

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

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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.

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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-outre/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.