



## **The criminalization of HIV non-disclosure in Canada: current status and the need for change**

April 2019



Published by the  
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## A legal obligation to disclose HIV-positive status to a sexual partner

There is no criminal statute in Canada that explicitly imposes an obligation to disclose HIV-positive status before sex. Instead, the obligation to disclose in some circumstances has been established by the courts.

The Supreme Court of Canada has ruled that people living with HIV have an obligation to disclose their status to a sexual partner before sexual activity that poses a “significant risk of serious bodily harm.”<sup>1</sup> In 2012, the Court has added that such a risk exists when there is a “**realistic possibility of transmission of HIV.**”<sup>2</sup>

If a person engages in a sexual activity that, in the eyes of the courts, carries a “realistic possibility of HIV transmission,” without disclosing first, they could be charged with a serious crime. The prosecution would also have to prove that the partner would not have had consented to sex had they known the person was HIV positive. The charge most commonly laid is *aggravated sexual assault*.

The law in Canada is particularly severe. A person living with HIV can be convicted for not disclosing their status even if they had no intent to cause harm and HIV was not transmitted. This can happen even in cases where there is little or no risk of transmission.

## What does “realistic possibility” of transmission mean? When is there no legal obligation to disclose?

There is no blanket obligation to disclose; the obligation to disclose does not apply to all sexual activities. Rather, as explained above, there is a duty to disclose if there is a “realistic possibility” of HIV transmission. So a key question is: what activities do prosecutors and courts think pose such a possibility? The interpretation and application of this standard has given rise to some serious concerns with the broad scope of HIV criminalization in Canada.

According to the Supreme Court of Canada’s decision in 2012, there is **no obligation to disclose** HIV-positive status when having vaginal and anal sex if a **condom** is used **and** the HIV-positive partner has a **low viral load** (defined as less than 1500 copies/ml). The Court concluded that, in such circumstances, there is no realistic possibility of transmission.

This combination of two factors was the only circumstance in which the Supreme Court was prepared, based on the evidence before it in that case, to say clearly that there was no

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

<sup>2</sup> *R. v. Mabior*, 2012 SCC 47. In 2018, the Court of Appeal of Nova Scotia confirmed that psychological harm alone resulting from non-disclosure (e.g. emotional stress) is not sufficient to trigger the application of the criminal law in the absence of a realistic possibility of transmission (*R. v. T.*, 2018 NSCA 13. The identity of the accused has been intentionally removed).

duty to disclose. But the Court did say there might be other circumstances in which there would be no duty to disclose because there would be no realistic possibility of transmission. The Court said that its ruling “*does 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.*”<sup>3</sup>

However, the decision appeared to leave people open to prosecutions in a range of circumstances, including when a condom was used *or* their viral load was low or undetectable. The decision was widely criticized for being unfair and at odds with scientific evidence about the risks of HIV transmission; it also prompted leading Canadian scientists to speak out against the over-reach of the criminal law.<sup>4</sup> Since the Supreme Court’s decision in 2012, several people have indeed been charged for not disclosing their HIV-positive status before sex *even if* they used a condom *or* had a low or undetectable viral load. Some of those people have been convicted.

But there have also been more recent, encouraging developments. Prosecutions and court decisions are evolving as a growing number of judges, policymakers and Crown prosecutors

- understand that effective HIV treatment prevents transmission; and
- recognize that there is negligible or no “possibility of HIV transmission” in other circumstances as well, and not just the case where there is both a condom used and the person with HIV has a low viral load.

The law is still evolving in some areas, as are prosecutorial policies and decisions. Some incremental positive changes are coming about as a result of community advocacy, but more change is needed. In the meantime, the continued uncertainty in the law is a challenge for people living with HIV who are trying to navigate their legal obligation to disclose.

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<sup>3</sup> *R. v. Mabior*, 2012 SCC 47 (para. 95).

<sup>4</sup> M. Loutfy, M. Tyndall et al., “[Canadian Consensus Statement on HIV and its transmission in the context of the criminal law](#),” *Canadian Journal of Infectious Diseases & Medical Microbiology*, 25(3) (2014): pp. 135-140.

## Viral load

Viral load is a measure of the amount of HIV in a person's blood. Having a reduced viral load improves health, decreases, and can even eliminate, the risk of HIV transmission. With effective treatment, viral load drops to levels that are "undetectable." Based on the most recent medical evidence, there is no possibility of HIV transmission through sex by someone with an "undetectable" viral load.<sup>5</sup>

This has also been summarized in the "Undetectable = Untransmittable" consensus statement.<sup>6</sup> This scientific reality was recognized in 2017 by the Council of Chief Medical Officers of Health from across Canada,<sup>7</sup> and on World AIDS Day 2018, the Canadian government endorsed "U=U."<sup>8</sup>

For the purpose of the criminal law in Canada, a "low" viral load has been defined as a viral load below 1500 copies/ml<sup>9</sup> and an "undetectable" (or "suppressed") viral load has been defined as a viral load below 200 copies/ml, but these definitions might evolve depending on developments in science.<sup>10</sup>

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<sup>5</sup> F. Barrée-Sinoussi et al., *Expert consensus statement on the science of HIV in the context of criminal law*, *Journal of the International AIDS Society* 2018, 21:e25161 available at <https://onlinelibrary.wiley.com/doi/abs/10.1002/jia2.25161>; See HIV JUSTICE WORLDWIDE summary available at [www.hivjusticeworldwide.org/en/expert-statement/](http://www.hivjusticeworldwide.org/en/expert-statement/)

<sup>6</sup> Prevention Access Campaign, "Undetectable = Untransmittable," available at [www.preventionaccess.org/](http://www.preventionaccess.org/).

<sup>7</sup> Statement on behalf of the Council of Chief Medical Officers of Health, November 30, 2017, available at [www.canada.ca/en/public-health/news/2017/11/statement\\_on\\_behalf\\_of\\_the\\_council\\_of\\_chief\\_medical\\_officers\\_of\\_health.html](http://www.canada.ca/en/public-health/news/2017/11/statement_on_behalf_of_the_council_of_chief_medical_officers_of_health.html).

<sup>8</sup> Public Health Agency of Canada, "Canada's Minister of Health calls for end to stigma on World AIDS Day," December 1<sup>st</sup>, 2018.

<sup>9</sup> *R. v. Mabior*, 2012 SCC 47.

<sup>10</sup> The definition of a "suppressed" viral load as below 200 ml/copies comes from the Department of Justice Canada's report released in 2017, *Criminal Justice System's Response to Non-Disclosure of HIV*, which refers to a 2017 scientific study by the Public Health Agency Canada.

## Recent legal and policy developments

### *Federal and provincial developments in prosecutorial policy*

On World AIDS Day 2016, the federal Attorney General recognized the “problem of overcriminalization.”<sup>11</sup> A year later, Justice Canada released a report entitled *Criminal Justice System’s Response to the Non-Disclosure of HIV*, which includes important recommendations to limit prosecutions against people living with HIV.<sup>12</sup> Then, in December 2018, based on Justice Canada’s report, the **federal Attorney General published a binding directive to the Public Prosecution Service of Canada (PPSC)** regarding prosecutions of HIV non-disclosure.<sup>13</sup> The directive reads as follows:

- The Director [of Public Prosecutions] **shall not** prosecute HIV non-disclosure cases where the person living with HIV has maintained a **suppressed viral load**, i.e. under 200 copies per ml of blood, because there is no realistic possibility of transmission.
- The Director **shall generally not** prosecute HIV non-disclosure cases where the person has not maintained a suppressed viral load but **used condoms** or engaged only in **oral sex** or was taking **treatment** as prescribed, unless other risk factors are present, because there is likely no realistic possibility of transmission.
- The Director shall prosecute HIV non-disclosure cases using non-sexual offences, instead of sexual offences, where non-sexual offences more appropriately reflect the wrongdoing committed, such as cases involving lower levels of blameworthiness.
- The Director shall consider whether public health authorities have provided services to a person living with HIV who has not disclosed their HIV status prior to sexual activity when determining whether it is in the public interest to pursue a prosecution against that person.

The federal directive only governs federal Crown attorneys who handle prosecutions in the three territories (Yukon, Northwest Territories and Nunavut). In the ten provinces, it is the provincial Attorneys General who are responsible for prosecuting *Criminal Code* offences. Therefore, to limit unjust prosecutions in other parts of the country, similar directives or guidelines must be issued in each province. While prosecutorial policies, guidelines or directives cannot change the underlying law, they can influence prosecution practices and reduce the number of new cases.

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<sup>11</sup> Government of Canada, “Minister Wilson-Raybould Issues Statement on World AIDS Day,” December 1, 2016.

<sup>12</sup> Department of Justice Canada, *Criminal Justice System’s Response to Non-Disclosure of HIV* (2017), available at [www.justice.gc.ca/eng/rp-pr/other-autre/hivnd-vihnd/index.html](http://www.justice.gc.ca/eng/rp-pr/other-autre/hivnd-vihnd/index.html).

<sup>13</sup> Attorney General of Canada, “Directive to Director of the Public Prosecution Service,” *Canada Gazette*, Part I, Vol. 152, December 8, 2018, available at <http://gazette.gc.ca/rp-pr/p1/2018/2018-12-08/html/notice-avis-eng.html#nl4>.

As this time, only two provinces, Ontario<sup>14</sup> and British Columbia,<sup>15</sup> have a formal policy in place that limits prosecuting alleged HIV non-disclosure. In Alberta, the Assistant Deputy Minister of Justice responsible for the provincial prosecution service has articulated its position in a letter to community advocates, and has said that provincial prosecutors have been “advised” of this position, but there is no official guideline or directive in place.<sup>16</sup>

### *Sex with a suppressed viral load*

At this time, federal Crown prosecutors and provincial prosecutors in the territories, and in Ontario, British Columbia and Alberta operate under some policy, directive or instruction to not prosecute people who had maintained a suppressed viral load (i.e. under 200 copies/ml) at the time they had sex, whether or not a condom was used. There are some variations in how this position is worded.

- The **federal directive applicable in the territories** does not specify that the person living with HIV had to be on treatment at the time they had sex. Also, it does not specify a minimum period of time that a person must have a suppressed viral load for it to be considered “maintained.”
- **Alberta** and **B.C.** instructions and policy state that there will be no prosecution where someone living with HIV is taking treatment and has maintained a suppressed viral load on consecutive viral load tests taken “four to six months apart.”
- **Ontario’s** policy states that there will be no prosecution when someone living with HIV is taking treatment and has maintained a suppressed viral load for six months.

Refraining from prosecution against someone who has an undetectable viral load is not only consistent with scientific evidence but has also been emerging in some court decisions and the practice of Crown prosecutors, even in the absence of clearly stated policy. In recent years, several people who had not used condoms but who had an undetectable viral load at the time they had sex — and therefore could not transmit HIV — were acquitted, while others saw their charges dropped, in Nova Scotia, Quebec, Ontario, British Columbia and the Northwest Territories.<sup>17</sup> Scientific evidence in these cases demonstrated that the risk of transmission was not “significant,” and courts concluded there was no “realistic possibility of transmission.” However, there has not yet been a Supreme Court of Canada ruling that would confirm this and make this the clear law across the country.

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<sup>14</sup> Ministry of the Attorney General, *Crown Prosecution Manual – D. 33: Sexual Offences against Adults*, updated December 1, 2017, available at [www.ontario.ca/document/crown-prosecution-manual/d-33-sexual-offences-against-adults](http://www.ontario.ca/document/crown-prosecution-manual/d-33-sexual-offences-against-adults).

<sup>15</sup> BC Prosecution Service, “Sexual Transmission, or Realistic Possibility of Transmission, of HIV,” *Crown Counsel Policy Manual*, April 16, 2019, available at [www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/sex-2.pdf](http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/sex-2.pdf).

<sup>16</sup> Letter from Mr. Eric Tolppannen, Assistant Deputy Minister, Alberta Crown Prosecution Service Division, Alberta Ministry of Justice and Solicitor General, to Richard Elliott, Executive Director, Canadian HIV/AIDS Legal Network, January 18, 2019, on file.

<sup>17</sup> See for example, *R. v. C.B.*, 2017 ONCJ 545 (CanLII), *R. v. J.T.C.*, 2013 NSPC 105.



While it is not yet definitely established policy or law in every jurisdiction, given the available science, the emerging situation is that someone with an undetectable or suppressed viral load is unlikely to be prosecuted, and highly unlikely to be convicted, for HIV non-disclosure in Canada, whether or not they used a condom.

### *Sex with a condom*

Scientific experts have confirmed that HIV cannot be transmitted when a condom has been used correctly; HIV does not pass through an intact latex or polyurethane condom.<sup>18</sup> However, the law on this issue is still evolving, as are prosecutorial policy and practice.

- In the three **territories**, according to the federal directive noted above, even if a person had an unsuppressed viral load, there “generally” should be no prosecution against them, if they used condoms, “unless other risk factors are present,” because “there is likely no realistic possibility of transmission.”<sup>19</sup>
- In **Ontario** and in **Alberta**, provincial policy and instructions for prosecutors are silent on the question of condom use. Based on correspondence and discussions with the Ontario Ministry of the Attorney General, people living with HIV who use condoms, but do not have a low or undetectable viral load, are still at risk of prosecution.<sup>20</sup>
- Similarly, in **British Columbia**, the BC Prosecution Service (BCPS) has refused to say clearly that people who use condoms will not be prosecuted. Instead, the policy adopted by the BC Prosecution Service in April 2019 says that in a case where the person living with HIV “correctly used a condom during a single act of vaginal or anal sex and HIV was not transmitted,” this is a factor that “may weigh against prosecution.” There is no certainty for people living with HIV in B.C. at this time.

There are conflicting court decisions on this issue. In Nova Scotia, courts found that, regardless of the HIV-positive partner’s viral load, sex with a condom does not pose a “realistic possibility of HIV transmission.”<sup>21</sup> But in Ontario, a young man (who did not have a low viral load) was convicted for not disclosing his HIV-positive status before sex despite having used a condom.<sup>22</sup> The decision is currently being appealed and should be decided in 2019.

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<sup>18</sup> F. Barrée-Sinoussi et al., *Expert consensus statement on the science of HIV in the context of criminal law*, supra note 5.

<sup>19</sup> Government of Canada, Office of the Director of Public Prosecutions, *HIV Non-Disclosure Directive*, December 8, 2018, *Director of Public Prosecutions Act*, Canada Gazette, Part I, Volume 152, Number 49, available at <http://gazette.gc.ca/rp-pr/p1/2018/2018-12-08/html/notice-avis-eng.html>.

<sup>20</sup> Ontario Attorney General Caroline Mulroney, *Letter to co-chairs of the Ontario Working Group on Criminal Law and HIV Exposure*, February 20, 2019, available at <http://clhe.ca/advocacy-timeline>.

<sup>21</sup> *R v. T.*, 2016 NSSC 134; *R. v. T.*, 2018 NSCA 13 (The identity of the accused has been intentionally removed).

<sup>22</sup> *R v. G.*, 2017 ONSC 6739 (The identity of the accused has been intentionally removed).

Prosecutions against individuals who have used a condom are rare. But the fact that Attorneys General and prosecution services have refused to clearly state they will refrain from prosecuting such cases is cause for concern.

### *Sex with a low viral load (and no condom)*

When a person living with HIV has a *low*, but still detectable, viral load — i.e. between 200 and 1500 copies/ml — at the time they had sex, the possibility of HIV transmission through condomless sex ranges from negligible to none, according to the best available scientific evidence.<sup>23</sup>

No directive, policy or instructions currently in place in any jurisdiction in Canada deals directly with this situation, so a person living with HIV in this circumstance remains at risk of prosecution. Note, however, that the federal directive applicable in the **territories** does say that if the person was “taking treatment as prescribed” at the time of their sexual encounter, they “generally” should not be prosecuted for not disclosing their HIV status, “unless other risk factors are present,” because “there is likely no realistic possibility of transmission” in such a case as treatment reduces viral load.<sup>24</sup>

In at least one court case in Nova Scotia, a person who did not use a condom, but who had a low viral load (under 1500 ml/copies), was prosecuted for not disclosing their status before sex. However, the person was acquitted based on the medical expert evidence that, given his low viral load, the risk of transmission was “negligible” or “extremely unlikely”.<sup>25</sup> The trial decision on this point was upheld on appeal.<sup>26</sup> However, at the time of this writing, at least one individual is being prosecuted in Ontario for not disclosing their HIV-positive status even though they had a low viral load (under 1500 ml/copies).

The law, and the likelihood of prosecution, for not disclosing HIV-positive status if there is a low viral load is still unsettled.

### *Oral sex*

According to the best available scientific evidence, the possibility of HIV transmission during a single act of oral sex ranges from negligible (in very unusual and extreme circumstances) to none.<sup>27</sup>

- In the **territories**, according to the federal directive, there should “generally” be no prosecution against someone who does not disclose their status simply for engaging

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<sup>23</sup> F. Barrée-Sinoussi et al., *Expert consensus statement on the science of HIV in the context of criminal law*, supra note 5; See HIV JUSTICE WORLDWIDE summary available at [www.hivjusticeworldwide.org/en/expert-statement/](http://www.hivjusticeworldwide.org/en/expert-statement/).

<sup>24</sup> Government of Canada, Office of the Director of Public Prosecutions, [supra note 19](#).

<sup>25</sup> *R v. T.*, 2016 NSSC 134. (The identity of the accused has been intentionally removed).

<sup>26</sup> *R. v. T.*, 2018 NSCA 13. (The identity of the accused has been intentionally removed).

<sup>27</sup> F. Barrée-Sinoussi et al., *Expert consensus statement on the science of HIV in the context of criminal law*, supra note 5; See HIV JUSTICE WORLDWIDE summary available at [www.hivjusticeworldwide.org/en/expert-statement/](http://www.hivjusticeworldwide.org/en/expert-statement/).

in oral sex “unless other risk factors are present,” because “there is likely no realistic possibility of transmission.”<sup>28</sup>

- In **Ontario** and in **Alberta**, prosecutorial policy and instructions do not say anything about oral sex. Based on correspondence and discussions with the Ontario Ministry of the Attorney General, people living with HIV (who do not have a suppressed viral load) are still at risk of prosecutions for engaging in oral sex without disclosing their status.<sup>29</sup>
- In **British Columbia**, the policy says that there is “no realistic possibility of transmission,” and therefore there should be no prosecution for not disclosing HIV-positive status, in cases where the partners “only engaged in oral sex, and no other risk factors were present.”

It is also worth noting that people have been charged for oral sex alone, without disclosing, but such prosecutions are rare. People are usually charged with oral sex in combination with other sexual acts such as vaginal or anal sex. In at least one case in Ontario in 2013, a lower court accepted that oral sex does not amount to a “realistic possibility of transmission.”<sup>30</sup>

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<sup>28</sup> Government of Canada, Office of the Director of Public Prosecutions, *supra* note 19.

<sup>29</sup> The Hon. Caroline Mulroney, Attorney General of Ontario, *Letter to co-chairs of the Ontario Working Group on Criminal Law and HIV Exposure*, February 20, 2019. Available at <http://clhe.ca/advocacy-timeline>.

<sup>30</sup> *R. v. M.*, 2013 CanLII 54139 (ON SC). (The identity of the accused has been intentionally removed).

## Key points

- There is an obligation to disclose HIV-positive status to a sexual partner before activity that poses a **“realistic possibility” of HIV transmission** — and prosecutors and courts effectively determine what this means.
- There is no obligation in Canadian criminal law to disclose HIV-positive status when having vaginal or anal sex if a condom is used and the HIV-positive partner has a “low” viral load (under 1500 copies/ml).
- Whether a person might be prosecuted and convicted for not disclosing their HIV-positive status in other circumstances is still evolving, and depends on court decisions and on directives and guidelines governing prosecutors (where they exist).
- A **federal directive** limits prosecutions in Canada’s three **territories**. Formal policy for provincial Crown prosecutors has been adopted in **Ontario** and **British Columbia**. An advisory has been given to provincial prosecutors in **Alberta**.
- **Suppressed viral load:** In **Ontario**, **British Columbia** and **Alberta** there should be no prosecution against someone with HIV for alleged HIV non-disclosure if they were under treatment and had a “suppressed viral load” (under 200 copies/ml) at the time they had sex, regardless of whether a condom was used. In the territories, the federal directive does not specify that the person living with HIV must be on treatment. There is some variation across jurisdictions about how long viral load must be suppressed before the sexual activity to avoid prosecution.
- **Condom use:** In the **territories**, there should “generally” be no prosecution for not disclosing if a condom was used (unless other risk factors were present), regardless of viral load. In **British Columbia**, using a condom “is factor that may weigh against prosecuting someone for alleged HIV non-disclosure.
- **Oral sex:** In **British Columbia** there should be no prosecution if a person only engaged in oral sex (if no other risk factors were present). In the **territories**, there should “generally” be no prosecution (unless other risk factors were present).

## The science of HIV in the context of the criminal law

Concerned that prosecutions are not always guided by the best available scientific evidence, 20 of the world's leading HIV scientists published the *Expert Consensus Statement on the science of HIV in the context of the criminal law* in the *Journal of the International AIDS Society* in 2018 to address the use of HIV science within the criminal justice system.<sup>31</sup> This statement was endorsed by more than 70 other leading HIV experts from around the world, as well as the International AIDS Society (IAS), the International Association of Providers of AIDS Care (IAPAC) and the Joint United Nations Programme on HIV/AIDS (UNAIDS).

The statement was written to assist scientific experts considering individual criminal cases, and to encourage governments and those working in the criminal justice system to make all efforts to ensure a correct and complete understanding of current scientific knowledge informs any application of the criminal law in cases related to HIV.

Some of the expert opinions contained in the Statement can be described as follows:

- The possibility of HIV transmission during a single act of vaginal or anal sex ranges from low to none (see below for important factors affecting the possibility of transmission).
- The possibility of HIV transmission during a single act of oral sex ranges from negligible (in very unusual and extreme circumstances) to none (see below for important factors affecting the possibility of transmission).
- There is no possibility of HIV transmission during a single act of vaginal, anal or oral sex where an intact condom has been used correctly.
- There is no possibility of HIV transmission during a single act of vaginal, anal or oral sex when the HIV-positive partner has an undetectable viral load.
- The possibility of HIV transmission during a single act of vaginal or anal sex when the HIV-positive partner has a low viral load ranges from negligible to none.
- There is no possibility of HIV transmission through saliva, even when it contains small quantities of blood.
- The possibility of HIV transmission from biting ranges from negligible (in very unusual and extreme circumstances) to none.

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<sup>31</sup> F. Barrée-Sinoussi et al., *Expert consensus statement on the science of HIV in the context of criminal law*, supra note 5 and summary prepared by HIV JUSTICE WORLDWIDE available at [www.hivjusticeworldwide.org/en/expert-statement/](http://www.hivjusticeworldwide.org/en/expert-statement/). Canadian researchers released similar statement in 2014. See M. Loutfy et al., supra note 4.

- Modern antiretroviral therapies have improved the life expectancy of most people living with HIV who have regular access to them, to the point that their life expectancy is similar to that of HIV-negative people, thereby transforming HIV infection into a chronic manageable health condition.<sup>32</sup>

Phylogenetic analysis can be compatible with, but cannot conclusively prove, the claim that a defendant has infected a complainant with HIV. Importantly, phylogenetic results can exonerate a defendant when the results rule out the defendant as the source of a complainant's HIV infection.

## Why are people charged with aggravated sexual assault for consensual sex?

As noted above, the charge most commonly laid against someone accused of not disclosing their HIV-positive status is aggravated sexual assault.

The argument is that if there is a “realistic possibility of HIV transmission,” then not disclosing your HIV-positive status amounts to a “fraud.” Under the *Criminal Code* (section 265), consent to physical contact (such as sex) is not valid if it is obtained by fraud. Therefore, the otherwise consensual sex is turned into a sexual assault under the law, treated the same was forced or coerced sex. The charge is then usually elevated to an *aggravated* sexual assault (section 273), because the courts have considered that exposing a person to the possibility of HIV “endangers life.”

Aggravated sexual assault is one of the most severe offenses in the *Criminal Code*. It carries a maximum penalty of life imprisonment and mandatory sexual offender registration.<sup>33</sup>

People living with HIV and other advocates, including women's rights advocates, have criticized the problematic use of the law of sexual assault to deal with cases of alleged HIV non-disclosure. Such misuse of the law of sexual assault harms people living with HIV and undermines the integrity of the law of sexual assault as a tool to address sexual violence.<sup>34</sup>

## Why is HIV criminalization harmful?

- People living with HIV continue to be criminally charged, prosecuted and imprisoned in absence of intent to transmit or actual transmission. In some cases, people have been charged and prosecuted for not disclosing their status before sex that poses minimal or no risk of transmission.

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<sup>32</sup> Summary prepared by HIV JUSTICE WORLDWIDE at [www.hivjusticeworldwide.org/en/expert-statement/](http://www.hivjusticeworldwide.org/en/expert-statement/).

<sup>33</sup> Canadian HIV/AIDS Legal Network, *Sex offender registries, Fact Sheet*, 2017.

<sup>34</sup> Canadian Coalition to Reform HIV Criminalization, *Ending unjust HIV criminalization: Community consensus statement*, November 2017, available at [www.hivcriminalization.ca](http://www.hivcriminalization.ca); LEAF (Women's Legal Education and Action Fund), *A Feminist Approach to Law Reform on HIV Non-Disclosure*, position paper, January 2019.

- No other medical conditions have been criminalized to that extent; the law profoundly stigmatizes people living with HIV. In particular, the misuse of the law of sexual assault to deal with HIV non-disclosure has severe implications for people living with HIV.
- The criminalization of HIV non-disclosure disproportionately affect marginalized people living with HIV including racialized people (particularly Black and Indigenous people), migrants and women (including Indigenous women and women experiencing intimate partner violence). The number of cases against gay men has also increased.
- The criminalization of HIV is at odds with public health objectives. Fear of prosecution can deter people, especially those from communities particularly affected by HIV, from getting tested and knowing their status. HIV criminalization can also deter access to HIV care and treatment by undermining counselling and the relationship between people living with HIV and health-care professionals and other service providers, because their records can be used as evidence in court and professionals can be compelled to testify against their patients or others to whom they provide support services.<sup>35</sup>

The criminalization of HIV non-disclosure has resulted in serious invasions of privacy (e.g. use of medical records in criminal proceedings, people's HIV status made public in the media including through police press releases) and bodily integrity (e.g. forced treatment).

## International guidance on HIV and the criminal law

Because of the numerous human rights and public health concerns associated with HIV-related prosecutions, numerous bodies and experts have all urged governments to limit the use of the criminal law to cases of intentional transmission of HIV (i.e. where a person knows they have HIV, acts with the intention to transmit HIV, and does in fact transmit HIV). Such a recommendation has been made by, among others, the Joint United Nations Programme on HIV/ AIDS (UNAIDS) and the United Nations Development Programme (UNDP),<sup>36</sup> the UN Special Rapporteur on the right to health,<sup>37</sup> the Global Commission on HIV and the Law,<sup>38</sup> the UN Committee on the Elimination of Discrimination against Women

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<sup>35</sup> S. E. Patterson et al., "The impact of criminalization of HIV non-disclosure on the health care engagement of women living with HIV in Canada: a comprehensive review of the evidence," *Journal of the International AIDS Society* 18, 1 (2015): 20572; E. Mykhalovskiy, "The public health implications of HIV criminalization: past, current, and future research directions," *Critical Public Health* 25, 4 (2015): pp. 373–385.

<sup>36</sup> UNAIDS, UNDP, *Policy brief: criminalization of HIV transmission*, August 2008.

<sup>37</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>38</sup> Global Commission on HIV and the Law, *HIV and the Law: Risks, Rights and Health*, UNDP HIV/AIDS Group, July 2012 (Recommendations 2.1 to 2.5). Supplement, 2018.

(CEDAW),<sup>39</sup> and leading Canadian feminist legal academics. Moreover, experts recommend that no prosecutions take place when the person used a condom or had a low viral load or just had oral sex.

*“The Committee welcomes that [Canada] intends to review the use and application of criminal norms to certain HIV/AIDS issues. This review will include the concerning application of harsh criminal sanctions (aggravated sexual assault) to women for non-disclosing their HIV status to sexual partners, even when the transmission is not intentional, when there is no transmission or when the risk of transmission is minimal. The Committee recommends that [Canada] limit the application of criminal law provisions to cases of intentional transmission of HIV/AIDS, as recommended by international public health standards.”<sup>40</sup>*

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## HIV prosecutions in Canada

- At least 197 people have been charged for alleged HIV non-disclosure in Canada since 1989.
- From 2004 to 2014, there were roughly 10–15 cases per year. There were at least 6–8 cases each year between 2015 and 2017, and at least 5 cases in 2018.
- Between 1989 and 2016, more than half of all cases in Canada occurred in Ontario. There were no new prosecutions in Ontario in 2018. In 2017 and 2018, more than a third of known new cases occurred in Quebec.
- Between 2012 and 2016, almost half of all people charged for whom race is known were Black men.
- Indigenous women in Canada account for a large proportion of women charged. Of the at least 19 women who faced charges related to HIV non-disclosure, we know the race/ethnicity of 13 women. To date, at least 38% (5 of 13) of women charged are Indigenous.
- The proportion of men charged who are gay or bisexual has increased since the 2012 Supreme Court decision. In 2017 and 2018, at least 3 of the 10 people charged, and for whom sexual orientation is known, are gay men.

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<sup>39</sup> Committee on the Elimination of Discrimination against Women, Concluding observations on the combined eighth and ninth periodic reports of Canada, CEDAW/C/CAN/CO/8-9, November 18, 2016.

<sup>40</sup> *Ibid.*



In 2017 and 2018, at least 5 of the 13 know people charged had a low or undetectable viral load. At the time of this writing, charges have been dropped in 4 of these 5 cases.<sup>41</sup>

## Community mobilization for change: the Canadian Coalition to Reform HIV Criminalization

In October 2016, a national coalition of people living with HIV, community organizations, lawyers, researchers and others was formed to progressively reform discriminatory and unjust criminal and public health laws and practices that criminalize and regulate people living with HIV in relation to HIV exposure, transmission and non-disclosure in Canada. The Canadian Coalition to Reform HIV Criminalization (CCRHC) includes individuals with lived experience of HIV criminalization, advocates and organizations from across the country.

In 2017, the CCRHC released a national Community Consensus Statement on ending unjust HIV criminalization.<sup>42</sup> Now endorsed by more than 170 community organizations from every part of Canada, and including not only HIV organizations but many others, the statement calls for criminal prosecutions to be limited to cases of actual, intentional transmission of HIV, in accordance with international guidance.

The statement also includes concrete calls for action to limit the unjust use of the criminal law against people living with HIV. In particular, it calls on:

- federal and provincial Attorneys General to develop **sound prosecutorial guidelines** to preclude unjust HIV prosecutions;
- the federal government to **reform the *Criminal Code*** to limit the unjust use of the criminal law against people living with HIV including by removing HIV non-disclosure from the reach of sexual assault laws; and
- all governments to support the development of **resources and training** for judges, police, Crown prosecutors and prison staff to address misinformation, fear and stigma related to HIV.

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<sup>41</sup> C. Hastings, C. Kazatchkine and E. Mykhalovskiy, *HIV criminalization in Canada: key trends and patterns*, March 2017; and ongoing tracking of cases by the Canadian HIV/AIDS Legal Network (material on file).

<sup>42</sup> Canadian Coalition to Reform HIV Criminalization, *End unjust HIV criminalization: Community Consensus Statement*, November 2017, available at <http://www.hivcriminalization.ca>.

**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.**

## **Get legal advice**

This document provides useful legal information, *but is not legal advice*. If the police contact you or you are worried you might be at risk of criminal charges, you should talk to a lawyer as soon as possible. For those based in Ontario, you can contact the HIV & AIDS Legal Clinic Ontario (HALCO, [www.halco.org](http://www.halco.org), tel 416 340 7790 or toll-free in Ontario at 1-888-705-8889, email: [talklaw@halco.org](mailto:talklaw@halco.org)). In Quebec, you can contact COCQ-sida ([www.cocqsida.com](http://www.cocqsida.com), tel 514 844 2477 (poste 0) or toll-free in Quebec at 1 866 535 0481, [info@cocqsida.com](mailto:info@cocqsida.com)).

## **Working with defence lawyers**

The Legal Network, HALCO and COCQ-sida all have extensive experience working with defence lawyers. They may be able to refer you to a lawyer familiar with HIV who can give you advice, and also provide you and your lawyer with information on case law and policies as well as the science of HIV. Bringing expert scientific evidence before a court on the risks associated with HIV transmission has been essential to the defence in many cases — and its absence has led to convictions that might well have been avoided. The Legal Network also maintains an online, bilingual toolkit for lawyers and other advocates responding to HIV non-disclosure prosecutions: [www.aidslaw.ca/lawyers-kit](http://www.aidslaw.ca/lawyers-kit).

## **For more information**

This document 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 are online at [www.aidslaw.ca/criminallaw](http://www.aidslaw.ca/criminallaw). These include an *online resource kit for lawyers and other advocates* at [www.aidslaw.ca/lawyers-kit](http://www.aidslaw.ca/lawyers-kit).

Additional information is also available on the website of the **Canadian Coalition to Reform HIV Criminalization** at [www.HIVcriminalization.ca](http://www.HIVcriminalization.ca).

Additional materials, including a toolkit for advocacy on HIV criminalization, are also available on the website of HIV JUSTICE WORLDWIDE at [www.hivjusticeworldwide.org](http://www.hivjusticeworldwide.org).

Production of this document has been made possible through a financial contribution from the Public Health Agency of Canada. The views expressed herein do not necessarily represent the views of the Public Health Agency of Canada.