

HIV non-disclosure and Canadian criminal law:

Condom use



The Context

- *In Canada, people living with HIV can be criminally prosecuted and convicted for not disclosing their status before engaging in an activity that represents a “significant risk” of HIV transmission.*
- *The duty to disclose should not apply when sex is protected by a condom or in other circumstance where the risk is similarly reduced, because the risk of HIV transmission is so low that it should not be considered legally “significant.”*
- *Using the criminal law in circumstances where the risk of transmission is almost zero or very low amounts to punishing people for being HIV-positive rather than for exposing an uninformed partner to HIV infection. Such broad use of the criminal law could amount to discrimination against people living with HIV. Moreover, given that a condom is the most reliable tool for preventing sexual transmission of HIV, prosecuting people who use condoms would be counterproductive for HIV prevention.*
- *Although a number of Canadian courts, including at the appellate level, have acknowledged that non-disclosure when sex is protected is not a crime, some people have been charged and convicted even when they used a condom or engaged in an activity where the risks of transmission were similarly reduced (e.g., unprotected oral sex). As a result, people living with HIV cannot be certain about when they have a duty to disclose.*
- *More clarity in the law is urgently needed to guarantee a limited and fair use of the criminal law in cases of HIV exposure and transmission. This should clearly exclude from prosecution cases of sex protected by a condom, as well as other circumstances where the risk of transmission is similarly reduced.*

This document will inform you about:

1. when there is a legal duty to disclose HIV-positive status;
2. the current evidence about the risk of HIV transmission with and without condoms;
3. the current state of the law about condom use and HIV disclosure; and
4. why people who use condoms should not be prosecuted for not disclosing HIV-positive status.

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

In 1998, the Supreme Court of Canada decided that, when there is a “**significant risk of serious bodily harm**” (i.e., of HIV transmission), then not disclosing one’s (known) HIV-positive status to a sexual partner can amount to “fraud” and therefore invalidates a partner’s consent to sex.¹ Because having sex with someone who has not given legally valid consent is a (sexual) assault in law, the Court ruled that a person living with HIV who does not disclose his or her status in circumstances where there is a significant risk of transmitting HIV can be convicted on assault charges even when no transmission occurs.

It was clear from the decision that the Court was *not* imposing a general duty on people living with HIV to disclose their status in every sexual encounter. However, the Court did not clearly define which activities pose a “significant risk” of transmission. Given the critical role of condom use in HIV prevention, whether using a condom removes the duty to disclose is of considerable concern to people living with HIV, service providers and legal advocates alike.

Justice Cory, writing for the majority of the Supreme Court (4 judges of the 7 who heard this case), contemplated that disclosing HIV-positive status *might* not be required when sexual intercourse is protected by a condom. But the majority’s judgment did not make an explicit ruling on this issue because the specific circumstances of the case involved an HIV-positive man having multiple instances of unprotected vaginal sex with two HIV-negative women:

To have intercourse with a person who is HIV-positive will always present risks. Absolutely safe sex may be impossible. **Yet the careful use of condoms *might* be found to so reduce the risk of harm that it could no longer be considered significant so that there might not be either deprivation or risk of deprivation [i.e., harm or risk of harm].** To repeat, in circumstances such as those presented in this case, there must be a significant risk of serious bodily harm before the section [of the *Criminal Code* on assault] can be satisfied. In the absence of those criteria, the duty to disclose will not arise.²

It is important to note that, in a separate minority opinion, two other judges of the Supreme Court explicitly stated that, while having unprotected sex without disclosing (known) HIV-positive status could appropriately be considered the crime of assault, sex with a condom should not.³ As a result, a total of 6 out of the 7 judges of the Supreme Court who heard the case either *suggested* or *explicitly affirmed* that using a condom would remove the duty to disclose.

The consistent use of condoms results in 80 percent reduction in HIV risk of transmission.⁴ In other words, condoms prevent 80 percent of the instances of transmission that would have occurred if a condom had not been used.⁵

Risk of HIV transmission with and without condoms

| | Vaginal sex (HIV+ man) | Vaginal sex (HIV+ woman) | Anal sex (HIV+ insertive partner) | Anal sex (HIV+ receptive partner) |
|---|--|--|--|--|
| Estimated risk of HIV transmission per act without a condom | 1 in 1250 sexual encounters (0.08%) ⁶ | 1 in 2500 sexual encounters (0.04%) ⁷ | <p>Male/female couple 1 in 59 sexual encounters (1.69%)⁸</p> <p>Male/male couple From 1 in 154 to 1 in 122 to 1 in 70 sexual encounters (0.65%⁹ to 0.82%¹⁰ to 1.43%¹¹)</p> | <p>Male/male couple From 1 in 1666 to 1 in 161 sexual encounters (0.06%¹² to 0.62%¹³)</p> |
| Estimated risk of HIV transmission per act with a condom (An 80% reduction in risk was applied to the above estimates. ¹⁴) | 1 in 6250 sexual encounters (0.016%) | 1 in 12 500 sexual encounters (0.008%) | <p>Male/female couple 1 in 296 sexual encounters (0.338%)</p> <p>Male/male couple From 1 in 769 to 1 in 610 to 1 in 350 sexual encounters (0.13% to 0.164% to 0.286%)</p> | <p>Male/male couple From 1 in 8333 to 1 in 806 sexual encounters (0.012% – 0.124%)</p> |

Main source: D. McLay, E. Mykhalovskiy, and G. Betteridge, “Scientific research on the risk of the sexual transmission of HIV infection and on HIV as a chronic manageable infection,” in *HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario*, August 2010, funded by the Ontario HIV Treatment Network

HIV disclosure and condom use: current state of the law

In the years since the Supreme Court of Canada's key 1998 decision, about 130 people have been criminally charged in Canada for allegedly not disclosing their HIV-positive status to sexual partners. In the vast majority of these cases, the allegations relate to instances of unprotected anal or vaginal sex.

Only a few *trial courts* have addressed the issue of whether the "significant risk" threshold set out by the Supreme Court of Canada is met in the case where a condom is used. Most of those that have addressed this issue have ruled in favour of not criminalizing people who use condoms. But, a few people have recently been charged and convicted even in cases where a condom was used, creating uncertainty in the law.

Recent developments at the level of some *appellate courts* have acknowledged that condom use can sufficiently reduce the risk of transmission so that there is no legal duty to disclose. However, given conflicting approaches at the trial level and that only a few provinces' appellate courts have addressed this issue, it is still urgent that the law be clarified, and consistent, across the country.

Trial-level decisions generally favour not criminalizing people who use a condom

A number of lower courts have expressly or implicitly accepted that the Crown must establish *unprotected* anal or vaginal sex in order to reach the threshold of a "significant risk" that triggers a legal duty to disclose (known) HIV-positive status.

For example, in British Columbia, a judge instructed the jury that the accused had a legal duty to disclose his HIV-positive status to his sexual partner in the event of *unprotected sexual intercourse*, but that there was no legal duty to disclose his HIV-positive status if he used condoms at all times.¹⁵ After the Court of Appeal reordered a trial,¹⁶ another B.C. judge acquitted the accused in circumstances where there was only one act of sexual intercourse and there was a doubt as to whether a condom was used or not. According to the judge, "the defendant [was] entitled to the benefit of that doubt."¹⁷ Similarly, a Saskatchewan judge stated his understanding of the law as requiring that he satisfy himself beyond a reasonable doubt that the sex was unprotected in order to convict the accused of assault for not disclosing his HIV-positive status.¹⁸ In an Ontario case, the judge identified unprotected sexual intercourse as an element of the offence that must be proven by the Crown.¹⁹ These cases all indicate that the "significant risk" threshold is not met when a condom is used for penetrative vaginal or anal sex.

However, some people living with HIV have been convicted even though they had used a condom or there was a doubt as to whether a condom had been used or not. In 2008, in a judgment later overturned on appeal, a trial judge in Manitoba ruled that a "significant risk" of transmission existed even when a condom was used, unless the accused *also* had an undetectable viral load.²⁰ Recently in Ontario, a man was convicted, even though he had worn a condom, without any analysis of the risk of HIV transmission.²¹ Another man

was convicted of sexual assault even though the Crown had not proved beyond a reasonable doubt that the sex was unprotected.²² According to the judge, simply the “lack of disclosure that he was HIV-positive vitiated any consent that was obtained on this occasion.”²³

Even if most decisions appear to be in favour of not criminalizing people living with HIV who use condoms, the divergent decisions have created confusion and have made it impossible for people living with HIV to know with any certainty what the law expects from them. Moreover, requiring HIV disclosure even when condoms are used seems to be based on the wrong assumption that sex can never be consensual unless there has been disclosure of HIV-positive status. This is not the legal test set out by the Supreme Court of Canada in its key decision, which requires a “significant” risk of HIV transmission.

Appellate level decisions: encouraging developments but no clear benchmark

While various trial courts have taken sometimes divergent approaches to the legal significance of condom use, a more consistent approach appears to be emerging in recent years from the handful of appellate courts that have addressed this issue.

In an October 2010 decision, the Manitoba Court of Appeal did a thorough evaluation of the scientific and medical evidence before it and concluded that the risk of HIV transmission was sufficiently reduced when the accused man carefully and consistently used a condom or had an undetectable viral load.²⁴ It therefore overturned his convictions on those counts where either of these factors was the case (while upholding his conviction on other counts).

The Court of Appeal recognized that the use of a condom does not need to be perfect but does need to be “proper” to sufficiently reduce the risk of HIV transmission below the threshold of a “significant risk.” The Court provided a list of factors which can guide the assessment of the use of a condom. Such factors include the influence of drugs or alcohol.²⁵ Note that, under the Court’s approach, if a condom breaks, the HIV-positive partner will have a duty to disclose his/her status even if the sexual intercourse is interrupted.²⁶

This decision is a positive development because it looks at current science to apply the *Cuerrier* test today. However, uncertainty in the law will remain as the Court did not make a general statement that condom use would automatically preclude criminal liability. Instead, the Court said that whether or not the accused had a duty to disclose his or her HIV-positive status would depend on the facts and the medical evidence available in each case. For instance, it remains open to the Crown to prove that additional factors increased the risk of transmission in a particular case (e.g., a condom was not carefully used, condom use was inconsistent) or the Crown might otherwise put forward medical evidence showing that there was a “significant risk” of transmission.²⁷ This approach is consistent with other decisions of the Court of Appeal of British Columbia and the Court of Appeal of Quebec,

which refused to set a clear benchmark regarding the impact of condom use on the duty to disclose, thus implying that conviction could be possible even where a condom was used.²⁸

Despite some remaining uncertainties regarding the impact of condom use on the duty to disclose, the decision of the Court of Appeal of Manitoba sets an important precedent: careful and consistent use of condom can preclude criminal liability.

The Crown has applied for leave to appeal to the Supreme Court of Canada. This can be an opportunity for the highest court in Canada to clarify the law by clearly excluding protected sex (as well as other circumstances where the risks of transmission are similarly reduced) from potential prosecution.

Condom use should preclude prosecution for HIV non-disclosure

It is unwarranted and unhelpful to prosecute people for non-disclosure when they have reduced the risk of transmission by using condoms. It is also not consistent with the Supreme Court's ruling in the leading case (*Cuerrier*).

Proving the required elements of the offence: establishing a significant risk of HIV transmission

The Supreme Court of Canada and other courts have clearly stated that the Crown must prove beyond a reasonable doubt a "significant risk" of HIV transmission as a prerequisite of criminal liability for non-disclosure. Some courts have accepted that the per-act risk of HIV transmission associated with penetrative intercourse with a condom *may* or *does* fall below this threshold.

Numerous peer-reviewed scientific studies have established average risk levels for HIV transmission associated with different sexual activities which show that HIV is not easy to transmit.²⁹ Even activities considered risky compared to others carry a relatively low risk of transmission.³⁰ For instance, the per-act risk of HIV transmission in unprotected penetrative vaginal intercourse from a male partner to a female partner is generally considered to be about 1 in 1250 (0.08 percent).³¹

As a result, most instances of unprotected vaginal or anal intercourse involving an HIV-positive person and his/her partner do not result in transmission. The chance of transmission may be further reduced when a person is following an effective regime of antiretroviral (ARV) drugs.³² It is now commonly accepted that effective ARV treatment, which reduces viral load (the amount of HIV, usually measured through blood tests), can dramatically reduce the risks of sexual transmission of HIV. A 2009 systematic review and meta-analysis found a reduction by 92 percent of transmission among male/female couples where the (known) HIV-positive partner was on ARV medication.³³ A recent clinical study involving 1763 couples (the vast majority of whom were heterosexual) in Botswana, Brazil, India, Kenya, Malawi, South Africa, Thailand, the United States and Zimbabwe found that an earlier initiation of ARVs led to a 96 percent reduction in HIV transmission.³⁴

With respect to condom use, peer-reviewed scientific studies demonstrate that using condoms for penetrative sex reduces the risk of HIV transmission by approximately 80 percent per act — in other words, condoms prevent 80 percent of the instances of transmission that would have occurred if a condom had not been used.³⁵ Assuming that the per-act risk of HIV transmission from an HIV-positive man to an HIV-negative woman is about 1 in 1250 (0.08 percent), the risk will fall to about 1 in 6250 (0.016 percent) if a condom is used (see the chart above).

Courts must consider the legal implications of this dramatic lowering of transmission risk: is there still a legally significant risk of HIV transmission if condoms are used? Recall that the majority judgement in *Cuerrier* makes clear that “it cannot be any trivial harm or risk of harm that will satisfy this requirement [i.e., deprivation] where the activity would have been consensual if the consent had not been obtained by fraud.”³⁶

In a few instances outside Canada, courts have also addressed the degree of risk of HIV transmission that could justify imposing criminal liability for non-disclosure. Of particular relevance is a New Zealand trial judgment, citing the Supreme Court of Canada’s judgment in *Cuerrier* among other authorities. In this case, the accused man was charged with the offence of “criminal nuisance” under that country’s *Crimes Act* for receiving oral sex without wearing a condom and engaging in vaginal intercourse with the use of a condom, without disclosing his HIV-positive status to his sexual partner. The trial judge concluded that there was a relatively low risk of transmission when a condom is used for vaginal intercourse. The accused was acquitted on the grounds that he took reasonable precaution and care and thus could not be guilty of criminal nuisance because he had not omitted to discharge a legal duty.³⁷

Finally, concerned about the negative impact of the criminalization of HIV non-disclosure on people living with HIV and public health, UNAIDS has urged governments to reject the use of the criminal law when there is no significant risk of HIV transmission, and more specifically when a condom is used.³⁸

HIV prevention: promoting, rather than undermining, condom use

Every HIV infection is regrettable and every effort should be made to prevent as many new infections as possible and contain the spread of the epidemic. For this, promoting widespread condom use is essential. Since early in the epidemic, condom use has consistently been a central feature of HIV prevention initiatives. Condom effectiveness for STI prevention has been demonstrated in both laboratory and epidemiologic studies. Therefore, people living with HIV are consistently counselled by their health-care providers, public health nurses and AIDS-service organization counsellors to use condoms in order to protect their sexual partners, and themselves, from exposure to HIV and other sexually transmitted infections.

To prosecute for non-disclosure someone who has used condoms is to punish that person despite their having taken the very precautions that are recommended to prevent onward

HIV transmission. By criminalizing non-disclosure even when condoms have been used, the criminal law would be out of line with HIV prevention efforts and public health messaging. This use of the criminal law is illogical in the face of the HIV epidemic, where every incentive should be directed towards encouraging condom use.

While disclosing HIV-positive status to a sexual partner may be ethically desirable, from an HIV-prevention perspective, disclosure is less of a priority than safer sex practices. While some may assume that disclosure leads to safer sex practices or to abstinence from sex, this is not necessarily the case. Research among gay and bisexual men, for example, has demonstrated that disclosure is not necessarily associated with higher rates of protected sex, and the consistent practice of safer sex can proceed without discussion.³⁹ So while the criminal law has focused on disclosure as the primary requirement with the assumption that this will lead (indirectly) to HIV prevention, HIV prevention policy based on evidence would instead prioritize practising safer sex which actually directly prevents transmission.

It is also worth noting that one quarter of people living with HIV in Canada are not aware of their status and therefore are not in a position to disclose to their sexual partners.⁴⁰ At the same time, recent research shows that the period of early infection accounts for approximately half of the cases of onward transmission.⁴¹ Notably, people are less likely to be aware of their HIV-positive status during this initial phase of infection. Therefore, if the goal is HIV prevention, relying on a partner's disclosure to inform decisions regarding sexual practices is ill-advised. The criminal law should provide incentives that are consistent with the best available evidence regarding HIV prevention, not dole out punishment for non-disclosure to persons who have in fact taken the step of getting tested for HIV and taken appropriate measures to prevent onward transmission.

Misinformation fuels stigma

Charging a person with a serious criminal offence — such as aggravated assault or aggravated sexual assault — implies that they have engaged in behaviour which is truly dangerous and/or harmful. Contrary to the evidence that condoms are highly effective at preventing the transmission of HIV and other sexually transmitted infections, prosecuting someone living with HIV who has engaged in protected intercourse incorrectly suggests that for that person to have a sexual life, even with a condom, is socially unacceptable, egregious and harmful behaviour.

Part of what fuels stigma is an exaggerated sense of HIV risk and hence the perceived threat posed by HIV-positive people. Criminal prosecutions that convey misinformation to the public, by targeting activities that do not carry a significant risk of transmission (including safer sex) feed that exaggerated sense of risk. This in turn contributes to further discrimination against people living with HIV in addition to the disproportionate, and disproportionately harsh, application of criminal sanctions. Such treatment infringes the right to non-discrimination protected under the *Canadian Charter of Rights and Freedoms*. It also has adverse effects on the effective diagnosis and treatment of the disease amongst people living with HIV and on the further spread of HIV amongst the population, including impeding disclosure of HIV status and adoption of protective measures.⁴²

Cases involving criminal charges against persons living with HIV garner considerable media attention. This media coverage tends to frame disclosure issues in terms of “innocent victims” and “AIDS criminals”, simplifying the complex and difficult issue of disclosure of HIV status.⁴³ Consequently, this is likely to reinforce stigma and discrimination against people living with HIV.⁴⁴

HIV is marked by continuing stigma. Not recognizing that condom use lowers the risk of HIV transmission below the threshold of “significant risk” has the potential to spread further misinformation, fuel further stigma and further undermine effective HIV prevention. Surely, these are not acceptable outcomes.

The information in this document is not legal advice and should not be relied upon as such. If you need legal advice, please contact a lawyer.

Copies of this document may be found at www.aidslaw.ca/criminallaw.

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References

¹ *R. v. Cuerrier* [1998] 2 SCR 371, para. 128.

² *Cuerrier*, para 129 [emphasis added].

³ *Ibid.*, *Cuerrier*, paras. 73–74.

⁴ S. C. Weller and K. Davis-Beaty, “Condom effectiveness in reducing heterosexual HIV transmission (Review),” *Cochrane Database of Systematic Reviews* 1 (2002) No. CD003255, doi: 10.1002/14651858.CD003255.

⁵ See Section 3 of E. Mykhalovskiy, G. Betteridge, and D. McLay, *HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario*, August 2010, funded by the Ontario HIV Treatment Network, p. 32.

⁶ M.C. Boily, et al., “Heterosexual risk of HIV-1 infection per sexual act: systematic review and meta-analysis of observational studies,” *The Lancet Infectious Diseases* 9, 2 (2009): pp.118–129. This estimate results from studies in high-income countries.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ F. Jin, et al., “Per-contact probability of HIV transmission in homosexual men in Sydney in the era of HAART,” *AIDS* 24(6) (2010): pp. 907–13. Figures result from a prospective, cohort study in Australia. The lower figure is for withdrawal before ejaculation and the higher figure for ejaculation in the rectum. See also, R. Baggaley, R. White, M.C. Boily, “HIV transmission risk through anal intercourse: systematic review, meta-analysis and implications for HIV prevention,” *International Journal of Epidemiology* 39(4) (2010): pp. 1048–63, suggesting a 1.4 percent average estimate per-act and per-partner risk of transmission for unprotected anal sex for heterosexuals and MSM.

¹⁰ E. Vittinghoff, et al., “Per-contact risk of human immunodeficiency virus transmission between male sexual partners,” *American Journal of Epidemiology* 150, 3 (1999): pp. 306–311. Figures results from a prospective, cohort study in the United States.

¹¹ F. Jin et al., *supra*.

¹² Vittinghoff, et al., *supra*.

¹³ F. Jin, et al., *supra*.

- ¹⁴ S.C. Weller and K. Davis-Beatty, *supra*.
- ¹⁵ *R. v. Nduwayo*, 2006 BCSC 1972 at paras. 7–8.
- ¹⁶ *R. v. Nduwayo*, 2008 BCCA 255. The decision of the Court of Appeal did not concern the interpretation of the notion of “significant risk.”
- ¹⁷ *R. v. Nduwayo*, 2010 BCSC 1277 at para. 146
- ¹⁸ *R. v. Smith* [2007] S.J. No. 116 (Sask. P.C.) (QL) at para. 59.
- ¹⁹ *R. v. Imona-Russel*, reasons delivered orally February 23, 2009 (Ont. SCJ); see also in Nova Scotia, *R. v. Edwards*, 2001 NSSC 80; in Québec *R. c. D.C.*, 2008 QCCQ 629; in Ontario *R. v. Agnatuk-Mercier* [2001] OJ 4729 (QL).
- ²⁰ *R. v. Mabior*, 2008 MBQB 201. The Manitoba Court of Appeal overturned this conviction on the basis that the careful use of a condom can sufficiently reduce the risk of HIV transmission so that there is no legal duty to disclose HIV-positive status: *R. v. Mabior*, 2010 MBCA 93.
- ²¹ *R. v. Mekonnen*, 2009 ONCJ 643.
- ²² *R. v. Felix*, 2010 ONCJ 322.
- ²³ *Ibid.*, para. 72.
- ²⁴ *R. v. Mabior*, 2010 MBCA 93. According to the evidence before the Court, the appropriate use of a condom reduces the risk of HIV transmission by 80 percent. As a result, the risk of transmission per act falls into the realm of 0.01 percent (1 in 10 000) to 0.052 percent (approximately 1 in 2000): see para. 89.
- ²⁵ *Ibid.* para. 91–92 and 151.
- ²⁶ *Ibid.*, para. 121.
- ²⁷ See *Ibid.*, paras. 90–92.
- ²⁸ *R. v. JT*, 2008 BCCA 463; *R. v. Wright*, 2009 BCCA 514. *R. c. D.C.*, 2010 QCCA 2289.
- ²⁹ See, for example, M.C. Boily, et al., “Heterosexual risk of HIV-1 infection per sexual act: systematic review and meta-analysis of observational studies,” *The Lancet Infectious Diseases* 9, 2 (2009): pp.118–129.
- ³⁰ D. McLay, E. Mykhalovskiy, and G. Betteridge, “Scientific research on the risk of the sexual transmission of HIV infection and on HIV as a chronic manageable infection,” in E. Mykhalovskiy, G. Betteridge, and D. McLay, *HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario*, Section 3, p.26, August 2010, funded by the Ontario HIV Treatment Network.
- ³¹ M.C. Boily, et al., *supra*.
- ³² S. Attia, et al., “Sexual transmission of HIV according to viral load and antiretroviral therapy: systematic review and meta-analysis,” *AIDS* 23 (2009): pp. 1397–1404. For more information on the impact of treatment on HIV risks of transmission, please see the brief, Canadian HIV/AIDS Legal Network, *HIV non-disclosure and Canadian criminal law: antiretroviral treatment and viral load*, 2011.
- ³³ *Ibid.* D. McLay, E. Mykhalovskiy, and G. Betteridge, “Scientific research on the risk of the sexual transmission of HIV infection,” *supra*, p. 32.
- ³⁴ M.H. Cohen, et al., “Prevention of HIV-1 Infection with Early Antiretroviral Therapy,” *The New England Journal of Medicine* 365(2011): pp. 493–505.
- ³⁵ *Supra*, note 34.
- ³⁶ *Cuerrier*, para. 128.
- ³⁷ *New Zealand Police v. Dalley* [2005] 22 C.R.N.Z. 495.
- ³⁸ UNAIDS, *Policy brief: criminalization of HIV transmission*, August 2008.
- ³⁹ K. Siegel, H.M. Lekas, and Eric W. Schrimshaw, “Serostatus disclosure to sexual partners by HIV-infected women before and after the advent of haart,” *Women and Health*, Vol. 41(4) 2005, pp. 63–85, citing J.M. Simoni & D.W. Pantalone, “HIV disclosure and safer sex,” in S. Kalichman (ed.), *Positive prevention: Reducing HIV transmission among people with HIV/AIDS* (New York: Kluwer Academic/Plenum: 2005), pp. 65–98.
- ⁴⁰ At the end of 2008, an estimated 26 percent of the 65 000 individuals living with HIV in Canada were unaware of their infection. See Public Health Agency of Canada, *Summary: Estimates of HIV Prevalence and Incidence in Canada*, 2008, at www.phac-aspc.gc.ca.
- ⁴¹ B.G. Brenner, et al., “High rates of forward transmission events after acute/early HIV-1 infection,” *The Journal of Infectious Disease* 195 (2007): pp. 951–959. M. Wawer, et al., “Rates of HIV-1 Transmission per Coital Act, by stage of HIV -1, Infection in Rakai, Uganda,” *Journal of Infectious Diseases* 191(9) (2005): pp. 1403–1409.
- ⁴² See M. Chesney and A. Smith, “Critical delays in HIV testing and care: The potential role of stigma,” *American Behavioral Scientist* 42(7) (1999): pp. 1162–1174; A.C. Gielen, et al. “Women’s disclosure of

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⁴³ See, for example, A. Larcher and A. Symington, *Criminals and Victims? The Impact of the Criminalization of HIV Non-Disclosure on African, Caribbean and Black Communities in Ontario* (Toronto: African and Caribbean Council on HIV/AIDS in Ontario, 2010), p. 21–22, available at <http://www.accho.ca/index.aspx?page=resources>.

⁴⁴ A. Persson and C. Newman, “Making Monsters: heterosexuality, crime and race in recent Western media coverage of HIV,” 30(4) (2008), *Sociology of Health and Illness*, p. 641.