

KNOW YOUR RIGHTS



HIV
CRIMINALIZATION

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Being diagnosed with HIV can be challenging news to receive, but today, most people living with HIV who know their status can get access to effective medical care, including HIV medications known as antiretroviral therapy, and live long, healthy lives. **Taking medication as prescribed can also reduce the amount of HIV in a person’s body to a point where they can no longer transmit the virus to their sex partners.** However, there is still no cure for HIV. Without proper medical care and medications, HIV can still lead to AIDS, serious illness, and death.

Knowing you have HIV can affect your life in different ways, including who you decide to tell about your HIV status and when you decide to tell them. **In most situations, you have no obligation to tell other people that you have HIV, but you might decide to do so if you think their support could help.**

You may choose not to disclose because you are not sure how to tell people or how others will react. You may fear judgement, rejection, discrimination, or violence.

For more information, check out our [Know Your Rights resources on privacy rights and disclosure obligations](http://www.hivlegalnetwork.ca/site/kyr/?lang=en) (www.hivlegalnetwork.ca/site/kyr/?lang=en) in different day-to-day contexts, including our recently updated brochure on [privacy and health records](http://www.hivlegalnetwork.ca/site/wp-content/uploads/2024/02/3963_HIVLN_KnowYourRights01_EN-Final.pdf). (www.hivlegalnetwork.ca/site/wp-content/uploads/2024/02/3963_HIVLN_KnowYourRights01_EN-Final.pdf).

But when it comes to sex partners, the situation is different. In Canada, the criminal law says that in certain circumstances you have to tell your sex partners that you have HIV before you have sex. This is often referred to as a “duty to disclose.”

When we talk about “HIV criminalization,” we are generally talking about cases where a person who is accused of not disclosing their HIV status to a sex partner is criminally charged. HIV criminalization can happen in cases where it is alleged that HIV was transmitted to the partner, but also in cases where no transmission occurs (typically referred to as cases of “exposure”).

This guide was prepared by the HIV Legal Network to answer some common questions about HIV disclosure and the criminal law in Canada. This guide gives you legal information, not legal advice – the difference between the two is important.

Legal information can help you understand the law, but it is general. Legal advice is specifically about your situation and can help you to decide what to do. If you want or need legal advice, you should talk to a lawyer. (See page 27 for information about how to find a lawyer.) This guide was written in March 2024, but the law may change. You can contact a lawyer to get up-to-date legal information and legal advice specific to your situation.



For more information about the impacts of HIV criminalization, statistics about criminalization in Canada, and some of the social context related to this important issue, check out the **HIV Legal Network’s website**: www.hivlegalnetwork.ca/site/our-work/criminalization/?lang=en

This guide explains:

- when you have to tell sex partners you have HIV, according to the criminal law;
- what may happen if you are charged, or at risk of being charged, for not telling your sex partners before sex that you have HIV; and
- steps you can take to protect yourself against a possible criminal charge.

This information will help you to make informed decisions about HIV disclosure and sex. If you have questions about other legal issues related to HIV, please see our list of resources at the end of this document.

You can contact the HIV Legal Network or the HIV & AIDS Legal Clinic Ontario (HALCO) if you are in Ontario, the Coalition des organismes communautaires québécois de lutte contre le sida (COCQ-Sida) if you are in Quebec, or speak to another lawyer who knows about HIV and the law.

The HIV Legal Network works on the land now called Canada, which is located on treaty lands, stolen lands, and unceded territories of Indigenous groups and communities who have respected and cared for this land since time immemorial. We work to address the ongoing injustices and resulting health inequities faced by Indigenous Peoples that contribute to the disproportionate impact of the HIV epidemic on Indigenous communities. We are committed to learning to work in solidarity and to dismantling and decolonizing practices and institutions to respect Indigenous Peoples and Indigenous ways of knowing and being.

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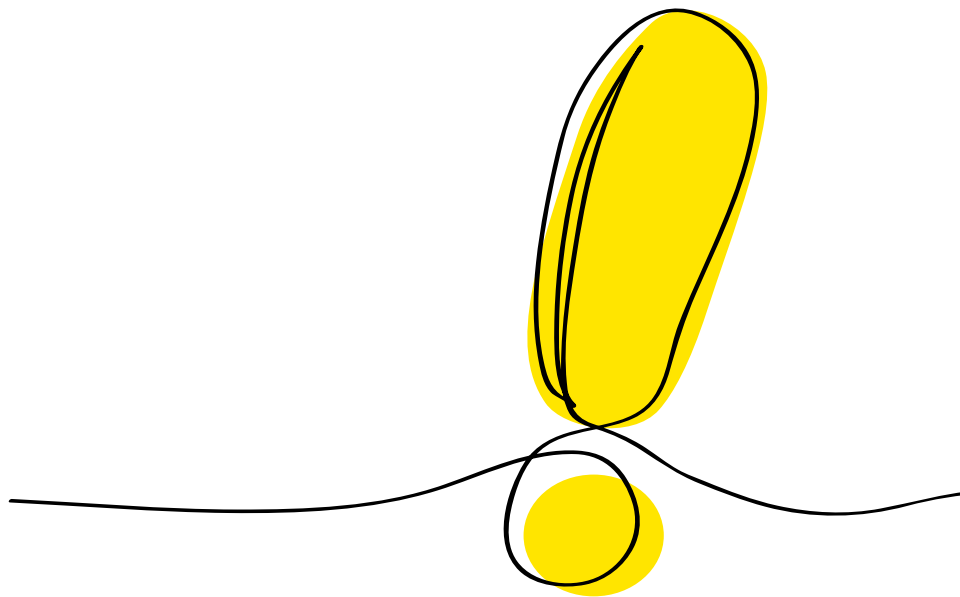
HIV disclosure in the context of sex, dating, and relationships

Telling someone you have HIV can be difficult. You may find that disclosing gets easier the more you do it. Or you may never find it easy to disclose. You might be nervous that the person you tell will tell other people.

You may be worried about facing homophobia, biphobia, transphobia, discrimination against Two-Spirit people, and/or racism if you disclose. You might also find disclosure difficult due to bias against sex workers, stigma against people who use drugs, and/or stigma and discrimination against people living with HIV. In some cases, domestic violence, economic conditions, and cultural or language barriers can be factors that affect a person's ability to disclose or to get support. **These are all valid concerns.**

There may be cases where you don't have a legal duty to disclose your status, but you might still want to inform a sexual or romantic partner anyway, because you trust them. You should still keep in mind what could happen if you do disclose.

In most day-to-day encounters, you do not have to tell others that you have HIV. But because HIV can be transmitted during some sex activities, the law in Canada says that in certain circumstances, you have to tell your sex partners that you are HIV positive before you have sex. Knowing about the criminal law may help you avoid legal problems.



You may want to seek legal advice before deciding whether to disclose your HIV status.

You should definitely talk to a lawyer before you speak to the police if you have been charged with a crime for not telling a sex partner you have HIV. You should also get legal advice if someone says they will be telling the police that you did not disclose that you have HIV before you had sex or that they will accuse you of transmitting HIV. Contacting an AIDS service organization can also be a good step to find help and support.



The legal rules around HIV disclosure obligations have generally been developed in the context of sexual relationships, but you may be wondering about your obligations in other scenarios, like through vertical transmission (mother to child) or through shared drug equipment.

It is possible that someone living with HIV could be criminalized if they did not take measures to prevent transmission during pregnancy, childbirth, or chestfeeding. There is at least one case from Ontario in 2006 where a mother was prosecuted for HIV transmission to her child, but prosecutions of this kind are very rare. Since there are so few recorded cases, it is hard to know for sure what a person's legal obligations would be in that scenario. If you are concerned, you can talk to a lawyer or to your healthcare professional about how to minimize the risk of transmission and any legal consequences in this scenario.

Likewise, it is possible that someone living with HIV could be criminalized if they share their injection drug equipment with other people without disclosing their HIV status first. Again, it is hard to know for sure what a person's legal obligations would be in that scenario since the overwhelming majority of court cases involve sexual encounters.

Figuring out if you have a legal duty to disclose that you are HIV positive before having sex

There is no single law in Canada that clearly states when you do or do not need to disclose your HIV status to your sexual partners. The obligation to disclose has been established through court decisions. According to the Supreme Court of Canada, **you are only required to disclose that you have HIV before you have sex when there is a “realistic possibility” that you could transmit the virus to your sex partner.**¹

But courts have not clearly defined what a “realistic possibility” means for different types of sex. **Sometimes it can be hard to figure out if you have a legal duty to disclose. It can vary from case to case, based on several factors.**

Different courts in different provinces have come to different conclusions on when they consider that there might be a “realistic possibility of transmission” and when people need to disclose. As a result, **whether a person has an obligation to disclose their HIV status can depend on the province they are in and the type of sex they have.**

What makes things trickier is that what the law says is a “realistic possibility of transmission” is not always the same as what the latest scientific research tells us about the risks of HIV transmission in different circumstances.²

Even though the legal system has been slow to respond to scientific progress so far, it is possible that the law will evolve in the future to keep up with scientific developments. This is why it is important to receive up-to-date legal advice that fits your personal situation from a lawyer or legal organization in your province.

There is no duty to disclose in the following situations, because the law considers that there is no realistic possibility of transmission.

- You do not legally have to tell your partner that you have HIV before kissing or other activities that have no risk of HIV being transmitted.
- You do not legally have to tell your partner that you have HIV before having vaginal, anal, or oral sex if you use a condom **and** your viral load is low, suppressed, or undetectable.³



Viral load is the amount of HIV in a person's bodily fluids. It is usually measured as "copies of the virus per millilitre of blood." One of the goals of HIV treatment is to reduce a person's viral load as much as possible, so there is less of the virus causing damage to the person's immune system and less risk of transmission.

"Suppressed viral load" is the term generally used for a viral load of under 200 copies of HIV per millilitre of blood. **When a person has a suppressed viral load, they cannot transmit HIV to their sexual partners.** The legal benchmark for a "suppressed viral load" in Canada could continue to change with new scientific information, but as of March 2024, it's safer to use the 200 copies/mL benchmark.⁴

"Undetectable viral load" means a person's viral load is so low that HIV does not show up in the most common type of viral load tests. This is usually around 50 copies of HIV per millilitre of blood, depending on the type of test used. **When a person has an undetectable viral load, they cannot transmit HIV to their sexual partners.** This is often reflected in the slogan U=U, which stands for undetectable = untransmittable.

"Low viral load" means, for the purposes of the criminal law in Canada, a viral load of under 1,500 copies of HIV per millilitre of blood.

Whether you need to disclose in other circumstances is less clear.

How does your viral load affect whether you have to disclose?

Under the current state of the law set by the Supreme Court of Canada, even if you have a low, suppressed, or undetectable viral load, you still have to either wear a condom or tell your partner that you have HIV.

That said, in recent years, some prosecutors and judges in some provinces and territories have accepted that **people do not have to tell a partner they have HIV if they have a suppressed or undetectable viral load even if they have anal, vaginal, or oral sex without a condom.**

This is because the person's suppressed or undetectable viral load means they can't transmit HIV to a sex partner (and this is the case even if no condom is used). This means that there is no realistic possibility of transmission, so there is no duty to disclose.

- There have been a few cases where courts have decided that even if a person didn't use a condom, just having a **suppressed** or **undetectable** viral load is enough on its own to find that there is no realistic possibility of transmission.⁵ But there has not yet been a decision from the Supreme Court of Canada that would clearly make this the law across the country.
- There are guidelines or policies for prosecutors in **British Columbia, Ontario, Alberta, and Quebec** that say that a **person living with HIV shall not be prosecuted for non-disclosure if they are on antiretroviral therapy and have a suppressed or undetectable viral load for a minimum period, between four to six months**, before the sex takes place.
- In the **Yukon, Northwest Territories, and Nunavut**, there is a formal directive for prosecutors which says that a person living with HIV **shall not be prosecuted for non-disclosure where they have a suppressed or undetectable viral load.**

In other words, if your viral load is suppressed or undetectable, it seems unlikely that a prosecution would succeed, especially if the sexual activity takes place in a province or territory where there is a policy in place that recommends against prosecution in such a case. We don't know of any prosecutions or convictions in recent years against someone living with HIV who had a suppressed or undetectable viral load at the time they had sex (including vaginal, anal, or oral sex without a condom).

If your viral load is "low," but not so low that it's considered "suppressed" or "undetectable," the chance of being prosecuted if you do not disclose is much higher, so it would be wiser to assume that you still have a legal duty to disclose your HIV-positive status (unless you also use a condom).

What if you use a condom? Does this affect whether you have to disclose?

But what if your viral load is not low, suppressed, or undetectable? If you use a condom, do you still have to disclose before anal, vaginal, or oral sex? The situation varies depending on where you live.

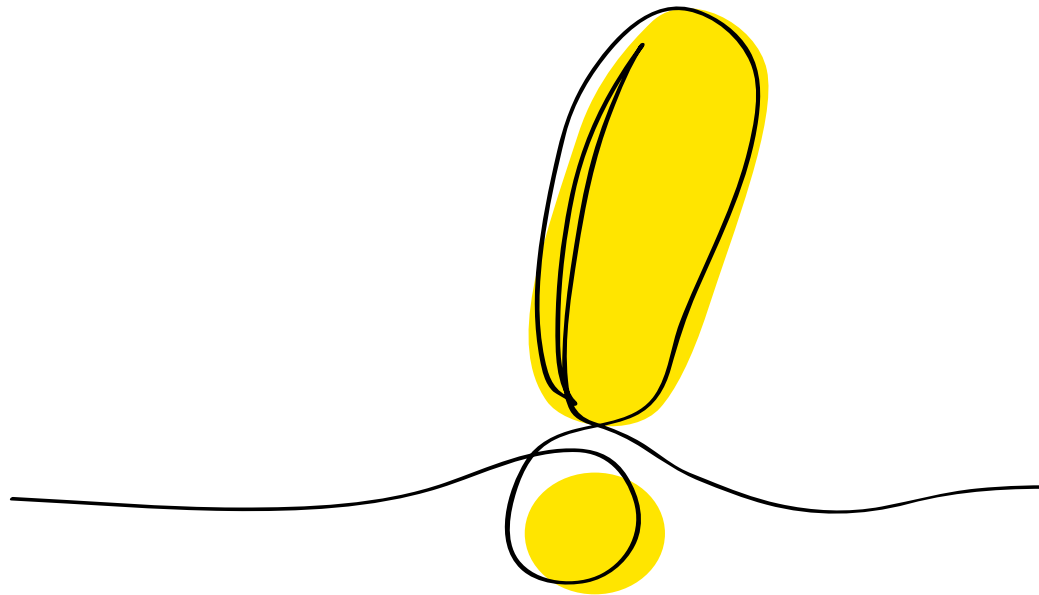
Nowhere in Canada is there clear legal protection that says using a condom will be enough to prevent you from being prosecuted or convicted for non-disclosure if you don't also have a low, suppressed, or undetectable viral load.

- In the Yukon, Northwest Territories, and Nunavut, a federal directive tells prosecutors that people “generally” should not be prosecuted if a condom was worn, but people could still end up being prosecuted.
- In British Columbia, a provincial policy says that using a condom “may” be a reason not to prosecute people for not telling their sex partner, but people can still be prosecuted.
- In Nova Scotia, there is one lower court decision in 2016 that said using a condom meant there is no legal duty to disclose.⁶ This is an important decision and could mean that prosecution in similar cases is less likely. But it does not automatically stop a prosecution or conviction in another case where someone used a condom but did not tell their sex partner that they have HIV.
- In Ontario, a 2020 court decision said that using a condom on its own (without a low, suppressed, or undetectable viral load) won't be enough to protect people from being prosecuted and convicted.⁷ All courts in Ontario have to follow this decision.
- You still legally have to disclose that you have HIV to a sex partner, even if a condom is used, unless you also have a low, suppressed, or undetectable viral load.

What about oral sex?

There is no single rule that applies across the country when it comes to oral sex, with or without a condom. There are policies or guidelines that apply in some provinces and territories:

- In the Yukon, Northwest Territories, and Nunavut, the directive tells prosecutors that people “generally” should not be prosecuted if they engaged only in oral sex, but people could still end up being prosecuted if other “risk factors” are present.⁸
- In British Columbia, the provincial policy states that people will not be prosecuted if they only have oral sex and no other “risk factors” are present.
- In Ontario, even if you only have oral sex, unless your viral load is suppressed or undetectable, there is still a risk of being prosecuted and convicted if you don’t tell your sex partner. Using a condom for oral sex *might* reduce the chance of being charged and convicted, but we do not know for sure.



Other important information about the duty to disclose HIV to sex partners

- You can be charged and convicted for not telling your sex partners even if you had no intent to cause them harm and even if they do not get HIV after having sex with you.
- If there is a “realistic possibility” of transmitting HIV, the law says you must disclose. There is no difference between lying about your HIV-positive status (i.e. You say, “I am HIV negative”) and simply not telling your partner that you have HIV (i.e. “They did not ask. I did not tell.”). In either case, you can still be charged and convicted.
- You might be charged and convicted even if you did not know or think that you had a legal duty to disclose.
- If there is a “realistic possibility” of transmitting HIV, you have a legal duty to disclose:
 - no matter where you meet the person or have sex;
 - no matter how long you have known the person or what they mean to you; or
 - whether you have sex because you like or love the person, for fun, to make money, in exchange for drugs, or for other reasons.
- You may not want to disclose that you have HIV because the person might tell other people or share it on the internet. Although this may make it harder for you to disclose, it does not change your legal duty under the criminal law.
- For all people, being drunk or high may make it more challenging to disclose that you have HIV, but it does not change your legal duty under the criminal law.
- Even if you know the other person is also HIV positive, you may still have a legal duty to disclose. That said, we are not aware of any cases where someone has been prosecuted for not disclosing they have HIV to a sex partner who they knew is also HIV positive.
- Not getting an HIV test is not a guarantee that you are protected against prosecution. So far, we are only aware of prosecutions against people who knew about their status because they had received a positive HIV diagnosis. But it is possible that you could be charged if you think you may be HIV positive, choose not to get tested, and don’t tell your partner about this.

- Even if you know the other person is taking pre-exposure prophylaxis (PrEP), you may still have a legal duty to disclose. The science is clear that PrEP is highly effective in reducing the risk of HIV infection, but you should not rely on a sex partner taking PrEP as a guarantee against facing criminal charges if you don't disclose. You can't know for sure if someone is consistently taking PrEP or if they have stopped taking their medication. Your sex partner being on PrEP might be considered by police or prosecutors before they decide whether to move forward with a criminal charge, but it is hard to know, since the law is not clear on this point.



PrEP is a type of medication that people can take to greatly reduce the possibility of HIV transmission. It can be taken on a daily basis or intermittently (taken occasionally around the dates when a person expects to have sex).

Post-exposure prophylaxis, also known as PEP, is a type of medication that people can take after a possible exposure to HIV — within 3 days (72 hours) — to greatly reduce the possibility of HIV transmission. You still need to disclose your HIV status to your sexual partner before having sex even if you think they could take PEP after your sexual encounter.

- It is possible that someone could still go to the police (or threaten to go to the police) and accuse you of not disclosing your status before having sex with them, even though you know that there was no “realistic possibility of transmission” when you had sex (for example, because you had a suppressed viral load for more than six consecutive months). It can take time and many steps in the legal process before police and prosecutors are able to verify the facts and determine whether the case should go forward. You could still face the stress of a police investigation, even if it turns out that you did not need to disclose in the first place. If you have strong evidence that you disclosed before sex or clear proof that there was no realistic possibility of transmission (for example, viral load test results, condom use, prescriptions for your medication, etc.), it could make it easier to put an end to an investigation.

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

Women living with HIV are at higher risk of gender-based violence. If a woman is not in a safe situation, she may not have power to decide when to have sex, who she has sex with, or whether condoms are used. Similarly, she may feel that disclosing her HIV-positive status to a partner could carry a risk of violence.

A court might accept that someone living with HIV is not required to disclose if they fear that they might suffer harm as a result of disclosing. It is also possible that if they are forced to have sex through violence or threats, a court would say that they did not have an obligation to tell their attacker about their HIV-positive status.

However, we are not aware of any cases where a court addressed these issues, so there is no clear answer yet. If you are being abused or fear violence, a local support organization such as a women's shelter can help you develop a safety plan with steps to take when you are in danger. You can also contact the HIV Legal Network or HALCO to find lawyers and resources for women living with HIV who fear or experience sexual violence.

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

Not all people in Canada have equal access to HIV treatment and care. Certain communities, including migrants, Indigenous and Black people, face barriers related to colonialism, racism, stigma, indifference, and lack of awareness that make it much more difficult to get HIV care, treatment, and support.

You may live in a rural or remote area where access to health care, including HIV treatment, is unavailable, or the small size of the community may create concerns about confidentiality. If you have had to move frequently or if you have been in jail, it may have been difficult for you to continue HIV care and treatment.


A lack of consistent access to HIV treatment can make it harder to reach a suppressed or undetectable viral load, for reasons that may be outside of your control.

So far, courts have not considered access to healthcare in a case where someone is criminally charged for not disclosing they have HIV to a sex partner. Judges might express sympathy for this situation. But it seems unlikely they would accept it as a valid excuse for not disclosing.

What may happen if you get charged by the police for not disclosing that you have HIV?


Here are some of the things that could happen if you are accused by a sexual partner of not disclosing that you have HIV before sexual activity that poses a “realistic possibility of transmission”:

The police can investigate and charge you with a serious crime, usually aggravated sexual assault, but sometimes other charges as well. If the police want to ask you questions, you do not have to answer them. Anything you say to the police at any time may be used as evidence against you. You have the right to speak to a lawyer in private before answering questions from the police. The lawyer is the only person you should talk to about this situation. (See page 27 for more information about legal aid and finding a lawyer.)

Aggravated sexual assault is one of the most serious offences in the *Criminal Code*. You could face up to life in prison and registration as a sex offender. 

There is not a crime of “HIV non-disclosure” in the *Criminal Code*. But people have also faced criminal charges such as common nuisance, administering a noxious substance, criminal negligence causing bodily harm, and attempted murder, when they did not disclose their HIV status before having sex.

If the police arrest you, they can either let you go with certain conditions or keep you in jail for up to 24 hours. If you are kept in jail, you will be taken to court within 24 hours where you can apply for bail — in other words, a court order releasing you from jail until your case has been decided. If the court refuses to release you, you will have to stay in jail while your case is ongoing or until you apply for a “bail review” to ask another judge to allow you out of jail and this new judge agrees to let you out.

The British Columbia Civil Liberties Association has created a detailed Arrest Handbook and a shorter Arrest Pocketbook, which provide lots of useful information about your rights when you interact with the police. This guide also includes specific information for people living with HIV: <https://bccla.org/resource/the-arrest-handbook-2023/>. 

- You will be fingerprinted and photographed when you are arrested. **Your picture, HIV status, other personal information, and the crime you are accused of committing could appear in a police press release, in the media, and on the internet.** This can happen after you are arrested, but it can also happen before, in situations where someone is wanted for arrest by the police. If a case goes to trial, usually the trial is open to the public and the media. Sometimes a court may put a publication ban in place, which may stop some details about the case from being reported, but this ban does not usually include the name of the person who is on trial.
- **You can hire a lawyer to defend you.** Depending on your income, you may be able to get a lawyer through legal aid.
- **You may also be able to access legal help through your community.** It is important to get a good lawyer who is knowledgeable about HIV. The HIV Legal Network, HALCO, COCQ-Sida, and/or an AIDS service organization may be able to connect you with a lawyer. Also, you and your lawyer could find it helpful to look at the resources listed below for lawyers handling HIV-related cases, and you can always contact the HIV Legal Network (and HALCO if you are in Ontario or COCQ-Sida if you are in Quebec).
- **If you plead guilty or are convicted, you will almost certainly be sentenced to time in prison.** You will have a criminal record. Your name will likely be put on a list of sex offenders. A DNA sample will likely be taken from you and placed in a data bank. A person with a criminal record or a person on a sex offender list may not be able to travel to some countries and they may not be able to get some types of jobs.
- **If you are not a Canadian citizen, you could be deported if you plead guilty or are convicted.** This is still true if you are a permanent resident who has lived in Canada for many years. If this is your case, you should let your lawyer know and you may also want to discuss your situation with a lawyer who specializes in immigration law, so that you fully understand the possible consequences on your immigration status in Canada.

Reducing your risk of criminal charges and convictions

In a criminal case, **the prosecutor must prove “beyond a reasonable doubt”** that the accused person committed the crime they have been charged with. This means that **the prosecutor must present the court with evidence**. The prosecutor can use almost anything you tell someone else about your sex life as evidence against you in a criminal case.

You should think carefully before you talk to people about your sex life, including who your partners have been, whether you disclosed your HIV-positive status to them, the kind of sex you had, whether condoms were used or not, etc.

This may include things you tell your doctor, nurse, counsellor, or other health professional or service provider, including people at an AIDS service organization or anyone providing you with HIV testing. Unfortunately, even if some of these professionals are bound by a duty of confidentiality, it is not absolute and they could be forced to testify in court or to disclose medical records. The only exception is your lawyer because, other than in extremely rare circumstances, everything you say to your lawyer is confidential and cannot be used against you in court.

Here are some other things that you can do to help reduce your risk of getting into trouble with the law:

- **Tell your sex partners you are HIV positive before sex (and try to get proof that you told them).** Avoid code words or hints. Do not assume they know what words like “poz” and “positive” mean. It is best to tell them “I have HIV,” “I am HIV positive,” or “I am living with HIV.”
- **If you have a doctor, see them regularly and work together to get and keep your viral load as low as possible.** Ask your doctor to test your HIV viral load on a regular basis (e.g. every three to six months) so you can keep track of it. Proof that your viral load was “low,” “undetectable,” or “suppressed” at the time you had sex can reduce your risk of facing criminal charges or being convicted if a sex partner accuses you of not disclosing that you have HIV.
- **Instead of anal or vaginal sex, you may choose to have other types of sex that have lower risks or no risk of transmitting HIV, such as oral sex, masturbation, and using toys.** Depending on the province or territory in which you have sex, having oral sex without a condom or without a suppressed or undetectable viral load could still put you at risk of being prosecuted or convicted for HIV non-disclosure.

- **Use condoms (made from latex or polyurethane) and lube (water-based or silicone-based) to protect your sex partners from being exposed to HIV and to protect both of you from other STIs.** Depending on the province or territory in which you have sex, using a condom may also lower the risk of being prosecuted or convicted for HIV non-disclosure.



Scientists confirm that HIV cannot be transmitted when a condom has been used correctly. Unfortunately, the law on this issue is still behind and does not reflect the current state of scientific knowledge.

Do not assume people know you are living with HIV

You should not take for granted that the person you want to have sex with knows that you are living with HIV. Here are some reasons you might think that they know, and the reasons you might be wrong:

- **You wrote “HIV” in your internet profile or in your app bio.** They did not read it.
- **You wrote “poz” in your profile.** They do not know what “poz” means.
- **You wrote “safer sex needs discussion” in your profile.** This could mean lots of things to them.
- **Their friends know you have HIV.** But their friends did not tell them this.
- **You left your HIV meds on the counter in your bathroom.** They do not know what your meds are for.
- **They saw your red ribbon tattoo or some other image or materials about HIV that you have at your place.** You do not have to be HIV positive to get such a tattoo or to have a poster or pamphlet about HIV.
- **They know you work or volunteer at a local AIDS service organization.** HIV-negative people work and volunteer at such organizations, too.
- **They know that you get a disability pension or benefits.** You could have a disability that has nothing to do with HIV, which is the case for most people who get disability benefits.

How to protect yourself against people who might lie

Even if you told a person before sex that you are living with HIV, they might lie after you have sex and say you never told them. They could go to the police and file a criminal complaint against you — even if what they are saying is not true. This does not appear to be common, but it has happened.

Here are some things you can do before you have sex that can help prove that you disclosed that you have HIV and that may protect you against criminal charges. Some of these strategies might not work depending on the situation. It is up to you to decide what strategies would work best for you.

Save online conversations, emails, and text messages: If you disclose to a person in an internet chat, on an app, by email or by text, be clear about your HIV status. They should acknowledge that you are living with HIV. Save a copy of what you wrote and their response. Print it out or take a screenshot and put it in a safe place. But be careful about what else you write in online chats and conversations. These kinds of messages could be shared by the people that you tell without your permission, so make sure that you can trust them to keep this information private. The police and prosecutors have also used these kinds of conversations as evidence when prosecuting people living with HIV.

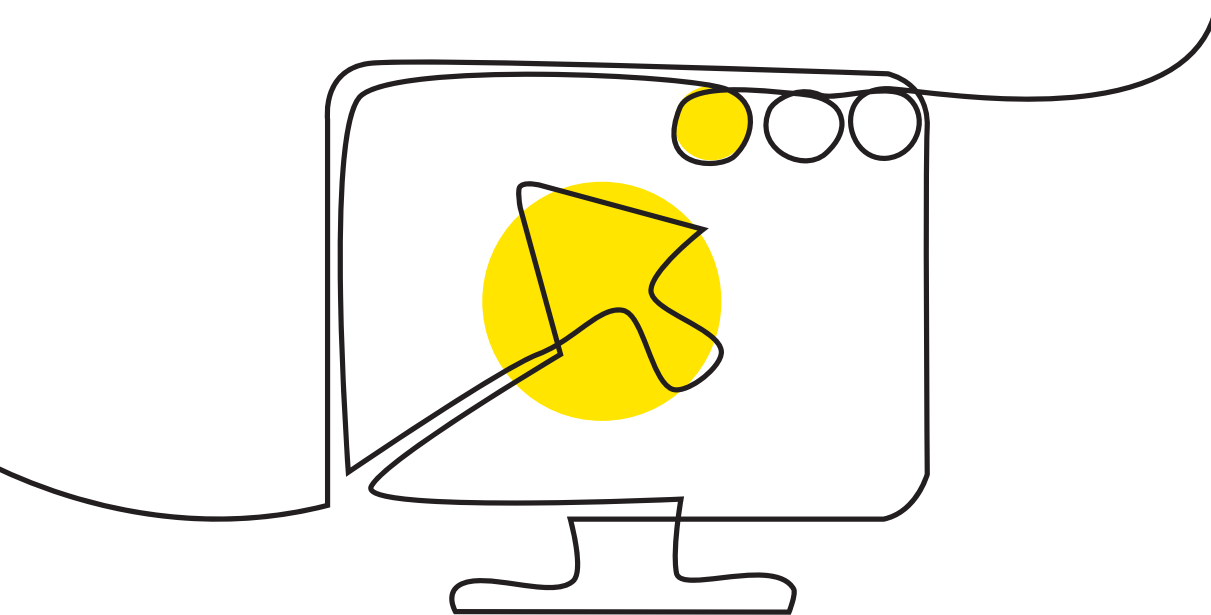
Have witnesses: Tell the person that you are HIV positive in front of a friend (or someone else you trust). Your friend becomes a witness who can say that you disclosed your HIV-positive status before any sexual activity. Or tell the person in front of a group of friends who already know you are living with HIV. This way you will have more witnesses. Ask your friend to write down the date of the discussion, the time, who was present, where the discussion took place, and exactly what was said — on paper or in an email — and send it to you.

Sign a document: Before you have sex, get the person to sign a paper that says that they know you are HIV positive and that they know what it means. Write down the date and have them print it and sign their name. This may not be a realistic strategy in many cases, but it could be a good way to protect yourself.

Make a video: Before you have sex with the person, ask them if they are willing to let you record a video of them on a phone, clearly stating that you have not had sex yet, and that they know you are HIV positive. This may also be unrealistic. Save a copy of the video on a computer, too, so that you (and your lawyer) can use it later if you need to defend yourself. Do not share the video with anyone else or post it on the internet unless the other person has given you permission to do so — there could be serious legal trouble if you share it without first getting permission.

Create support and counselling records: If you are thinking about getting into a relationship, you and the other person can go for a counselling session with a counsellor, support worker, or your healthcare provider before you have sex for the first time. Ask the counsellor, support worker, or healthcare provider to make notes of the session, including your disclosure. During the session, tell the other person that you are living with HIV, even if it's something you have already told them.

i Trust your instincts. If a person seems like they cannot be trusted, ask yourself if sex with them is worth the risk.



Are there any obligations outside the criminal law to disclose my HIV-positive status to a sex partner?

Yes. For example, public health authorities might require you to tell your sex partner that you are HIV positive.

The information in this section is very general. Public health law, and how public health authorities act and use their powers, may be different depending on where you live. If you want to know more about public health law where you live, talk to a lawyer (see page 27).

Public health authorities can take action to prevent the spread of STIs, including HIV.

When you test positive for HIV, the test result is reported to the public health authority responsible for the area where you got tested. The type of information that gets reported to public health, and that may be stored in a database, is different depending on the location.⁹

You may be able to get an anonymous HIV test, which generally uses a code instead of your name. If you test positive for HIV anonymously, the test result and some information (but not your name) will be reported to the public health authority. That said, if you test HIV positive, your name could be reported to public health once you begin accessing medical care for HIV, even if you tested anonymously at first.

In any case, the person administering your HIV test is likely to ask you all sorts of questions about your sex activity, such as how many partners you have or have had, what kind of sex you have, whether you always use condoms, etc., to determine the need for testing. You do not need to give this information to get a test for HIV. If you don't feel comfortable, you can tell them that you'd prefer not to get into those details but still want to get tested. There is no good reason for them to deny you the test just because you do not provide this information.

If you test positive for HIV or certain other STIs, public health authorities — depending on where you live — may require that your sex partners be contacted. This is called “contact tracing” or “partner notification.”

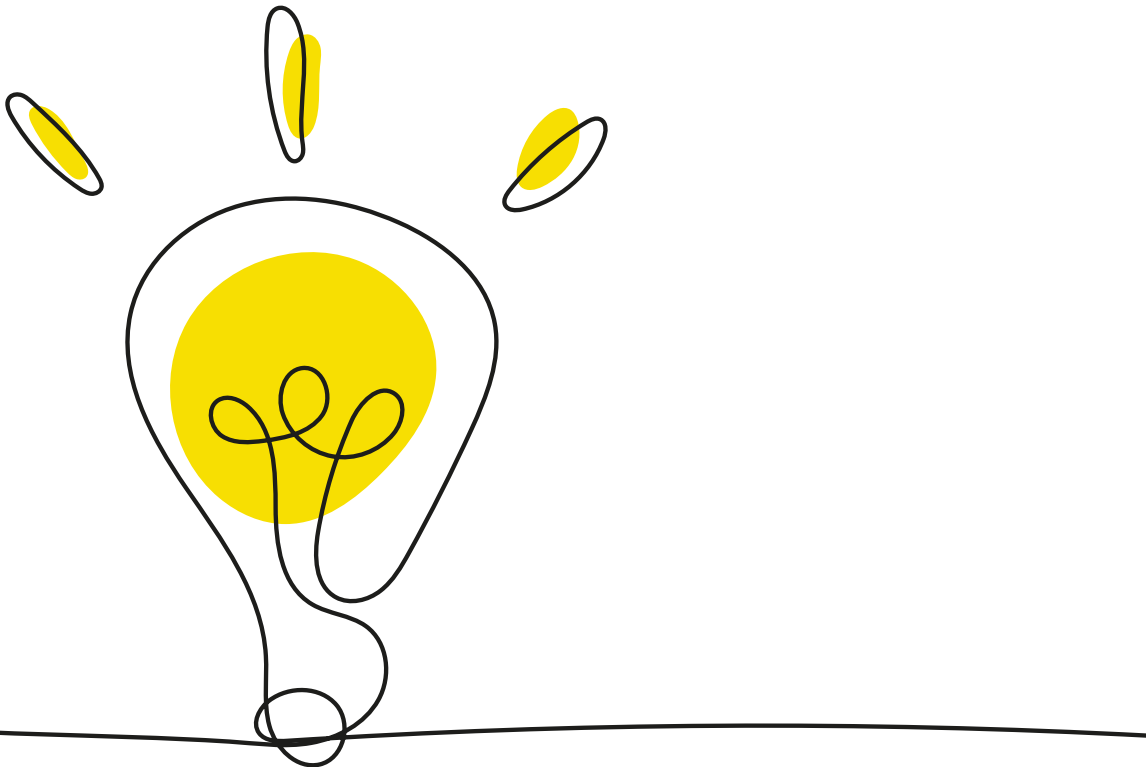
Someone from public health will probably ask you for information about your sex partners, including their names. They may ask you or your doctor to contact your sex partners to tell them that they may have been exposed to HIV or another STI, and advise them to get medical care. Or they may contact your partners directly. While public health staff should not share your name with your sex partners, in some situations your sex partners may figure out that you have HIV or another STI.

Aside from notifying previous sex partners, **public health authorities may sometimes take action if they think that you are putting others at risk for HIV or another STI.** The powers of public health authorities and the rules that they follow may vary between provinces and territories, but some public health authorities may require that in certain circumstances you tell your sex partners you're HIV positive before you have sex.

If public health authorities take action against you (e.g. issue an "order" requiring that you disclose your HIV-positive status), you may be able to challenge this. To find out your rights and responsibilities, talk to a lawyer as soon as possible because there may be very short time limits to respond to the decision made by public health authorities.



For more information about public health and HIV testing options, contact your local AIDS service organization. If you live in Ontario, HALCO can provide legal advice if you have concerns related to public health and issues surrounding HIV testing.



Community response to HIV criminalization

HIV criminalization in Canada is unscientific, overly broad, and punitive. People living with HIV continue to be criminally charged, prosecuted, and imprisoned for serious crimes when they did not disclose their status before sex, even if they did not want to give their partner HIV and even if there was no actual transmission. The law in Canada continues to put people at risk of criminalization for not disclosing their HIV status in cases where there was little to no risk of transmission. Criminalization contributes to stigma and discrimination for people living with HIV, as well as fear and misinformation within the public.

HIV disclosure obligations can be unclear for people living with HIV, since they can vary from case to case and from province to province. This situation can leave people feeling unsure about their legal obligations and whether their actions could be criminalized.

Punitive approaches are rarely beneficial for public health, and that applies to HIV prevention as well. What are really needed are measures that create a safe environment that supports people and enables them to seek HIV testing, treatment, and counseling, and to safely disclose their HIV status, free of stigma and discrimination, when they so choose.

People living with HIV and human rights advocates have spoken out against criminalization for years and have pursued many strategies to mobilize communities and to advocate for changes in law, policy, and practice. In 2022, a **Community Consensus Statement was developed by the Canadian Coalition to Reform HIV Criminalization calling on the Canadian government to change the *Criminal Code* to limit HIV criminalization.** If you want to learn about community advocacy and ongoing law reform efforts, visit the website of the Canadian Coalition to Reform HIV Criminalization: www.hivcriminalization.ca/.

Conclusion

The law on HIV disclosure can feel overwhelming. This is an area of the law that is still evolving. Science and medicine also continue to change and improve over time. There are groups of people and organizations who are trying to make a difference by changing these laws so that they reflect what we know about the science of HIV transmission. Until the law changes for sure, it is best to stay informed and up to date about your legal duties when it comes to disclosing that you have HIV to sexual partners. This guide is one resource that can provide you with general legal information. A lawyer or legal clinic will be better placed to provide with you with legal advice for your situation.

Know that you are not alone and there are resources available to help you. Contacting an AIDS service organization can be a good first step to finding help and support. Some organizations may have specific supports for the community or communities that you are part of (i.e. 2SLGBTQ+, Indigenous, Black, women, etc.).



Remember: your HIV status is personal information that you are allowed to keep private in most areas of your life. Your legal situation can depend on a lot of factors, including where you live, your viral load, whether police and prosecutors are well informed about HIV science, and the type of evidence that might exist for or against you. To avoid potential legal problems, it is best to be properly informed about your legal obligations around HIV disclosure before having sex.

Additional Resources

For more information on:

- **HIV disclosure and the criminal law** — see the website of the HIV Legal Network, at [HIV Criminalization – HIV Legal Network \(www.hivlegalnetwork.ca/site/our-work/criminalization/?lang=en\)](http://www.hivlegalnetwork.ca/site/our-work/criminalization/?lang=en). You can also contact the [HIV Legal Network \(www.hivlegalnetwork.ca/site/?lang=en\)](http://www.hivlegalnetwork.ca/site/?lang=en), the [HIV & AIDS Legal Clinic Ontario \(HALCO\) \(www.halco.org\)](http://www.halco.org), or [Coalition des organismes communautaires québécois de lutte contre le sida \(COCQ-Sida\) \(www.cocqsida.com\)](http://www.cocqsida.com). If you need legal advice, you should contact a lawyer. The Legal Network, HALCO, and COCQ-Sida may be able to provide appropriate referrals to lawyers.
- **For more information on the laws and policies governing HIV non-disclosure in Canada** — see *The Criminalization of HIV Non-Disclosure in Canada: Current Status and the Need for Change* at www.hivlegalnetwork.ca/site/the-criminalization-of-hiv-non-disclosure-in-canada-report/?lang=en.
- **HIV Criminalization in Canada: Key Trends and Patterns (1989-2020)**, available at www.hivlegalnetwork.ca/site/hiv-criminalization-in-canada-key-trends-and-patterns-1989-2020/?lang=en.
- **HIV criminalization and law reform** — see the website of the [Canadian Coalition to Reform HIV Criminalization](http://www.hivcriminalization.ca), a national coalition of people living with HIV, community organizations, lawyers, researchers, and others, at www.hivcriminalization.ca.
- **Privacy rights and HIV disclosure obligations in different contexts** — see *Know Your Rights* at www.hivlegalnetwork.ca/site/kyr/?lang=en.
- **HIV disclosure and women** — see [Special Considerations for Advising Sexual Assault Complainants Living with HIV](http://www.hivlegalnetwork.ca/site/special-considerations-for-advising-sexual-assault-complainants-living-with-hiv/?lang=en), a HALCO and HIV Legal Network resource, at www.hivlegalnetwork.ca/site/special-considerations-for-advising-sexual-assault-complainants-living-with-hiv/?lang=en.
- **Criminal defence lawyers representing clients** — see the HIV Legal Network's *Resource Kit for Lawyers and Advocates*: www.hivlegalnetwork.ca/site/responding-to-the-criminalization-of-hiv-transmission-or-exposure-resources-for-lawyers-and-advocates-2/?lang=en.
- **HIV and Indigenous People in Canada** — see the website of [Communities, Alliances & Networks \(CAAN, formerly known as Canadian Aboriginal AIDS Network\)](http://www.caan.ca) at www.caan.ca and the [Ontario Aboriginal HIV/AIDS Strategy](http://www.oahas.org) at www.oahas.org, as well as the resource co-produced by CAAN, HALCO, and the HIV Legal Network for Indigenous audiences, [HIV and the Criminal Law in Canada](http://www.hivlegalnetwork.ca/site/our-work/indigenous-communities/hiv-criminalization-information-for-indigenous-communities/?lang=en) at www.hivlegalnetwork.ca/site/our-work/indigenous-communities/hiv-criminalization-information-for-indigenous-communities/?lang=en.

- **HIV risks of transmission, prevention and treatment** — see information available on [CATIE's website](http://www.catie.ca) at www.catie.ca.
- **BCCLA Arrest Handbook** – for information on your rights when interacting with the police in different contexts, available at <https://bccla.org/resource/the-arrest-handbook-2023>.

For more information or legal advice:

Lawyer Referral Services, which can often be found through the different provincial law societies in Canada, refer people to lawyers. Your province or territory may have a lawyer referral service. The service may charge a fee. The fee is much less than what a lawyer would usually charge for services. After you pay the fee, you get a telephone or in-person appointment with a lawyer to discuss your case.

For more information about lawyer referral services and any fees they charge, contact the lawyer referral service in your province or territory. If there is no lawyer referral service in your province or territory, contact Legal Aid.

For more information about HIV and the law in Canada:

HIV Legal Network

www.hivlegalnetwork.ca

416-595-1666

For information and advice about HIV and the law in Ontario:

HIV & AIDS Legal Clinic Ontario (HALCO)

www.halco.org

416-340-7790 or 1-888-705-8889

For information and advice about HIV and the law in Quebec:

Coalition des organismes communautaires québécois de lutte contre le sida (COCQ-Sida)

www.cocqsida.com

514-844-2477 ext 0 or 1-866-535-0481 (French only)

To contact Legal Aid or a lawyer referral service in your province or territory:

Alberta

Legal Aid Alberta
www.legalaid.ab.ca
1-866-845-3425

Law Society of Alberta's Find a Lawyer Service
www.lawsociety.ab.ca/public/findalawyer
1-800-661-1095

British Columbia

Legal Aid BC
www.lss.bc.ca
Greater Vancouver: 604-408-2172
Elsewhere in BC: 1-866-577-2525

Lawyer Referral Service
www.accessprobono.ca/our-programs/lawyer-referral-service
1-800-663-1919

The Indigenous Community Legal Clinic
www.allard.ubc.ca/community-clinics/indigenous-community-legal-clinic
604-822-5421

Manitoba

Legal Aid Manitoba
www.legalaid.mb.ca
1-800-261-2960

Community Legal Education Association's Lawyer Referral Program
www.communitylegal.mb.ca/programs/law-phone-in-and-lawyer-referral-program
1-800-262-8800

New Brunswick

New Brunswick Legal Aid Services Commission
www.legalaid-aidejuridique-nb.ca
Saint John: 506-633-6030
Fredericton: 506-444-2777

See website for more local offices or call 506-444-2776.

Newfoundland & Labrador

Newfoundland and Labrador Legal Aid Commission
www.legalaid.nl.ca
1-800-563-9911

Public Legal Information Association of Newfoundland and Labrador
www.publiclegalinfo.com
1-888-660-7788

Northwest Territories

Legal Aid Northwest Territories
www.justice.gov.nt.ca/en/legal-aid/
1-844-835-8050

Law Society of the Northwest Territories' Lawyer Referral Service
www.lawsociety.nt.ca/for-the-public/
867-873-3828

Nova Scotia

Nova Scotia Legal Aid Commission

www.nslegalaid.ca

1-877-420-6578

Legal Information Society of Nova Scotia's Lawyer Referral Service

www.legalinfo.org

1-800-665-9779

Nunavut

Legal Services Board of Nunavut

www.nulas.ca

Kitikmeot: 1-833-913-2549

Kivalliq: 1-833-913-2551

Qiktaaluk: 1-833-913-2459

Law Society of Nunavut

[www.lawsociety.nu.ca/en/for-the-public/
lawyer-referrals](http://www.lawsociety.nu.ca/en/for-the-public/lawyer-referrals)

844-979-2330

Ontario

HIV & AIDS Legal Clinic Ontario (HALCO)

www.halco.org

1-888-705-8889

Aboriginal Legal Services (ALS)

www.aboriginallegal.ca

1-844-633-2886

Legal Aid Ontario

www.legalaid.on.ca

1-800-668-8258

Law Society of Ontario's Lawyer Referral Service

www.findlegalhelp.ca

1-855-947-5255

Prince Edward Island

Prince Edward Island Legal Aid

[www.princeedwardisland.ca/en/information/
justice-and-public-safety/legal-aid](http://www.princeedwardisland.ca/en/information/justice-and-public-safety/legal-aid)

1-800-236-5196

Community Legal Information Association

www.legalinfopei.ca

1-800-240-9798

Quebec

Coalition des organismes communautaires québécois de lutte contre le sida (COCQ-Sida)

www.cocqsida.com

1-866-535-0481

Quebec Legal Aid

[www.csj.qc.ca/commission-des-services-
juridiques/aide-juridique/Quest-ce-que-aide-
juridique/en](http://www.csj.qc.ca/commission-des-services-juridiques/aide-juridique/Quest-ce-que-aide-juridique/en)

514-873-3562

Barreau du Québec's Lawyer Referral Service

[www.barreau.qc.ca/en/find-lawyer/referral-
services/](http://www.barreau.qc.ca/en/find-lawyer/referral-services/)

Montréal: 514-866-2490

Québec, Beauce, and Montmagny:

418-529-0301 ext 21

www.referencebarreaulongueuil.ca/en

(Longueuil)

Barreau de Montréal's Referral Service

[www.barreaudemontreal.qc.ca/en/public/
referral-service](http://www.barreaudemontreal.qc.ca/en/public/referral-service)

514-866-2490

Saskatchewan

Legal Aid Saskatchewan

www.legalaid.sk.ca

1-800-667-3764

Pro Bono Law Saskatchewan

www.pblsask.ca

1-855-833-7257

Yukon

Yukon Legal Services Society “Legal Aid”

www.yukonlegalaid.ca

1-800-661-0408 ext 5210

Law Society of Yukon’s Lawyer

Referral Service

www.lawsocietyyukon.com/lawyer-referral-service

867-668-4231 (outside Whitehorse,
call collect)

References

- ¹ This legal standard was established by the Supreme Court of Canada in two decisions about HIV non-disclosure. In a 1998 case called *R. v. Cuerrier*, the Court determined 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.” In a 2012 case called *R. v. Mabior*, the Court added that such a risk exists when the sexual activity in question carries a “realistic possibility of transmission of HIV.”
- ² Scientists and medical experts working on HIV have repeatedly criticized the disconnect between the science and the criminal law. In 2018, an *Expert Consensus Statement on the science of HIV in the context of the criminal law*, signed by scientific experts from around the world and leading HIV science organizations, was published in the *Journal of the International AIDS Society* to address the misuse of HIV science by the criminal justice system.
- ³ In its 2012 decision in *R. v. Mabior*, the Supreme Court established that there was no realistic possibility of transmission for vaginal sex where a condom was used **and** a person had a low viral load. Since then, later court decisions have made clear that this rule also applies to anal and oral sex, and for people who have a suppressed or undetectable viral load.
- ⁴ The World Health Organization released a report in July 2023 determining that a suppressed viral load extends to under 1000 copies of HIV per millilitre of blood: www.who.int/news/item/23-07-2023-new-who-guidance-on-hiv-viral-suppression-and-scientific-updates-released-at-ias-2023. This new benchmark has yet to be adopted by actors in the Canadian legal system.
- ⁵ In one decision from Ontario (*R. v. Rubara*, 2022 ONCA 694), the Court of Appeal confirmed that a person considered an “elite controller,” whose body can naturally suppress HIV in their blood without being on treatment, did not pose a realistic possibility of transmission when they had sex without a condom.

In another decision from Ontario (*R. v. Murphy*, 2022 ONCA 615), the Court of Appeal accepted, based on the specific facts in that case, that the accused did not pose a realistic possibility transmission, since she was taking antiretroviral therapy and had an undetectable viral load at the time she had sex without a condom.

These court decisions were specific to the facts in those cases and do not necessarily apply more broadly.

- ⁶ *R. v. Thompson*, 2016 NSSC 134.
- ⁷ *R. v. NG*, 2020 ONCA 494. The Ontario Court of Appeal upheld a conviction on three counts of sexual assault against a man who did not disclose his HIV-positive status but used a condom for his consensual sexual encounters, even though there was no allegation that he had transmitted HIV nor was there any evidence of improper use or failure of the condom.
- ⁸ Some risk factors that might increase the possibility of HIV transmission and the possibility of prosecution in cases of oral sex include if you or your partner had sores on your mouth or genitals, gum bleeding, or other sexually transmitted infections.
- ⁹ In Quebec, only your demographic information, and not your name, is reported. In other provinces, your name and contact information may be reported.



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