

HIV CRIMINALIZATION IN CANADA: KEY TRENDS AND PATTERNS (1989-2020)



Colin Hastings, Notisha Massaquoi, Richard Elliott, and Eric Mykhalovskiy

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Key Points

- There have been at least 206 individuals prosecuted, in 224 different criminal cases, in Canada between 1989 and 2020.
- Two provinces — Ontario and Quebec — account for the majority of criminal prosecutions to date.
- Most prosecutions for alleged HIV non-disclosure have been brought against men in the context of sexual encounters with women.
- The criminal law continues to be used disproportionately against people living with HIV from some racialized populations. Black men are disproportionately represented among those prosecuted for alleged HIV non-disclosure. Black and Indigenous people are convicted at a higher rate, acquitted at a lower rate, and are more likely to face prison sentences compared to white people who face similar charges.
- Most prosecutions have been for cases that did not involve transmission of HIV, only potential or perceived exposure to a risk of transmission.
- In recent years, there has been a reduction in prosecutions, and particularly against people with a suppressed viral load, reflecting community advocacy and greater understanding of the available scientific evidence. However, people living with HIV continued to be charged and convicted for HIV non-disclosure in cases in which their sexual activities pose a negligible risk of HIV transmission or no risk at all.
- Prosecutions for “sexual assault” based on alleged HIV non-disclosure have high conviction rates compared to cases of sexual assault generally, and result in prison sentences that appear to be higher than in other cases of convictions for sexual assault involving forced or coerced sex.
- The temporal trends, demographic patterns, and outcomes of HIV criminalization cases highlight the urgent need for the criminal legal system to be better guided by science and by human rights principles in responding to HIV, and for government action to end the harms of HIV criminalization in Canada.

Current Legal Context

In Canada, a person living with HIV can go to prison and be registered as a sex offender for life for not disclosing their HIV-positive status to a sexual partner in some circumstances. People are usually charged with (aggravated) sexual assault, due to the Supreme Court of Canada’s ruling that HIV non-disclosure can sometimes amount to fraud that invalidates consent to sex. The Supreme Court has ruled that disclosure is only legally required if there is a “realistic possibility of HIV transmission,” but the interpretation and application of this legal test has been widely criticized as too broad. People can face charges regardless of whether they had any intent to cause harm or did indeed transmit the virus, and people have been prosecuted and convicted even if they had sex that posed negligible to no risk of transmission.

Research shows that HIV criminalization undermines effective public health initiatives, increases stigma and discrimination against people living with HIV, spreads misinformation about HIV, and ultimately violates the human rights of people who live with HIV (Global Commission on HIV and the Law 2012; O’Byrne, Bryan, and Roy 2013; UNAIDS 2013). In 2016, following years of community advocacy, Canada’s federal government acknowledged the “overcriminalization” of HIV non-disclosure (Department of Justice Canada 2016). In 2019, the House of Commons Standing Committee on Justice and Human Rights released a report on HIV criminalization. People living with HIV, activists, and experts welcomed several of the recommendations in the report, especially the call to remove HIV non-disclosure from the reach of sexual assault law and to limit HIV criminalization through *Criminal Code* reform and prosecutorial guidelines (Canadian HIV/AIDS Legal Network 2019; Hastings, McClelland, and Nicholson 2021). However, to date, political leaders have not acted on these recommendations and Canadian law continues to be, in the words of the Standing Committee, “overly broad and punitive.”

To support ongoing advocacy to address the harms of HIV criminalization, this report provides information about the temporal and demographic patterns of HIV criminalization in Canada and the outcomes of HIV non-disclosure criminal cases from 1989 to 2020. This analysis updates earlier reports published in 2012 (Mykhalovskiy and Betteridge 2012) and 2017 (Hastings, Kazatchkine, and Mykhalovskiy 2017).

Methods

There is no official tracking of HIV non-disclosure cases in Canada. In the absence of a central database of cases, this analysis draws upon various methods to update existing data on the temporal, geographic, and demographic patterns of HIV criminalization in Canada, adding to the database reported on in 2017. The authors reviewed information on criminal trials related to HIV non-disclosure compiled by the HIV Legal Network, media reports, and legal documents identified through LexisNexis, Quicklaw, and CanLII databases, and consulted with colleagues who are conducting critical studies of patterns and trends of HIV criminalization in Canada.

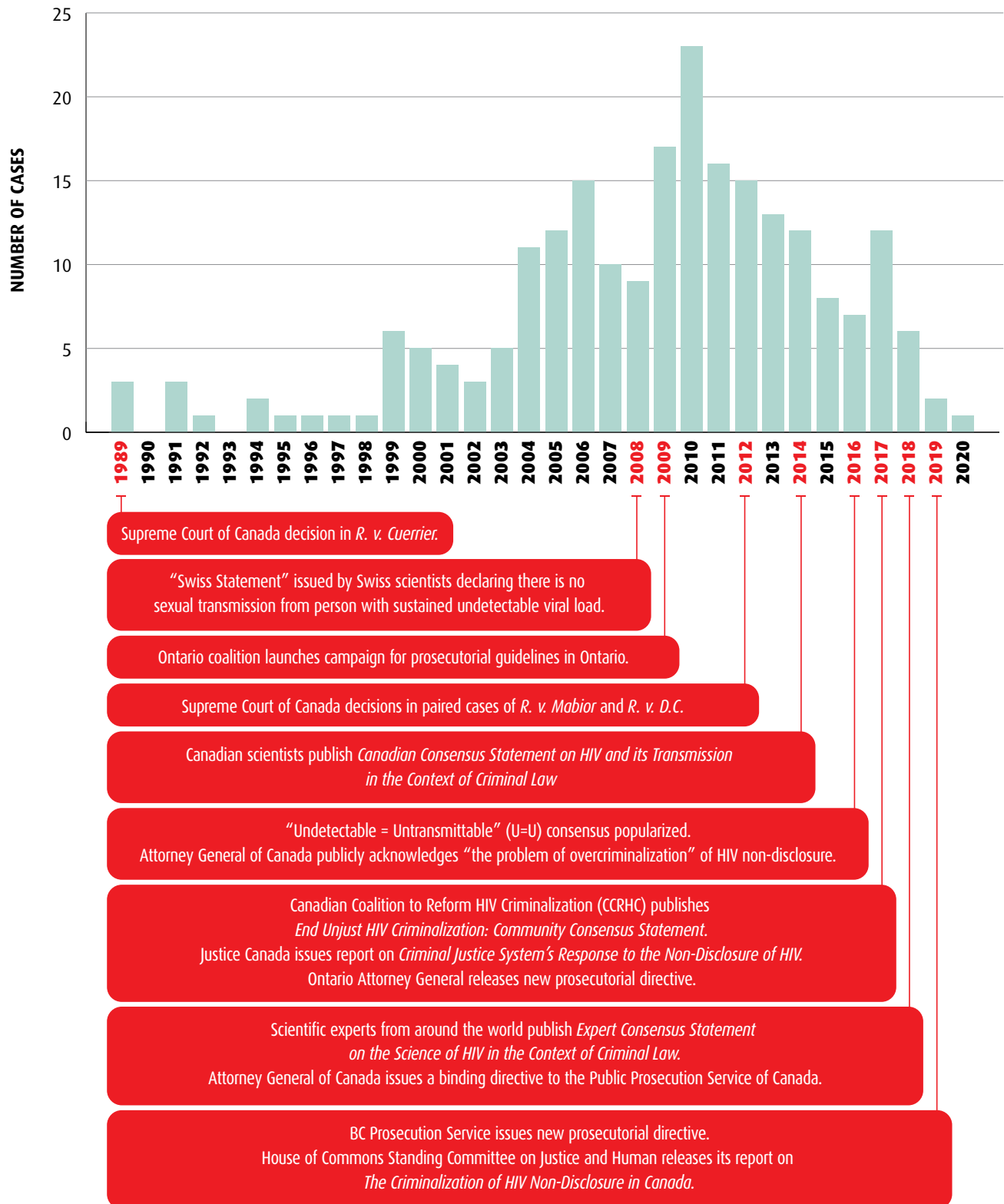
As with previous reports in 2012 and 2017, this report differentiates between *individuals* who have faced criminal charges and the criminal *cases* in which they have been involved. A *case* is defined as “any circumstance in which one or more *Criminal Code* charges were laid by police against a person based on alleged HIV non-disclosure in the context of sexual activity.” This report treats as separate cases “charges that were prosecuted in separate proceedings, either at the trial stage or on appeal.” (Hastings, Kazatchkine, and Mykhalovskiy 2017; Mykhalovskiy and Betteridge 2012)

The number of *cases* is greater than the number of *individuals* facing charges because 15 individuals have faced criminal charges related to HIV non-disclosure on more than one occasion, each of which represents a separate criminal case. As appropriate to the context, and as made clear in the sections below, this report alternates between analyzing cases and analyzing the individuals involved in these cases.

This report examines only cases of criminal prosecutions for alleged HIV non-disclosure in the context of (otherwise) consensual sex. The tally of cases does not include cases of forced or coerced sex where HIV might be an aggravating factor, nor does it include cases of assault that involved someone living with HIV accused of biting or spitting on a person.¹ Finally, while the data set includes cases in which charges were laid but ultimately stayed by the prosecution, there may be other cases that prosecutors have chosen not to pursue of which the authors are unaware (Hastings, Kazatchkine, and Mykhalovskiy 2017).

¹ See forthcoming research by Eli Manning (Dalhousie University) and colleagues that investigates how race, racism, and colonialism organize the criminal legal system’s punishment of people living with HIV. Given its broader parameters and somewhat different approach, this important study does not focus solely on prosecutions for alleged non-disclosure in sexual encounters but also examines prosecutions in other contexts in which HIV arises as an aggravating factor.

Figure 1: Temporal Trends for HIV non-disclosure cases, Canada 1989-2020 (n=224)



From the first prosecution in 1989 until the end of 2020, at least 206 people have faced charges related to HIV non-disclosure in 224 separate cases. As noted above, some individuals have been involved in more than one case. Figure 1 shows the yearly number of cases in Canada up to the end of 2020. Since the previous report in 2017, there have been 21 new cases (during the four-year period of 2017-2020). The previous report noted that HIV criminalization cases had declined from 2011 to 2016. However, there was an increase in the number of cases in 2017, followed by declines in 2018, 2019, and 2020 (with only one known case identified in 2020).

The recent decline of HIV criminalization cases may be the result of various factors. For one, the decrease likely reflects

the result of sustained advocacy efforts across Canada critical of how the criminal law is applied in instances of alleged HIV non-disclosure. At the same time, there have also been broader efforts to increase access to HIV treatment (which lowers viral load and hence the possibility of transmission), a wider understanding of the evolving scientific evidence regarding HIV transmission (Barré-Sinoussi et al. 2018; Loutfy et al. 2014; Prevention Access Campaign 2016; UNAIDS 2018), and advocacy efforts to have these scientific advancements reflected in prosecutorial practice. However, there can be a lag in the reporting or detection of new criminal cases. In some instances, a case is only identified after it has been resolved. There is a need to continue to track trends in the annual number of cases.

Geographic Patterns

Figure 2: Provincial distribution of HIV non-disclosure cases, Canada 1989-2022 (n=224)

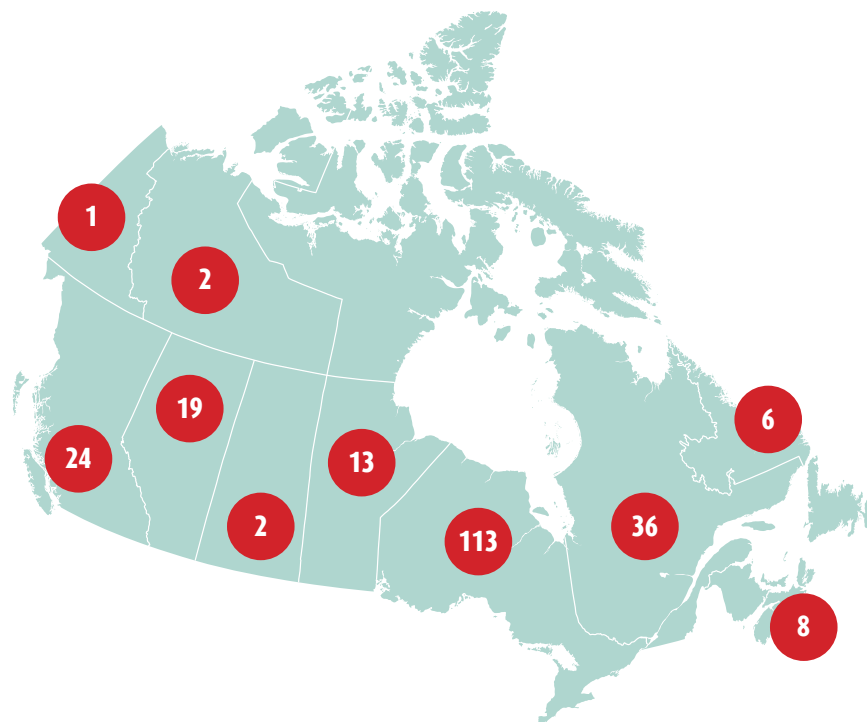


Figure 2 provides data on the provincial distribution of cases of criminalization of HIV non-disclosure. The vast majority of cases between 1989 and 2020 have been in Ontario (113), Quebec (36), and British Columbia (24). Ontario accounts for just over half (50.4 %) of all known cases and more than three times the number of cases than any other province. This likely reflects both the fact that the province accounts for the highest number and proportion of reported HIV diagnoses in Canada, and the prosecutorial approach in the province toward cases of alleged HIV non-disclosure. Since the previous report in 2017, 33% (7/21) of cases in Canada have been in Ontario, while 24% (5/21) have been in Quebec.

Demographic Patterns

This section quantifies demographic patterns in the criminalization of alleged HIV non-disclosure. It analyzes demographic data regarding *individuals* charged and prosecuted.

Gender and Sexual Orientation²

Gender continues to pattern HIV non-disclosure prosecutions in significant ways. Of all people charged to the end of 2020, men (all of them apparently cisgender) account for 89% (183/206) and women (including cisgender and transgender women) account for 9% (19/206). The gender of 2% (4/206) of people who have faced charges is unknown. The gender distribution of criminal HIV non-disclosure charges is stable over time. Since the earlier 2017 report, 21 people have faced charges between 2017 and 2020; the gender of 19 of them is known, and 95% (18/19) are men and 5% (1/19) are women.

All 19 women charged to date for alleged HIV non-disclosure faced charges in cases involving male complainants. Of the 183 men who have faced charges since 1989, 63% (116/183) were involved in cases with solely female complainants and 25% (46/183) in cases with solely male complainants. Three men faced charges in cases involving both male and female complainants, while 18 men (10%) faced charges in cases in which the gender of the complainant is unknown.

In the earlier years of HIV criminalization in Canada, gay, bisexual, and other men who have sex with men (GBMSM) did not feature significantly in the prosecutions, particularly considering the proportion of people living with HIV in Canada identified as GBMSM. This has changed modestly over approximately the last decade. Up until 2012, 26% of men had been charged in the context of sex with male partners (Mykhalovskiy and Betteridge 2012). For cases between 2013 and 2016, this figure increased to 38%. For cases between 2017 and 2020, the proportion of men who charged in the context of sex with male partners decreased to 29% (5/17), but it remains slightly higher than it was in 2013. Accounting for *all* cases between 1989 to 2020, the proportion of cases

involving men prosecuted in relation to sexual encounters with just male partners or in relation to sex with both male and female partners is 27% (49/183). For various reasons, this proportion of GBMSM among those prosecuted to date is lower than the consistently high proportion of GBMSM among people living with HIV in Canada; however, they remain the single largest population affected by HIV and hence by the *prospect* of prosecution (Haddad et al. 2019, 2021; Mykhalovskiy and Betteridge 2012; Public Health Agency of Canada 2021, n.d.).

The focus of analysis here is on actual prosecutions and the gendered patterns within that data. This does not directly capture the various ways in which inequities related to gender and sexual orientation may affect which sexual encounters result in allegations of HIV non-disclosure and in criminal charges being laid. Nor does it capture the broader effects of HIV criminalization that are also gendered, such as the weaponization of the criminal law through partners threatening to accuse a sexual partner of failing to disclose their HIV status, or the ways in which women living with HIV report that HIV criminalization contributes to their being surveilled by other systems such as child welfare (HIV Legal Network 2021).

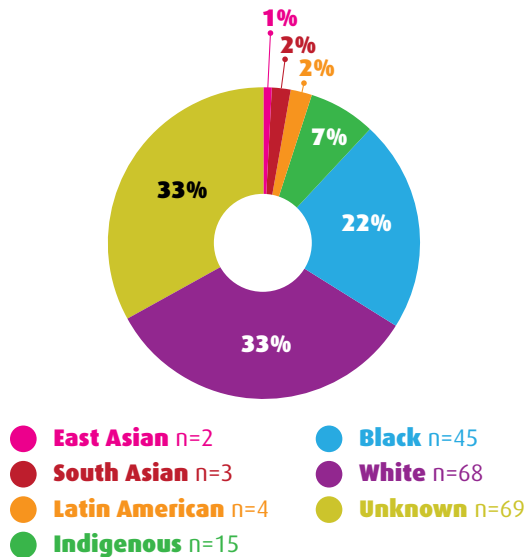
Race

There is no uniform mechanism for reporting demographic information about those involved in criminal prosecutions for alleged HIV non-disclosure. For purposes of this and previous analyses, data about the race of people who have faced charges related to HIV non-disclosure and of complainants was recorded when it was clearly indicated in media coverage of a case or in documents from the legal proceedings, or was known from direct contact with an accused person or by service providers or defence lawyers in our networks (Mykhalovskiy and Betteridge 2012). As noted in previous reports, for many cases, especially early ones, data is often missing, which means that there is a significant proportion of cases in which the race of the individual prosecuted is unknown.

² This report uses the term “gender” in differentiating between those identified as men and as women in the known prosecutions, including both cisgender and transgender people within each of these categories. This usage is based on how those individuals appear to be identified in the various data sources (e.g. media reports, reported court decisions and other legal documents, communications with the individual and/or their defence lawyers and other service providers). The term “sexual orientation” is used as shorthand to signal that there are cases involving allegations of HIV non-disclosure in sexual encounters between men and women and in encounters where both partners are men. It is recognized that the participants in those encounters may not necessarily identify themselves as solely heterosexual, bisexual, or gay.

The proportional distribution of people who have been charged for HIV non-disclosure between 1989 and 2020 is as follows:

HIV Non-disclosure: Race/ethnicity of individuals charged, Canada 1989-2020 (n=206)



Of the 206 individuals charged between 1989 and 2020, race is known for 137 (66.5%). It is unlikely that information can be obtained about the race of the remainder. Of the 69 people whose race is unknown, most (41/69) faced charges more than 10 years ago. As was suggested in the previous report in 2017, many of the people for whom race is unknown are likely white. White people constitute the largest racial category of people, and of people living with HIV, in Canada during the period 1989-2020 (Bourgeois et al. 2017; Haddad et al. 2018; Ontario HIV Epidemiology and Surveillance Initiative 2021). In addition, media reports of criminal charges and prosecutions for alleged HIV non-disclosure are a primary source of information about an accused person’s race. In the mainstream press, “whiteness is often treated as a normative, neutral, and assumed position,” and therefore not explicitly identified in media reports in the way that it is when a Black, Indigenous, or person of colour faces criminal charges (Hastings, Kazatchkine, and Mykhalovskiy 2017).

Black people currently make up 3.5% of the Canadian population (Statistics Canada 2019). However, as the data above indicate, Black people represent *at least* 22% of those criminally charged to date in cases of alleged HIV non-disclosure, suggesting a disproportionate representation of Black people among those charged, warranting closer analysis.

Note that this pattern of disproportionality is the *lower* bound of the over-representation of Black people among those charged to date. As noted above, the race of one-third of those prosecuted is unknown. While it is likely that most of those people are white, if any of the people in this category are Black, the representation of Black people among those charged would be higher still than what is already known.

To assess the extent of possible disproportionality in prosecutions, it would be useful to compare the proportion of Black people among HIV criminalization cases to date to the proportion of Black people among the population of people who are living or have lived with HIV in Canada during this same period. More specifically, it is overwhelmingly Black *men* who are represented in these figures: between 1989 and 2020, of the 45 Black people charged for alleged HIV non-disclosure, all but two are men (i.e. 96%). Given this, it would be useful to compare the proportion of men prosecuted who are Black to the proportion of men who are living or have lived with HIV in Canada during this period who are Black.

However, data on the racial demographics on the HIV epidemic in Canada is very partial and inadequate (Haddad et al. 2019, 2021), making this direct comparison difficult. There have not been extensive surveys, repeated over time, to determine the race of people living with HIV. Instead, we must resort to ongoing epidemiological surveillance reporting newly diagnosed HIV infections, accompanied by demographic data and data regarding “exposure categories.”

One approach sometimes used to consider the racial demographics of the HIV epidemic in Canada is to look at the reported *HIV infections among people “from countries where HIV is endemic”* as reported by the Public Health Agency of Canada (PHAC). In 2008, people in this exposure category used by PHAC accounted for approximately 14% of HIV infections newly reported in that year — a figure sometimes cited as the estimate of Black people living with HIV in Canada at that time (Public Health Agency of Canada 2012). In 2018, a

decade later, this figure was 15.4% (Haddad et al. 2021). However, a measure of HIV infections among people “from countries where HIV is endemic” only provides partial data and, for various reasons, significantly under-reports the extent to which Black people — and particularly Black GBMSM — are represented among those who have lived or are living with HIV in Canada.

Data directly capturing the *race/ethnicity of people newly diagnosed with HIV*, in a given year or over a certain period of years, is more useful. However, as is evident over the years from PHAC’s national HIV surveillance reports, consistent and complete provincial/territorial reporting of such data for HIV cases has been a long-standing problem. There is no standardized, nation-wide approach to reporting data on race/ethnicity alongside diagnosed HIV infections. Some provinces/territories (e.g. Quebec) do not report this data to PHAC, while others only have data for a limited period (e.g. Ontario since 2009). Certain others only report certain data (e.g. Indigenous or non-Indigenous status). Among those jurisdictions that do report race/ethnicity, the completeness of this data is often very low (Haddad et al. 2019, 2021; Public Health Agency of Canada 2009). Since 1998, PHAC reports show that Black people represent between 9.7% and 25.5% of new HIV infections, with the figure higher in the last decade or so than in previous periods (Bourgeois et al. 2017; Haddad et al. 2018, 2021; Public Health Agency of Canada 2009, 2016; Tomas and et. al 2015).

As noted, Black *men* represent the overwhelming majority (96%) of people prosecuted in HIV criminalization cases to date known to be Black (43/45) (and the large majority of them were prosecuted in cases involving only female complainants). Therefore, an assessment of how Black men are represented in the HIV epidemic in Canada in comparison to their representation among prosecutions is warranted.

The most recent PHAC HIV surveillance report (2019 data) indicates that Black men represent 17.7% of the reported new HIV infections in that year among men for whom race/ethnicity is known. (Recall that the proportion of Black people, including men, among new HIV infections appears to be higher in more recent years.) In contrast, Black men represent 35% of the men prosecuted to date for whom race is known (43/124). Comparing the proportion of Black men among criminal prosecutions to date (between 1989 and 2020) to the proportion of Black men among newly reported HIV infections in a single year (2019) is imperfect, but it shows there is cause for concern regarding the high proportion of prosecutions against Black men compared to their representation in the best available national data regarding the racial demographics of the HIV epidemic in Canada.

In Ontario, in recent years there is modestly better data regarding race and HIV cases. This is significant, in that it is the province with the greatest share of people living with HIV and the greatest share of Black people, estimated at more than 60% of the Black population in Canada (Public Health Agency of Canada 2009). As shown above, it also the province also accounts for more than half of HIV criminalization cases to date in Canada. As reported by the Ontario HIV Epidemiology and Surveillance Initiative (Ontario HIV Epidemiology and Surveillance Initiative 2021), in 2019, “African, Caribbean or Black” (ACB) men accounted for 15.1% of all first-time HIV diagnoses in Ontario and 18.8% of the first-time HIV diagnoses among men. Looking back over the preceding decade, ACB men accounted for between 10.2% (2013) and 17.1% (2011) of these cases. In contrast, Black men have accounted for 23% of all HIV criminalization prosecutions in Ontario to date.

Previous reports noted that the criminal law appears to be increasingly used against people living with HIV from certain racialized populations. The updated data presented here confirms this continues to be a concern. Since 2017, 21 people have faced charges; the race of 12 of these people is known. In more than half of those cases (7/12), the person was Indigenous (4), Black (2) or a person of colour (1 South Asian person); the remaining 5 people were white.

In particular, concern remains that **Black men** are disproportionately represented in HIV criminalization prosecutions. Between 2004 and 2010, among men charged in relation to sexual encounters with women, just over half were Black (Mykhalovskiy and Betteridge 2012). Between 2012 and 2016 the proportion of Black men among those charged in HIV non-disclosure cases increased (Hastings, Kazatchkine, and Mykhalovskiy 2017). Overall, between 1989 and the end of 2020, *at least 23.5%* of all the men prosecuted to date (43/183) have been Black. Among the men prosecuted for whom race is known, 35% have been Black (43/124). In comparison, in 2019, of new HIV infections reported among men for whom race was known, only 17.7% were Black men.

The 2017 report also underlined that **Indigenous women** in Canada account for a significant proportion of women who have faced charges related to HIV non-disclosure (although women overall remain a small proportion of those charged). This trend remains stable in 2021. We know the race of 15 women (of 19) who have faced charges related to HIV non-disclosure since 1989: of these women, 33% (5/15) are Indigenous. In comparison, Indigenous women represented about 4% (and growing) of the total female population in Canada as of the 2016 census (Arriagada 2016). PHAC estimated that in 2011, Indigenous people made up 12.2% of new HIV infections and 8.9% of those living with HIV in

Canada. During the period 1998 to 2012, just under 42% of new HIV cases among women were among Indigenous women (Public Health Agency of Canada 2014). This figure remains similar in the most recent HIV surveillance data: in 2019, Indigenous women accounted for 40% of new HIV infections in 2019 among women (Haddad et al. 2021). Given their disproportionate representation among people living with HIV in Canada, Indigenous women are another population heavily affected by the threat of potential prosecution. In Canada, qualitative studies show that Indigenous women living with HIV experience over-surveillance by health officials, police, and the law as a form of colonial surveillance and racism (Hoppe, McClelland, and Pass 2022, 4; Sanderson et al. 2021).

The existence of systemic racism in the criminal legal system in Canada is well-documented and acknowledged (Commission on Systemic Racism 1995; *R. v. Morris*, 2021 ONCA 680 n.d.). This updated analysis of demographic patterns in HIV criminalization comes at a time of import-

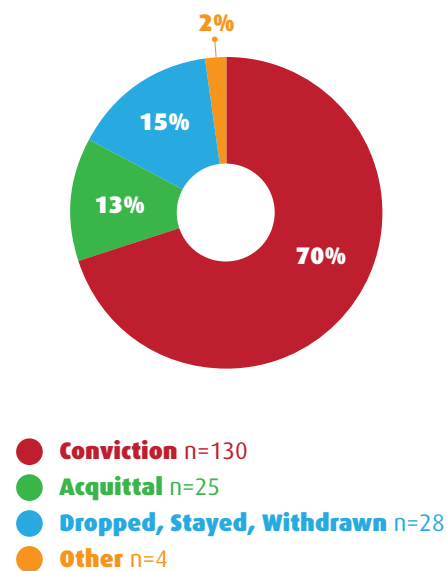
ant, overdue attention to anti-Black and anti-Indigenous racism in the criminal legal system, and it complements other work that has analyzed racism manifesting in the phenomenon of HIV criminalization, including in media coverage of prosecutions (African and Caribbean Council on HIV/AIDS in Ontario 2013; Hastings et al. 2020; E Mykhalovskiy et al. 2020; Wilson 2013). Disaggregating data by race can support efforts to identify and eliminate discriminatory application of the criminal law, and, understood in the context of a broader critique of racism in the criminal legal system, can help refute racist narratives related to HIV non-disclosure (Mykhalovskiy and Betteridge 2012). However, simply collecting racial data and describing disparities in HIV criminalization does not automatically lead to meaningful change. This information needs to be publicized and used to increase the transparency and accountability of the criminal justice system and to challenge the ways in which it reinforces systemic racism (Wortley and Owusu-Bempah 2011), including in the criminalization of people living with HIV.

Outcomes of Cases

This section of the report moves from analyzing **demographic data about individuals** who have faced criminal charges related to HIV non-disclosure to examining data about **the outcomes of criminal prosecutions for alleged HIV non-disclosure**. This shift allows us to analyze how the criminal legal system treats HIV non-disclosure cases each time the Crown pursues criminal charges. It is necessary to distinguish individuals from criminal cases at this stage, because 15 individuals have faced criminal HIV non-disclosure charges on more than one occasion. There are 206 people who have been charged in 224 cases. Of these, 189 people have been charged once, 12 people have been charged in two cases, and three people have been charged in three cases.

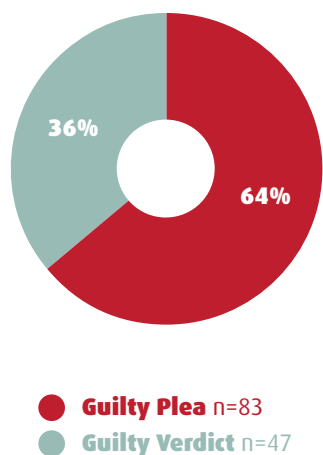
With respect to the outcomes of cases — both their *disposition* in relation to a conviction or acquittal (or the dismissal, stay, or withdrawal of charges) and the *sentencing* — it should be noted that these are affected by many variables (e.g. the strength of the evidence introduced, including from witnesses; the facts proven at trial; the presence or absence of a good legal defence; whether a trial is by jury or judge alone; the presence of aggravating or mitigating factors at sentencing; whether a person being sentenced has a previous criminal record). Analyzing all of these for each case across the full data set is a significant undertaking well beyond the scope of what is possible for this report. Nonetheless, the notable differences in outcomes by race across the full data set — particularly in a comparison between Black and white defendants — raise a vital concern that racism is a factor affecting the disposition of cases in which someone is prosecuted for alleged HIV non-disclosure.

Figure 3: Disposition of HIV Non-disclosure Cases, Canada, 1989-2020 (n=187)



The disposition is known for 187 of the 224 cases since 1989. Figure 3 above shows that a significant majority of cases (excluding those that are ongoing or for which no information is available) ended in conviction: 70% (130/187) of all cases since 1989 have ended in conviction on at least one charge. Since 1989, 64% (83/130) of convictions have been the result of a guilty plea as opposed to a guilty verdict following trial.

Figure 4: Cases that Ended in Conviction, Canada 1989-2020 (n=130)



Meanwhile, 13% (25/187) of cases ended in acquittal and in 15% (28/187) of cases, charges were dropped, stayed, or withdrawn. In four cases (2%) categorized as “other,” the defendant died before trial or after trial but before a verdict was rendered.

In Canada, the use of “sexual assault” charges to prosecute allegations of HIV non-disclosure has been highly criticized by HIV and women’s rights advocates as harming not only people living with HIV but also important principles in the law of sexual assault itself (Canadian HIV/AIDS Legal Network 2019; Grant 2020). The previous 2017 report noted that, while comparisons are challenging for various reasons, the conviction rate in HIV non-disclosure cases (most of which have been prosecuted as sexual assault) is considerably higher than that typically reported in prosecutions for sexual assault. This trend remains stable. In 2019, Justice Canada reported that “for the 2016/2017 fiscal year, 42% of all sexual assault case decisions in adult criminal court resulted in a finding of guilt...the percentage of sexual assault cases that resulted in a guilty decision has remained stable over the past 10 years.” (Department of Justice Canada 2019) This is a significantly lower conviction rate than the 70% of HIV criminal non-disclosure cases (the large majority of them for sexual assault) that have ended in conviction since 1989. This sug-

gests both ongoing challenges with the successful prosecution of sexual assault cases that involved forced or coerced sex and that the criminal legal system is considerably more prepared to convict people of sexual assault where the “fraud” of HIV non-disclosure is alleged than where force or coercion is alleged.

Disposition of cases by race

The following tables show that racialized populations have lower rates of acquittal and of having charges dismissed, stayed, or withdrawn, and a higher conviction rate in criminal prosecutions for alleged HIV non-disclosure. Meanwhile, white people have the highest rates of acquittal and charges dismissed, stayed, or withdrawn and the lowest rate of conviction.

Acquittal Rate

Cases in which the person facing charges is white	15% (11/74)
Cases in which the person facing charges is Black	7% (3/44)
Cases in which the person facing charges is Indigenous	12.5% (2/16)

Rate of Charges Dismissed, Stayed, or Withdrawn

Cases in which the person facing charges is white	12% (9/74)
Cases in which the person facing charges is Black	7% (3/44)
Cases in which the person facing charges is Indigenous	6.25 % (1/16)

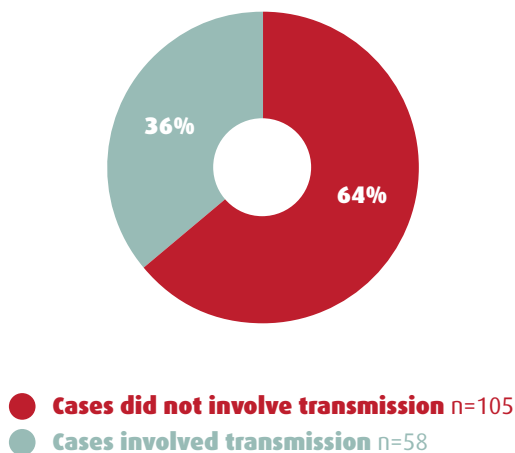
Conviction Rate

Cases in which the person facing charges is white	73% (54/74)
Cases in which the person facing charges is Black	86% (38/44)
Cases in which the person facing charges is Indigenous	81.25% (13/16)

HIV transmission in HIV criminalization cases

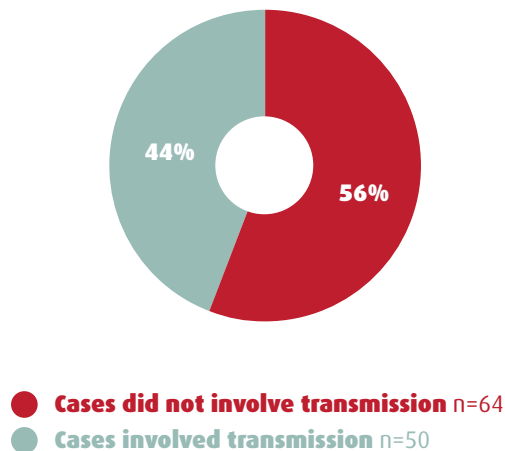
In Canada, people living with HIV can be prosecuted and face very serious criminal charges even where HIV is not transmitted. Of the 224 cases between 1989 and 2020, there have been 163 cases in Canada in which the HIV status of the complainant is known; there was no HIV transmission in 64% (105/163) of these cases. Figure 5 below shows that this trend seems to be intensifying. Since the previous report, there have been 16 cases in which the HIV status of the complainant is known. In 75% (12/16) of cases there was no HIV transmission, demonstrating that most HIV non-disclosure cases are about (alleged or real) exposure to the virus rather than transmission. At least 5 cases involved a defendant with an undetectable viral load, most from 2019 (3 out of 5). In all these cases, charges were ultimately withdrawn. One additional case from 2019 (in Ontario) involved a defendant with a *low* viral load (i.e. <1500 copies/ml), which was the basis for an acquittal. However, note also one case (in Ontario) in which, despite consistent condom use and no HIV transmission alleged, a man was convicted; his conviction was upheld on appeal in 2020.

Figure 5: HIV Transmission in HIV Non-disclosure Cases, Canada, 1989-2020 (n=163)



Looking at the cases resulting in *convictions* reveals that most people convicted for HIV non-disclosure did not transmit HIV to their sexual partners. Of the 130 cases (of 224) that have ended in conviction since 1989, there are 114 cases in which we know the HIV status of the complainant. Figure 6 below shows that of those 114 cases, there was no HIV transmission in 57% (64/113) of cases.

Figure 6: HIV Transmission in HIV Non-disclosure Cases that Ended in Conviction, Canada, 1989-2020 (n=114)



Sentences

Data shows that people living with HIV who are criminally charged for not disclosing their HIV-positive status to sexual partners continue to face harsh punishment.

The sentence is known for 124 of the 130 cases since 1989 that ended in a conviction (on at least one count of an offence charged). In only 6% of cases (8/124), the defendant was given a conditional or suspended sentence and did not face prison time. Figure 7 illustrates that an overwhelming majority (94%, 116/124) of people convicted in HIV non-disclosure cases received prison sentences. This is in part a result of applying the law of sexual assault. In the large majority of cases to date, and particularly since the 1998 Supreme Court of Canada decision in *R. v. Currier*, allegations of HIV non-disclosure have been prosecuted as the offence of *aggravated sexual assault*. Since 2007, the *Criminal Code* has precluded the possibility of a conditional (i.e. non-custodial) sentence if a person is convicted of such an offence.

In 62% (78/124) of cases, courts sentenced the defendant to more than two years in prison. With the caveat that sentences can vary significantly depending on various mitigating or aggravating factors (e.g. the number of complainants, whether there was an allegation of HIV transmission), the average prison sentence is 54 months. Sentences ranged from 7.5 months to life in prison. The mode or most frequent sentence is 24 months. For many of the same reasons that it is challenging to compare the *conviction* rate in HIV non-disclosure cases (overwhelmingly prosecuted as sexual assault) to the conviction rate overall for sexual assault cases, it is difficult to compare *sentences* for HIV non-disclosure convictions (mostly for sexual assault) to the sentences imposed for sexual assault convictions based on forced or coerced sex.

However, while acknowledging that various factors come to bear on sentencing decisions, it is worth noting that the pattern of harsh sentences handed to defendants convicted in HIV non-disclosure cases diverges from a reported general decline in the severity of sentences for sexual assault. Based on the large proportion of people convicted in HIV non-disclosure cases who receive prison sentences, the high percentage of cases in which a defendant received sentences of at least two years, and the greater than average length of sentence that defendants are handed, those convicted in HIV non-disclosure cases appear to receive particularly harsh sentences.

Figure 7: Sentence Upon Conviction in HIV Non-disclosure Cases, Canada, 1989-2020 (n=124)

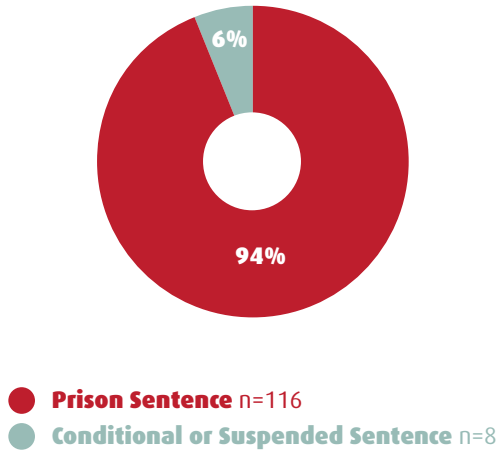
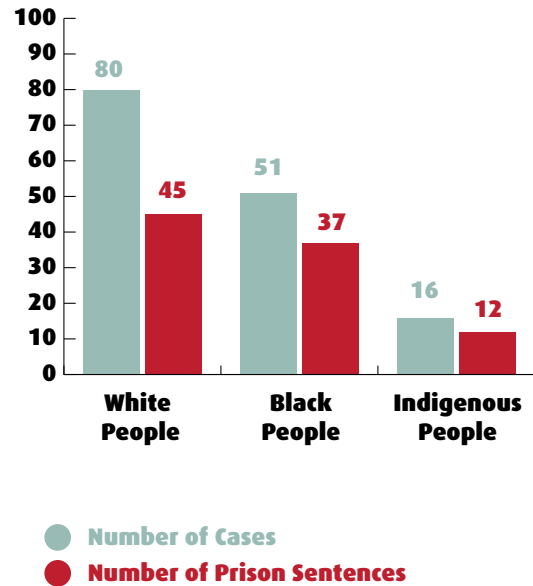


Figure 8: Rate of Prison Sentence in HIV Criminalization Cases by Race, Canada, 1989-2020



Disaggregating the data by race shows that Black and Indigenous people are more likely to face prison sentences than white people. Of the 51 cases resulting in a conviction that involved a Black defendant, at least 73% (37/51) resulted in prison sentences. Of the 16 cases resulting in a conviction that involved an Indigenous defendant, 75% (12/16) resulted in prison sentences. In contrast, of the 79 cases that involved a white defendant, 57% (45/79) of cases resulted in prison sentences.

Conclusion

This report provides evidence that substantiates ongoing concerns about HIV criminalization in Canada.

First, it demonstrates that the criminal law continues to be used disproportionately against people living with HIV from some racialized populations. Since the last report in 2017, more than half of the people who have faced criminal charges related to HIV non-disclosure, for whom race is known, are Black, Indigenous, or a person of colour. This report also shows that Black people (overwhelmingly men) not only account for a disproportionate proportion of people who have faced charges, Black people and Indigenous people also face harsher punishment at each stage of the criminal legal system. When Black and Indigenous people face HIV criminalization charges they are convicted at a higher rate, acquitted at a lower rate, and are more likely to face prison sentences compared to white people who face similar charges.

Second, the updated data underline concerns about how people living with HIV are charged and convicted, including in cases in which their sexual activities pose a negligible risk of HIV transmission or no risk at all. While there has been growing recognition in prosecutorial policy and practice that a suppressed viral load effectively eliminates the possibility

of sexual transmission of HIV, prosecutors and courts have in recent years continued to impose criminal liability in other instances of little or no possibility of transmission (e.g. sex with correct condom use). Since 2017, 75% (12/16) of prosecutions involved no HIV transmission. This finding suggests that there is a need for continued advocacy in order to ensure that criminal legal decisions are informed by the most recent data on the science of HIV transmission (Barré-Sinoussi et al. 2018).

Finally, the Canadian criminal legal system's approach to HIV non-disclosure remains exceptionally punitive. This is notably due, in part, to the use of sexual assault charges in HIV non-disclosure cases. There are stable trends that suggest that HIV non-disclosure cases have very high rates of conviction (including compared to cases of sexual assaults) and that a large proportion of cases result in prison sentences.

Overall, this report on the temporal trends, demographic patterns, and outcomes of HIV criminalization cases highlights the urgent need for the criminal legal system to be better guided by science and by human rights principles in responding to HIV, and for government action to end the harms of HIV criminalization in Canada.



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1240 Bay Street, Suite 600, Toronto, Ontario, Canada M5R 2A7
Telephone: +1 416 595-1666 • Fax: +1 416 595-0094

www.hivlegalnetwork.ca