

APRIL 2019

THE **CRIMINALIZATION** OF
HIV
NON-DISCLOSURE
IN CANADA

CURRENT STATUS + THE NEED FOR **CHANGE**

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

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The Canadian HIV/AIDS Legal Network promotes the human rights of people living with, at risk of or affected by HIV or AIDS, in Canada and internationally, through research and analysis, litigation and other advocacy, public education and community mobilization.

Le Réseau juridique canadien VIH/sida fait valoir les droits humains des personnes vivant avec le VIH ou le sida et de celles qui sont à risque ou affectées autrement, au Canada et dans le monde, à l'aide de recherches et d'analyses, d'actions en contentieux et d'autres formes de plaidoyer, d'éducation du public et de mobilisation communautaire.

A legal obligation to disclose HIV-positive status to a sexual partner in some circumstances

There is no criminal statute in Canada that explicitly imposes an obligation to disclose HIV-positive status before sex. Instead, the obligation to disclose in some circumstances has been established by the courts.

The Supreme Court of Canada has ruled 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.”¹ In 2012, the Court added that such a risk exists when there is a “**realistic possibility of transmission of HIV.**”²

If a person engages in a sexual activity that, in the eyes of the courts, carries a “realistic possibility of HIV transmission,” without disclosing first, they could be charged with a serious crime. The charge most commonly laid is *aggravated sexual assault*.

The law in Canada is particularly severe. A person can be convicted for not disclosing even if they had no intent to cause harm and HIV was not transmitted. The interpretation by police, prosecutors and courts of what amounts to a “realistic possibility” of HIV transmission has led to charges, prosecutions and convictions in cases where there was little or no risk of transmission.

What does “realistic possibility” of transmission mean? When is there no legal obligation to disclose?

There is no blanket obligation to disclose. Rather, as explained above, there is a duty to disclose if there is a “realistic possibility” of HIV transmission. So a key question is: what activities do prosecutors and courts think pose such a possibility? The interpretation and application of this standard has given rise to some serious concerns with the broad scope of HIV criminalization in Canada.

Sex with a condom and a “low” viral load

According to the Supreme Court of Canada’s decision in 2012, there is **no obligation to disclose** HIV-positive status when having vaginal or anal sex if a **condom** is used **and** the HIV-positive partner has a “**low**” viral load (defined as less than 1500 copies/ml). The Court concluded that, in such circumstances, there is no realistic possibility of transmission.

This combination of two factors was the only circumstance in which the Supreme Court was prepared, based on the evidence before it in that case, to say clearly that there was no duty to disclose. But the Court did say there might be other circumstances in which there would be no duty to disclose. The Court said that its ruling “*does 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.*”³

Despite this statement, the decision appeared to leave people open to prosecutions in a range of circumstances, and has in some cases been interpreted as always requiring both condom use and a low viral load in order to avoid being prosecuted. The decision was widely criticized for being unfair and at odds with scientific evidence about HIV and its transmission. It prompted leading Canadian scientists to speak out against the over-reach of the criminal law.⁴ Since the Supreme Court’s decision in 2012, several people have indeed been charged for not disclosing their HIV-positive status before sex *even if they* used a condom (but had a viral load above “low”), while others who did not use a condom have been prosecuted even though they had a low or undetectable viral load. Some of those people have been convicted.

But there have also been more recent, encouraging developments. The law is evolving as a growing number of judges, policymakers and Crown prosecutors

- understand that having a suppressed viral load prevents sexual transmission; and
- recognize that there is negligible or no possibility of HIV transmission in other circumstances as well — i.e. not just the case, as was recognized in the *Mabior* decision, where there is **both** a condom used **and** the person with HIV has a low viral load.

The law is still evolving in some areas, as are prosecutorial policies and court decisions. Some incremental positive changes are coming about as a result of community advocacy, but more change is needed. In the meantime, the continued uncertainty in the law is a challenge for people living with HIV who are trying to navigate their legal obligation to disclose.

Viral load

Viral load is a measure of the amount of HIV in a person's blood (usually expressed as copies of the virus per milliliter of blood). Having a reduced viral load improves health, and decreases — and can even eliminate — the risk of HIV transmission. With effective treatment, viral load drops to levels that are “undetectable.” Based on the most recent medical evidence, there is no possibility of HIV transmission through sex by someone with an “undetectable” (or “suppressed”) viral load.⁵

This has also been summarized in the “Undetectable = Untransmittable” consensus statement.⁶ This scientific reality was recognized in 2017 by the Council of Chief Medical Officers of Health from across Canada,⁷ and on World AIDS Day 2018, the Canadian government endorsed “U=U.”⁸

For the purpose of the criminal law in Canada, a “low” viral load has been defined as a viral load below 1500 copies/ml⁹ and an “undetectable” (or “suppressed”) viral load has been defined as a viral load below 200 copies/ml.¹⁰

Recent legal and policy developments

As noted above, the Supreme Court of Canada decided in 2012 that there is no “realistic possibility” of transmission — and therefore no obligation to disclose HIV-positive status — when having vaginal or anal sex if a **condom** is used **and** the HIV-positive partner has a **low viral load** (which the Court considered meant less than 1500 copies/ml). This leaves the scope of HIV criminalization very wide, and advocates have argued, in court cases and to Attorneys General, that there are other circumstances in which there should be no prosecution. There have been mixed results, and the law and policy is still developing.

Federal and provincial developments in prosecutorial policy

On World AIDS Day 2016, the federal Attorney General recognized the “problem of overcriminalization.”¹¹ A year later, Justice Canada released a report entitled *Criminal Justice System's Response to the Non-Disclosure of HIV*, which includes important recommendations to limit prosecutions against people living with HIV.¹² Then, in December 2018, based on Justice Canada's report, the

federal Attorney General published a binding directive to the Public Prosecution Service of Canada (PPSC) regarding prosecutions of HIV non-disclosure.¹³ The directive reads as follows:

- The Director [of Public Prosecutions] **shall not** prosecute HIV non-disclosure cases where the person living with HIV has maintained a **suppressed viral load**, i.e. under 200 copies per ml of blood, because there is no realistic possibility of transmission.
- The Director **shall generally not** prosecute HIV non-disclosure cases where the person has not maintained a suppressed viral load but **used condoms** or engaged only in **oral sex** or was taking **treatment** as prescribed, unless other risk factors are present, because there is likely no realistic possibility of transmission.
- The Director shall prosecute HIV non-disclosure cases using non-sexual offences, instead of sexual offences, where non-sexual offences more appropriately reflect the wrongdoing committed, such as cases involving lower levels of blameworthiness.
- The Director shall consider whether public health authorities have provided services to a person living with HIV who has not disclosed their HIV status prior to sexual activity when determining whether it is in the public interest to pursue a prosecution against that person.

The federal directive only governs federal Crown attorneys; these attorneys only handle *Criminal Code* prosecutions in the three territories (Yukon, Northwest Territories and Nunavut). In the ten provinces, it is the provincial Attorneys General and their designated Crown prosecutors who are responsible for prosecuting *Criminal Code* offences. Therefore, to limit unjust prosecutions in other parts of the country, similar directives or guidelines must be issued in each province. While prosecutorial policies, guidelines or directives cannot change the underlying law, they can influence prosecution practices and reduce the number of new cases.

As this time, only two provinces, Ontario¹⁴ and British Columbia,¹⁵ have a formal policy in place limiting in any way the prosecution of alleged HIV non-disclosure. In Alberta, the Assistant Deputy Minister of Justice responsible for the provincial prosecution service has articulated its position in a letter to community advocates, and has said that provincial prosecutors have been “advised” of this position, but there is no official guideline or directive in place.¹⁶

Sex with a “suppressed” viral load

At this time, federal Crown prosecutors and provincial prosecutors in the territories, and in Ontario, British Columbia and Alberta operate under some policy, directive or instruction to not prosecute people who had maintained a suppressed viral load (i.e. under 200 copies/ml) at the time they had sex, *whether or not a condom was used*. There are some variations in how this position is worded.

- The **federal directive applicable in the territories** does not specify that the person living with HIV had to be on treatment at the time they had sex. Also, it does not specify a minimum period of time that a person must have a suppressed viral load for it to be considered “maintained.”
- In **Alberta** and **B.C.**, instructions and policy state that there will be no prosecution where someone living with HIV is taking treatment and has maintained a suppressed viral load on consecutive viral load tests taken “four to six months apart.”
- **Ontario’s** policy states that there will be no prosecution when someone living with HIV is taking treatment and has maintained a suppressed viral load for six months.

Refraining from prosecution against someone who has an undetectable (or “suppressed”) viral load is not only consistent with scientific evidence but has also been emerging in some court decisions and the practice of Crown prosecutors, even in the absence of clearly stated policy.

In recent years, several people who had not used condoms but who had an undetectable viral load at the time they had sex — and therefore could not transmit HIV — were acquitted by courts, while others saw their charges dropped by prosecutors, in Nova Scotia, Quebec, Ontario, British Columbia and the Northwest Territories.¹⁷ Scientific evidence in these cases demonstrated that the risk of transmission was not “significant,” and courts concluded there was no “realistic possibility of transmission.” However, there have been a few cases to the contrary, and there has not yet been a Supreme Court of Canada ruling that would make it clear across the country that a suppressed viral load is sufficient to avoid prosecution.

While it is not yet definitely established policy or law in every jurisdiction, given the available science, the emerging situation is that someone with an undetectable (or “suppressed”) viral load is unlikely to be prosecuted, and unlikely to be convicted, for HIV non-disclosure in Canada, *whether or not they used a condom*.

Sex with a condom (and an unsuppressed viral load)

Scientific experts have confirmed that HIV cannot be transmitted when a condom has been used correctly; HIV does not pass through an intact latex or polyurethane condom.¹⁸ However, the law on this issue is still evolving, as are prosecutorial policy and practice.

- In the three **territories**, according to the federal directive, even if a person had an unsuppressed viral load, there “generally” should be no prosecution against them if they used condoms, “unless other risk factors are present,” because “there is likely no realistic possibility of transmission.”¹⁹
- In **Ontario** and in **Alberta**, provincial policy and instructions for prosecutors are silent on the question of condom use. Based on correspondence and discussions with the Ontario Ministry of the Attorney General, someone living with HIV who uses condoms is still at risk of prosecution if they have a viral load that is higher than “low” (i.e. 1500 copies/ml).²⁰
- Similarly, in **British Columbia**, the BC Prosecution Service (BCPS) has refused to say clearly that people who use condoms will not be prosecuted. Instead, the policy adopted by the BCPS in April 2019 says that in a case where the person living with HIV “correctly used a condom during a single act of vaginal or anal sex and HIV was not transmitted,” this is a “factor” that “may weigh against prosecution.” There is no certainty for people living with HIV in B.C. at this time.

There are conflicting court decisions on this issue. In Nova Scotia, courts have found that, regardless of the HIV-positive partner’s viral load, sex with a condom does not pose a “realistic possibility of HIV transmission.”²¹ But in Ontario, a young man (who did not have a low viral load) was convicted for not disclosing his HIV-positive status before sex even though he used a condom.²² The decision is currently being appealed and is likely to be decided in 2019.

The law, and the likelihood of prosecution for not disclosing HIV-positive status if a condom is used, is still unsettled.

Sex with a low viral load (and no condom)

When a person living with HIV has a *low*, but still detectable, viral load — i.e. between 200 and 1500 copies/ml — at the time they had sex, the possibility of HIV transmission through condomless sex ranges from negligible to none, according to the best available scientific evidence.²³

No directive, policy or instructions currently in place in any jurisdiction in Canada deals directly with this situation, so a person living with HIV in this circumstance remains at risk of prosecution. Note, however, that the federal directive applicable in the **territories** does say that if the person was “taking treatment as prescribed” at the time of their sexual encounter, they “generally” should not be prosecuted for not disclosing their HIV status, “unless other risk factors are present,” because “there is likely no realistic possibility of transmission” as treatment reduces viral load.²⁴

In at least one court case in Nova Scotia, a person was acquitted based on medical expert evidence that the risk of transmission associated with a low viral load (under 1500 copies/ml) was “negligible” or “extremely unlikely,” even in the absence of a condom.²⁵ The trial decision on this point was upheld on appeal.²⁶ However, at the time of this writing, at least one individual is being prosecuted in Ontario for not disclosing their HIV-positive status before sex (without a condom) even though they had a low viral load (under 1500 copies/ml).

The law, and the likelihood of prosecution for not disclosing HIV-positive status if there is a low viral load (but no condom), is still unsettled.

Oral sex

According to the best available scientific evidence, the possibility of HIV transmission during a single act of oral sex ranges from negligible (in very unusual and extreme circumstances) to none.²⁷

- In the **territories**, according to the federal directive, there should “generally” be no prosecution against someone who does not disclose their status simply for engaging in oral sex “unless other risk factors are present,” because “there is likely no realistic possibility of transmission.”²⁸
- In **Ontario** and in **Alberta**, prosecutorial policy and instructions do not say anything about oral sex. Based on correspondence and discussions with the Ontario Ministry of the Attorney General, people living with HIV (who do not have a suppressed viral load) are still at risk of prosecutions for engaging in oral sex without disclosing their status.²⁹
- In **British Columbia**, the policy says that there is “no realistic possibility of transmission,” and therefore there should be no prosecution for not disclosing HIV-positive status, in cases where the partners “only engaged in oral sex, and no other risk factors were present.”

It is also worth noting that people have been charged for oral sex alone, without disclosing, but such prosecutions are rare. People are usually charged with oral sex in combination with other sexual acts such as vaginal or anal sex. In at least one case in Ontario in 2013, a lower court accepted that oral sex does not amount to a “realistic possibility of transmission.”³⁰

Key points

- There is an obligation to disclose HIV-positive status to a sexual partner before activity that poses a “**realistic possibility**” of HIV transmission — and prosecutors and courts effectively determine what this means.
- According to the Supreme Court of Canada, there is no obligation in Canadian criminal law to disclose HIV-positive status when having vaginal or anal sex if a condom is used and the HIV-positive partner has a “low” viral load (under 1500 copies/ml).
- Whether a person might be prosecuted and convicted for not disclosing their HIV-positive status in other circumstances is still evolving, and depends on court decisions and on directives and guidelines governing prosecutors (where they exist).
- A **federal directive** limits prosecutions in Canada’s three **territories**. Formal policy for provincial Crown prosecutors has been adopted in **Ontario** and **British Columbia**. An advisory has been given to provincial prosecutors in **Alberta**.
- **Suppressed viral load:** In **Ontario**, **British Columbia** and **Alberta** there should be no prosecution against someone with HIV for alleged HIV non-disclosure if they were under treatment and had a “suppressed viral load” (under 200 copies/ml) at the time they had sex, regardless of whether a condom was used. In the **territories**, the federal directive does not specify that the person living with HIV must be on treatment; it simply says that having a suppressed viral load suffices. There is some variation across jurisdictions about how long viral load must be suppressed before the sexual activity to avoid prosecution.
- **Condom use:** In the **territories**, there should “generally” be no prosecution for not disclosing if a condom was used (unless “other risk factors” were present), regardless of the person’s viral load. In **British Columbia**, using a condom “is a factor that may weigh against prosecuting someone for alleged HIV non-disclosure.”

- Oral sex: Regardless of a person's viral load, in **British Columbia** there should be no prosecution if a person only engaged in oral sex (if no "other risk factors" were present), while in the **territories**, there should "generally" be no prosecution (unless "other risk factors" were present).
- The possibility of HIV transmission during a single act of vaginal or anal sex when the HIV-positive partner has a low viral load ranges from negligible to none.
- There is no possibility of HIV transmission through saliva, even when it contains small quantities of blood.

The science of HIV in the context of the criminal law

Concerned that prosecutions are not always guided by the best available scientific evidence, including about HIV transmission, 20 of the world's leading HIV scientists published the *Expert Consensus Statement on the science of HIV in the context of the criminal law* in the *Journal of the International AIDS Society* in 2018 to address the use of HIV science within the criminal justice system.³¹ This statement was endorsed by more than 70 other leading HIV experts from around the world, as well as the International AIDS Society (IAS), the International Association of Providers of AIDS Care (IAPAC) and the Joint United Nations Programme on HIV/AIDS (UNAIDS).

The statement was written to assist scientific experts considering individual criminal cases, and to encourage governments and those working in the criminal justice system to make all efforts to ensure a correct and complete understanding of current scientific knowledge informs any application of the criminal law in cases related to HIV.

Some of the expert opinions contained in the statement can be described as follows:

- The possibility of HIV transmission during a single act of vaginal or anal sex ranges from low to none. (See the full statement for important factors affecting the possibility of transmission.)
- The possibility of HIV transmission during a single act of oral sex ranges from negligible (in very unusual and extreme circumstances) to none. (See the full statement for important factors affecting the possibility of transmission.)
- There is no possibility of HIV transmission during a single act of vaginal, anal or oral sex where an intact condom has been used correctly.
- There is no possibility of HIV transmission during a single act of vaginal, anal or oral sex when the HIV-positive partner has an undetectable viral load.

- The possibility of HIV transmission from biting ranges from negligible (in very unusual and extreme circumstances) to none.
- Modern antiretroviral therapies have improved the life expectancy of most people living with HIV who have regular access to them, to the point that their life expectancy is similar to that of HIV-negative people, thereby transforming HIV infection into a chronic manageable health condition.³²
- Phylogenetic analysis — which assesses the degree to which the virus in one person is genetically related to the virus in another person — can be compatible with the claim that one person has transmitted HIV to another person, but it cannot conclusively prove this. Importantly, phylogenetic results can exonerate a defendant when the results rule out the defendant as the source of a complainant's HIV infection.

Why are people charged with aggravated sexual assault for consensual sex?

As noted above, the charge most commonly laid against someone accused of not disclosing their HIV-positive status is *aggravated sexual assault*.

The argument is that if there is a "realistic possibility of HIV transmission," then not disclosing your HIV-positive status amounts to a "fraud." Under the *Criminal Code* (section 265), consent to physical contact (such as sex) is not valid if it is obtained by fraud. Therefore, the otherwise consensual sex is turned into a sexual assault under the law, treated the same as forced or coerced sex. The charge is then usually elevated to an *aggravated* sexual assault (section 273), as the courts have considered that exposing a person to the possibility of acquiring HIV "endangers life."

Aggravated sexual assault is one of the most serious offences in the *Criminal Code*. It carries a maximum penalty of life imprisonment and mandatory lifetime registration as a sex offender.³³ Conviction for this offence also means that any person who is not a Canadian citizen — including permanent residents who may have lived for many years or their whole life in Canada — faces deportation.

People living with HIV and other advocates, including women's rights advocates, have criticized the problematic use of the law of sexual assault to deal with cases of alleged HIV non-disclosure. Such misuse of the law of sexual assault harms people living with HIV and undermines the integrity of the law of sexual assault as a tool to address sexual violence.³⁴

Why is HIV criminalization harmful?

- People living with HIV continue to be criminally charged, prosecuted and imprisoned in absence of intent to transmit or actual transmission. In some cases, people have been charged and prosecuted for not disclosing their status before sex that poses minimal or no risk of transmission.
- No other medical condition has been criminalized to that extent; the law profoundly stigmatizes people living with HIV. In particular, the misuse of the law of sexual assault to deal with HIV non-disclosure has severe implications for people living with HIV.
- The criminalization of HIV non-disclosure disproportionately affects marginalized people living with HIV including racialized people (particularly Black and Indigenous people), migrants and women (including Indigenous women and women experiencing intimate partner violence). Gay men represent the largest proportion of people living with HIV in Canada, and the number of cases against gay men has also increased since the Supreme Court's 2012 decision in *Mabior*.
- The criminalization of HIV is at odds with public health objectives. Fear of prosecution can deter people, especially those from communities particularly affected by HIV, from getting tested and knowing their status. HIV criminalization can also deter access to HIV care and treatment by undermining counselling and the relationship between people living with HIV and health-care professionals and other service providers, because their records can be used as evidence in court and professionals can be compelled to testify against their patients or others to whom they provide support services.³⁵
- The criminalization of HIV non-disclosure has resulted in serious invasions of privacy (e.g. use of medical records in criminal proceedings, people's HIV status made public in the media including through police press releases) and bodily integrity (e.g. forced HIV treatment upon pain of prosecution).

International guidance on HIV and the criminal law

Because of the numerous human rights and public health concerns associated with HIV-related prosecutions, numerous bodies and experts have all urged governments to limit the use of the criminal law to cases of intentional transmission of HIV (i.e. where a person knows they have HIV, acts with the intention to transmit HIV, and does in fact transmit HIV). Such a recommendation has been made by, among others, the Joint United Nations Programme on HIV/ AIDS (UNAIDS) and the United Nations Development Programme (UNDP),³⁶ the UN Special Rapporteur on the right to health,³⁷ the Global Commission on HIV and the Law,³⁸ the UN Committee on the Elimination of Discrimination against Women (CEDAW),³⁹ and leading Canadian feminist legal academics. Moreover, experts recommend that no prosecutions take place when the person used a condom or had a low viral load or just had oral sex.

"The Committee welcomes that [Canada] intends to review the use and application of criminal norms to certain HIV/AIDS issues. This review will include the concerning application of harsh criminal sanctions (aggravated sexual assault) to women for non-disclosing their HIV status to sexual partners, even when the transmission is not intentional, when there is no transmission or when the risk of transmission is minimal. The Committee recommends that [Canada] limit the application of criminal law provisions to cases of intentional transmission of HIV/AIDS, as recommended by international public health standards."⁴⁰

HIV prosecutions in Canada

- At least 197 people have been charged for alleged HIV non-disclosure in Canada since 1989.
- From 2004 to 2014, there were roughly 10–15 cases per year. There were at least 6–8 cases each year between 2015 and 2017, and at least 5 cases in 2018.
- Between 1989 and 2016, more than half of all cases in Canada occurred in Ontario. There were no new prosecutions in Ontario in 2018. In 2017 and 2018, more than a third of known new cases occurred in Quebec.
- Between 2012 and 2016, almost half of all people charged for whom race is known were Black men.
- Indigenous women in Canada account for a large proportion of women charged. Of the at least 19 women who faced charges related to HIV non-disclosure, we know the race/ethnicity of 13 women. To date, at least 38 percent (5 of 13) of women charged are Indigenous.
- The proportion of men charged who are gay or bisexual has increased since the 2012 Supreme Court decision. In 2017 and 2018, at least 3 of the 10 people charged, and for whom sexual orientation is known, are gay men.
- In 2017 and 2018, at least 5 of the 13 known people charged had a low or undetectable viral load. At the time of this writing, charges have been dropped in 4 of these 5 cases.⁴¹

Community mobilization for change: the Canadian Coalition to Reform HIV Criminalization

In October 2016, a national coalition of people living with HIV, community organizations, lawyers, researchers and others was formed to progressively reform discriminatory and unjust criminal and public health laws and practices that criminalize and regulate people living with HIV in relation to HIV exposure, transmission and non-disclosure in Canada. The Canadian Coalition to Reform HIV Criminalization (CCRHC) includes individuals with lived experience of HIV criminalization, advocates and organizations from across the country.

In 2017, the CCRHC released a national *Community Consensus Statement* on ending unjust HIV criminalization.⁴² Now endorsed by more than 170 community organizations from every part of Canada, and including not only HIV organizations but many others, the statement calls for criminal prosecutions to be limited to cases of actual, intentional transmission of HIV, in accordance with international guidance.

The statement also includes concrete calls for action to limit the unjust use of the criminal law against people living with HIV. In particular, it calls on:

- federal and provincial Attorneys General to develop **sound prosecutorial guidelines** to preclude unjust HIV prosecutions;
- the federal government to **reform the *Criminal Code*** to limit the unjust use of the criminal law against people living with HIV, including by removing HIV non-disclosure from the reach of sexual assault laws, and ensuring that convictions related to HIV do not affect immigration status; and
- all governments to support the development of **resources and training** for judges, police, Crown prosecutors and prison staff to address misinformation, fear and stigma related to HIV.

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.

Get legal advice

If the police contact you or you are worried you might be at risk of criminal charges, you should talk to a lawyer as soon as possible. For those based in Ontario, you can contact the HIV & AIDS Legal Clinic Ontario (HALCO, www.halco.org, tel 416-340-7790 or toll-free in Ontario at 1-888-705-8889, email: talklaw@halco.org). In Quebec, you can contact COCQ-SIDA (www.cocqsida.com, tel 514-844-2477 [poste 0] or toll-free in Quebec at 1-866-535-0481, info@cocqsida.com). Elsewhere, you can also contact the Canadian HIV/AIDS Legal Network (www.aidslaw.ca, tel 416-595-1666, email: info@aidslaw.ca), as we may be able to refer you to a suitable lawyer.

Working with defence lawyers

The Legal Network, HALCO and COCQ-SIDA all have extensive experience working with defence lawyers. They can assist by providing you and your lawyer with information on existing court decisions and policies, as well as the science of HIV. Bringing expert scientific evidence before a court on the risks associated with HIV transmission has been essential to the defence in many cases — and its absence has led to convictions that might well have been avoided.

The Legal Network also maintains an online, bilingual toolkit for lawyers and other advocates responding to HIV non-disclosure prosecutions: www.aidslaw.ca/lawyers-kit.

For more information

This document 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** are online at www.aidslaw.ca/criminallaw. These include an *online resource kit for lawyers and other advocates* at www.aidslaw.ca/lawyers-kit.

Additional information is also available on the website of the **Canadian Coalition to Reform HIV Criminalization** at www.HIVcriminalization.ca.

Additional materials, including a toolkit for advocacy on HIV criminalization, are also available on the website of **HIV JUSTICE WORLDWIDE** at:

www.HIVjusticeworldwide.org.

- ¹ *R. v. Cuerrier*, [1998] 2 SCR 371.
- ² *R. v. Mabior*, 2012 SCC 47. In 2018, the Court of Appeal of Nova Scotia confirmed that psychological harm alone resulting from a partner's non-disclosure (e.g. emotional stress) is not sufficient to trigger the application of the criminal law in the absence of a realistic possibility of transmission: *R. v. T.*, 2018 NSCA 13. (The identity of the accused has been intentionally removed.)
- ³ *R. v. Mabior*, 2012 SCC 47 (para. 95).
- ⁴ M. Loutfy, M. Tyndall et al., "Canadian Consensus Statement on HIV and its transmission in the context of the criminal law," *Canadian Journal of Infectious Diseases & Medical Microbiology*, 25(3) (2014): pp. 135-140.
- ⁵ F. Barré-Sinoussi et al., *Expert consensus statement on the science of HIV in the context of criminal law*, *Journal of the International AIDS Society* 2018, 21:e25161 available at <https://onlinelibrary.wiley.com/doi/abs/10.1002/jia2.25161>; See HIV JUSTICE WORLDWIDE summary available at www.hivjusticeworldwide.org/en/expert-statement/
- ⁶ Prevention Access Campaign, "Undetectable = Untransmittable," available at www.preventionaccess.org/.
- ⁷ Statement on behalf of the Council of Chief Medical Officers of Health, November 30, 2017, available at www.canada.ca/en/public-health/news/2017/11/statement_on_behalf_of_the_council_of_chief_medical_officers_of_health.html.
- ⁸ Public Health Agency of Canada, "Canada's Minister of Health calls for end to stigma on World AIDS Day," December 1, 2018.
- ⁹ *R. v. Mabior*, 2012 SCC 47.
- ¹⁰ In its 2017 report, in keeping with current science, the federal Department of Justice defines a "suppressed" viral load as being below 200 copies/ml of blood.
- ¹¹ Government of Canada, "Minister Wilson-Raybould Issues Statement on World AIDS Day," December 1, 2016.
- ¹² Department of Justice, *Criminal Justice System's Response to Non-Disclosure of HIV* (2017), available at www.justice.gc.ca/eng/rp-pr/other-autre/hivnd-vihnd/index.html.
- ¹³ Attorney General of Canada, "Directive to Director of the Public Prosecution Service," *Canada Gazette*, Part I, Vol. 152, December 8, 2018, available at <http://gazette.gc.ca/rp-pr/p1/2018/2018-12-08/html/notice-avis-eng.html#nl4>.
- ¹⁴ Ministry of the Attorney General, *Crown Prosecution Manual – D. 33: Sexual Offences against Adults*, updated December 1, 2017, available at www.ontario.ca/document/crown-prosecution-manual/d-33-sexual-offences-against-adults.
- ¹⁵ BC Prosecution Service, "Sexual Transmission, or Realistic Possibility of Transmission, of HIV," *Crown Counsel Policy Manual*, April 16, 2019, available at www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/sex-2.pdf.
- ¹⁶ Letter from Mr. Eric Tolppannen, Assistant Deputy Minister, Alberta Crown Prosecution Service Division, Alberta Ministry of Justice and Solicitor General, to Richard Elliott, Executive Director, Canadian HIV/AIDS Legal Network, January 18, 2019, on file.
- ¹⁷ See for example, *R. v. C.B.*, 2017 ONCJ 545 (CanLII), *R. v. J.T.C.*, 2013 NSPC 105.
- ¹⁸ F. Barré-Sinoussi et al., *Expert consensus statement on the science of HIV in the context of criminal law*, supra note 5.
- ¹⁹ Government of Canada, Office of the Director of Public Prosecutions, *HIV Non-Disclosure Directive, December 8, 2018, Director of Public Prosecutions Act*, *Canada Gazette*, Part I, Volume 152, Number 49, available at <http://gazette.gc.ca/rp-pr/p1/2018/2018-12-08/html/notice-avis-eng.html>. The Directive does not state what "other risk factors" might encompass.
- ²⁰ Ontario Attorney General Caroline Mulroney, *Letter to co-chairs of the Ontario Working Group on Criminal Law and HIV Exposure*, February 20, 2019, available at <http://clhe.ca/advocacy-timeline>.
- ²¹ *R. v. T.*, 2016 NSSC 134; *R. v. T.*, 2018 NSCA 13. (The identity of the accused has been intentionally removed.)
- ²² *R. v. G.*, 2017 ONSC 6739. (The identity of the accused has been intentionally removed.)
- ²³ F. Barré-Sinoussi et al., *Expert consensus statement on the science of HIV in the context of criminal law*, supra note 5; See HIV JUSTICE WORLDWIDE summary available at www.hivjusticeworldwide.org/en/expert-statement/.
- ²⁴ Government of Canada, Office of the Director of Public Prosecutions, supra note 19.
- ²⁵ *R. v. T.*, 2016 NSSC 134. (The identity of the accused has been intentionally removed.)
- ²⁶ *R. v. T.*, 2018 NSCA 13. (The identity of the accused has been intentionally removed.)
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- ³⁰ *R. v. M.*, 2013 CanLII 54139 (ON SC). (The identity of the accused has been intentionally removed.)
- ³¹ F. Barré-Sinoussi et al., *Expert consensus statement on the science of HIV in the context of criminal law*, supra note 5 and summary prepared by HIV JUSTICE WORLDWIDE available at www.hivjusticeworldwide.org/en/expert-statement/. Canadian researchers released similar statement in 2014. See M. Loutfy et al., supra note 4.
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- ⁴¹ C. Hastings, C. Kazatchkine and E. Mykhalovskiy, *HIV criminalization in Canada: key trends and patterns*, March 2017; and ongoing tracking of cases by the Canadian HIV/AIDS Legal Network (material on file).
- ⁴² Canadian Coalition to Reform HIV Criminalization, *End unjust HIV criminalization: Community Consensus Statement*, November 2017, available at <http://www.hivcriminalization.ca>.



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Production of this document has been made possible through a financial contribution from the Public Health Agency of Canada.
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