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SPECIAL SECTION ON COVID-19: COMMENTARY

Human rights, public health and COVID-19 in Canada

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Abstract
Faced with the extraordinary global public health crisis of COVID-19, governments across Canada must decide, often with limited and imperfect evidence, how to implement measures to reduce its spread. Drawing on a health and human rights framework, this commentary explores several features of the Canadian response to date that raise human rights concerns. Our discussion focuses on criminal law, fines, data collection, and so-called snitch lines. We argue that the approach of governmental and public health authorities must be grounded in the best available scientific evidence and align with human rights standards. Our aim is to encourage dialogue within the public health community in Canada about the importance of human rights-based responses to COVID-19.

Résumé
Face à la crise de santé publique sans précédent que représente la COVID-19 à l'échelle mondiale, les gouvernements des provinces et territoires du Canada doivent décider, souvent en se fondant sur des preuves limitées et imparfaites, comment mettre en œuvre des mesures pour réduire sa propagation. En s'appuyant sur un cadre de travail relatif à la santé et aux droits de la personne, cette analyse explore plusieurs éléments de la réponse canadienne apportée à ce jour qui soulèvent des préoccupations en matière de droits de la personne. Notre analyse porte en particulier sur le droit criminel, les amendes, la collecte de données et ce qu'on appelle les « lignes de dénonciation ». Nous estimons que l'approche des autorités gouvernementales et de santé publique doit être fondée sur les preuves scientifiques disponibles les plus solides et s'aligner sur les normes en matière de droits de la personne. Nous avons pour objectif d'encourager le dialogue au sein de la communauté du secteur de la santé publique au Canada sur l'importance des réponses à la COVID-19 fondées sur les droits de la personne.

Keywords COVID-19 · Pandemic · Human rights · HIV

Mots-clés COVID-19 · pandémie · droits de la personne · VIH

Faced with an extraordinary global public health crisis, governments across Canada must decide, often with limited and imperfect evidence, how to implement measures to reduce the spread of COVID-19. Drawing on a health and human rights framework, this commentary explores four problematic aspects of the Canadian response to COVID-19. We argue that the approach of governmental and public health authorities must be grounded in the best available scientific evidence and align with human rights standards.

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A human rights-based approach

One key articulation of a human rights-based approach to infectious disease epidemics is Jonathan Mann's pioneering work on HIV/AIDS. Mann et al. (1994: 8) sought to "broaden

human rights thinking and practice" by establishing stronger connections between health and human rights. They emphasized that human rights violations can have health impacts and that public health policies can negatively or positively affect human rights. Most importantly, they upended assumptions about a "natural" conflict between public health measures and individual rights by arguing that "the protection of the majority of the population directly depend[s] upon the protection of the rights and dignity of infected people" (Fee and Parry 2008:62).

We orient to Mann's work as an interdisciplinary analytic framework for thinking about public health responses to infectious disease and as a springboard for considering Canada's COVID-19 response in relation to human rights obligations. Rooted in longstanding social justice traditions, Mann's framework recognizes that HIV and other infectious diseases are social phenomena, the prevention of which requires defending human rights, including tackling gender, racial, and other social inequalities; combatting stigma and discrimination; and resisting repressive laws and policies (Fee and Parry 2008). The framework is consistent with human rights-based approaches that move beyond protecting individuals against over-reach and abuse by the state (and others), by offering a critique of social, economic, political, and legal structures that impede or undermine enjoyment of the highest attainable standard of health for all (itself a right explicitly recognized in the *International Covenant on Economic, Social and Cultural Rights*).

WHO (2020) and UNAIDS (2020) recently reaffirmed the need for a rights-based approach to COVID-19, including such principles as involving and empowering affected communities; combatting stigma and discrimination; protecting privacy; avoiding the criminalization of people who breach public health restrictions or risk transmitting SARS-CoV-2; and addressing social inequities that shape vulnerability to the virus, limit access to health services, and render certain communities disproportionately affected and unable to follow public health recommendations. Similar concerns have been articulated by civil society advocates in Canada, the Ontario Human Rights Commission (2020) and the Canadian Human Rights Commission (2020), among other human rights organizations.

Limitations on rights during a public health emergency

In the context of COVID-19, Canadian government and public health officials face the challenge of addressing a crisis that raises multi-faceted public health, social, and economic issues. When responding, they must take care to avoid deviating from a rights-based approach. Human rights law, domestic and international, recognizes that certain restrictions on civil liberties and other human rights may sometimes be justified, including to contain disease spread. Any limitations on individual rights must comply with the *Canadian Charter of Rights and Freedoms*, which permits "reasonable limits" on constitutional rights. Canada is also legally bound to respect, protect, and fulfil human rights guaranteed by treaties it has ratified, including the *International Covenant on Civil and Political Rights* (ICCPR). The *Siracusa Principles* (United Nations Commission on Human Rights 1984) identify standards that governments must respect when adopting measures that limit ICCPR-protected rights.

While their articulation may differ, the principles embedded in domestic and international human rights frameworks are substantially similar. Both legal frameworks require that rights limitations be necessary to achieve a legitimate, pressing objective; the least intrusive and restrictive means of achieving that objective; neither arbitrary nor discriminatory in application; of limited duration; and subject to review and appeal. Furthermore, the needs of the most vulnerable must be considered, and ultimately there must be "proportionality between the harmful effect of the measure limiting rights and the greater public good in achieving the objective" (Canadian HIV/AIDS Legal Network 2020). All levels of government must demonstrate that limitations on rights are justifiable, and satisfying several of the above criteria obviously requires that any measure limiting rights be rooted in evidence.

COVID-19 and human rights concerns

So far in Canada the public health response has coalesced around a combination of recommendations and orders related to hand washing, wearing masks, physical distancing, isolation of those diagnosed as positive, quarantine of those who may have been exposed, restricting the size of social gatherings, closing nonessential business and public spaces, using personal protective equipment, testing for SARS-CoV-2, and contact tracing. While the nature and enforcement of these measures in Canada have not, to date, posed as extreme a challenge to human rights standards as has been observed in numerous other jurisdictions, certain features of the response raise important concerns.

Criminal law

We are aware of no Canadian jurisdiction that has proactively turned, as a matter of policy, to using or threatening criminal charges to prohibit and punish conduct perceived as risking the transmission of SARS-CoV-2. Still, there have been suggestions to do so, analogizing to the criminalization of HIV nondisclosure to sexual partners (David 2020) and, at the time of writing, according to the Policing the Pandemic Mapping Project (McClelland et al. 2020), at least 23 individuals in

Canada have faced ad hoc criminal charges for threatening or potentially exposing others to SARS-CoV-2, primarily through spitting or coughing during altercations with police. In addition, in July 2020, a man in Prince Edward Island was criminally charged for allegedly breaching an isolation order (Ross 2020).

Research on HIV demonstrates that criminal charges for nondisclosure fall disproportionately on racialized communities, heighten stigma, and have no positive impact on preventing disease transmission (Mykhalovskiy 2015). This body of evidence strongly suggests that criminalizing behaviour that risks or is perceived to risk transmission of SARS-CoV-2 could, depending on how such law is worded and applied, violate principles of strict necessity, nondiscrimination, and proportionality. Law and policy makers should refrain from using the COVID-19 pandemic to expand the scope of the criminal law in infectious disease management (Elliott et al. 2020).

Fines

To enforce public health measures, governments have turned primarily to a specific legal instrument: the fine. In Canada, from 1 April to 15 June 2020, there were over 10,000 COVID-19-related tickets issued for alleged noncompliance with a patchwork of emergency regulations, orders, health directives, and by-laws, resulting in over $13 million in fines. Quebec (6600) leads the country, followed by Ontario (2853), and Nova Scotia (555). Other provinces have been more cautious and taken an "education first" approach. During the same period, British Columbia issued only 23 tickets (Deshman et al. 2020).

The use of monetary penalties to direct people's behaviour has a complex history. The evidence on intended and unintended effects of fines in such areas as gun control (Flores 2015), traffic violations (Moffat and Poynton 2007), and infectious disease control (Reardon 2016) remains equivocal. While measures such as self-isolation and physical distancing are necessary, using fines to enforce them raises human rights concerns. First, as with applying coercive police powers more generally, fines during the COVID-19 pandemic will likely be felt disproportionately by poor, marginalized, and underhoused people, for whom stay-at-home orders are difficult to meet. Indeed, evidence indicates that in Toronto, Hamilton, and Montreal, homeless people have been fined upwards of $880 for allegedly violating physical distancing rules (McClelland et al. 2020). Second, the monetary penalties associated with fines, which in Toronto can range from $750 to $5000 for not respecting the closure of public amenities (Draaisma 2020), are excessive. Given that COVID-19 has already aggravated income inequalities, harsh fines represent an extraordinary burden on people with low incomes and raise proportionality and discrimination concerns.

Finally, some municipalities have relied on law enforcement to issue tickets, with potentially serious consequences for vulnerable people. Using police and by-law officers, who are not trained to deal with health issues, to enforce public health measures over-associates police and public health functions and can instill mistrust of public health among marginalized people. It also puts communities already disproportionally surveilled, policed, and criminalized—racialized communities, homeless people, or people who use drugs or sell sex—at even greater risk of discrimination, police abuse, and criminalization, during a time of emergency and fear (Canadian HIV/AIDS Legal Network 2020; Skolnik 2020).

Data collection concerns: over-surveillance and undercounting

Public health authorities have used various measures to identify, monitor, and surveil people who have tested SARS-CoV-2 positive. The form, control, circulation, and use of such data by authorities, health providers, and others raise important human rights concerns.

One concern is the relaxation of privacy protections under emergency legislation. For example, blanket authorization under Ontario's *Emergency Management and Civil Protection Act* allowed police, firefighters, and paramedics to access personal medical records to check people's COVID-19 status (Jerome 2020).[1] How such privacy relaxations meet the principle of strict necessity is unclear. Not only is there no indication that people are informed that police can access their personal health information but also it is not clear how such access enhances pandemic response.

A second set of privacy concerns coalesces around new forms of digital surveillance, particularly digital contact tracing using cellphone data. In May, Alberta launched a voluntary COVID-19 mobile phone tracking app. The federal government's tracking app, initially planned for release in July, has been delayed but is now in beta-testing (The Canadian Press 2020). While recognizing different degrees of privacy risks associated with different contact tracing technologies (CIFAR 2020), privacy experts have raised numerous concerns about such apps including user control of data, the collection of identifiable information, the end date for data tracking and retention, data accuracy, and the monetization of collected data (Office of the Privacy Commissioner of Canada 2020). The potential for data gathered in the name of facilitating a public health response to be used for other purposes such as criminal investigation and prosecution raises further human rights concerns. In deploying such technologies in the name of public health, it will be important to protect against the

[1] The regulation under the Emergency Management and Civil Protection Act was revoked on Wednesday, July 22, 2020.

punitive use of any personally identifying data that are gathered. The novelty and complexity of such technologies and the privacy concerns they raise represent an important opportunity for Canadian public health authorities to coordinate a transparent, national dialogue to set robust privacy standards to guide their use.

On the flip side, inadequate data collection about the spread of COVID-19, and in particular data disaggregated on grounds such as race, ethnicity, gender, age, and class, is a human rights failure (Massaquoi 2019). It ignores or obscures the differential impact of the pandemic on particular communities and can result in the failure to address particular structural factors that drive the epidemic and produce poorer health outcomes, thus perpetuating discrimination. Data about particular occupations or workplace settings are also needed, given current knowledge of heightened transmission risks; the right to safe working conditions demands the collection of such data and, of course, action accordingly.

Snitch lines

Finally, governments in Canada have encouraged members of the public to surveil one another and report presumed noncompliance with public health directives, emergency laws, and regulations. In Toronto, Montreal, and elsewhere, city authorities have created anonymous online systems to report noncompliance with self-isolation and physical distancing measures, or the operation of nonessential businesses (City of Toronto 2020). The public health response to COVID-19 has required rapid transformations in previously taken-for-granted features of everyday life. People have been asked to dramatically alter their day-to-day contacts with friends and family and learn new ways of coordinating bodily space in public. A sustained commitment to such new ways of being is best supported by fostering mutual respect and shared caring for one another. So-called snitch lines, by contrast, can promote overzealous moralism, social division, and demonization of those who allegedly do not comply with public health requirements. Rather than encouraging people to surveil one another, at considerable risk of unfounded complaints, overfocus on marginalized people, and discriminatory enforcement by police and by-law officers, we encourage more "prosocial" responses—such as space for self-isolation and peer mental health support for homeless people—that align with established public health social justice traditions. Such responses recognize that social inequalities figure into people's ability to comply with public health measures. They focus on education, support, and resources that promote social cohesion, trust in science and public health, and that enable participation in collective efforts to preserve community health.

Conclusion

We write during early stages of a likely protracted pandemic with potential cycles of repeated outbreaks and public health restrictions. In order to be effective, ongoing public health responses to COVID-19 must be based on robust evidence, prioritize human rights, and engage and empower individuals and communities. They should remove, not add, barriers to protecting personal and community health, particularly for marginalized people. Exceptional emergency responses must be subject to transparent review and challenge and should automatically "sunset" unless government can continue to justify them as necessary and proportionate. Adopting a human rights-based approach in response to COVID-19 is essential to effectively address the current public health crisis and preserve trust in our public health system.

Compliance with ethical standards

Conflict of interest The authors declare that they have no conflict of interest.

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