court is currently considering the [un]constitutionality of these amendments in a case called *R. v. N.*). As a result of these amendments, people convicted of aggravated sexual assault for HIV non-disclosure are subject to mandatory sex offender registration. Liam explained that there are multiple, interconnected sources of harms of the sex offender regime for those convicted for non-disclosure. These harms include *SOIRA*'s burdensome registration requirements, psychological distress arising from being under police surveillance, barriers to community reintegration and family reunification, vigilantism, and media coverage. According to Liam, "The stated purpose and principles of *SOIRA* do not include the punishment of those on the [National Sex Offender Registry]. Yet, people living with HIV required to register as sex offenders clearly experience *SOIRA* as punitive."





Liam shared this quote from an Indigenous woman who was required to register because of an aggravated sexual assault conviction for non-disclosure: “I’m on the registry that is for rapists and pedophiles, I really don’t feel like I belong there. I am on there because of HIV. I have to let people know when I am working or when I am volunteering. They need to keep tabs on me.”

Finally, Léa Pelletier-Marcotte, from COCQ-SIDA, and India Annamanthadoo, from the HIV Legal Network, shared an update on ongoing advocacy efforts of the Canadian Coalition to Reform HIV Criminalization (CCRHC). The CCRHC was formed in 2016, with a common goal of progressively reforming the overly broad laws that criminalize HIV. Members of the CCRHC include people living with HIV (including people who have been criminalized for non-disclosure), community organizations, activists, lawyers, and researchers.

In 2017, the CCRHC released a [Community Consensus Statement](#) that called for changes to the Canadian *Criminal Code* to limit HIV criminalization to actual, intentional transmission, and to put an end to the use of sexual assault offences in these cases. This statement was supported by more than 170 organizations across Canada. Léa shared several developments from the past six years that demonstrate the federal government’s openness to proceed with law reform.

In the fall of 2021, building on the 2017 advocacy, the CCRHC launched a second community consultation to explore concrete options to achieve these calls to action. Community feedback on three proposed reform options was solicited through an online survey and several live workshops. Although the results are still being interpreted, India reported that, despite the risks associated with law reform advocacy, “the community agrees that the status quo is unacceptable and that it is time we push for law reform.”

Positive Women Revisited

Ten years ago, the Legal Network was fortunate to team up with filmmaker Alison Duke and four amazing women living with HIV in Canada on a new project exploring the profound effects of criminalization on their lives. The result of this collaboration was *Positive Women: Exposing Injustice* (2012), a documentary film shown in Canada — and around the world — to many diverse audiences over the past decade. These women and their important stories touched and inspired viewers, and ultimately made *Positive Women* a galvanizing moment in the worldwide movement to end HIV criminalization. The documentary retains its resonance even today and, unfortunately, these stories of the looming threat of criminalization still ring true for people living with HIV in Canada and beyond.

This year, to mark the 10th anniversary of *Positive Women*, the HIV Legal Network went back to two of the protagonists featured in the original documentary to understand if and how criminalization was still part of their lives. We spoke with Lynn, a Two-Spirit Indigenous advocate now living in British Columbia, and Jessica, a queer activist who is also now a mother of two and living abroad with her family. In *Positive Women Revisited* (2022), Lynn and Jessica fearlessly assess how criminalization continues to have impact on their lives and their work — and they deliver strong, heartfelt messages to policymakers about what it is like to live with the fear of prosecution as a constant reality, and why this needs to finally change for people living with HIV in Canada.



POSITIVE WOMEN: EXPOSING INJUSTICE

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Panel 2: Minimizing Harm – Litigation

Moderator Shakir Rahim, a lawyer and member of the board of directors of the HIV Legal Network and the HIV & AIDS Legal Clinic Ontario (HALCO), facilitated a conversation between Khalid Janmohamed, Director of Legal Clinic Programs at the Lincoln Alexander School of Law, X University (and former litigation director at HALCO) and Isabel Grant, Professor and Associate Dean, Academic Affairs at the Peter Allard School of Law, UBC. The panelists discussed the implications of *R. v. Kirkpatrick*, a case currently before the Supreme Court of Canada, on people living with HIV and on sexual assault law.

To begin, Shakir provided an overview of *R. v. Hutchinson*, a 2014 case before the Supreme Court of Canada that dealt with “condom deception.” In that case, the complainant agreed to have sex with the accused if they used a condom. The accused, without the complainant’s knowledge, poked holes in the condom and the complainant became pregnant. The Court needed to decide whether poking holes in the condom meant the accused engaged in a *different act* than the sexual activity agreed upon. If so, that would be sexual assault. The Court ultimately held that condom use does not form part of the sexual activity in question. Rather, by damaging the condom, the accused committed a dishonest act and deprived the complainant of her choice to become pregnant or increased the risk of pregnancy, thus invalidating her consent after the fact and committing sexual assault pursuant to s. 265(3)(c) of the *Criminal Code*, the same law that applies to HIV non-disclosure.

R. v. Kirkpatrick is also a case about condom use and consent. The complainant agreed to have sex with the accused only if he used a condom. But the accused, without the complainant’s knowledge or consent, did not use a condom. The B.C. Court of Appeal said such “condom refusal” constitutes sexual assault because the accused engaged in a *different* sexual activity than the one agreed upon. Therefore, there was no consent to sex and condom refusal will always constitute sexual assault regardless of whether there is a significant risk of serious bodily harm.

As Isabel explained, there are two forms of non-consensual condom removal:

- **Condom deception** was the scenario in *Hutchinson*, where a man tricked his partner into thinking he was wearing an intact condom when in fact he had cut holes in it to impregnate his partner. It is this kind of condom deception that courts have said is equivalent to HIV non-disclosure. According to the Supreme Court in *Hutchinson*, condom deception does not directly negate consent but invalidates consent after the fact where there was a significant risk of serious bodily harm.
- **Condom refusal**, on the other hand, was the scenario in *Kirkpatrick*, where an accused doesn’t lie about using an intact condom but rather goes ahead with sex without a condom without her permission.





Why does *Kirkpatrick* matter to people living with HIV?

Khalid began his presentation by describing why we should largely do away with carceral state responses: “in plain words, there are better ways to deal with problems than putting people in jails.” But as he noted, the reality of our current legal system today is that people living with HIV face the risk of criminal charges if they don’t disclose their HIV status before sex in some circumstances. If the Supreme Court in *Kirkpatrick* broadens the law that applies to condom removal, there is a chance that this could result in the law that applies to HIV non-disclosure being broadened, too, and more people living with HIV facing criminal charges. So, HALCO and the HIV Legal Network intervened before the Supreme Court to argue how this problem could be avoided:

1. If the Court broadens the law that applies to condom removal, they could specifically say that that change applies only to condom removal (and not HIV non-disclosure) so that there is no confusion.
2. The Court could decide to place condom removal in a different area of sexual assault law, which would mean that HIV non-disclosure and condom removal would be considered under different laws.

The main argument of HALCO and the HIV Legal Network was that the Court should place condom removal under s. 273.1 of the Criminal Code, so that condom use during sex is part of the “physical sexual act.” Under this framework, when one sexual partner states that a condom is a condition of their consent to sex and the other partner doesn’t wear a condom, then there was no consent to the sex. They also urged the Court to indicate in its decision that HIV does not form part of the “physical sexual act,” so HIV non-disclosure would remain under the fraud analysis under s. 265(3) (c) of the Criminal Code. This approach poses the least risk of expanding the criminalization of HIV non-disclosure and better recognizes the sexual autonomy of women and their right to be able to make their consent conditional on the wearing of a condom.

What are the implications of *Kirkpatrick* for sexual assault law?

Isabel described the harm it does to sexual assault law generally to say that HIV non-disclosure is a form of sexual assault. As she noted, “the need to put limits on the prosecution of people for HIV non-disclosure has led to distortions in sexual assault law that don’t work outside of the HIV context. While people with HIV have been over-criminalized through sexual assault laws, sexual assault outside of this context is under prosecuted and under enforced.”

In the empirical literature and in reported Canadian case law, condom refusal is more common than condom deception. Men simply ignore the wishes of their partner and proceed with sex without a condom — without tricking them. The Supreme Court in *Hutchinson* only decided that condom *deception* did not go to consent, whereas *Kirkpatrick* is about whether that finding extends to condom refusal. The question in *Kirkpatrick* is whether refusal to wear a condom when your partner has insisted on it negates consent to sex even if it doesn’t cause bodily harm. That should be a simple question, but because of HIV non-disclosure, it isn’t. The Court in *Hutchinson* sought to limit the factors that are part of the consent determination, and it didn’t want HIV non-disclosure to always negate consent, even if there was no significant risk of bodily harm.

As Isabel explained, whether a complainant has a right to insist on a condom should not depend on the partner’s HIV status or that complainant’s ability to become pregnant. Outside of the HIV context, bodily harm in these cases usually takes the form of unwanted pregnancy. Yet, many people are incapable of becoming pregnant because of gender, age, fertility, or the fact that they are already pregnant, and people should have a right to insist on a condom regardless of whether they risk pregnancy. The distinction between deceptive condom removal and condom refusal also leads to incoherent distinctions in the case law: it may depend on whether the accused was standing behind the complainant or in front of her when he took the condom off. If she didn’t see him take off the condom, it is deceptive but if she did see, it is straightforward refusal. These are distinctions without a difference in terms of moral culpability and in terms of a person’s right to choose what kind of sex to have.

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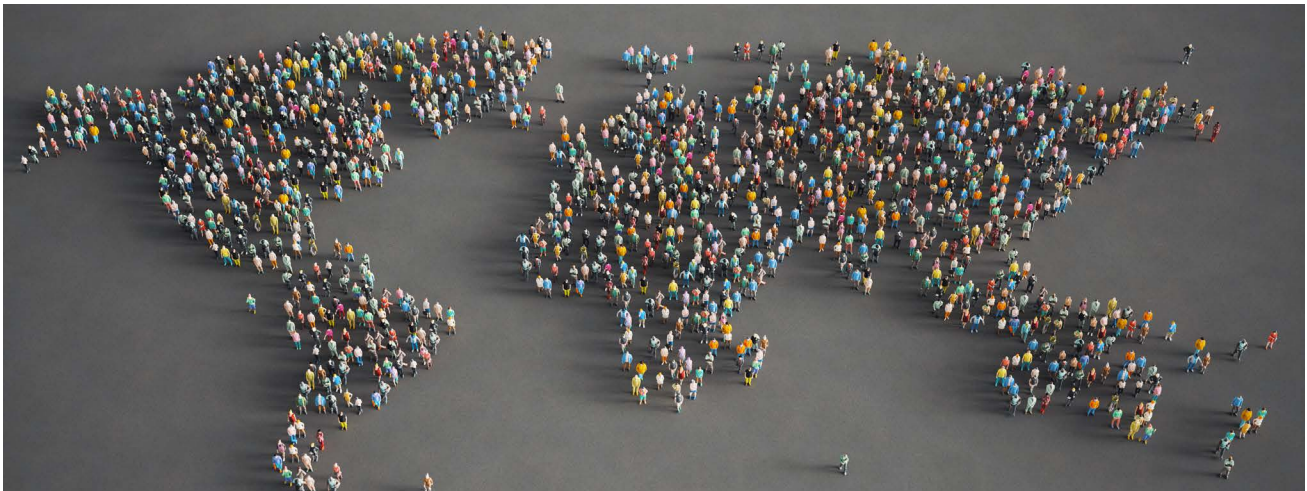
Panel 3: HIV Justice Worldwide — Global movements to limit HIV criminalization

With the last panel of the symposium, we crossed borders and learned about advocacy against HIV criminalization happening outside Canada. The moderator, Edwin Bernard, Executive Director of the HIV Justice Network and global coordinator of HIV Justice Worldwide, introduced the session by stressing how tireless collective — and often groundbreaking — advocacy against HIV criminalization in Canada influences advocacy worldwide. Edwin presented HIV Justice Worldwide — a global coalition that campaigns to abolish criminal and similar laws, policies, and practices that regulate, control, and punish people living with HIV based on their HIV-positive status. HIV Justice Worldwide was founded in March 2016 by seven partners including the HIV Legal Network and has now grown significantly to a 14-member steering committee with 120 member organizations.

The session then officially started with a short video introducing a new resource published by Positive Women’s Network-USA on behalf of HIV Justice Worldwide, which aims to support people living with HIV, activists, legal experts, and human rights campaigners in understanding the complexities and consequences of molecular HIV surveillance (MHS). Molecular HIV surveillance is an umbrella term that describes a wide range of practices focused on monitoring HIV variants and the differences and similarities between them for scientific research, public health surveillance, and intervention. The use of MHS raises important human rights concerns including the lack of consent from people living with

HIV and the potential for increased HIV criminalization within communities that are already marginalized and oppressed. Professor Alexander McClelland from Carleton University in Canada, and co-author on the MHS briefing paper, reacted to the video. He described how MHS originated from British Columbia and is being used in Canada (especially in B.C. and Quebec). Stressing human rights concerns raised by MHS, Alex described ongoing advocacy in the United States where people living with HIV have called for a moratorium on the use of MHS and successfully stopped a recent massive study from being conducted. Alex expects MHS to be rolled out across Canada and called on the HIV community there to work collectively to respond.

Edwin then turned to Cécile Kazatchkine, Senior Policy Analyst at the HIV Legal Network, who coordinates *l’espace francophone* — a dedicated forum for learning exchange and support to local advocacy on HIV criminalization especially in Francophone North, West, and Central Africa. Advocacy in the region often focuses on law reform because of the existence of many HIV-specific laws criminalizing HIV on the continent. Cécile described ongoing and promising efforts in Burkina Faso to decriminalize HIV through law reform. She also described how HIV Justice Worldwide’s francophone network supported community mobilization in Benin to respond to a problematic bill to reform Benin HIV law, highlighting the benefits of having such a network in place and being able to activate contacts and expertise in the region.





Our last speaker was Mikhail Golichenko, also Senior Policy Analyst at the HIV Legal Network. Mikhail discussed ongoing efforts in Eastern Europe and Central Asia against HIV criminalization. Russia, Belarus, and Uzbekistan are the top three countries for unjust arrests, prosecutions, and convictions in the world and places where chances of acquittals are close to zero. But even in difficult political, social, and legal environments, incremental improvements are possible. Mikhail discussed strategies to respond to criminalization in the region, centering support to people living with HIV and engagement with key partners, including UN partners such as UNDP and HIV Justice Worldwide. Mikhail discussed recent law reform in Belarus that recognizes HIV disclosure (to sexual partners) as precluding criminalization in cases of HIV

exposure or transmission and recent commitment of law enforcement authorities to adopt prosecutorial guidelines in relation to HIV criminalization. Mikhail also discussed important work with UN human rights treaty bodies that secured strong recommendations for Belarus, Uzbekistan, Tajikistan, and Kyrgyzstan. Ongoing work in the region is now deeply affected by Russia's invasion of Ukraine and the humanitarian crisis in the region. HIV Justice Worldwide's members including colleagues from the Eurasian Women's Network on AIDS are in Ukraine. Mikhail is hopeful that the war will resolve soon and may create opportunities for reform of repressive legislations associated with Russia. Both Ukraine and Moldavia could be leaders in the region. However, any meaningful work in Russia has now been made impossible.

Conclusion

Sandra gave the closing remarks, thanking the panelists and the *Positive Women* contributors for sharing their stories, expertise, and advocacy with us. She acknowledged the contribution of the Public Health Agency of Canada, whose funding made the symposium possible. She and Janet thanked the audience for their care and attention to this issue and their willingness to spend an afternoon of learning with us.





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