

Ending unjust HIV prosecutions: Making progress through community advocacy and scientific expertise

RICHARD ELLIOTT^{1,2}, NICHOLAS CAIVANO^{1,2}, CÉCILE KAZATCHKINE^{1, 2}, ALEX MCCLELLAND^{3, 2}, CHAD CLARKE², LÉA PELLETIER-MARCOTTE^{4, 2}, NEIL SELF^{5, 2}, VALERIE NICHOLSON^{5, 2}, RYAN PECK^{6,2}

1. Canadian HIV/AIDS Legal Network, 2. Canadian Coalition to Reform HIV Criminalization, 3. Concordia University, 4. Coalition des organismes communautaires québécois de lutte contre le sida, 5.Positive Living Society of BC, 6. HIV & AIDS Legal Clinic Ontario.



Canadian
HIV/AIDS
Legal
Network

Réseau
juridique
canadien
VIH/sida

CANADIAN
COALITION
TO REFORM
HIV
CRIMINALIZATION
(CCRHC)

1 Background

- The Supreme Court of Canada has ruled that people must disclose their HIV-positive status to a sexual partner when there is a “**realistic possibility of transmission**” of the virus.¹
- Not disclosing can lead to criminal prosecution, particularly for aggravated sexual assault, punishable by life in prison and mandatory lifetime registration as a sex offender.
- People can be convicted even if they had no intent to cause harm and HIV was not transmitted.
- The interpretation by police, prosecutors and courts of what constitutes a “realistic possibility” of transmission has led to charges, prosecutions and convictions in cases where there is little or no risk of transmission.

2 Mobilizing for change

- On World AIDS Day 2016, in response to many years of community advocacy, the federal Attorney General committed to examining the “overcriminalization of HIV.”
- Community advocates engaged with Justice Canada throughout its subsequent study and developed a national **community consensus statement**,² which calls for limits to HIV criminalization through sound federal and provincial prosecutorial policies as well as Criminal Code amendments.
- Justice Canada’s report, released on World AIDS Day 2017, reflects some of the limits on prosecutions that have been urged by community advocates.³
- In July 2018, leading scientists published the international **Expert Consensus Statement on the science of HIV in the context of the criminal law**, concerned about the overly broad application of the criminal law contrary to scientific evidence about HIV.⁴
- Advocates have continued to press for government action, in line with the community consensus statement.

3 Not good enough: Recommendations to further limit unjust prosecutions

- The federal directive to the territories is a significant achievement by advocates, but it should go further.
- Current provincial policies in Ontario and BC also fall short, and most provinces have no clear policy.
- Federal Criminal Code amendments are necessary to preclude the use of sexual assault charges against alleged HIV non-disclosure, and to limit any HIV criminalization to cases where there is actual, intentional transmission.

Contact: Richard Elliott

Executive Director, Canadian HIV/AIDS Legal Network
relliott@aidslaw.ca +1 416 595-1666 (ext 229)

Conflict of Interest Disclosure

I have no conflicts of interest.

HIV criminalization:

Law and policy in Canada as of April 2019

- A **federal directive** limits prosecutions in Canada’s three territories. Formal policy has been adopted in **Ontario**⁵ and **British Columbia**⁶ while advisory has been given in **Alberta**.⁷ None of these yet fully reflect international recommendations, and they also represent a patchwork of inconsistent approaches across the country.
- **Condom use AND low viral load:** The Supreme Court has ruled that there is no obligation to disclose HIV-positive status **if a condom is used and the HIV-positive partner has a “low” viral load** (under 1500 copies/ml). It has not yet ruled out criminalization in any other circumstances.
- **Suppressed viral load:**
 - **Policy in Ontario, British Columbia, Alberta and the three territories** means that, regardless of condom use, there should be no prosecution for non-disclosure if the person has a “suppressed viral load” (under 200 copies/ml).
 - **Some courts** have ruled there is no realistic possibility of transmission with a suppressed viral load and therefore no legal duty to disclose.
- **Condom use:**
 - In the **territories**, there should “generally” be no prosecution for non-disclosure if a condom was used (“unless other risk factors were present”), regardless of viral load.
 - In **British Columbia**, using a condom “may” weigh against prosecution, but B.C. policy fails to clearly rule out prosecuting people who use condoms.
 - **Ontario**’s policy is even more deficient, lacking any reference to condoms at all.
 - There are **conflicting court decisions** on whether condom use alone is enough to prevent conviction.
- **Oral sex:**
 - In **British Columbia**, there should be no prosecution if a person only engaged in oral sex (“and no other risk factors were present”).
 - In the **territories**, there should “generally” be no prosecution for oral sex alone (“unless other risk factors were present”).
 - **Some court decisions** have concluded that oral sex alone does not require disclosure.

FOOTNOTES

¹ R. v. Mabior, 2012 SCC 47.

² Canadian Coalition to Reform HIV Criminalization, End Unjust HIV Criminalization: Community Consensus Statement, November 2017, available online at: <http://www.hivcriminalization.ca/community-consensus-statement/>.

³ Justice Canada, Criminal Justice System’s Response to Non-Disclosure of HIV, December 1, 2017, available online at: www.justice.gc.ca/eng/rp-pr/other-autre/hivnd-vihnd/index.html.

⁴ F. Barré-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 (2018), available online at: <https://onlinelibrary.wiley.com/doi/full/10.1002/jia2.25161>.

⁵ Ministry of the Attorney General, Crown Prosecution Manual – D. 33: Sexual Offences against Adults, updated December 1, 2017, available online at: www.ontario.ca/document/crown-prosecution-manual/d-33-sexual-offences-against-adults.

⁶ BC Prosecution Service, “Sexual Transmission, or Realistic Possibility of Transmission, of HIV,” *Crown Counsel Policy Manual*, April 16, 2019, available online at: www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/sex-2.pdf.

⁷ Letter from Mr. Eric Tolppanen, 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.