Overview of HIV Criminalization in Canada: 2022

Published by the
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The HIV 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.

Where Are We Now?: HIV Criminalization in Canada

Current state of the law

In Canada, a person living with HIV must disclose their status to a sexual partner before engaging in sexual activity that carries a "realistic possibility" of HIV transmission. This requirement is not set out in the *Criminal Code*, but rather comes from key Supreme Court of Canada decisions, namely *R. v. Cuerrier* (1998) and *R. v. Mabior* (2012). Since 1989, there have been more than 220 documented prosecutions for HIV non-disclosure in Canada; notably, Black men are disproportionately represented among those prosecuted.[1]

People accused of HIV non-disclosure are usually charged with aggravated sexual assault, an offence that is typically used in cases of non-consensual sex. This is because non-disclosure before sex posing a realistic possibility of transmission has been considered by the courts as amounting to "fraud" that can invalidate the other partner's consent to sex. Aggravated sexual assault is one of the most serious offences in the *Criminal Code*. It carries a maximum penalty of life imprisonment, mandatory sex offender registration, and the possibility of deportation in the case of non-citizens.

Evolutions in the law post-Mabior (2012)

In its 2012 decision in *Mabior*, the Supreme Court of Canada ruled that there is no obligation to disclose one's HIV-positive status before sex when 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 decision was widely criticized for being unfair and at odds with the scientific evidence, given that using a condom *or* having a low viral load alone prevents transmission.

Since 2012, the law has been evolving towards the recognition that there is no "realistic possibility" of HIV transmission (and hence no duty to disclose) where a person has a suppressed (or undetectable) viral load (i.e. < 200 copies/ml), even where no condom is used. This has been recognized by the courts, as well as by some prosecutorial services in the country, as described below. In other words, there is increasing recognition in the law that "Undetectable = Untransmittable" (U=U). As a result, there has been a reduction in prosecutions in recent years against people with a suppressed viral load. This is an important and welcome development.

However, in comparison to viral load, the law in relation to condom use has not evolved to the same extent. There are conflicting court decisions about whether just using a condom, without having a suppressed or low viral load, is enough to prevent a "realistic possibility of transmission." Nova Scotia courts have accepted that a person should not be convicted for HIV non-disclosure if they used a condom (regardless of their viral load).[2] But, in 2020, Ontario's Court of Appeal came to the opposite conclusion: it upheld the conviction of a man living with HIV who had used condoms (even though he was not accused of using them incorrectly or of transmitting HIV).[3] Consequently, some people living with HIV in Canada are still at risk of non-disclosure prosecutions when they just use condoms.

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[1] C. Hastings et al, *HIV Criminalization in Canada: Key Trends and Patterns (1989-2020)*, 2022 ["Key Trends and Patterns"].
[2] *R. v. T.*, [2018] NSCA 13. (The identity of the accused has been intentionally removed)
[3] *R. v. N.G.*, [2020] ONCA 494 (In 2020, N.G.'s conviction was confirmed on appeal)

Advances in prosecutorial policy

In the three territories and in some provinces, the prosecution of HIV non-disclosure has been limited by prosecutorial directives, guidelines, or instructions. These do not change the law itself, but they can restrict prosecutors' ability to prosecute cases of HIV non-disclosure — or at least influence whether and when they choose to prosecute. Prosecutorial policy varies across the country:

- In Ontario, Quebec, Alberta, and British Columbia: A person living with HIV who is on antiretroviral therapy and maintains a viral load of under 200 copies/ml for at least four to six months (or for at least six months, in the case of Ontario) should not be prosecuted for HIV non-disclosure. This is the case regardless of the type of sex they had (anal, vaginal, or oral) and whether a condom was used. In British Colombia, the correct use of a condom during a single act of vaginal or anal sex, where HIV was not transmitted, is a "factor" that may weigh against prosecution.

- In the Northwest Territories, Yukon, and Nunavut: A 2018 directive to federal prosecutors from the Attorney General of Canada states that a person living with HIV:
    - will not be prosecuted if they maintained a viral load of under 200 copies/ml; and
    - should "generally" not be prosecuted if they were taking treatment as prescribed, or a condom was used, or they and their partners only had oral sex.

- No specific directives, guidelines, or instructions are in effect in Newfoundland and Labrador, Nova Scotia, Prince Edward Island, New Brunswick, Manitoba, or Saskatchewan.

How might the law evolve next?: Recent Supreme Court cases relevant to HIV criminalization

Over the past year, the Supreme Court of Canada has heard three non-HIV-specific cases that could significantly affect the law around HIV non-disclosure. The HIV Legal Network and HIV & AIDS Legal Clinic Ontario (HALCO) intervened in these cases to share their arguments with the Court and to ensure that the concerns of people living with HIV were represented.

R. v. Kirkpatrick: non-consensual condom removal and sexual assault law

A man was charged with sexual assault after engaging in sex where, unbeknownst to his sexual partner, he did not wear a condom. His partner had previously insisted on condom use during sex. The question facing the Supreme Court of Canada: is it a crime for a person to ignore their partner's condition to always wear a condom during sex and if so, why? Under the law, sexual assault occurs when someone engages in sexual activity without the other person's consent. Consent must be given up front at the time of the sexual encounter. However, a person's upfront consent can later be "vitiated" (or invalidated) by an act of "fraud," meaning that an otherwise sexual encounter can transform into a sexual assault after the fact. The central issue in *Kirkpatrick* is whether non-consensual condom removal should be considered as a violation of someone's upfront consent (because it is an essential feature of their consent), or whether it should be considered as an act of fraud that later vitiates someone's upfront consent.

Why this matters to people living with HIV: Under the current law, not disclosing one's HIV status is not a violation of someone's upfront consent. This is because a person's HIV status is not an essential feature of a sexual act. Non-disclosure may, however, amount to fraud vitiating consent when 1) there is a realistic possibility of transmission and 2) a sexual partner would not have consented to sex had they known their partner was living with HIV. If the Court were to decide in *Kirkpatrick* that condoms are fundamental to upfront consent, it is possible they could also decide that HIV status is fundamental to upfront consent. If they do decide that HIV status is fundamental to upfront consent, this would broaden the circumstances in which someone could be criminalized for non-disclosure. The Court may consider that there can be no consent to sex in the absence of disclosure (whatever the risks of HIV transmission) and thus require a person living with HIV to disclose in all situations. This would be a huge step backward.

R. v. N.: Challenging mandatory sex offender designations

In February 2022, the Supreme Court considered the constitutionality of mandatory sex offender registration in a case bought by a young man convicted of sexual assault. In addition to jail time, the man's sentence included a mandatory lifetime registration on the National Sex Offender Registry. Following amendments to the *Criminal Code* and the *Sex Offenders Information Registration Act* (SOIRA) in 2011, judges are required to impose sex offender registration orders on those convicted of certain offences. The man argued that mandatory sex offender registration violated his rights to life, liberty, and security of the person under section 7 of the *Charter*.

Why this matters to people living with HIV: Because aggravated sexual assault (the offence most commonly used to prosecute HIV non-disclosure) is one of the offences for which sex offender registration is now required, this decision has an enormous impact on people living with HIV. Mandatory sex offender designation exacerbates the already significant harms of HIV criminalization in Canada. By placing a

person living with HIV on the sex offender registry, the criminal legal system perpetuates HIV stigma and imposes enormous — and potentially lifelong — psychological and social harms.[4]

R. v. Sharma: Challenging the restrictions on conditional sentences

In March 2022, the Supreme Court heard the case of a young Indigenous woman who was ineligible to receive a conditional sentence (e.g. a sentence served in the community) after being convicted of importing drugs. Conditional sentences are unavailable for certain offences, such as drug importation and aggravated sexual assault, even where the person's conduct or life circumstances suggest that a conditional sentence would be more appropriate. Ms. Sharma challenged these restrictions on the basis that they violated her *Charter* rights to life, liberty, and security of the person, as well as her right to equality, because the laws reinforce, perpetuate, and exacerbate the overincarceration of Indigenous peoples.

Why this matters to people living with HIV: In the past, sentencing judges have determined in some cases that a conditional sentence was appropriate for people convicted of aggravated sexual assault for HIV non-disclosure. But now, as a result of these restrictions, people in this situation are ineligible to receive conditional sentences. This has a disproportionate impact on Indigenous and Black people, who are more likely to face prison sentences upon conviction for HIV non-disclosure,[5] and on LGBTQ2S + individuals, who are more likely than others to be living with HIV in Canada (meaning that criminal laws that apply to HIV non-disclosure are more likely to negatively affect them). The restrictions also interfere with the application of the *Gladue* framework to Indigenous people, which requires judges to consider their unique circumstances. Given inadequate access to healthcare and harm reduction services in prisons, restricting the availability of conditional sentences for people living with HIV also exacerbates the harms of HIV criminalization.

[4] L. Michaud et. al, *Harms of Sex Offender Registries in Canada among People Living with HIV*, December 15, 2021.
[5] Key Trends and Patterns, p. 10.