

Criminal Law & HIV Non-Disclosure in Canada

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This is one in a series of three info sheets on the criminalization of HIV non-disclosure in Canada.

1. The obligation to disclose HIV-positive status under Canadian criminal law

2. The criminalization of HIV non-disclosure in Canada and internationally
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The obligation to disclose HIV-positive status under Canadian criminal law

Canadian HIV/AIDS Legal Network | Réseau juridique canadien VIH/sida



When is there a legal duty to disclose HIV-positive status to a sexual partner?

Under current Canadian criminal law, people living with HIV can be charged and prosecuted if they do not tell their sexual partner(s) about their HIV-positive status before having sex. This is usually called the “criminalization of HIV non-disclosure.”

The legal obligation to disclose was established in the 1990s, but the law became harsher in 2012 when the Supreme Court of Canada decided that people living with HIV must disclose their status before having sex that poses a “realistic possibility of HIV transmission” in *R. v. Mabior* and *R. v. D.C.*¹ The Supreme Court characterized even very small risks of HIV transmission as “a realistic possibility.”

a) Vaginal sex

According to the Supreme Court’s 2012 rulings, when a person living with HIV has a low or undetectable viral load *and* uses condoms, there is *no* duty to disclose prior to vaginal intercourse.²

What this means in practice is that people living with HIV have a legal duty to disclose prior to:

- vaginal sex without a condom (regardless of viral load); or
- vaginal sex with a condom if their viral load is higher than “low.”³

b) Anal sex

Anal sex can pose higher risks of transmission than vaginal sex, so the legal duty to disclose would be at least as strict as for vaginal sex.⁴

Therefore, based on the Supreme Court’s 2012 rulings, people living with HIV will have a legal duty to disclose prior to:

- anal sex without a condom (regardless of viral load); and
- anal sex with a condom if their viral load is higher than “low.”

It might be the case that, as with vaginal sex, a person living with HIV who uses a condom *and* has a low viral load does not have a legal duty to disclose before anal sex. But we cannot say this for certain because the Supreme Court of Canada only dealt with HIV non-disclosure in the context of vaginal sex.⁵

c) Oral sex

Oral sex is usually considered a very low risk for HIV transmission. Despite some developments at lower level courts, we cannot say for certain, at time of writing, that oral sex without a condom and/or a low viral load does not require disclosure.⁶

However, based on the Supreme Court’s 2012 rulings, it is clear that there should be no duty to disclose before oral sex if a person uses a condom *and* has a low viral load given that oral sex carries a lower risk of HIV transmission than vaginal sex.

d) “No risk” activities

Logically, kissing, mutual masturbation and other intimate activities that are considered “no risk” by health professionals cannot pose a “realistic possibility of transmission” under the law. Therefore, and according to the Supreme Court’s 2012 rulings, there should be no legal duty to disclose HIV-positive status to partners before engaging in such activities.

Important things to know about the legal duty to disclose one's HIV-positive status:

- There is no legal distinction between silence and a lie. People living with HIV may face criminal charges for not disclosing their HIV status even if the sexual partner(s) did not inquire about or discuss HIV before having sex.
- There is no legal distinction based on the circumstances of a particular sexual encounter. People may face criminal charges for non-disclosure in relation to any type of relationship (e.g., whether a casual partner, a spouse, a client, etc.) and whatever the reason for the sex (e.g., whether for love, fun, procreation, money, drugs, etc.).
- People living with HIV can be prosecuted for non-disclosure even if they had no intent to harm their partner.
- Criminal charges for HIV non-disclosure can be laid (and have been in numerous cases) even if HIV is not transmitted.

How and when will the law around disclosure be clarified?

The criminal law develops as judges apply it to the specific circumstances of the cases before them. It does not necessarily develop in a predictable or consistent manner. Remaining questions will not be resolved until cases go to court where those specific questions are addressed, and until higher-level courts (e.g., Courts of Appeal, the Supreme Court of Canada) set out clear and binding benchmarks or principles, or until Parliament passes a law that addresses the issue (which is unlikely on this topic).⁷

Can the current interpretation of what constitutes a “realistic possibility of transmission” ever evolve?

The Supreme Court in its 2012 rulings was quite clear that people living with HIV have a legal duty to disclose unless they both use a condom *and* have a low viral load (at least in the context of vaginal sex). But it also indicated that its “general proposition [that both a condom and a low viral load negate a realistic possibility of transmission] d[id] 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* [emphasis added].”⁸ Defence lawyers will continue to explore any possible ways to limit the application of the criminal law.

For example, in November 2013, a trial

Court in Nova Scotia acquitted a young man who had an undetectable viral load even though he had engaged in unprotected vaginal sex. The decision was based on the particular medical evidence brought before the Court in that case.⁹ The medical expert called by the defence testified that the risk of transmission, in that particular case, was approaching zero.¹⁰ While trial court decisions (unlike Court of Appeal or Supreme Court decisions) have limited precedential authority in the Canadian legal system, this decision demonstrates that the interpretation of what constitutes a “realistic possibility of transmission” may still evolve in response to evidence and legal arguments brought before the Courts. (At the time of this writing, the Nova Scotia decision remains exceptional.)¹¹

In order to secure a conviction for aggravated (sexual) assault, the Crown must prove five things *beyond a reasonable doubt*:

1. the identity of the accused, who is aware of his or her HIV-positive status and the potential for sexual transmission;
2. “dishonesty” about HIV status (through lying or silence);
3. a “realistic possibility of HIV transmission”;
4. that the complainant would not have consented to sex if the complainant had known the accused was HIV-positive; and
5. that the sex act “endangered the life of the complainant.”

What charges can a person living with HIV face in relation to non-disclosure?

There are no HIV-specific criminal offences in Canada. People living with HIV who are charged in relation to non-disclosure are charged with existing crimes in the Canadian Criminal Code. The most common charge applied in cases of alleged HIV non-disclosure is *aggravated sexual assault*. A conviction for aggravated sexual assault carries a sentence of jail time (up to a maximum of life imprisonment) and registration on the Sexual Offender Registry.

Other criminal offences that have been applied in cases of alleged HIV non-disclosure include administering a noxious substance, common nuisance, criminal negligence causing bodily harm, sexual assault, aggravated assault, attempted murder, and in one case involving alleged HIV transmission, murder.

Why are people living with HIV charged with aggravated sexual assault if the partner agreed to have sex with them?

Without disclosure of HIV-positive status, the courts have ruled that there is no valid consent to sexual activity when:

- there is a “realistic possibility of HIV transmission”; and
- the individual would not have consented to sex had they known of the sexual partner’s HIV status.

When these conditions are met, HIV non-disclosure is considered a “fraud” that invalidates the consent to have sex, thus transforming otherwise consensual sex into sexual assault in the eyes of the law.

People are charged with *aggravated* sexual assault because the courts have considered that exposing a person to a “realistic possibility of HIV transmission” endangers life.

What about people who do not know their HIV status?

A positive HIV-antibody test, as well as knowledge of what HIV is and how it is transmitted, should be required for a person to be criminally charged in relation to HIV non-disclosure. To the best of our knowledge, everyone charged to date in Canada had been formally diagnosed HIV-positive at the time the charges were laid.

Nevertheless, the Supreme Court of Canada has suggested that people who are aware they *might* be HIV-positive but have not yet been diagnosed would have an obligation to *disclose that possibility* to sexual partners.¹² This means that people could be charged for non-disclosure as soon as they are aware of the possibility of being HIV-positive.

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 through 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 consumption 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.

As a person living with HIV, what should I do if charged for allegedly failing to disclose my HIV-positive status?

If you have concerns about being charged or if you are contacted by police, you should consult a criminal defence lawyer familiar with HIV-related issues *as soon as possible*. If contacted by police or detained, you don’t have to answer the police officers’ questions but you should tell the police basic information such as your name and date of birth. You have

the right to speak with your lawyer in private, without delay. Anyone who is not a Canadian citizen, including permanent residents and people with no immigration status, should also contact an immigration lawyer.

The investigation and trial process can be very difficult and lengthy. An AIDS service organization or prisoner support organization may be able to offer moral support during the investigation and legal proceedings. It is better to talk to a criminal lawyer before sharing your story with anyone else because what you say could possibly be used against you.

The Canadian HIV/AIDS Legal Network (in Canada), HIV & AIDS Legal Clinic Ontario (HALCO) (in Ontario), and COCQ-SIDA (in Quebec) may be able to suggest a lawyer or legal clinic, as well as possible support organizations. The Canadian HIV/AIDS Legal Network also has useful resources for lawyers (see “For more information,” below).

Outside the sexual context, is disclosure legally required under the criminal law?

Casual contacts

HIV is not transmitted through casual contacts. A person living with HIV has no legal duty to disclose HIV-positive status to casual contacts, employers, teachers, co-workers, sports coaches, roommates, family or friends under current Canadian criminal law. The issue of whether there might be a duty to disclose in exceptional circumstances where a person is, or has been exposed, to a certain risk of transmission through casual contacts has, to our knowledge, never been addressed in Court.

Drug use partners

Sharing drug injection equipment (e.g., needles, syringes) is considered a risky activity for transmitting HIV. Therefore, a person living with HIV who engages in such activities may have a legal duty to

disclose, although no Canadian court has yet ruled on this issue.

Pregnancy, childbirth and breastfeeding

Under Canadian criminal law, no criminal charges can be laid for not taking steps to prevent HIV infection during pregnancy. However, an HIV-positive mother who risks transmitting HIV to a child during delivery and after the birth (e.g., by not informing health-care providers attending the birth, refusing preventive medications for the newborn infant, or breastfeeding) could potentially face criminal charges and/or intervention from child protection authorities. While criminal charges in such circumstances seem unlikely and generally not in the best interest of a child, charges have been laid against one woman in Ontario in a case of vertical (i.e., mother-to-child) transmission.¹³

Health-care setting

To our knowledge, there is no reported Canadian court decision establishing a legal duty to disclose under the criminal law with respect to the provision of health care. Medical providers are supposed to use universal precautions to prevent exposure to blood-borne infections in all settings.

Can someone be charged and prosecuted for spitting or biting while knowing they are HIV-positive?

Spitting or biting constitutes an “assault” that can lead to criminal charges. Although HIV cannot be transmitted through saliva, some people living with HIV have seen their HIV-positive status taken into account in criminal prosecutions related to spitting or biting, especially in the sentencing process.¹⁴

Is there any obligation to disclose outside of the criminal law?

Someone’s HIV-positive status is personal and private information and people living with HIV are entitled to control over the decision to disclose their HIV-positive status to others. However, there might be some limited circumstances where a person living with HIV might be obliged to disclose HIV status outside of the criminal law. Here are some examples:

Immigration

Foreign nationals who are applying for permanent residence in Canada, as well as certain foreign nationals applying for temporary residency, will be asked about their medical history on their application forms. Applicants will also be required to undergo a medical examination which includes an HIV test. The HIV-status of many applicants will therefore be known to Citizenship and Immigration Canada. Applicants in the Family Class or Dependent Refugee Class (i.e., those who are sponsored to come to Canada) should be aware that their spouse or partner will be notified by Citizen and Immigration Canada that they have tested positive for HIV.¹⁵

Public health

HIV and AIDS are reportable illnesses in all Canadian provinces and territories, meaning that when an individual tests 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 a province or territory. (If an individual has an anonymous HIV test, the test result and non-identifying information is reported to the public health agency, but not the person’s name. However, once the person seeks medical care for HIV, their name will be reported to public health regardless of the type of test involved.)

Public health authorities are responsible for protecting public health and preventing the transmission of infections including HIV. If a person tests positive for HIV or certain other sexually transmitted infections (STIs), public health — depending on where a person lives — will probably require that the person’s sex partners be contacted. This procedure is known as contact-tracing, partner counselling or partner notification. The powers and procedures of public health authorities vary among the provinces and territories. Although public health and the criminal justice system are distinct, in some circumstances public health records may be used in a criminal investigation or prosecution if subpoenaed by the Court.

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.

For more information

This info sheet 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.

Additional resources by the Canadian HIV/AIDS Legal Network

www.aidslaw.ca/criminallaw

An online resource kit for lawyers and other advocates

Cases of HIV transmission or exposure can be very complex and require specialized knowledge, including of the latest science related to HIV. This resource kit is designed for lawyers involved in HIV-related prosecutions.

People who have been charged, or are concerned they may be under investigation, should bring this resource to the attention of their defence lawyers. www.aidslaw.ca/lawyers-kit

An online resource kit for service providers

The criminalization of HIV non-disclosure raises complex legal and ethical issues for service providers, especially for AIDS Service Organizations (ASOs). This resource kit provides information adapted for service providers including topics such as counselling and record-keeping practices, as well as how to support clients and protect client confidentiality. www.aidslaw.ca/community-kit

Videos

The Legal Network has several short videos on the criminalization of HIV non-disclosure. <http://www.youtube.com/AIDSLAW>

A documentary on women and criminalization

In 2012, the Legal Network co-produced, with Goldelox Productions, a 45-minute documentary titled *Positive Women: Exposing Injustice*, which has been screened all across Canada and internationally. www.positivewomenthemovie.org

Other useful resources on HIV disclosure

HIV disclosure: a legal guide for gay men in Canada (revised 2013)
HIV & AIDS Legal Clinic Ontario (HALCO), Ontario's Gay Men's Sexual Health Alliance (GMSH), CATIE
<http://www.catie.ca/en/practical-guides/hiv-disclosure>

Contact

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References

¹ *R. v. Mabior*, 2012 SCC 47 and *R. v. D.C.*, 2012 SCC 48. In 1998, the Supreme Court of Canada had ruled that people living with HIV have a legal duty to disclose HIV status before having sex that poses a “significant risk” of HIV transmission.

² *R. v. Mabior*, 2012 SCC 47, para 104.

³ Viral load is a measure of the amount of HIV in a person's blood. The goal of antiretroviral therapy is to render viral load undetectable. “Undetectable” does not mean that HIV has been eliminated from the body, but rather that it is below the level of detection via laboratory testing. Lowering the viral load slows disease progression and reduces the risk of HIV transmission. Note that the Supreme Court spoke of “low viral load,” not “undetectable viral load.” What will qualify as “low” remains to be defined in subsequent cases. However, based on the Supreme Court's decision in the *Mabior* case, it seems that it should at least include any viral load below 1500 copies of the virus per millilitre of blood.

⁴ The Supreme Court's decisions only address HIV non-disclosure and vaginal sex, so we cannot say for sure how the test of a “realistic possibility of transmission” will be applied to other sexual acts. The information included here is the best available at the time of writing.

⁵ Since the Supreme Court's 2012 decisions (and at the time of writing), at least two men have been convicted at the trial level by juries for non-disclosure before unprotected anal sex and another man has pled guilty. (It is our understanding that none of these men had an undetectable viral load at the time they had sex.) No court has yet considered whether anal sex with condoms and a low or undetectable viral load meets the “realistic possibility” threshold. Indeed, we are not aware of any people who have been charged for alleged non-disclosure before protected anal sex with a low viral load.

⁶ In August 2013, an Ontario trial-level court ruled that the HIV transmission risk associated with cunnilingus did not meet the level of “a realistic possibility of transmission,” and therefore disclosure prior to oral sex was not legally required. The accused had an undetectable viral load. See *R. v. J.M.*, [2013] O.J. No. 3903 [accused's identity intentionally protected]. In October 2012, a jury acquitted a man who was charged with aggravated sexual assault for not disclosing his HIV-positive status before receiving oral sex. See, “HIV-positive Ottawa man guilty of attempted murder,” CBC News, November 1, 2012.

⁷ For more information on the criminal justice system and the decisions hierarchy among courts, see “Understanding the criminal law in Canada,” at www.aidslaw.ca/community-kit.

⁸ *R. v. Mabior*, 2012 SCC 47, para 95.

⁹ *R. v. J.T.C.*, 2013 NSPC 105.

¹⁰ The trial court did not accept that the Supreme Court of Canada's decision had definitively closed the doors to a different interpretation of what constitutes a “realistic possibility of HIV transmission” based on the medical evidence before the judge in a particular case.

¹¹ Since the Supreme Court's 2012 rulings (and at time of writing), at least two individuals in Ontario have been convicted for having unprotected sex with an undetectable viral load. See, *R. v. J.M.*, [2013] O.J. No. 3903 [accused's identity intentionally protected]. In the second case, the accused pled guilty. See also the Ontario Court of Appeal's description of *Mabior* in *R. v. Felix*, 2013 ONCA 415.

¹² *R. v. Williams*, [2003] 2 SCR 134.

¹³ *R. v. J.I.*, 2006 ONCJ 356 (Ontario Court of Justice).

¹⁴ Cases of spitting or biting usually arise in the context of an altercation between a person living with HIV and a police officer, a prison guard or a paramedic. In a recent case, the Court of Appeal of

Manitoba decided that spitting did not amount to an aggravated assault (i.e., an assault endangering life) because it could not be proven to pose a “realistic possibility of transmission.” However, if the person intended to transmit HIV through spitting (even if that was impossible), they could still be charged and convicted of *attempted* aggravated assault. See, *R. v. Bear*, 2013 MBCA 96. In February 2013, a woman in Quebec was sentenced to 10 months in jail, after pleading guilty to assault on a peace officer and uttering threats. Her awareness of her positive status (both HIV and hepatitis C), as well as the prejudice suffered by the policeman who decided to undergo post-exposure prophylaxis treatment, were both taken into account as aggravating factors in sentencing. *R. v. J.*, 2013 QCCQ 931 [accused’s identity intentionally protected].

¹⁵ For further information on HIV and immigration to Canada, please see the resources available via www.aidslaw.ca/immigration. See, also, Citizenship and Immigration Canada, at www.cic.gc.ca.

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Ce feuillet d'information est également disponible en français.

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