

INDIGENOUS COMMUNITIES

and HIV Disclosure
to Sexual Partners



Canadian
HIV/AIDS
Legal
Network

Réseau
juridique
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VIH/sida

Questions and Answers

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Learning about your HIV-positive status is an important step for your health. Thanks to medical advances, people who know their HIV-positive status and have access to care and HIV treatment (also known as antiretroviral therapy (ART) or antiretrovirals (ARVs)) can live long and healthy lives. Access to treatment can also help reduce the risks of transmitting HIV to sexual partners. But knowing that you are HIV-positive also has other implications in your life — for example, deciding whom to tell about your HIV status. Because HIV can be transmitted during sex, the criminal law in Canada imposes an obligation on people living with HIV to share, or “disclose,” their HIV-positive status to their sexual partners in certain circumstances. As of the time of preparing this resource, more than 180 people had been charged in Canada for not disclosing their HIV status to a sexual partner. It is difficult to know how many Indigenous people have been charged with HIV non-disclosure, but among a total of 17 women living with HIV charged to date for non-disclosure, at least 5 were Indigenous.



While the criminal law is a blunt instrument to deal with complex issues such as disclosure or the root causes for HIV in Indigenous communities, it is the law in Canada, and it is important for you to know about it so you can make informed decisions about your sexual life.

This brochure has been prepared by the Canadian HIV/AIDS Legal Network (the Legal Network) with the Canadian Aboriginal AIDS Network (CAAN). It will provide you with important information about the law in Canada as it relates to HIV disclosure. If you need legal advice, please contact a lawyer.

In Canada, Indigenous people, especially women and youth, are disproportionately affected by HIV. It is estimated that in 2011, Indigenous populations represented 12.2% of new HIV infections and 8.9% of people living with HIV in Canada. Injection drug use remains the main route of HIV transmission among Indigenous communities.

Indigenous populations are extremely diverse, with communities that reflect variations in historical backgrounds, language and cultural traditions. In their diversity, these communities are more affected by HIV because of a variety of factors and social determinants of health that influence vulnerability to infection, including poverty, housing and homelessness, early childhood development, physical environments, access to health services, support networks and social environments, gender, violence and incarceration, as well as racism and the multigenerational effects of colonialism and the residential school system.

Source: Public Health Agency of Canada, *HIV/AIDS Epi Updates Chapter 8: HIV/AIDS among Aboriginal People in Canada*, December 2014.



Key terms

HIV disclosure means to tell someone (e.g., a friend, your parents, your girlfriend, boyfriend or spouse, etc.) that you are HIV-positive.

Consensual sex is when both partners agree to have sex. Sex without consent is a crime in Canada. It is a sexual assault. To be valid in law, consent to sex must be freely given. For example, agreeing to sex out of fear for your safety is not consenting to sex.

HIV transmission: The two main ways that HIV can get passed between people are:

- through sex; and
- by sharing needles or other equipment to inject drugs.

Not all sexual activities represent the same level of risk of HIV transmission. For instance, there is a greater chance of transmitting HIV if you have anal sex rather than vaginal sex. Oral sex is usually considered to pose a very low risk of transmission. Moreover, using a condom when you have sex or having an undetectable viral load can dramatically reduce the risks of HIV transmission. HIV cannot be passed through kissing.

Viral load is a measure of the amount of HIV in a person's blood. With effective HIV treatment, your viral load can become "**undetectable.**" When you have an undetectable viral load, it does not mean that you are cured of HIV, but it does mean that the virus is under control. Having a low or undetectable viral load can greatly reduce the risks of HIV transmission.

Disclosure and the law: know your rights

Most of the time, disclosure is up to you. You may choose not to disclose your HIV status because you aren't sure how to tell anyone or because of homophobia, racism, stigma and discrimination against people living with HIV. You have no obligation to tell your family or friends that you are HIV-positive, but you might decide to do so if you think their support could help.



Similarly, in most circumstances, you don't need to tell other people in your community (e.g., your landlord, employer, co-workers, classmates or school officials). You also do not have to tell your dentist or other health-care workers that you are HIV-positive. But, again, you might decide to do so to ensure that you receive proper, well-informed care.

The situation is different when it comes to sexual partners. In Canada, the law generally obliges people living with HIV to disclose their status before sex.

1. What is disclosure to a sexual partner?

Disclosing to a sexual partner means telling someone you are having sex with that you are HIV-positive. This person could be anyone with whom you have a sexual relationship, including your spouse, a regular sexual partner, or someone you might have sex with only once.

2. What does Canadian criminal law say about disclosure to sexual partners?

In Canada, people living with HIV have an **obligation** under the criminal law to tell their sexual partners they are HIV-positive before having sex that poses what the courts call “a **realistic possibility of transmission.**” (See the table below for a breakdown of sexual acts and disclosure requirements.) In other words, if you engage in a sexual activity that, according to the law, carries a realistic possibility of transmitting HIV, and you do not disclose your status first, you could be charged with a serious crime — usually aggravated sexual assault. If you are found guilty, you could go to jail.

It does not matter whether HIV is transmitted or not. You can be charged simply for not disclosing to your sexual partners that you are HIV-positive, **even if HIV is not transmitted.**

This legal obligation to disclose your HIV status applies equally to all sexual partners — whether it’s a spouse, a long- or short-term relationship, sex in exchange for money, or a one-time sexual encounter. Similarly, how a person acquired HIV in the first place does not change their obligation to disclose to partners. For example, people living with HIV have a duty to disclose their HIV-positive status even if they were infected by a sexual partner who did not disclose their status to them and/or forced sex on them.

The Legal Network keeps track of cases of HIV non-disclosure in Canada. However, available information is limited and we might not know about every case. As far as we are aware, all criminal cases for HIV non-disclosure have been brought against people who *knew* their HIV-positive status because they had received an HIV test. However, not taking an HIV test does not necessarily mean you will be protected against prosecution. It is possible that you could be charged if you think you *may* be HIV-positive and you do not disclose that possibility.

3. **When do I have an obligation to disclose my HIV-positive status to a sexual partner under the criminal law?**

You do not always have to disclose your HIV-positive status to your sexual partner. Whether or not you are required to disclose your HIV status under the criminal law depends on the level of risk of transmitting HIV. The courts decide what “realistic possibility of transmission” means.

The law might evolve or be applied differently depending on available medical evidence in a particular case. But based on the current state of the law, it is safest to assume that you have an obligation to disclose before:

- Vaginal or anal sex without a condom; **and**
- Vaginal or anal sex with a condom **unless** you have a low viral load (less than 1500 copies/ml).

A viral load test tells you how much HIV is in your blood. With effective HIV treatment, your viral load can become “undetectable.” Having a low or undetectable viral load can greatly reduce the risks of HIV transmission. This is why the law takes into account your viral load to determine whether you have an obligation to disclose.

Remember that **the criminal law is about disclosure**. This means you should not be prosecuted for having sex (even if you do not use a condom and/or your viral load is high) if you have disclosed your status before sex and your partner agreed to have sex with you knowing that you are HIV-positive.





4. What if disclosing my HIV-positive status could result in violence?

Women living with HIV, in particular, are at high risk of sexual violence. However, the criminal law is a blunt instrument for dealing with the reality of abuse, the difficulties around disclosing one's HIV-positive status, or the fact that some people feel they cannot disclose because they are afraid that they

will be harmed in some way. If a woman is not safe, she may not have power to make choices about sex, including when to have sex, whom she has sex with, or whether condoms are used.

The court might accept that someone living with HIV is not required to disclose:

- if they fear harm as a result of disclosing, or
- if they are forced to have sex through violence or threat.

However, there have been no cases reported in Canada where a court addressed these issues, so there is no clear answer yet.

If you're experiencing abuse and fear violence, you may want to contact a local support organization such as a women's shelter to help you develop a safety plan. A safety plan involves identifying action steps to increase your safety and outlining the best way to react when you're in danger.

5. What if I am too drunk or too high to disclose my HIV-positive status?

non-disclosure and being drunk or high (“self-induced intoxication”) is no defence in cases of sexual assault under Canadian criminal law.

While being drunk or high may make it more challenging to disclose your HIV-positive status, it is unlikely to be recognized as a valid defence in a case of HIV non-disclosure. People living with HIV are usually charged with aggravated sexual assault in cases of

6. When do I not have an obligation to disclose my HIV-positive status to a sexual partner under the criminal law?

Because using a condom **and** having a low or undetectable viral load means it is almost impossible to transmit HIV, courts have said that you **do not** have an obligation under the criminal law to disclose before vaginal sex if you use a condom **and** you have a low or undetectable viral load. (This principle **likely** applies in a similar way to anal sex but we cannot be certain until it is confirmed by the courts.)

There is also **no obligation** to disclose before other intimate activities that pose **no risk** of HIV transmission, such as kissing.

Oral sex is usually considered a very low risk for HIV transmission. However, at the time of this writing, we cannot say for certain that oral sex without a condom and/or without a low viral load does not require disclosure.



“A realistic possibility of transmission” — disclosure obligations according to sexual activity

The following table summarizes what we can say about your disclosure obligations, based on the current state of the law in Canada.

LIMITATIONS: The courts decide what “a realistic possibility of transmission” is. The law may evolve or be applied differently depending on medical evidence available in a particular case.

| | Obligation to disclose | No obligation to disclose | Possibly no obligation to disclose but it is uncertain |
|--------------------------------------------------------------------------------|------------------------|---------------------------|--------------------------------------------------------|
| Sex (vaginal, anal) without a condom, regardless of viral load | ✓ | | |
| Sex (vaginal, anal) with a condom but without a low or undetectable viral load | ✓ | | |
| Sex with a condom AND a low or undetectable viral load | | ✓ (vaginal sex) | ✓ (anal sex) |
| Oral sex | | | ✓ |
| Kissing | | ✓ | |

If you have been contacted by the police or if you are worried you might be at risk of criminal charges, **you need to talk to a lawyer.** The Legal Network may be able to refer you to a lawyer familiar with HIV and provide you with information on medical evidence regarding risks of HIV transmission. Bringing medical evidence before a court on the risks associated with HIV transmission could be critical to your defence.

Sentencing and Gladue factors

If you have been convicted with a crime and are an Indigenous person, section 718.2(e) of the *Criminal Code*, as well as the Supreme Court of Canada decision in *R. v. Gladue*, [1999] 1 S.C.R. 688, require sentencing judges to consider the unique systemic or background factors that played a part in bringing you before the court and the most appropriate type of sentence or sanction given your Indigenous heritage or connection. This is true for all Indigenous peoples of Canada, including status and non-status Indian, Inuit, and Métis and whether living on or off reserve. *Gladue* factors may also be taken into account at bail hearing.

While *Gladue* principles are meant to respond to the overrepresentation of Indigenous people in prison, it does not mean that Indigenous people automatically qualify for lighter sentences.

It is important that you inform your lawyer or duty counsel that you identify as Indigenous and that you work with them to get a strong *Gladue* report at your pre-sentencing hearing or your bail hearing.

7. Does it matter if I did not have access to HIV treatment at the time of the incident for which I'm being charged?

Not all communities in Canada have equal access to HIV treatment and care. Indigenous people may face barriers such as racism, stigma, indifference and lack of understanding that make it much more difficult to receive HIV care, treatment and support. You may live in a rural or remote area where access to health care and HIV treatment are simply not available, or the small size of the community creates concerns around confidentiality. If you

have had to move frequently (e.g., between cities and your own community) or if you have been incarcerated, it may have been difficult for you to continue HIV care and treatment, so there may have been periods of time when you adhered to medical treatment (that is, took your medication in the way that your doctor prescribed, without missing doses) and others when you could not. In all of these scenarios, a lack of consistent access to HIV treatment means that your viral load may not be “undetectable.”

As of this writing, courts have not considered access to health care when deciding whether or not to find an HIV-positive person guilty for HIV non-disclosure.

8. 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 on 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 use 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.



9. What happens if I have been charged with not disclosing my HIV-positive status to a sexual partner?

If you have been charged with not disclosing your HIV-positive status to a sexual partner, the police can investigate and you can be prosecuted with a serious crime, usually aggravated sexual assault. If the police contact you, you are not obliged to answer their questions, but you should tell the police basic information such as your name and date of birth. **Anything you say to the police at**

any time may be used against you.

If you are contacted by the police, you should get the officer's contact information and immediately contact a criminal lawyer. If you are detained by the police, you have **the right to remain silent.**

You also have the right to speak to a lawyer in private without delay. You can hire a lawyer to defend you in court. Depending on your income, legal aid may help to pay for the lawyer. The police must provide a phone and appropriate phone books to enable you to contact a lawyer. The police must also inform you about legal aid and your right to free legal services.

If you are charged for HIV non-disclosure, your picture, HIV status, other personal information and the crime you are accused of committing may appear in a police press release, in the media and on the internet. Usually, criminal court trials are open to the public and the media. Ask your lawyer about available steps, if any, to protect your identity.

If you plead guilty, or if the court decides you are guilty, you will likely be sentenced to time in prison. You will have a criminal record, and your name will likely be put on a list of sex offenders. This is because people living with HIV are usually charged with aggravated sexual assault in cases of HIV non-disclosure. A DNA sample may be taken from you and placed in a data bank of people convicted of crimes.

(See our online resource kit for service providers to get more information about legal aid and find a lawyer in your province or territory: www.aidslaw.ca/community-kit)

10. Is there any obligation outside the criminal law to disclose my HIV-positive status to a sexual partner?

Yes. Public health authorities might require you to tell your sexual partner that you are HIV-positive.

In Canada, when you test 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 the relevant province or territory. (If you choose to take an anonymous HIV test, the test result and non-identifying information will be reported to the public health agency, but not your name. However, when you begin accessing medical care for HIV, your name will likely be reported to public health regardless of the type of test involved.)

If you test positive for HIV or certain other sexually transmitted infections (STIs), public health authorities — depending on where you live — will probably require that your sexual partners be contacted. This is called **partner notification**.

Public health authorities are responsible for protecting public health and preventing the transmission of infections, including HIV. While these authorities will generally work with you, they may sometimes take action if you do not or cannot disclose your status to your sexual partners. The powers and procedures of public health authorities vary from one province/territory to another.



11. Where can I get support around disclosure?

Telling others that you are HIV-positive can be difficult and stressful. In some cases you may fear rejection, violence or discrimination, or you may be worried that your HIV-positive status will not be kept confidential. Such

concerns are particularly real for those living in tight-knit communities and in communities where sexuality and HIV are taboo. Racism, gender norms, economic conditions, and cultural and language barriers are all factors that can also affect a person's ability to disclose their status, take precautions to reduce risks of HIV transmission, and access support.

Contacting your local AIDS organization can be a good first step to finding help and support. There are also a number of health organizations that provide services specifically for Indigenous communities (contact CAAN for referral). You may also want to seek legal advice before deciding whether to disclose your HIV status.



Additional resources

For more information on:

HIV disclosure and the criminal law — See the Legal Network’s info sheet, *Criminal Law & HIV Non-Disclosure in Canada*, at <http://www.aidslaw.ca/site/criminal-law-and-hiv/>, and watch a series of videos about the HIV and the criminal law at www.youtube.com/aidslaw (available in English and French). You can also contact the Legal Network and other organizations working at the intersection of HIV and the law in Canada (see contact information below). If you need legal advice, you should contact a lawyer; the Legal Network may be able to provide appropriate referrals.

HIV disclosure and women — See the Legal Network’s info sheet, co-produced with the HIV & AIDS Legal Clinic Ontario (HALCO) and METRAC Action on Violence, *Women living with HIV and intimate partner violence: questions and answers*, at <http://www.aidslaw.ca/site/women-living-with-hiv-and-intimate-partner-violence-questions-and-answers/>, and the Positive Women’s Network and BC Women’s Hospital and Health Centre’s booklet to support women with HIV disclosure at <http://pwn.bc.ca/wp-content/uploads/2008/05/Disclosure-to-sex-partners-WEB-2016-03-07.pdf>.

HIV disclosure at work, school or in health-care settings — See the Legal Network’s series of info sheets, *Know Your Rights*, available at <http://www.aidslaw.ca/site/kyr/> (available in English, French, Arabic, Chinese, Spanish and Tagalog).

Public health and HIV testing options — In your province, contact your local AIDS service organization. If you live in Ontario, HALCO can provide legal advice if you have concerns related to public health.

HIV risks of transmission, prevention and treatment — See information available on CATIE’s website at www.catie.ca

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