

HIV

and the Criminal Law in Canada



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Most of the time, whether you tell others (or “disclose”) that you have HIV is up to you. You may choose not to disclose that you have HIV because you are not sure how to tell people, or because of stigma and discrimination against people living with HIV. You may also choose not to disclose because of homophobia, racism, transphobia, or discrimination against Two-Spirit people.

The situation is different when it comes to sex partners. In Canada, the criminal law says that, in certain circumstances, you must tell your sex partners that you have HIV before you have sex. This is sometimes referred to as a **“legal duty to disclose.”** While criminal law in Canada is colonial law that denies Indigenous law and legal traditions, it is the law that is currently enforced.

But you do not always have to disclose that you have HIV to your sex partner under the criminal law. According to courts in Canada, you are only required to tell your sex partner that you have HIV before you have sex when there is a **“realistic possibility”** that you could pass on (transmit) HIV. If you do not tell your sex partner that you have HIV before you have sex where there is a “realistic possibility” of passing on HIV, you can be charged with aggravated sexual assault, even if your partner does not get HIV.

Unfortunately, courts have not clearly defined what “realistic possibility” means for different types of sex. So sometimes it can be really hard to figure out if you have a legal duty to disclose.

When there is no duty to disclose

- You do not legally have to tell your partner that you have HIV before kissing or other activities that have no risk of HIV being passed on.
- You do not legally have to tell your partner before having vaginal, anal, or oral sex if you use a condom **and** your viral load is low, suppressed, or undetectable.

Viral load is the amount of HIV in a person’s bodily fluids. It is usually measured per millilitre of blood. One of the goals of HIV treatment is to reduce a person’s viral load as much as possible, so that there is less of the virus causing damage to the person’s immune system and organs. When someone has a “suppressed” or “undetectable” viral load, it does not mean that they are cured of HIV. But it does mean that they cannot transmit HIV through sex.

- **Low viral load** means, for the purposes of the criminal law, a viral load of under 1,500 copies of HIV per millilitre of blood.
- **Suppressed viral load** means a viral load of under 200 copies of HIV per millilitre of blood.
- **Undetectable viral load** means a person’s viral load is so low that HIV does not show up in viral load tests.



Whether you have to disclose in other circumstances is less clear.

- In recent years, depending on where you live in Canada, **you do not have to disclose if you have a suppressed or undetectable viral load for a certain period of time** (e.g. four or six months), even when a condom is not worn during anal, vaginal, or oral sex.
- If you do not have a low, suppressed, or undetectable viral load **and** a condom is used during vaginal, anal, or oral sex, whether or not you have a duty to disclose depends on the situation and where you live:
 - In the Yukon, Northwest Territories, and Nunavut, a federal policy tells prosecutors that people “generally” should not be prosecuted if a condom was worn or they engaged only in oral sex, but people still may be prosecuted.
 - In British Columbia, a provincial policy says that using a condom “may” be a reason not to prosecute people for not telling their sex partner, but people can still be prosecuted. The policy also states that people will not be prosecuted if they only have oral sex and no other “risk factors” are present. The policy describes sores in the mouth, vagina or penis, bleeding gums, oral contact with menstrual blood, and the presence of other sexually transmitted infections (STIs) as risk factors. There may be other risk factors that prosecutors could consider, which means that people may still be prosecuted even if they only have oral sex.
- In Nova Scotia, there is one court decision that said using a condom meant there is no legal duty to disclose. This is an important decision. Even so, it does not automatically stop a prosecution or conviction in another case where someone used a condom but did not tell their sex partner they have HIV.
- In Ontario, a 2020 court decision said that just using a condom won’t be enough to protect people from being prosecuted and convicted. Unless you have a low, suppressed, or undetectable viral load, you still legally have to disclose that you have HIV to a sex partner, even if a condom is used, during vaginal and anal sex. And even if you only have oral sex, unless your viral load is low, suppressed, or undetectable, there is still a risk of being prosecuted and convicted if you don’t tell your sex partner — and this could be the case even if you use a condom. Using a condom for oral sex might reduce the chance of being charged and convicted, but we do not know for sure.

If you are threatened with criminal charges, please contact a lawyer immediately. If the police want to ask you questions, you do not have to answer them. You should only tell the police your name and date of birth, but nothing else, even if they keep asking questions. Anything you say to the police at any time may be used as evidence against you. You have the right to speak to a lawyer in private before answering questions from the police. The lawyer is the only person you should talk to about this situation.

You can read more about HIV and the criminal law in Canada in our longer pamphlet, available in English and French.

hivlegalnetwork.ca/IndigenousCommunities



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