

# Criminal Law & HIV Non-Disclosure in Canada

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This is one in a series of three info sheets on the criminalization of HIV non-disclosure in Canada.

1. The obligation to disclose HIV-positive status under Canadian criminal law
2. The criminalization of HIV non-disclosure in Canada and internationally
3. Criminalization, public policy and community responses

## The obligation to disclose HIV-positive status under Canadian criminal law



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

### When is there a legal duty to disclose HIV-positive status to a sexual partner?

Under current Canadian criminal law, people living with HIV can be charged and prosecuted if they do not tell their sexual partner(s) about their HIV-positive status before having sex. This is usually called the “criminalization of HIV non-disclosure.”

The legal obligation to disclose was established in the 1990s, but the law became harsher in 2012 when the Supreme Court of Canada decided that people living with HIV must disclose their status before having sex that poses a “realistic possibility of HIV transmission” in *R. v. Mabior* and *R. v. D.C.*<sup>1</sup> The Supreme Court characterized even very small risks of HIV transmission as “a realistic possibility.”

#### a) *Vaginal sex*

According to the Supreme Court’s 2012 rulings, when a person living with HIV has a low or undetectable viral load *and* uses condoms, there is *no* duty to disclose prior to vaginal intercourse.<sup>2</sup>

What this means in practice is that people living with HIV have a legal duty to disclose prior to:

- vaginal sex without a condom (regardless of viral load); or
- vaginal sex with a condom if their viral load is higher than “low.”<sup>3</sup>

#### b) *Anal sex*

Anal sex can pose higher risks of transmission than vaginal sex, so the legal duty to disclose would be at least as strict as for vaginal sex.<sup>4</sup>

Therefore, based on the Supreme Court’s 2012 rulings, people living with HIV will have a legal duty to disclose prior to:

- anal sex without a condom (regardless of viral load); and
- anal sex with a condom if their viral load is higher than “low.”

It might be the case that, as with vaginal sex, a person living with HIV who uses a condom *and* has a low viral load does not have a legal duty to disclose before anal sex. But we cannot say this for certain because the Supreme Court of Canada only dealt with HIV non-disclosure in the context of vaginal sex.<sup>5</sup>

#### c) *Oral sex*

Oral sex is usually considered a very low risk for HIV transmission. Despite some developments at lower level courts, we cannot say for certain, at time of writing, that oral sex without a condom and/or a low viral load does not require disclosure.<sup>6</sup>

However, based on the Supreme Court’s 2012 rulings, it is clear that there should be no duty to disclose before oral sex if a person uses a condom *and* has a low viral load given that oral sex carries a lower risk of HIV transmission than vaginal sex.

#### d) *“No risk” activities*

Logically, kissing, mutual masturbation and other intimate activities that are considered “no risk” by health professionals cannot pose a “realistic possibility of transmission” under the law. Therefore, and according to the Supreme Court’s 2012 rulings, there should be no legal duty to disclose HIV-positive status to partners before engaging in such activities.

## Important things to know about the legal duty to disclose one's HIV-positive status:

- There is no legal distinction between silence and a lie. People living with HIV may face criminal charges for not disclosing their HIV status even if the sexual partner(s) did not inquire about or discuss HIV before having sex.
- There is no legal distinction based on the circumstances of a particular sexual encounter. People may face criminal charges for non-disclosure in relation to any type of relationship (e.g., whether a casual partner, a spouse, a client, etc.) and whatever the reason for the sex (e.g., whether for love, fun, procreation, money, drugs, etc.).
- People living with HIV can be prosecuted for non-disclosure even if they had no intent to harm their partner.
- Criminal charges for HIV non-disclosure can be laid (and have been in numerous cases) even if HIV is not transmitted.

### How and when will the law around disclosure be clarified?

The criminal law develops as judges apply it to the specific circumstances of the cases before them. It does not necessarily develop in a predictable or consistent manner. Remaining questions will not be resolved until cases go to court where those specific questions are addressed, and until higher-level courts (e.g., Courts of Appeal, the Supreme Court of Canada) set out clear and binding benchmarks or principles, or until Parliament passes a law that addresses the issue (which is unlikely on this topic).<sup>7</sup>

### Can the current interpretation of what constitutes a “realistic possibility of transmission” ever evolve?

The Supreme Court in its 2012 rulings was quite clear that people living with HIV have a legal duty to disclose unless they both use a condom *and* have a low viral load (at least in the context of vaginal sex). But it also indicated that its “general proposition [that both a condom and a low viral load negate a realistic possibility of transmission] d[id] not preclude the common law *from adapting to future advances in treatment and to circumstances where risk factors other than those considered in this case are at play* [emphasis added].”<sup>8</sup> Defence lawyers will continue to explore any possible ways to limit the application of the criminal law.

For example, in November 2013, a trial

Court in Nova Scotia acquitted a young man who had an undetectable viral load even though he had engaged in unprotected vaginal sex. The decision was based on the particular medical evidence brought before the Court in that case.<sup>9</sup> The medical expert called by the defence testified that the risk of transmission, in that particular case, was approaching zero.<sup>10</sup> While trial court decisions (unlike Court of Appeal or Supreme Court decisions) have limited precedential authority in the Canadian legal system, this decision demonstrates that the interpretation of what constitutes a “realistic possibility of transmission” may still evolve in response to evidence and legal arguments brought before the Courts. (At the time of this writing, the Nova Scotia decision remains exceptional.)<sup>11</sup>

#### In order to secure a conviction for aggravated (sexual) assault, the Crown must prove five things *beyond a reasonable doubt*:

1. the identity of the accused, who is aware of his or her HIV-positive status and the potential for sexual transmission;
2. “dishonesty” about HIV status (through lying or silence);
3. a “realistic possibility of HIV transmission”;
4. that the complainant would not have consented to sex if the complainant had known the accused was HIV-positive; and
5. that the sex act “endangered the life of the complainant.”

### What charges can a person living with HIV face in relation to non-disclosure?

There are no HIV-specific criminal offences in Canada. People living with HIV who are charged in relation to non-disclosure are charged with existing crimes in the Canadian Criminal Code. The most common charge applied in cases of alleged HIV non-disclosure is *aggravated sexual assault*. A conviction for aggravated sexual assault carries a sentence of jail time (up to a maximum of life imprisonment) and registration on the Sexual Offender Registry.

Other criminal offences that have been applied in cases of alleged HIV non-disclosure include administering a noxious substance, common nuisance, criminal negligence causing bodily harm, sexual assault, aggravated assault, attempted murder, and in one case involving alleged HIV transmission, murder.

### Why are people living with HIV charged with aggravated sexual assault if the partner agreed to have sex with them?

Without disclosure of HIV-positive status, the courts have ruled that there is no valid consent to sexual activity when:

- there is a “realistic possibility of HIV transmission”; and
- the individual would not have consented to sex had they known of the sexual partner’s HIV status.

When these conditions are met, HIV non-disclosure is considered a “fraud” that invalidates the consent to have sex, thus transforming otherwise consensual sex into sexual assault in the eyes of the law.

People are charged with *aggravated* sexual assault because the courts have considered that exposing a person to a “realistic possibility of HIV transmission” endangers life.

## What about people who do not know their HIV status?

A positive HIV-antibody test, as well as knowledge of what HIV is and how it is transmitted, should be required for a person to be criminally charged in relation to HIV non-disclosure. To the best of our knowledge, everyone charged to date in Canada had been formally diagnosed HIV-positive at the time the charges were laid.

Nevertheless, the Supreme Court of Canada has suggested that people who are aware they *might* be HIV-positive but have not yet been diagnosed would have an obligation to *disclose that possibility* to sexual partners.<sup>12</sup> This means that people could be charged for non-disclosure as soon as they are aware of the possibility of being HIV-positive.

## As a person living with HIV, how can I avoid criminal charges for non-disclosure to sexual partners?

There is no fail-safe way to avoid being accused of HIV non-disclosure. People lie and make mistakes about whether disclosure took place, whether condoms were used, and other circumstances of sexual encounters. But there are things you can do to reduce the risks of criminal prosecution or conviction for HIV non-disclosure. These options include:

- clearly disclosing your HIV-positive status before having sex, and discussing the risk of HIV

transmission and prevention options with all sexual partners;

- disclosing in front of a witness, such as a counsellor or health-care provider, who can ensure that your partner understands what the disclosure means and can document in your client-file that disclosure took place before sex that poses a “realistic possibility of HIV transmission”;
- having sexual partners sign a document or make a short video indicating that they are aware of your HIV-positive status before having sex that poses a “realistic possibility of HIV transmission”;
- keeping copies of any documents or correspondence that can be used to show that disclosure took place before having sex that poses a “realistic possibility of HIV transmission,” such as letters, e-mail messages or chat-room dialogues (*Remember that anything you write in an e-mail, on a website or through social media may later be shared with others — be very careful when posting personal information online.*);
- avoiding activities that may pose higher risk for HIV transmission, especially vaginal and anal intercourse without condom, and sharing drug consumption equipment; and
- working with a doctor to maintain a low or undetectable viral load. You can ask your doctor to test you on a regular basis (for example, every three to six months) in order to establish a record of lowered viral load.

## As a person living with HIV, what should I do if charged for allegedly failing to disclose my HIV-positive status?

If you have concerns about being charged or if you are contacted by police, you should consult a criminal defence lawyer familiar with HIV-related issues *as soon as possible*. If contacted by police or detained, you don’t have to answer the police officers’ questions but you should tell the police basic information such as your name and date of birth. You have

the right to speak with your lawyer in private, without delay. Anyone who is not a Canadian citizen, including permanent residents and people with no immigration status, should also contact an immigration lawyer.

The investigation and trial process can be very difficult and lengthy. An AIDS service organization or prisoner support organization may be able to offer moral support during the investigation and legal proceedings. It is better to talk to a criminal lawyer before sharing your story with anyone else because what you say could possibly be used against you.

The Canadian HIV/AIDS Legal Network (in Canada), HIV & AIDS Legal Clinic Ontario (HALCO) (in Ontario), and COCQ-SIDA (in Quebec) may be able to suggest a lawyer or legal clinic, as well as possible support organizations. The Canadian HIV/AIDS Legal Network also has useful resources for lawyers (see “For more information,” below).

## Outside the sexual context, is disclosure legally required under the criminal law?

### *Casual contacts*

HIV is not transmitted through casual contacts. A person living with HIV has no legal duty to disclose HIV-positive status to casual contacts, employers, teachers, co-workers, sports coaches, roommates, family or friends under current Canadian criminal law. The issue of whether there might be a duty to disclose in exceptional circumstances where a person is, or has been exposed, to a certain risk of transmission through casual contacts has, to our knowledge, never been addressed in Court.

### *Drug use partners*

Sharing drug injection equipment (e.g., needles, syringes) is considered a risky activity for transmitting HIV. Therefore, a person living with HIV who engages in such activities may have a legal duty to

disclose, although no Canadian court has yet ruled on this issue.

### *Pregnancy, childbirth and breastfeeding*

Under Canadian criminal law, no criminal charges can be laid for not taking steps to prevent HIV infection during pregnancy. However, an HIV-positive mother who risks transmitting HIV to a child during delivery and after the birth (e.g., by not informing health-care providers attending the birth, refusing preventive medications for the newborn infant, or breastfeeding) could potentially face criminal charges and/or intervention from child protection authorities. While criminal charges in such circumstances seem unlikely and generally not in the best interest of a child, charges have been laid against one woman in Ontario in a case of vertical (i.e., mother-to-child) transmission.<sup>13</sup>

### *Health-care setting*

To our knowledge, there is no reported Canadian court decision establishing a legal duty to disclose under the criminal law with respect to the provision of health care. Medical providers are supposed to use universal precautions to prevent exposure to blood-borne infections in all settings.

### **Can someone be charged and prosecuted for spitting or biting while knowing they are HIV-positive?**

Spitting or biting constitutes an “assault” that can lead to criminal charges. Although HIV cannot be transmitted through saliva, some people living with HIV have seen their HIV-positive status taken into account in criminal prosecutions related to spitting or biting, especially in the sentencing process.<sup>14</sup>

### **Is there any obligation to disclose outside of the criminal law?**

Someone’s HIV-positive status is personal and private information and people living with HIV are entitled to control over the decision to disclose their HIV-positive status to others. However, there might be some limited circumstances where a person living with HIV might be obliged to disclose HIV status outside of the criminal law. Here are some examples:

#### *Immigration*

Foreign nationals who are applying for permanent residence in Canada, as well as certain foreign nationals applying for temporary residency, will be asked about their medical history on their application forms. Applicants will also be required to undergo a medical examination which includes an HIV test. The HIV-status of many applicants will therefore be known to Citizenship and Immigration Canada. Applicants in the Family Class or Dependent Refugee Class (i.e., those who are sponsored to come to Canada) should be aware that their spouse or partner will be notified by Citizen and Immigration Canada that they have tested positive for HIV.<sup>15</sup>

#### *Public health*

HIV and AIDS are reportable illnesses in all Canadian provinces and territories, meaning that when an individual tests positive for HIV, the test result is reported to the provincial or territorial public health authorities. The type of information that gets reported to public health, and perhaps stored in a database, depends on the law and practice in a province or territory. (If an individual has an anonymous HIV test, the test result and non-identifying information is reported to the public health agency, but not the person’s name. However, once the person seeks medical care for HIV, their name will be reported to public health regardless of the type of test involved.)

Public health authorities are responsible for protecting public health and preventing the transmission of infections including HIV. If a person tests positive for HIV or certain other sexually transmitted infections (STIs), public health — depending on where a person lives — will probably require that the person’s sex partners be contacted. This procedure is known as contact-tracing, partner counselling or partner notification. The powers and procedures of public health authorities vary among the provinces and territories. Although public health and the criminal justice system are distinct, in some circumstances public health records may be used in a criminal investigation or prosecution if subpoenaed by the Court.

**The information contained in this publication is information about the law, but it is not legal advice. For legal advice, please contact a criminal lawyer.**

### **For more information**

This info sheet focuses primarily on HIV disclosure and the criminal law in the sexual context. For more information on disclosure outside the criminal law or the sexual context, please see our *Know your rights* series, available at [www.aidslaw.ca](http://www.aidslaw.ca).

*Additional resources by the Canadian HIV/AIDS Legal Network*

[www.aidslaw.ca/criminallaw](http://www.aidslaw.ca/criminallaw)

*An online resource kit for lawyers and other advocates*

Cases of HIV transmission or exposure can be very complex and require specialized knowledge, including of the latest science related to HIV. This resource kit is designed for lawyers involved in HIV-related prosecutions.

People who have been charged, or are concerned they may be under investigation, should bring this resource to the attention of their defence lawyers. [www.aidslaw.ca/lawyers-kit](http://www.aidslaw.ca/lawyers-kit)

### *An online resource kit for service providers*

The criminalization of HIV non-disclosure raises complex legal and ethical issues for service providers, especially for AIDS Service Organizations (ASOs). This resource kit provides information adapted for service providers including topics such as counselling and record-keeping practices, as well as how to support clients and protect client confidentiality. [www.aidslaw.ca/community-kit](http://www.aidslaw.ca/community-kit)

### *Videos*

The Legal Network has several short videos on the criminalization of HIV non-disclosure. <http://www.youtube.com/AIDSLAW>

### *A documentary on women and criminalization*

In 2012, the Legal Network co-produced, with Goldelox Productions, a 45-minute documentary titled *Positive Women: Exposing Injustice*, which has been screened all across Canada and internationally. [www.positivewomenthemovie.org](http://www.positivewomenthemovie.org)

### *Other useful resources on HIV disclosure*

*HIV disclosure: a legal guide for gay men in Canada* (revised 2013)  
HIV & AIDS Legal Clinic Ontario (HALCO), Ontario's Gay Men's Sexual Health Alliance (GMSH), CATIE  
<http://www.catie.ca/en/practical-guides/hiv-disclosure>

### **Contact**

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## **References**

<sup>1</sup> *R. v. Mabior*, 2012 SCC 47 and *R. v. D.C.*, 2012 SCC 48. In 1998, the Supreme Court of Canada had ruled that people living with HIV have a legal duty to disclose HIV status before having sex that poses a “significant risk” of HIV transmission.

<sup>2</sup> *R. v. Mabior*, 2012 SCC 47, para 104.

<sup>3</sup> Viral load is a measure of the amount of HIV in a person's blood. The goal of antiretroviral therapy is to render viral load undetectable. “Undetectable” does not mean that HIV has been eliminated from the body, but rather that it is below the level of detection via laboratory testing. Lowering the viral load slows disease progression and reduces the risk of HIV transmission. Note that the Supreme Court spoke of “low viral load,” not “undetectable viral load.” What will qualify as “low” remains to be defined in subsequent cases. However, based on the Supreme Court's decision in the *Mabior* case, it seems that it should at least include any viral load below 1500 copies of the virus per millilitre of blood.

<sup>4</sup> The Supreme Court's decisions only address HIV non-disclosure and vaginal sex, so we cannot say for sure how the test of a “realistic possibility of transmission” will be applied to other sexual acts. The information included here is the best available at the time of writing.

<sup>5</sup> Since the Supreme Court's 2012 decisions (and at the time of writing), at least two men have been convicted at the trial level by juries for non-disclosure before unprotected anal sex and another man has pled guilty. (It is our understanding that none of these men had an undetectable viral load at the time they had sex.) No court has yet considered whether anal sex with condoms and a low or undetectable viral load meets the “realistic possibility” threshold. Indeed, we are not aware of any people who have been charged for alleged non-disclosure before protected anal sex with a low viral load.

<sup>6</sup> In August 2013, an Ontario trial-level court ruled that the HIV transmission risk associated with cunnilingus did not meet the level of “a realistic possibility of transmission,” and therefore disclosure prior to oral sex was not legally required. The accused had an undetectable viral load. See *R. v. J.M.*, [2013] O.J. No. 3903 [accused's identity intentionally protected]. In October 2012, a jury acquitted a man who was charged with aggravated sexual assault for not disclosing his HIV-positive status before receiving oral sex. See, “HIV-positive Ottawa man guilty of attempted murder,” CBC News, November 1, 2012.

<sup>7</sup> For more information on the criminal justice system and the decisions hierarchy among courts, see “Understanding the criminal law in Canada,” at [www.aidslaw.ca/community-kit](http://www.aidslaw.ca/community-kit).

<sup>8</sup> *R. v. Mabior*, 2012 SCC 47, para 95.

<sup>9</sup> *R. v. J.T.C.*, 2013 NSPC 105.

<sup>10</sup> The trial court did not accept that the Supreme Court of Canada's decision had definitively closed the doors to a different interpretation of what constitutes a “realistic possibility of HIV transmission” based on the medical evidence before the judge in a particular case.

<sup>11</sup> Since the Supreme Court's 2012 rulings (and at time of writing), at least two individuals in Ontario have been convicted for having unprotected sex with an undetectable viral load. See, *R. v. J.M.*, [2013] O.J. No. 3903 [accused's identity intentionally protected]. In the second case, the accused pled guilty. See also the Ontario Court of Appeal's description of *Mabior* in *R. v. Felix*, 2013 ONCA 415.

<sup>12</sup> *R. v. Williams*, [2003] 2 SCR 134.

<sup>13</sup> *R. v. J.I.*, 2006 ONCJ 356 (Ontario Court of Justice).

<sup>14</sup> Cases of spitting or biting usually arise in the context of an altercation between a person living with HIV and a police officer, a prison guard or a paramedic. In a recent case, the Court of Appeal of

Manitoba decided that spitting did not amount to an aggravated assault (i.e., an assault endangering life) because it could not be proven to pose a “realistic possibility of transmission.” However, if the person intended to transmit HIV through spitting (even if that was impossible), they could still be charged and convicted of *attempted* aggravated assault. See, *R. v. Bear*, 2013 MBCA 96. In February 2013, a woman in Quebec was sentenced to 10 months in jail, after pleading guilty to assault on a peace officer and uttering threats. Her awareness of her positive status (both HIV and hepatitis C), as well as the prejudice suffered by the policeman who decided to undergo post-exposure prophylaxis treatment, were both taken into account as aggravating factors in sentencing. *R. v. J.*, 2013 QCCQ 931 [accused’s identity intentionally protected].

<sup>15</sup> For further information on HIV and immigration to Canada, please see the resources available via [www.aidslaw.ca/immigration](http://www.aidslaw.ca/immigration). See, also, Citizenship and Immigration Canada, at [www.cic.gc.ca](http://www.cic.gc.ca).

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*Ce feuillet d'information est également disponible en français.*

Funding for this publication was provided by the Law Foundation of Ontario. The opinions in this publication are those of the authors and do not necessarily reflect the official views of the Law Foundation of Ontario.

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## The criminalization of HIV non-disclosure in Canada and internationally

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### What is the history of the criminalization of HIV non-disclosure in Canada?

#### *Cuerrier: the starting point*

The first criminal charges in relation to HIV exposure in Canada were brought in the 1990s. In September 1998, the Supreme Court of Canada released its decision in *R. v. Cuerrier*, establishing that people living with HIV could be found guilty of aggravated assault if they did not disclose their HIV status to a sexual partner prior to sex that posed a “significant risk” of HIV transmission.<sup>1</sup> The Supreme Court did not impose on people living with HIV a blanket duty to disclose. The legal duty to disclose would only apply where there was a “significant risk” of HIV transmission.

In the aftermath of the *Cuerrier* decision, it was generally understood that people living with HIV were legally required to reveal their HIV-positive status to sexual partners before having vaginal or anal intercourse without a condom. It was unclear whether sex with a condom and oral sex would also be considered to carry a “significant risk” of HIV transmission and thus a legal duty to disclose. In

*Cuerrier*, the Court had suggested that there might be no duty to disclose when a condom was used. However, it did not rule decisively on this issue.<sup>2</sup>

#### *Following Cuerrier: uncertainty and unfairness in the application of the law*

In the mid-2000s, both the number of charges and their severity (i.e., aggravated sexual assault versus the lesser charges of aggravated assault or criminal negligence causing bodily harm) began to escalate, and an increasing percentage of the charges were laid in Ontario.<sup>3</sup> Several high-profile cases involving troubling circumstances went to trial in the latter half of the decade, contributing through sensational media coverage to the public’s increased attention on the issue. Concurrently, greater numbers of advocates across the country and around the world were expressing their alarm at criminalization trends, as well as the uncertainty and unfairness in the application of the law.

After *Cuerrier*, court rulings interpreted the “significant risk” standard inconsistently,<sup>4</sup> and some Crown prosecutors began pushing for a broad application of the criminal law to

include even those sexual activities with negligible or no risk of transmission. As a result, while a majority of lower courts found that condom use was enough to preclude criminal liability, some people living with HIV were charged and convicted even though they used condoms.<sup>5</sup> Some people were also charged for oral sex, and in one case, mutual male masturbation. An extensive body of new science had also emerged, showing that treatment with highly effective antiretroviral drugs (ARVs) could dramatically reduce the risks of transmission associated with sex without a condom by lowering a person’s viral load (i.e., the presence of the virus in one’s body). But this, too, was not addressed consistently by the judiciary.<sup>6</sup>

#### *Mabior and D.C.: a step backward*

On October 5, 2012, the Supreme Court of Canada released important decisions in two cases: *R. v. Mabior* and *R. v. D.C.*<sup>7</sup> In both cases, the Court was asked to revisit *Cuerrier* and articulate the circumstances in which people living with HIV can be convicted of a crime for not disclosing their HIV-positive status to a sexual partner. Specifically, these cases required the Court to determine how using a

condom or having a low viral load would impact criminal liability.

These appeals in *Mabior* and *D.C.* were brought by the Attorneys General of Manitoba and Quebec, respectively. In particular, Manitoba's Attorney General argued that the Supreme Court should abandon the "significant risk" test. They argued that people living with HIV should have a legal duty to disclose their status to their sexual partner before having sex, regardless of the level of risk of HIV transmission. They took the position that withholding information about one's HIV-positive status denies sexual partners the right to control the conditions under which they are willing to engage in sexual activity.

The Legal Network, in coalition with seven other organizations, strongly opposed the prosecution's position. We argued that it perpetuated false and dangerous assumptions about people's ability to consent to sex, undermined human rights and public health messages of shared responsibility for safer sex, trivialized the offence of sexual assault, and ignored the available science about HIV transmission risks and treatment.<sup>8</sup>

Although the Supreme Court rejected the prosecution's position, it nevertheless made the legal requirement more onerous for people living with HIV. In *Mabior* and *D.C.*, the Court decided that people living with HIV must disclose their HIV-positive status before having

sex that poses a "realistic possibility of HIV transmission." But in the eyes of the Court, even very small risks of transmission could be considered "realistic."

Based on the Court's rulings, people have a legal duty to disclose their status unless they both use a condom *and* have a low or undetectable viral load (at least in the context of vaginal sex).<sup>9</sup> This means people can be charged and convicted of aggravated sexual assault, even if they took precautions to protect a partner by using a condom, did not intend to cause any harm to their partner, and did not transmit HIV.<sup>10</sup>

## Trends in Canadian criminal cases of HIV non-disclosure

The Legal Network tracks charges and prosecutions related to HIV non-disclosure using published decisions, media reports, and communications with community members and lawyers. Complete information on all prosecutions is impossible to obtain, but based on the best available information as of January 2014, here is what we can estimate:

- Approximately 155 people have been criminally charged in Canada for not disclosing their HIV-positive status since 1989.
- A majority of cases occurred in Ontario.
- People are usually charged with aggravated sexual assault.
- A little over 30 people were charged in relation to alleged HIV non-disclosure in the three years prior to this writing (January 2011 to January 2014), including seven women and six men who have sex with men (MSM). Nineteen of these individuals were charged in Ontario.<sup>11</sup>
- While most of the cases are against men who had sex with women, an increasing number of MSM are being charged and prosecuted in Canada.<sup>12</sup>
- At time of writing, at least 17 women in Canada have been criminally charged for HIV non-disclosure.
- There are serious concerns that criminalization may have a disproportionate impact on racialized communities. A 2012 study revealed that Black men account for 52 percent of heterosexual cases from 2004 to 2010 in Ontario.<sup>13</sup>
- Conviction rates are high in cases of HIV non-disclosure. By the end of 2010, 78 percent of concluded cases (where the outcome was known) had ended in a conviction on at least one charge related to HIV non-disclosure, while only 16 percent had resulted in an acquittal.<sup>14</sup> Moreover, seven of the eleven people charged in 2011 were convicted. Six had pled guilty and one was convicted at trial. In two cases, the charges were withdrawn. We do not know what happened to the other two individuals charged in 2011.<sup>15</sup>

## Is non-disclosure of other sexually transmitted infections criminalized in Canada?

In 1998, in *R. v. Cuerrier*, the Supreme Court decided that the criminal law could be used to address not only the risk of HIV infection but also of other sexually transmitted infections (STIs).<sup>16</sup> However, with the exception of a handful of cases

involving herpes and hepatitis B and C, only people living with HIV have been prosecuted.<sup>17</sup>

In 2012, in *R. v. Mabior*, the Supreme Court clearly indicated that the legal test of a "realistic possibility of transmission" — which triggers the legal duty to disclose HIV-positive status — was specific to HIV.<sup>18</sup>

## Is Canada any different from other countries when it comes to criminalizing HIV?

Many jurisdictions throughout the world criminalize HIV non-disclosure, exposure or transmission. Some have enacted HIV-specific laws while others (including Canada) have applied existing criminal



laws to HIV cases.

However, with more than 155 people charged by January 2014, Canada has the dubious distinction of being one of the world “leaders” in prosecuting people living. Canada has the highest number of arrests and prosecutions after the United States, where more than a thousand HIV-related cases have been identified in the last decade. High numbers of arrests and prosecutions have also been reported in Austria, Sweden and Switzerland.<sup>19</sup>

Recognizing on the one hand that HIV treatment improves the health of people living with HIV and lowers the risks of transmission, and on the other hand acknowledging the negative impacts of an overly broad use of the criminal law on individuals’ lives and public health, some countries have engaged in law reform. For example, Congo, Guinea, Togo and Senegal revised their legislation or adopted new legislation that limits the use of the criminal law to cases of intentional transmission of HIV. Fiji removed HIV-specific criminal offences for transmission or exposure from a broader HIV statute, and Guyana rejected a proposed HIV-specific criminal law.<sup>20</sup> In February 2011, Denmark’s Minister of Justice announced the suspension of article 252(2) of the Danish Criminal Code which criminalizes HIV exposure or transmission. A working group was established to consider the revision or repeal of the legislation based on current scientific evidence.<sup>21</sup> In 2013, law reform efforts in Switzerland led to the decriminalization of unintentional HIV exposure or transmission.<sup>22</sup> In England and Wales, as well as in Scotland, guidelines for crown prosecutors were developed to limit the application of the criminal law in cases of HIV exposure or transmission.<sup>23</sup>

## What are international recommendations on the criminalization of HIV non-disclosure, exposure or transmission?

The numerous human rights and public health concerns associated with the criminalization of HIV non-disclosure, exposure or transmission have led the Joint United Nations Programme on HIV/AIDS (UNAIDS) and the United Nations Development Programme (UNDP),<sup>24</sup> the UN Special Rapporteur on the right to health<sup>25</sup> and the Global Commission on HIV and the Law<sup>26</sup> to urge governments to limit the use of the criminal law to cases of *intentional transmission* of HIV (i.e., where a person knows his or her HIV-positive status, acts with the intention to transmit HIV, and does in fact transmit it).<sup>27</sup> In 2013, UNAIDS developed a guidance note providing critical scientific, medical and legal considerations in support of ending or mitigating the overly broad criminalization of HIV non-disclosure, exposure or transmission. This document contains explicit recommendations against prosecutions in cases where a condom was used consistently, where other forms of safer sex were practised (including non-penetrative sex and oral sex), or where the person living with HIV was on effective HIV treatment or had a low viral load.<sup>28</sup>

In 2012, a group of civil society advocates from around the world gathered in Oslo, Norway, to create the *Oslo Declaration on HIV Criminalisation*. By December 2013, more than 1700 individuals and organizations across the world had signed the Oslo Declaration, which provides a roadmap for policy-makers and criminal justice actors to ensure a cohesive, evidence-informed approach regarding the appropriate application, if any, of the criminal law to cases of HIV non-disclosure, exposure or transmission. This support demonstrates the existence of a strong global movement resisting an overly broad use of the criminal law against people living with HIV.<sup>29</sup>

For more information about the criminalization of HIV non-disclosure, exposure or transmission around the world, please consult HIV Justice Network, at [www.hivjustice.net](http://www.hivjustice.net).

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[www.positivewomenthemovie.org](http://www.positivewomenthemovie.org)

### *Other useful resources on HIV disclosure*

Eric Mykhalovskiy and Glenn Betteridge, “Who? What? Where? When? And with What Consequences? An Analysis of Criminal Cases of HIV Non-disclosure in Canada,” *Canadian Journal of Law and Society* 27(1) (2012): 31–53.

## Contact

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## References

<sup>1</sup> *R. v. Cuerrier*, [1998] 2 SCR 371.

<sup>2</sup> “To have intercourse with a person who is HIV-positive will always present risks. Absolutely safe sex may be impossible. Yet the careful use of condoms might be found to so reduce the risk of harm that it could no longer be considered significant so that there might not be either deprivation or risk of deprivation [i.e., harm or risk of harm].” *R. v. Cuerrier*, at para 129.

<sup>3</sup> A. Symington, “Criminalization confusion and concerns: the decade since the *Cuerrier* decision,” *HIV/AIDS Policy & Law Review* 14:1 (2009): 1, 5–10.

<sup>4</sup> E. Mykhalovskiy, G. Betteridge, and D. McLay, *HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario* (August 2010). A report funded by the Ontario HIV Treatment Network.

<sup>5</sup> Canadian HIV/AIDS Legal Network, “HIV non-disclosure and Canadian criminal law: condom use,” briefing paper.

<sup>6</sup> Canadian HIV/AIDS Legal Network, “HIV non-disclosure and Canadian criminal law: antiretroviral treatment and viral load,” briefing paper.

<sup>7</sup> *R. v. Mabior*, 2012 SCC 47; *R. v. D.C.*, 2012 SCC 48.

<sup>8</sup> Canadian HIV/AIDS Legal Network, et al., *Factum of the Interveners at the Supreme Court of Canada: R v. Mabior and R v. D.C.*, 2012. Numerous other parties intervened before the Supreme Court of Canada. All of them, except the Attorney General of Alberta, strongly opposed the position put forward by the Attorneys General of Manitoba and Quebec, and argued for a strictly limited use of the criminal law in cases of HIV non-disclosure.

<sup>9</sup> Because these decisions were about vaginal sex, it is not clear how the test of a “realistic possibility” applies to other sexual acts (e.g., anal sex or oral sex).

<sup>10</sup> C. Kazatchkine, et al., “HIV Non-disclosure and the Criminal Law: An Analysis of two Recent Decisions of the Supreme Court of Canada,” *Criminal Law Quarterly* 60 (2013): 30–40.

<sup>11</sup> In some cases, the actual year of the charges is unknown. Our estimates include 5 people (out of 31) for which the date of the charges is unknown but is likely to be between 2011 and 2014.

<sup>12</sup> Only 5 of the 30 cases (concerning 28 individuals) that we have estimated against MSM occurred before 2006.

<sup>13</sup> Eric Mykhalovskiy and Glenn Betteridge, “Who? What? Where? When? And with What Consequences? An Analysis of Criminal Cases of HIV Non-disclosure in Canada,” *Canadian Journal of Law and Society* 27:1 (2012): 31–53.

<sup>14</sup> *Ibid.*

<sup>15</sup> At the time of writing, data on the outcomes of cases dated from 2012 to 2013 are too limited to be reported. Most of the cases are likely to be ongoing.

<sup>16</sup> *R. v. Cuerrier*, [1998] 2 S.C.R. 371, at para. 137.

<sup>17</sup> We are aware of at least one case related to hepatitis C in New Brunswick which resulted in an acquittal. The risk of transmission through sex was considered too low to trigger a duty to disclose. *R. v. Jones*, [2002] N.B.J. 375 (QL). In one case in Prince Edwards Island, a man pled guilty to sexual assault and sexual assault causing bodily harm for not disclosing he had hepatitis B before having unprotected sex. Transmission was alleged in the case of one of the two complainants. See, “Man with hepatitis B jailed for sexual assault,” CBC News, March 3, 2010. Three people have been charged in Ontario for not disclosing that they had herpes before having sex. Transmission was alleged in at least two of these cases. The accused

in those three cases pled guilty to, or were convicted at trial of, assault, sexual assault and negligence causing bodily harm, respectively. At least one of them was conditionally discharged and placed on probation for one year. *R. v. J.H.*, 2012 ONCJ 753. See also, *R. v. S.*, 2010 ONCA 462 [accused's identity intentionally protected], and A. Seymour, "Herpes far from HIV, lawyer says, police confused in case against soldier: defense," *Ottawa Citizen*, Feb. 8, 2013.

<sup>18</sup> *R. v. Mabior*, 2012 SCC 47, at para. 92.

<sup>19</sup> See, Sergio Hernandez, "How We Built Our HIV Crime Data Set," *ProPublica*, December 1, 2013; Global Network of People Living with HIV (GNP+) and HIV Justice Network, *Advancing HIV Justice: A progress report of achievements and challenges in global advocacy against HIV criminalisation*, Amsterdam/London (2013).

<sup>20</sup> UNAIDS, *Global report: UNAIDS report on the global AIDS epidemic 2013* (2013), 87.

<sup>21</sup> Global Commission on HIV and the Law (UNDP HIV/AIDS Group), *HIV and the Law: Risks, Rights and Health* (July 2012), 24.

<sup>22</sup> Inter-Parliamentary Union and UNDP, *Effective laws to end HIV and AIDS: next steps for parliaments* (2013), 44–47.

<sup>23</sup> Crown Prosecution Service for England and Wales (CPS), *Intentional or Reckless Transmission of Sexual Infection and Policy for prosecuting cases involving the intentional or reckless sexual transmission of infection* (originally published 2008; updated 15 July 2011); Crown Office and Procurator Fiscal Service of Scotland, *Guidance on intentional or reckless sexual transmission, or exposure to, infection* (May 2012).

<sup>24</sup> UNAIDS/UNDP, Policy brief: criminalization of HIV transmission (August 2008).

<sup>25</sup> UN, General Assembly, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, Human Rights Council, Fourteenth session, Agenda item 3, A/HRC/14/20, April 27, 2010.

<sup>26</sup> *Supra*, Global Commission on HIV and the Law.

<sup>27</sup> Note that the Global Commission report is unclear on whether criminalization might be justified in the absence of actual transmission where there is malicious intent to transmit. *Ibid.*, 24.

<sup>28</sup> UNAIDS, *Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations* (2013), 20.

<sup>29</sup> The Oslo Declaration is available online at <http://www.hivjustice.net/oslo/>.

## 2

This publication contains general information. It does not constitute legal advice, and should not be relied upon as legal advice. Copies are available on the website of the Canadian HIV/AIDS Legal Network at [www.aidslaw.ca/criminallaw](http://www.aidslaw.ca/criminallaw). Reproduction is encouraged, but copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source of this information.

*Ce feuillet d'information est également disponible en français.*

Funding for this publication was provided by the Law Foundation of Ontario. The opinions in this publication are those of the authors and do not necessarily reflect the official views of the Law Foundation of Ontario.

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A dark blue rectangular block with an olive green top border. It contains the logo of the Canadian HIV/AIDS Legal Network, which consists of a white brushstroke above the text. The text is arranged in two columns: "Canadian HIV/AIDS Legal Network" on the left and "Réseau juridique canadien VIH/sida" on the right.

# Criminal Law & HIV Non-Disclosure in Canada

3

This is one in a series of three info sheets on the criminalization of HIV non-disclosure in Canada.

1. The obligation to disclose HIV-positive status under Canadian criminal law
2. The criminalization of HIV non-disclosure in Canada and internationally
3. Criminalization, public policy and community responses

## Criminalization, public policy and community responses

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### What are the objectives of criminal prosecutions?

Criminal prosecutions have four main objectives: deterrence, retribution, incapacitation and rehabilitation. How relevant are these objectives when considering prosecutions of HIV non-disclosure?

#### *Deterrence*

In theory, criminal prosecutions for HIV non-disclosure would deter people from withholding information about their HIV-positive status and/or engaging in sex that risks transmitting HIV. However, such deterrent effect is likely to be limited at best. The little existing evidence suggests that HIV-related prosecutions do not deter people from engaging in risky sexual behaviour.<sup>1</sup> The history of prohibitions on alcohol, drugs, sex work, and sex between men demonstrates that the criminal law is ineffective in deterring such fundamental, complex human behaviour. As for the few who act maliciously or with disregard for the welfare of others, there is little reason to think that a legal prohibition will have much or any deterrent effect.

Similarly, there is no clear evidence that

criminal prosecutions make people more likely to disclose.<sup>2</sup> HIV disclosure is a complex and difficult undertaking. It depends on multiple factors, including a person's sense of safety and comfort. Moreover, many people seem to rely on their own moral or social compass, rather than what the law requires, in making decisions about disclosing their status.<sup>3</sup> There are concerns that disclosure could become even more challenging for those who may fear being subjected to false accusations and/or prosecution if they tell their partners they have HIV.<sup>4</sup> This is of particular concern for people living with HIV in abusive relationships or following a bad breakup. Studies have reported a heightened sense of fear and vulnerability among some people living with HIV in Canada as a result of an increased number of criminal prosecutions.<sup>5</sup>

#### *Retribution*

Certain conduct is considered so morally blameworthy that it deserves punishment, and this in itself is considered sufficient reason for criminalizing it. This justification for criminal sanctions has nothing to do with deterring an individual from not disclosing their status or engaging in the future in risky conduct. Rather, it is about punishing past conduct

deemed blameworthy.

Moral culpability requires a sufficiently "guilty mind." In cases of HIV non-disclosure, people living with HIV can be convicted even if they did not intend to transmit HIV to their partner. To establish the required mental culpability, the Crown has only to prove that a person was aware of their HIV status and that HIV can be transmitted sexually. Arguably, not all of these cases justify criminal conviction and incarceration. The retribution of the criminal law should be reserved for the most serious of cases.

#### *Incapacitation to prevent harm*

Imprisoning those convicted of HIV non-disclosure is thought to prevent them from harming others, at least for the length of their sentence. But in the context of HIV transmission, this is a weak justification for criminal penalties. Imprisoning a person living with HIV does little to prevent further exposure. In fact, it may have the opposite effect. Rates of HIV are often significantly higher in prison than in the community as a whole, and prisons are environments in which high-risk behaviour is common (e.g., unprotected sexual intercourse, both consensual and non-consensual, and sharing equipment

for tattooing or drug injection).<sup>6</sup> However, incarcerated people often have limited or no access to HIV prevention measures such as condoms and sterile needles for drug injecting or tattooing, increasing the risks of HIV spreading in prisons. Moreover, in most cases those serving prison sentences are eventually released back into the community, meaning that risky activities within prisons can lead to further transmissions on the outside.

### *Rehabilitation*

Causing individuals to change their behaviour in order to prevent further transmission of HIV is of critical importance to HIV prevention efforts. But most cases of HIV transmission are related to sexual activity and drug use, human behaviours which are complex and difficult to change through blunt tools such as criminal sanctions. Long-term changes in behaviour are more likely to result from other non-coercive interventions, such as education, risk-reduction counselling, support for disclosure and behaviour change, and addressing underlying reasons for engaging in high-risk behaviours.

### **Why is it problematic to treat non-disclosure as a form of sexual assault?**

The protection of the right of a sexual partner to personal autonomy and equality has increasingly become the primary objective of criminal prosecutions for alleged HIV non-disclosure. People charged for alleged non-disclosure are now usually prosecuted within the framework of *sexual* assault law and face registration as sexual offenders.

However, HIV non-disclosure cases are not like other sexual assaults. In HIV non-disclosure cases, both partners have consented to have sex. Lack of disclosure is usually not about asserting force over another person in order to gain sexual gratification but rather the result of fear of violence or other harm, rejection or denial. Arguably, by associating HIV

non-disclosure with sexual assault, the criminalization of HIV non-disclosure trivializes the offence of sexual assault and reinforces stigma against people living with HIV.

It is also unclear to what extent the criminalization of HIV non-disclosure protects personal autonomy and advances equality. Everyday people decide to have sex without knowing if their partner does or does not have a sexually transmitted infection, including HIV. Putting the complete onus for HIV prevention on the shoulders of those living with HIV does not only contradict the public health message of shared responsibility for protected sex, but also assumes all sexual partners are passive, lacking agency, and never equal and active participants in the sexual encounter when the reality is much more nuanced. Moreover, in those circumstances where a partner does lack the ability to make autonomous choices (e.g., because of violence or fear of violence), criminalizing HIV non-disclosure will do nothing to change her or his situation. On the contrary, the criminalization of HIV non-disclosure may be particularly detrimental for people living with HIV who are in abusive or dependant relationships (disproportionately likely to be women), or whose marginal status in other ways may make HIV disclosure even more complicated and difficult.<sup>7</sup>

### **Why don't people living with HIV always disclose?**

No matter who you are or what your circumstances, disclosing your HIV-positive status can be very difficult. The stigma and discrimination associated with HIV infection and the lack of understanding among the general public about HIV and AIDS can make disclosure even more challenging. Requiring someone to disclose their HIV-positive status may put them in a “double-bind” — they face condemnation if they do not disclose and rejection if they do.

Certain people may face additional challenges with respect to disclosure,

such as women in abusive relationships and sex workers who may face violence as a result of disclosure, as well as people with mental health or drug dependence issues who may have extra difficulties in understanding and coping with their illness.

A range of cultural and structural issues also increase the risk of HIV infection and the isolation and stigma experienced by people living with HIV in certain racial and ethnic groups, including religious beliefs, homophobia and silence about sexuality within communities, and the racialization of HIV as a Black or African disease. Gender, race, sexuality, immigration status, poverty, age, a history of sexual abuse, residential school or other past trauma, and so on — these intersecting factors can affect the ability of many people to understand and prevent HIV transmission, to negotiate the terms of sex, and to disclose their HIV-positive status.

### **Do criminal prosecutions help prevent HIV?**

There is no evidence that criminalization of HIV non-disclosure helps prevent new infection. In fact, there is growing concern that an overly broad use of the criminal law will do more harm than good from a public health perspective. Criminal prosecutions have been shown to deter people from honestly communicating with frontline workers about their risky behaviours and disclosure practices, as well as to undermine counselling and clinical practice.<sup>8</sup>

An overly broad use of the criminal law, especially in cases where the risks of transmission are extremely low, reinforces stigma and discrimination against people living with HIV and fuels misinformation about HIV and how it is transmitted. The appearance that the criminal law protects people from HIV infection may create a false sense of security among those who believe themselves to be HIV-negative and not at risk, therefore discouraging individuals to take responsibility for their own sexual health.

Finally, because a positive diagnosis exposes a person to greater risk of prosecution for non-disclosure, and because over-criminalization reinforces stigma, prosecutions may also operate as an additional disincentive to HIV testing, especially for marginalized communities and communities most at risk of HIV.<sup>9</sup> It is estimated that more than one quarter of people living with HIV are unaware of their HIV-positive status.<sup>10</sup> Instead of criminalizing people who have been diagnosed with HIV, efforts should focus on creating an environment where people living with HIV are free from violence, stigma and discrimination, and where it is safe to get tested for HIV.

### **Do criminal prosecutions raise other concerns?**

The criminal law is a blunt and harsh instrument; its use should be limited to a last resort. However, since the Supreme Court's 2012 rulings in *R. v. Mabior* and *R. v. D.C.*, people can be charged and prosecuted for aggravated sexual assault for not disclosing their status to their sexual partners even if they engaged in sex that posed minimal risks of transmission (e.g., because they used a condom or had an undetectable viral load), had no intent to harm their partner, and did not transmit HIV. The consequences of being charged and prosecuted for HIV non-disclosure are extremely serious for people living with HIV, whose identities and health status are regularly made public via police releases and media reports, and who face imprisonment and inclusion on the sexual offender registry. Using the criminal law against people living with HIV — an already stigmatized and marginalized community — even where the risk of transmission is extremely low is not only unfair but disproportionate and potentially discriminatory.

Another concern raised by the current overly-broad use of the criminal law is how it affects the most vulnerable people living with HIV. As illustrated by the case of *D.C.*, a woman who was charged with HIV non-disclosure after complaining to

the police about domestic violence, the criminal law can be used by vindictive partners as a weapon against people living with HIV, most likely to be women in abusive relationships.<sup>11</sup> Moreover, by requiring that people disclose their status unless they use a condom *and* have a low viral load — at least for vaginal sex — the law may disproportionately affect people who have inadequate access to medications or sustained health care, and who may not be able to maintain a low viral load.

### **What are the alternatives to using the criminal law?**

Public health interventions, including access to confidential and voluntary testing, counselling and treatment, safer-sex campaigns and provision of prevention materials (e.g., condoms and sterile drug injection equipment) should be the first line of response to HIV. Eliminating stigma and discrimination against people living with HIV, and ending violence against women and sexual minorities would also be effective means to address vulnerability to HIV infection.

If an individual continues to engage in conduct that risks transmitting HIV to others, public health powers can be used, including individualized counselling, partner notification, and even orders to refrain from certain activities (e.g., unprotected sex without disclosure). Increasingly coercive interventions to change or prevent certain behaviours can be adopted under public health legislation if less coercive measures fail.<sup>12</sup> Criminal charges should only be used as a last resort and in exceptional cases.

### **What is the Legal Network's position on the criminalization of HIV non-disclosure?**

The Canadian HIV/AIDS Legal Network advocates that all legal and policy responses to HIV are based on the best available evidence, the objectives of HIV prevention, care, treatment and support,

and respect for human rights. There is no evidence that criminalizing HIV non-disclosure has prevention benefits. But there are serious concerns that the trend towards criminalization is causing considerable harm by increasing stigma and discrimination against people living with HIV, spreading misinformation about HIV, undermining public health messaging about prevention, affecting the trust between HIV patients and their physicians and counsellors, and resulting in injustices and human rights violations. As a result, the Legal Network opposes criminal charges for non-disclosure in cases of otherwise consensual sex, except in limited circumstances (such as when people are aware of their status and act with malicious intent to infect others).

In any case, people should not be charged for HIV non-disclosure if they

- did not pose a significant risk of transmission;<sup>13</sup>
- did not know about their HIV infection;
- lacked an understanding of how HIV is transmitted;
- feared violence or other serious negative consequences would result from disclosing HIV-positive status;
- disclosed their HIV-positive status to a sexual partner or other person before any act posing a significant risk of transmission (or honestly and reasonably believed the other person was aware of their status through some other means);
- were forced or coerced into sex; or
- are being counter-charged following a report of domestic violence.<sup>14</sup>

### **What are the Legal Network and others doing to oppose the expansive use of the criminal law with respect to HIV non-disclosure in Canada?**

The Legal Network, in collaboration with numerous AIDS service organizations (ASOs), researchers, activists and criminal defence lawyers, is working on several fronts:

- *Tracking cases:* Using reported case decisions, media reports and personal communications, we track cases across the country in order to discern trends and inform education and advocacy activities.
- *Providing support:* With respect to HIV non-disclosure cases, the Legal Network provides legal information, background materials and other forms of assistance as appropriate to lawyers, service providers and individuals facing charges. (N.B.: The Legal Network does not provide legal advice.)
- *Education and awareness-raising:* We produce publications and videos, conduct multiple workshops, and answer information requests with respect to the criminal law and HIV non-disclosure. We also make our voice heard in the media on the issue of criminalization.
- *Legal interventions:* We have intervened in multiple cases related to non-disclosure, specifically those with the potential to narrow the scope of the criminal law. As intervenors, we are able to put public policy considerations before the courts, in addition to legal arguments.
- *Community mobilization and advocacy:* We have been involved in several advocacy initiatives to oppose the expansive use of the criminal law, including rallies and protests before courts, as well as the production of a documentary denouncing the impact of criminalization on women living with HIV. As a member of the Ontario Working Group on Criminal Law and HIV Exposure, the Legal Network has also been involved in advocacy work towards the development of prosecutorial guidelines to address HIV non-disclosure cases in Ontario. Prosecutorial guidelines would be issued by a provincial Attorney General's office and guide the discretion of Crown prosecutors with respect to when prosecutions are (and are not) appropriate. Prosecutorial guidelines have been developed in England and Wales, as well as in Scotland. UNAIDS recommends such

guidelines as a way to limit police and prosecutorial discretion in application of criminal law.<sup>15</sup>

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[criminallaw@aidslaw.ca](mailto:criminallaw@aidslaw.ca)



## References

<sup>1</sup> E.g., see: S. Burris, et al., “Do Criminal Laws Influence HIV Risk Behaviour? An Empirical Trial,” *Arizona State Law Journal* 39 (2007): 467–519; K. J. Horvath, et al., “Should it be illegal for HIV-positive persons to have unprotected sex without disclosure? An examination of attitudes among US men who have sex with men and the impact of state law,” *AIDS Care* 22 (2010): 1221–1228

<sup>2</sup> Ibid.

<sup>3</sup> B. Adam, et al., *How HIV criminalization is affecting people living with HIV in Ontario* (Ontario HIV Treatment Network, 2012).

<sup>4</sup> In a British study about HIV-positive gay men, a few were found to have disclosed their HIV status more regularly since hearing about criminal cases, while others responded by maximizing their anonymity, and being less open about their HIV status. See, C. Dodds, A. Bourne, and M. Weait, “Responses to criminal prosecutions for HIV transmission among gay men with HIV in England and Wales,” *Reproductive Health Matters*, 17(34) (2009): 135–145.

<sup>5</sup> Adam, et al., *supra*, p. 17.

<sup>6</sup> Correctional Service of Canada, *Summary of Emerging Findings from the 2007 National Inmate Infectious Diseases and Risk-Behaviours Survey* (March 2010), on-line at [www.csc-scc.gc.ca](http://www.csc-scc.gc.ca); Canadian HIV/AIDS Legal Network, PASAN, CTAC, “HIV and hepatitis C crisis in federal prisons, according to new CSC report,” news release, Toronto, April 21, 2010.

<sup>7</sup> See, R. Elliott and Alison Symington, “Mabior and DC: is criminal law the answer to non-disclosure?”, *The Court*, blog of February 7, 2012, available at [www.thecourt.ca/2012/02/07/mabior-and-d-c-is-criminal-law-the-answer-to-non-disclosure-part-2/](http://www.thecourt.ca/2012/02/07/mabior-and-d-c-is-criminal-law-the-answer-to-non-disclosure-part-2/) (accessed July 2014); and C. Kazatchkine, et al., “HIV non-disclosure and the criminal law: an

analysis of two recent decisions of the Supreme Court of Canada,” *The Criminal Law Quarterly* 60 (2013): 30–40.

<sup>8</sup> See, for instance, E. Mykhalovskiy, “The problem of ‘significant risk’: Exploring the public health impact of criminalizing HIV non-disclosure,” *Soc Sci & Med* 73(5) (2011): 668–675.

<sup>9</sup> P. O’Byrne, A. Bryan, and C. Woodyatt, “Nondisclosure prosecutions and HIV prevention: Results from an Ottawa-based gay men’s sex survey,” *Journal of the Association of Nurses in AIDS Care* 24(1) (2013):81–87.

<sup>10</sup> Public Health Agency of Canada, *Summary: Estimates of HIV Prevalence and Incidence in Canada* (2011).

<sup>11</sup> For more information about the impact of criminalization on women, see Canadian HIV/AIDS Legal Network, *Women and the criminalization of HIV non-disclosure* (2012), info sheet.

<sup>12</sup> Canadian HIV/AIDS Legal Network and Interagency Coalition on AIDS and Development, *Addressing HIV Risk Behaviours: A Role for Public Health Legislation and Policy* (2010).

<sup>13</sup> It is the Legal Network’s position that oral sex, sex with a condom, or sex without a condom where the HIV-positive partner has a low viral load should not be considered to pose a “significant risk of transmission” for the purpose of the criminal law, because the risks associated with these activities are extremely low.

<sup>14</sup> This list is not necessarily exhaustive. There might be other circumstances requiring extra caution when determining whether criminal prosecutions are warranted or not.

<sup>15</sup> UNAIDS, *Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations* (2013).

# 3

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*Ce feuillet d’information est également disponible en français.*

Funding for this publication was provided by the Law Foundation of Ontario. The opinions in this publication are those of the authors and do not necessarily reflect the official views of the Law Foundation of Ontario.

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