

The Intersection Between Clinic Law and Health: Responding to Issues Faced by People With HIV

Ryan Peck

[Note: This speech was presented by Ryan Peck, Executive Director of the HIV & AIDS Legal Clinic Ontario (HALCO) upon accepting the Legal Aid Ontario 2016 Sidney B. Linden Award.]

Before focussing on what we at HALCO humbly refer to as holistic and revolutionary (or at least incremental reformist) lawyering, as well as on legal injustices facing people with HIV, I pay tribute to the countless who are no longer with us.

HALCO was founded in a dark time. Death was an everyday experience and people treated as untouchable pariahs. But from the beginning, people came together and fought back. From the beginning, the people most affected, those living with HIV, were at the forefront of the struggle. And from the beginning, people took care of each other through, for example, care teams, while also fighting for systemic change through, for example,

- involvement in research ethics boards,
- demands for patient centred care, and
- right down the road from here [Queen's Park], bringing to realization the Trillium Drug Program that benefits innumerable Ontarians, whether living with HIV or not.

HALCO has taken the same approach. We take very seriously the meaningful involvement of people with HIV (*e.g.*, the majority of our board of directors must be living with HIV) and provide front-line services (summary advice, brief services, referrals, and representation) as well as engage in public legal education, community development and law reform initiatives.

While it took HALCO a number of years to become part of the community legal clinic system — we

started as a project at ARCH Disability Law Centre in 1991, struck out on our own in 1995, and officially joined several years later — we fit right into a system that has also always been rooted in community, not the least of which is the community-based board of directors' model, and has always engaged in a mix of direct and systemic services.

I'd like to take a moment to discuss why this unique mandate is vital. Community rootedness ensures that legal services are in touch with what is needed on the ground. Front-line services are essential to respond to day-to-day issues that people face — it would be unacceptable to ignore evictions, discrimination, or bureaucratic decisions that disentitle and leave individuals without income, housing or access to medications. However, to focus solely on individual matters would be problematic. We would become complicit in maintaining, even supporting, the *status quo*.

As a result, there is the imperative to also engage in systemic work. But it is only with the knowledge gained through community rootedness and front-line work that effective systemic activities can take place. A beautiful circle.

Another hallmark of HALCO and the community legal system is the holistic manner in which the work is approached. We know that people who are marginalized, whether by health status, poverty, sexuality, gender, gender identity, race, or more likely a combination of said, are at heightened risk of unwanted and negative contact with legal and other systems, and that barriers such as lack of access to justice tend to compound problems and multiply legal issues. Rather than traditional lawyering that tends to compartmentalize issues and to

some extent lives, a holistic approach embraces the porous and interlapping nature of legal compartments, and leads to services in tune with clients' lived realities.

This means remaining alive to the intersections in people's lives and providing services in relation to the various legal issues facing clients. For example, if a client is seeking redress in relation to the termination of employment, we proactively flag access to medications, housing, income maintenance and other cascading issues that flow from loss of employment.

We and other clinics engage in this approach not to be paternalistic but to assist clients to exercise their autonomy, increase engagement in legal processes, and arrive at positive outcomes.

While providing services, we also constantly remind ourselves that legal service providers do not own the law. Of course, we have a privileged and central role, but we sure do not, nor should we, monopolize the law.

HALCO and other community clinics do this by offering an array of services, from public legal education workshops to summary advice, brief services and self-help. This approach, which has been employed for many years and is now known as the "unbundling of legal services", is important not simply as a response to demand but because different people and different situations warrant different legal services.

But please do not take this to mean that there is no place for old fashioned representation. While the reality is that resources are not limitless, HALCO and other clinics provide plenty of representation services. It is absolutely crucial that such services remain available to low-income communities due to the myriad of complex legal interactions they face. Tax or Charter litigation is often thought of as complex. Try navigating opaque social assistance laws, regulations and policies.

When making resource decisions regarding representation services there is the need to act strategically, which involves making difficult decisions not only on the mix of front-line/systemic work but on how to most effectively achieve results. For example, does it make sense to represent an individual on a "test" or "high impact" case or intervene in an appeal court matter?

HALCO has done both. For example, we take on test cases in relation to public health authorities' use of coercive powers and to expand the breach of privacy tort, and we intervene in matters that raise issues impacting people living with HIV. Such issues range from the HIV-specific matter of the criminalization of HIV non-disclosure to broader issues that impact communities of people with HIV such as sex work, drug policy, autonomy in health care decision-making, and access to human rights remedies.

Sometimes it takes years, even decades for the victories to come to fruition. One example is the overly broad use of the criminal law, which I will come back to shortly. Another is access to human rights remedies. Ten years ago, we witnessed a significant development when the Supreme Court of Canada made clear that administrative tribunals must apply human rights law. This sounds great, and it is great. But it is not so simple. Tribunals still need to be held to account to provide appropriate remedies. This is particularly important as individuals may be barred from later seeking redress for discrimination if they fail to raise the human rights issue in a forum that is foisted upon them and in which they are under attack.

Even when legal struggles are successful, tireless work must be done to protect hard-fought successes. The fact is that rights, especially for marginalized communities, are constantly under attack.

All of this to say that the work of community legal clinics is unique and crucial. From the time, I was introduced to the clinic system in law school, I

have taken the clinic approach to heart. It was further cemented in me as an articling student and lawyer and through involvement in the HIV community. It is why I decided to work as both tenant and criminal duty counsel — to gain a further understanding of what takes place on the street *and* across practice areas in order to arrive at rigorous and effective services, both front-line and systemic. And it is why, when I had the opportunity to become executive director, I did my utmost to work with HALCO's board, staff and funders to expand services, including immigration law, litigation and summary advice services, while also scaling up public legal education, law reform and community development initiatives, by, for example, adding a policy lawyer position and encouraging everyone at the clinic to constantly draw links between front-line and law reform work, and to always push things.

The clinic system is highly regarded around the world, and I commend the government and Legal Aid Ontario for supporting it and embedding its model in the *Legal Aid Services Act* and in other foundational documents. In a time of increasing income disparity, when affordable housing is less than scant and social assistance rates dismally low, when low-income communities often live under burdensome state surveillance and experience intersecting discrimination, ongoing funding for community legal clinics is an absolute must.

And this includes ongoing funding for HALCO. The need for HALCO is as strong today as ever. While there remains no cure for HIV, currently available treatments are effective at managing the virus. People living with HIV who have access to sustained health care and medications have more or less the same life expectancy as those who are HIV-negative. Knowledge of prevention strategies is also better than ever and it is much harder to transmit HIV than generally supposed. For example, the risk of transmission is zero if a condom is

used properly and no breakage occurs, and negligible to zero if a person living with HIV is being successfully treated with antiretroviral medications (and this is the case even if a condom is not used).

This is beautiful news. So why the need for HALCO and other specialized HIV-related services? While the scientific reality must not be ignored, many people, including in Ontario, face significant institutional, social and economic barriers to accessing health care and life-saving medications. Moreover, social attitudes have not nearly kept pace with science. HIV-related stigma and accompanying discrimination remain pervasive. It is shameful that, per a 2012 Canada-wide study commissioned by the Public Health Agency of Canada,

- Fifteen per cent of Canadians feel afraid of people with HIV;
- Sixty-nine per cent believe that people would not be willing to tell others they have HIV and 38% agree that people are unwilling to be tested for HIV due to stigma;
- Twenty-four per cent feel uncomfortable even wearing a sweater once worn by a person living with HIV; and
- Twenty-two per cent feel uncomfortable shopping at a small neighbourhood grocery store owned by someone living with HIV.

As a result, legal issues abound. From being denied services to being refused accommodation in the workplace, human rights concerns are widespread. Privacy is a constant worry for many, whether related to institutional actors, service providers or neighbours, and legal recourse may be difficult to impossible to obtain. Gaining access to life saving medications is all too often a deep struggle for people with immigration status in Canada, let alone for those with no status. And when it comes to Canada's immigration system, many people with HIV, like those with other medical conditions, are not

viewed as whole individuals but are reduced to one figure: the cost of their medical treatment. State surveillance, through public health authorities and the use of the criminal law, remains prevalent.

Canada, Ontario in particular, is a world leader in criminalizing people with HIV. People are being prosecuted for aggravated sexual assault — one of the most serious offences in Canada's *Criminal Code*, one designed to respond to the most horrific of forced sex acts — in circumstances where (i) sexual behaviour is consensual; (ii) there is negligible to no risk of HIV transmission; (iii) there is no intention to transmit HIV; and, (iv) transmission does not occur.

In short, the law is out of step with science and human rights principles, and hampers the public response to HIV.

It has a disproportionate impact on women, Indigenous peoples, migrants and African/Caribbean/Black communities. For example, there is great concern that women with HIV who are in abusive relationships will face aggravated sexual assault charges in situations wherein they cannot safely impose condom use nor disclose their HIV status.

The law also hinders HIV prevention efforts and hampers care, treatment and support for those living with HIV by providing disincentives for HIV testing, and by deterring honest and open conversations with health care providers, including public health authorities, for legitimate fear that such conversations will be used in criminal cases.

But after many years of work, there are hopeful signs. The recently released HIV strategy in Ontario recognizes negative impacts of the current use of the criminal law and calls for engagement with community on reform. The medical community is speaking up, the feminist community is speaking up, the international community is speaking up, and the Canadian federal government itself is speaking up. In a

statement released on World AIDS Day, December 1, 2016, the Minister of Justice explicitly recognized over-criminalization and committed to working on this issue with the HIV community, medical professionals, and provincial and territorial counterparts.

Attorney General Naqvi has committed to *meaningful* engagement with the HIV community. After many years of *attempted* work with the Ministry of the Attorney General (MAG), we very much look forward to such engagement with the province to bring the law in line with science, human rights principles, and the public health response to HIV.¹

[Further thanks and acknowledgments]

This award is dedicated to all the people with HIV who day after day trust HALCO staff with the most sensitive of information during the most trying of times. We will continue to take this responsibility as seriously as can be and will continue to partner with you and others to ensure economic and social justice.

Thank you, Merci, Megwetch, and L'chaim.

[*Editor's Note:* **Ryan Peck** graduated from the University of Toronto, Faculty of Law in 2000. Since 2007, he has been executive director of the HIV & AIDS Legal Clinic Ontario (HALCO), where he was previously both an articling student and a staff lawyer. Ryan has worked as a staff lawyer at the Advocacy Centre for the Elderly, and in the Tenant Duty Counsel Program at the Advocacy Centre for Tenants Ontario. He has also served as criminal duty counsel at Toronto's Old City Hall. Ryan is a member of the Ontario Advisory Committee on HIV/AIDS (which provides HIV-related advice to the Minister of Health and Long-Term Care), chair of the Ontario Working Group on Criminal Law and HIV Exposure, and member of the executive committee of the board of directors of the Canadian HIV/AIDS Legal Network.]

¹ For more information about engagement with MAG, see <www.clhe.ca>.