

# **The domestic and international environments for the work of the Canadian HIV/AIDS Legal Network in 2005 and beyond**

**DRAFT FOR COMMENT – August 2005**

## **Introduction**

The objective of this document is to provide a brief summary and analysis of factors in the social and political environment in Canada and abroad that relate to legal and human rights aspects of HIV/AIDS and thus are of concern to the Canadian HIV/AIDS Legal Network. These are the factors that need to be taken into account as the Legal Network determines priorities for its work in the coming years. This paper will inform the Legal Network's strategic plan for 2006-2010.

This environmental scan results from discussions with the Legal Network's board of directors, staff and members; with key informants and partners in Canada and outside Canada; and from the Legal Network's internal analysis of lessons from its past work. With the support of the Public Health Agency of Canada, the Legal Network in 2005 surveyed AIDS service organizations, HIV/AIDS researchers, legal assistance providers and social workers in Canada for their ideas on priority issues in the area of legal and human rights aspects of HIV/AIDS. Preliminary results of that survey are reflected here.

## **Factors related to legal and human rights aspects of HIV/AIDS in Canada**

The Canadian Strategy on HIV/AIDS was the framework for federal action against the epidemic from 1998 to 2004. In December 2004, the government announced the Federal Initiative to Address HIV/AIDS in Canada, which will include the new Public Health Agency of Canada, Health Canada (First Nations and International Affairs Directorates), the Canadian Institute for HIV/AIDS Research, and Correctional Service Canada. The Federal Initiative is meant to guide the scaling up of federal funding for HIV/AIDS programs from about CAD 42 million annually to about CAD 84 million by 2010. The Initiative explicitly claims a "social justice" and human rights framework. It commits the federal partners to addressing not just HIV/AIDS as an outcome but also "social determinants" of HIV/AIDS in Canada.

The boldness of the language of the Federal Initiative should signal an enhanced political profile for the Canadian response to HIV/AIDS. Yet, so far, the environment for reinvigorated public policy to address the epidemic in Canada remains challenging. The doubling of the federal budget for HIV/AIDS falls short of the CAD 100 million a year recommended by the parliamentary Standing Committee on Health, the national HIV/AIDS organizations and most HIV/AIDS advocates. The increased resources are a sign that HIV/AIDS retains some political currency as an issue, but there is a pervasive sense among activists that (1) it is increasingly difficult to get the public and the media interested in HIV/AIDS, and (2) stigma, discrimination, marginalization and abuse associated with HIV/AIDS remain alive and well in Canada. In addition, HIV/AIDS

service organizations in the country virtually universally report being overloaded and underfunded, and staff turnover is a big concern. It remains to be seen how the Federal Initiative will be useful in addressing these problems. The action plan meant to accompany the Federal Initiative, *Leading Together*, which may indicate in more detail the particular social determinants that will be priorities in government programs, has yet to be released at this writing.

With respect to human rights and legal aspects of HIV/AIDS, some particular challenges on the Canadian scene are worth noting:

**Changing demography of people living with HIV/AIDS:** HIV/AIDS has evolved in Canada from affecting largely middle-class gay men in the early years to more recently affecting people living in poverty, women, Aboriginal persons, people from countries where HIV/AIDS is endemic, and prisoners. The facts of this shift are well noted in government surveillance reports, but programs do not seem to have caught up with the special needs of the newly affected populations, some of which do not enjoy the level of political organization found among gay men's groups in the early years. The HIV/AIDS crisis among Aboriginal populations, for example, does not seem to be a public policy priority. The public health importance of ensuring that prisoners have access to the level of HIV/AIDS prevention and treatment services that are available in the general population is little appreciated by the public. There seems to be little effort on the part of government to link HIV/AIDS programs with anti-poverty programs or programs related to violence against women or the status of women. It is possible that this is part of what is envisioned under the Federal Initiative's focus on "social determinants" of HIV/AIDS, but how such deep vulnerabilities will be addressed is unclear.

**Legal and human rights needs heightened:** Many of those most affected by HIV/AIDS in Canada experience multiple forms of stigma, discrimination and marginalization. Aboriginal persons and those from countries where HIV is endemic confront racism; women confront sexism and subordination. People who use drugs, people in the sex trade and prisoners face social disapproval and are easily deprived of their rights without public outcry. People living with HIV/AIDS can face criminal sanctions linked to the 1998 Supreme Court decision in *R v Cuerrier*. (This decision held, in short, that a person living with HIV/AIDS who does not disclose his or her HIV status to a sex partner before having unprotected sex could be charged with criminal assault.) There are few free or subsidized legal services for people with HIV/AIDS-related cases. HALCO in Toronto is the only organization in the country that provides free, specialized HIV/AIDS legal services. Frontline AIDS service organizations are presented with legal problems by their clients but often do not have the expertise or resources to provide assistance.

#### Compelling legal and human rights issues in the Canadian context

A number of specific legal and human rights issues linked to HIV/AIDS cry out for urgent attention. On most of these, the Legal Network has a long track record of policy research and analysis.

**Basic services for prisoners:** Canada remains in violation of the long-held principle in international human rights norms that the level of health services available to prisoners should be at least at the level of what is available to the population outside prison. Opiate substitutes, for example, are available, at least in theory, to prisoners but needle exchange programs are non-existent in Canadian prisons. University-based research and numerous anecdotal accounts suggest that services that are officially available to prisoners in Canada, including ARV therapy, are often of poor quality or are frequently interrupted. Under the Federal Initiative, Correction Services Canada will be allocated significant new funds for its HIV/AIDS work, yet it is unclear how CSC has allocated its previous HIV/AIDS resources. Civil society consultation in decision-making on HIV/AIDS programs by CSC is urgently needed.

**Harm reduction and other drug policy concerns:** Developments on the domestic drug policy and program scene will continue to be important both for drug users in Canada and for Canada's leadership role in this area. Little effort is made to include people who use drugs as part of decision-making in programs and policies that affect them. Access to needle exchange and addiction treatment remains limited in some parts of the country. The trial of prescription heroin has been cancelled in Toronto and has gone slowly in Vancouver. Public pressure has challenged the provision of harm reduction services to crack users in Ottawa. In spite of the apparent success of the safe injection facility in Vancouver against a number of criteria, popular support for such sites in other cities is difficult to mobilize. A heavy police presence outside needle exchange facilities in the centre city of Montreal threatens life-saving services that have existed for 15 years. Harm reduction is a central principle of the Canadian Drug Strategy, but the commitment of law enforcement authorities to it is rarely palpable. Drug policy issues remain among the most challenging elements of the national response to HIV/AIDS.

**Vulnerability of sex workers and the solicitation law:** Sex workers are not noted as a vulnerable population of concern in the Federal Initiative on HIV/AIDS. Thanks to the work of MP Libby Davies, the parliamentary Subcommittee on the Solicitation Laws of the Standing Committee on Justice, which is meant to look at the antiquated Canadian prostitution laws, was re-established in 2004. It conducted hearings across Canada in 2005, including testimony of numerous sex workers. Analyses by the Legal Network and others have concluded that elements of the Criminal Code related to sex work have the effect of making the work more dangerous and increasing the risk of HIV/AIDS faced by sex workers, especially women. Whatever the eventual conclusion of the parliamentary subcommittee, reform of these laws is a feasible and urgent goal.

**The momentum of "opt-out" testing and new uses of mandatory HIV testing:** At least five provinces and territories in Canada have adopted a policy of "opt-out" HIV testing for pregnant women – that is, women are tested for HIV unless they explicitly refuse to be tested. The jurisdictions in question mostly claim that this policy does not violate women's right to informed consent in testing, but it is far from clear that the practical application of these policies allows for informed consent, and it seems plain that pre-test counseling in these jurisdictions has been greatly curtailed or eliminated. In addition, three provinces are pursuing legislation that would enable mandatory HIV

testing in a variety of circumstances, a signal that the principles of voluntary counseling and testing and universal precautions remain fragile in Canadian law and policy.

**Disclosure and the continued criminalization of exposure:** At this writing, a young HIV-positive woman sits in a maximum-security prison in Ontario charged with aggravated assault for non-disclosure of her HIV status before having sex with a soldier on a Canadian army base. She has been castigated in the national press as wanton and promiscuous. A second woman in Ontario has been charged with non-disclosure of her HIV-positive status linked to the birth and subsequent breastfeeding of her child. These are just two illustration of the continuing challenge of criminalization of HIV exposure related to the 1998 *Cuerrier* decision. The Legal Network's recent survey of AIDS service organizations indicates that numerous such cases involving men have continued to be brought in recent years. The misuse of criminal law to deal with the public health challenge of encouraging safer behaviour with respect to HIV/AIDS is sure to remain a challenge in Canada in the coming years.

**Women's many levels of marginalization and risk:** The percentage of new HIV transmission that occurs among women and girls has risen steadily in Canada over the course of the epidemic and stands currently at over 26%. Among Aboriginal adults, half of all new transmission is among women. There are relatively few HIV/AIDS programs in Canada designed for women, and fewer still for Aboriginal women. Women living in Canada who are from countries where HIV is endemic face many of the issues of subordination that they would face in their home countries as well as fears related to their immigration status. Anecdotal evidence suggests that they are impeded from seeking services because of fear of deportation or of domestic abuse. Women who inject drugs, women in the sex trade, and women living in poverty generally all face particular risks with respect to HIV/AIDS as well as chronic abuse of their human rights. The Federal Initiative notes women and youth as vulnerable populations with respect to some HIV/AIDS action areas but not others, and there is no budget line earmarked for women's programs. A reconstituted coalition of organizations working on women and HIV/AIDS in Canada called the Blueprint for Action on Women and HIV/AIDS is strategizing to enrich the content of the 2006 Toronto International AIDS Conference with respect to women's issues and may provide an avenue of action on this front beyond 2006.

**Global leadership and treatment access:** Global leadership in the fight against HIV/AIDS is an explicit element of the Federal Initiative. An example of an area where domestic policy has an impact on Canada's global leadership capacity is the 2004 passage of Canada's Bill C-9, intended to facilitate the exportation of Canadian-produced generic antiretroviral drugs to low-income countries. The Legal Network helped to lead civil society advocacy that contributed to this legislative breakthrough. Challenges remain in seeing the implementation of the bill through to the development, approval and marketing of generic medicines and their arrival in the hands of people in resource-poor countries. Civil society will need to remain vigilant to see that the potential of Bill C-9 is fully realized.

**Other issues:** Results of the Legal Network's survey of AIDS service organizations and legal service providers across Canada underscored the need of front-line service providers for legal and human rights support on a range of other issues, including:

- access to medicinal marijuana
- access to medical insurance, disability insurance and government benefits
- questions related to episodic disability
- disclosure of HIV status without consent
- workplace discrimination
- housing discrimination
- custody and adoption of children by people living with HIV/AIDS.

### **International factors: A human rights-unfriendly global environment**

The last few years have witnessed a much greater flow of financial resources into the global fight against HIV/AIDS overall. It would be nice to conclude that human rights protections of people living with HIV/AIDS and those vulnerable to the disease were also enhanced, but this seems not to be the case. Indeed, in some cases, new money is flowing in large amounts to fund HIV/AIDS programs that may undermine human rights protections. In particular, an important part of the new reality is the United States' dominance of multilateral fora, its injection of religious fundamentalism into HIV/AIDS policy, and its cavalier rejection of science and empirical public health lessons, all of which are transforming global HIV/AIDS policy. The US' heavy hand is often not adequately countered by UN leadership, which has recently been very muted on human rights issues related to HIV/AIDS, or by other countries.

The US legislation of 2003 that authorized funding for George W. Bush's global AIDS initiative included provisions mandating massive allocation of resources for programs that promote sexual abstinence outside marriage as the only sure HIV prevention strategy and deny people, including young people, the right to the information and support they need to protect themselves from a lethal disease. US federal web sites have been purged of information on condoms, and federal officials have made statements claiming that condoms are ineffective against HIV, a distortion of science meant to encourage unmarried persons to abstain from sex. "Abstinence-only" programs idealize heterosexual marriage as the only legitimate context for sex and are inherently homophobic. These programs are being exported across the globe.

The same 2003 legislation holds that organizations seeking support through US official development assistance to do work on HIV/AIDS must make a declaration against prostitution, a provision that can only contribute to the stigmatization and marginalization of sex workers. Organizations that have received US support in the past and have tried to work on the basis of respect for the human rights of sex workers are placed in the difficult position of having to renounce human rights principles or lose their US funding.

**Drug policy and harm reduction:** In this environment, the human rights of drug users are also under particular threat. Fueled by repressive "zero-tolerance" policies, drug

users in many countries face systematic and relentless abuse of their human rights, including police harassment and violence, unlawful arrest, abrogation of due process, and torture. The Legal Network in 2004 played an important role in advocacy at the Bangkok AIDS Conference surrounding the heinous attacks on drug users as part of a bloody crackdown by police in Thailand. The Network also assisted the Thai Drug Users' Network in the development of a project proposal to the Global Fund to Fight AIDS, Tuberculosis and Malaria, which led to a precedent-setting Global Fund grant for the group. In spite of small victories such as this, the situation of drug users in all but a few exceptional countries is deeply worrying.

In the last year, several United Nations fora have become battle grounds for the future of international support for human rights-based programs for people who use drugs. In the weeks leading up to the annual meeting of the UN Commission on Narcotic Drugs (CND) in March 2005, the United States government began an assault on HIV prevention services for drug users that included pressuring the UN Office on Drugs and Crime to purge all reference to syringe exchange from its documents and public statements. The US Congress also held hearings in February 2005 led by the Republican majority entitled "harm reduction or harm maintenance?" that were clearly meant to discredit syringe exchange and those who support its provision.

At the CND meeting, the US ruthlessly deleted from every resolution any reference that could remotely be construed as supportive of the human rights of drug users or of harm reduction services. They went even further, removing any consideration of HIV prevention from national drug policy, supporting instead only efforts to prevent drug use, as though this were sufficient for HIV prevention purposes. UNAIDS missed an important opportunity to provide leadership for harm reduction and human rights in this meeting.

In spite of setbacks at the CND, the meeting was the focus of a ground-breaking alliance between HIV/AIDS, human rights and harm reduction advocates. In the weeks before the meeting, this informal coalition gathered over 300 institutional endorsements to a letter to CND country delegations that urged them to stand fast in their support of harm reduction. The work of certain groups in this coalition led to unprecedented attention to the CND in the international media before the annual session. By their own admission, many of the CND delegates had never met (at least not to their knowledge) a drug user or a person living with HIV/AIDS. The NGO representatives included both, and these persons were the most effective spokespersons for harm reduction at the session.

In June 2005, the US again threatened to jettison references to harm reduction and sterile syringe programs in the UN prevention strategy paper that was brought to the UNAIDS governing board. Thanks to Canada, numerous European countries, Australia and Brazil, the US finally backed off, allowed language on sterile syringe programs to remain in the strategy, and settled for a note specifying its disagreement with the approach. It is clear that this battle is not over, however, and diligence is needed to ensure that UN member states and UN leaders exert leadership in the face of such attacks.

The struggles of recent months have underlined that very few networks or organizations of drug users could be called upon to help in these global advocacy efforts because so few exist in the world. Greater involvement of people who use drugs in decision-making that affects them is urgently needed to create an environment in which they can organize and become a sustained voice in HIV/AIDS policy-making.

**Women's rights:** At first glance, women and HIV/AIDS would appear to have found a prominent place on the global agenda. In UN and national policy statements, there is ubiquitous recognition of women and girls as vulnerable populations with respect to the epidemic, including sophisticated analyses of the root causes of this vulnerability. Nonetheless, very few resources are allocated to programs addressing the root causes of women's vulnerability to HIV/AIDS, including human rights violations. UNAIDS established a Global Coalition on Women and AIDS, but it seems to consist of a series of meetings and has a small budget. The Global Fund mentions the vulnerability of women in its project criteria, but very few of the dozens of projects it has funded have steered significant resources to programs that address women's and girls' vulnerability to HIV/AIDS or barriers to equality of women in access to treatment and care.

The US, again, has been a regressive force on the matter of women's rights linked to HIV/AIDS and also reproductive health services. The Bush administration withdrew US support for the UN Fund for Population Activities (UNFPA) on the grounds that UNFPA has programs in China, and the Chinese government is associated with coercive abortion policies. At the March 2005 meeting of the UN Commission on the Status of Women (CSW), the US attempted to block reaffirmation of the Beijing 1995 Plan of Action, but an extraordinary show of support and exceptional civil society pressure finally caused it to back down. Nonetheless, the CSW lost a great deal of time that could have been spent moving ahead the agenda on women's health and HIV/AIDS concerns.

The focus of a new program announced by the Canadian International Development Agency (CIDA) on World AIDS Day 2004 was women and AIDS. Most of the newly funded program consists of microbicide research and reproductive health services. These are extremely important activities, but there remains an urgent need to address violations of the human rights of women, particularly sexual violence and coercion and subordination through inequities in the law.

**Access to treatment and HIV testing:** Although progress has been slow toward the WHO goal of antiretroviral therapy for 3 million persons with HIV/AIDS by end-2005 ("3 by 5") in developing and transitional countries, many countries are working toward their 3 by 5 goals. Canada is the largest donor to the 3 by 5 Initiative.

Scaling up treatment raises many human rights and ethical concerns, including equity of access and sustainability of treatment, especially for those living in poverty. Even if optimistic scale-up scenarios become a reality, there will not be enough affordable medicines to meet the need. Guidance for the hard decisions about who is treated first are not always well articulated in policy. In many countries, it is already the case that

people who use drugs and sex workers are being excluded from government treatment programs as a matter of policy.

Treatment scale-up also has led to revisiting the principles of HIV testing and a challenge to the model of voluntary counseling and testing with informed consent that has been the standard of care in most national policies. As in Canada, on the international scene prominent individuals and institutions are calling for increased use of “opt-out” testing or other models of testing that minimize informed consent processes. UN agencies are under pressure from the US to abandon the voluntary counseling and testing model and are, at this writing, re-examining their policies.

**HIV/AIDS and human rights in countries with poor human rights records:** In China, an emerging HIV/AIDS civil society movement has defined its goals in human rights terms. At the invitation of Chinese NGOs, the Legal Network conducted a workshop in Beijing in June 2005 for lawyers who are beginning to take HIV/AIDS-related legal cases. This activity underscored how difficult a rights-based struggle against HIV/AIDS continues to be for the courageous activists who dare to raise in public sensitive subjects such as gay rights and rights of people who use drugs. There has still been no accountability for the Chinese government’s complicity in the infection of hundreds of thousands of rural dwellers as part of a scheme to commercialize blood plasma in the 1990s. No compensation has been given to those infected in this way, and many who have tried to assert their right to treatment have been arrested or harassed.

The challenges of mobilizing a rights-based response to the HIV/AIDS epidemics in the former Soviet bloc continue to be great. While a few countries have invested in humane HIV/AIDS prevention services for people who use drugs, others have clung to repressive drug laws that cannot be enforced without violating drug users’ rights. Harm reduction services in prisons remain a rarity. Civil society organizations that have developed expertise in rights-based approaches to HIV/AIDS have a responsibility to assist the emerging NGOs in countries where this work may be not just difficult but dangerous.

**Need for a global legal network related to HIV/AIDS:** The Legal Network continues to receive hundreds of inquiries every year from all over the world on a wide range of legal and human rights questions related to HIV/AIDS. While the Network is keen to respond as fully as possible to each question and to share the expertise it has acquired, it is difficult to sustain this work. It is also clear that as HIV/AIDS legal networks emerge in many countries, a systematic way is needed to link such networks to each other to enable them share their experiences. The 2006 Toronto International AIDS Conference may provide an opportunity to reflect with other legal networks on ways to systematize the support we can offer each other.

#### **Note on the funding environment**

The Canadian HIV/AIDS Legal Network has received federal support for work in Canada mostly through the NGO operational funds and the Legal, Ethical and Human Rights



Fund. The latter was funded at CAD 700,000 annually during the whole period of Canadian Strategy on HIV/AIDS. At this writing, it is not known what level of resources will be allocated to either of these portfolios in the scale-up of federal HIV/AIDS funds. The Federal Initiative mentions “research on and analysis of the legal, ethical and human rights dimensions of Canada’s response to HIV/AIDS” as a priority area. It will be important to monitor what this commitment means in financial terms.

On the international scene, the Legal Network works on unpopular issues that are not on the priority list of many foundations or international agencies. The Open Society Institute has been one of the rare funders in private philanthropy willing to support HIV/AIDS policy and program work centred on drug use, prisons and sex work. Many of the emerging HIV/AIDS legal and human rights organizations in developing and transitional countries face severe challenges in finding funds to sustain their activities. It is possible that a more concerted effort to explain to donors the importance of human rights-based measures in the fight against HIV/AIDS might improve the funding environment.

### **Some conclusions related to strategic directions**

**Federal Initiative:** It is not yet clear whether and how the Canadian HIV/AIDS policy and program environment will change with the roll-out of the Federal Initiative. It is also unclear what level of funding will be allocated to legal, ethical and human rights research and analysis and what restrictions those funds will have. The explicit inclusion of global leadership in the Federal Initiative is an important step forward, but it deserves more funding than it has been allocated.

**Building technical capacity:** Both in Canada and elsewhere, it is crucial to find ways to build the capacity of civil society and governments to address legal and human rights issues related to HIV/AIDS. In Canada, the Legal Network should pursue strategies for strengthening the work of AIDS service organizations as they seek to assist their communities with legal concerns and/or for strengthening the capacity of existing legal assistance organizations to take on HIV/AIDS-related issues. In other countries, the Legal Network will continue to be challenged by numerous requests for technical support and training. The Network should seek ways to establish a global technical support system to which many organizations might contribute.

**Bridging domestic and international issues:** There are numerous current issues that, as strategic priorities for 2006-2010, would build on the Legal Network’s past work and would have both domestic and international relevance. Among these are HIV testing and informed consent; access to generic antiretroviral drugs (including Canadian action through Bill C-9); women’s human rights and HIV/AIDS; drug policy reform and harm reduction, including contributing to greater involvement of drug users in program and policy decision-making; and HIV/AIDS services in prisons.

**Model legislation as a strategy:** The Legal Network is in the early stages of its work on creating model legislation, a project that ideally will include not only the development of options for wording of legislation but strategic capacity building and joint advocacy with human rights and HIV/AIDS organizations on the ground. The sustained high level of inquiries to the Legal Network and to UNAIDS with legislative questions demonstrates that the project addresses an important need. The project can clearly be expanded beyond the areas of women's rights and drug policy on which it is currently focused. Intellectual property law related to compulsory licensing and generic drug access as well as prison issues might also be ripe for model legislation work.

**Harm reduction, human rights and HIV/AIDS civil society:** Advocacy around the annual session of the UN Commission on Narcotic Drugs in 2005 showed the effectiveness of an alliance among HIV/AIDS, harm reduction and human rights organizations. The Legal Network in many ways bridges these worlds and was an important player in the civil society effort that brought a new level of global attention to harm reduction issues. The attacks on harm reduction will not stop and can be expected at the 2008 UN Summit on Drugs and at upcoming HIV/AIDS multilateral meetings. There is an urgent need for sustained advocacy for harm reduction globally in the coming years. It will be worth the effort to sustain the civil society alliance that came together in 2005.