



EXECUTIVE SUMMARY:

The Need for
New Charge Assessment Guidelines:
HIV Non-Disclosure
in British Columbia

Executive Summary

The Positive Living Society of British Columbia (Positive Living BC) recommends the development of new charge assessment guidelines regarding HIV non-disclosure in British Columbia. The Society's position is described in full in the following paper, a paper that is educational, comprehensive, and the result of a year's worth of extensive consultation, collaboration, research, and writing. Positive Living BC hopes the Minister of Justice, through the Office of the Assistant Deputy Attorney General, will heed the information herein and use it to shape new charge assessment guidelines on HIV non-disclosure – a subject of acute importance to HIV-positive persons living in British Columbia.

Positive Living BC recommends the development of new charge assessment guidelines in consequence of two 2012 HIV non-disclosure decisions by the Supreme Court of Canada – *R. v. Mabior* and *R. v. D.C.* The *Mabior* decision states, "A significant risk of serious bodily harm is established by a realistic possibility of transmission of HIV. On the evidence before us, a realistic possibility of transmission is negated by evidence that the accused's viral load was low at the time of intercourse and that condom protection was used." (*Mabior*, 2012. pp. 622-623).

Positive Living BC is a non-profit organization dedicated to empowering persons living with HIV/AIDS through mutual support and collective action. As an organization with a membership of more than 5,500 HIV-positive members, representing nearly two-thirds of all persons who have been diagnosed with HIV in this province, we are greatly concerned that the Supreme Court decisions in *R. v. Mabior* and *R. v. D.C.* will lead to larger numbers of criminal prosecutions arising from instances of HIV non-disclosure, increase stigma against people living with HIV/AIDS, and damage public health efforts to bring an end to the HIV/AIDS epidemic.

Positive Living BC has identified the following problems with the Supreme Court decisions in *R. v. Mabior* and *R. v. D.C.*:

1. *R. v. Mabior's* definition of "realistic possibility of transmission" is unjustifiably broad and does not reflect up-to-date scientific and medical data. Each year, hundreds of thousands of HIV exposure events in Canada could fall under the "realistic possibility of transmission" test as defined in *Mabior*. In actuality, the overwhelming majority of HIV non-disclosure events do not result in transmission [p.22], and the risk of transmission during sexual acts is negligible when safer sex is practiced. [p.35].
2. While the *Mabior* decision addresses risk and possibility of transmission in regards to vaginal intercourse, it does not address other sexual acts and transmission methods such as oral sex and anal intercourse. The decision also fails to differentiate between HIV exposure and transmission events. As a result, persons living with HIV face uncertainty regarding which legal standards apply to which sexual acts or transmission methods. Four decades after the HIV/AIDS epidemic began, people living with HIV still face the dehumanizing situation of inconsistent and uncertain application of the criminal law.
3. The decisions in *R. v. Mabior* and *R. v. D.C.* may result in larger numbers of criminal prosecutions arising from instances of HIV non-disclosure. Increased criminal cases for HIV non-disclosure, and the media sensationalism, breaches of personal privacy and discrimination that often accompany such cases, will further stigmatize HIV/AIDS and increase discrimination against people living with the disease. Canada is already a 'world

leader' when it comes to the criminal prosecutions of such cases. Canada and the US have convicted more people for HIV exposure and transmission offences than all the other countries of the world combined. [p. 11].

4. The justice system's increased criminalization of HIV and HIV non-disclosure is inconsistent with, and works against, health systems and public health campaigns that seek to normalize HIV testing and treatment. Increased criminalization of HIV non-disclosure will damage and diminish the effectiveness of current efforts to bring an end to the HIV/AIDS epidemic.
5. Over-criminalization of HIV non-disclosure will disproportionately affect and further marginalize at-risk populations who historically have had less power to obtain health and social services, access HIV care, and negotiate safer sex practices, such as women, First Nations, and others.

Consequently, the Positive Living Society of British Columbia recommends:

1. The development of charge assessment and prosecutorial guidelines in regards to HIV non-disclosure should include meaningful consultation with persons living with HIV, HIV experts, and other key stakeholders.
2. Approved guidelines should be subject to ongoing review and revision. The three areas in which we find the current "Sex 2" [p.27] guidelines to be helpful should be retained, they being:
 - Upon receipt of a Report to Crown Counsel, if the MHO has not been involved, ensure that the matter is reported as soon as possible,
 - Prosecution decision should take into account conditions which the medical health officer may order under pertinent legislation, and
 - Any proposed charge involving possible transmission of a sexually transmitted disease, including HIV, should be reviewed by Regional or Deputy Regional Crown Counsel.
3. Public health options should be exhausted before resorting to the criminal law, except when a deliberate transmission event has taken place or a person engages in an ongoing pattern of deliberately reckless and dangerous sexual activities. Such behaviour may warrant a charge under the Criminal Code.
4. There should be a strong presumption against prosecution in cases of exposure alone (i.e. where transmission of the virus does not occur), especially when the risk of transmission was low or negligible (e.g., oral sex), or based on a single occurrence.
5. Persons living with HIV who have followed public health and/or medical advice by practicing safer sex, such as using a condom or maintaining a low viral load through adherence to ARV treatment, should not be subject to prosecution.
6. It is imperative that all new charge assessments and criminal prosecutions related to HIV be informed by complete, accurate and up-to-date understanding of relevant medical and scientific research in such areas as: the risk of HIV exposure and transmission, treatments, changes in morbidity, mortality and life expectancy, the social context of HIV as experienced by persons living with HIV who are members of marginalized and vulnerable groups, and the impact of stigmatization and discrimination. Specifically, until such time as a more authoritative source is published, the Canadian Consensus Statement on HIV Transmission and the Criminal Law should be the principal source for information regarding transmission

risks on the basis of which new charge decisions are made. Further, in instances where the defence seeks to introduce the Consensus Statement during court proceedings arising from charges involving HIV non-disclosure, the Crown should not oppose the motion.

7. Reference to the Consensus Statement notwithstanding, it is necessary to seek the advice of a qualified medical expert during the charge assessment process and at trial.
8. No prosecution should be undertaken in cases where the sexual activity engaged in by the non-disclosing person living with HIV did not involve vaginal and/or anal penetrative sex (i.e., oral sex, digital sex, masturbation, etc.).
9. We believe that prosecutorial discretion should be exercised when considering use of the Criminal Code to address HIV non-disclosure among women and members of marginalized groups. In particular, we believe that no prosecutions should be undertaken in instances where the non-disclosing person living with HIV reasonably believed that their disclosure of their HIV status would lead their sex partner or some other third party to do serious harm to them (e.g., harm of a sort that could reasonably be supposed to result in a charge of assault causing bodily harm, section 267 of the Criminal Code).
10. Police and Crown Counsel must handle HIV-related criminal complaints and prosecutions in a fair, non-stigmatizing and non-discriminatory manner that respects the privacy and human rights of persons living with HIV while avoiding any reinforcement of societal prejudices, preconceptions and irrational fears.
11. Crown Counsel and the police must respect the privacy rights of persons living with HIV and limit the negative impacts inevitably attendant on publicly disclosing a person's HIV-positive status by avoiding activities which promote media sensationalism or unnecessary breaches of personal privacy, or which contribute to ongoing stigmatization of HIV and discrimination against persons living with HIV.
12. Current cultural awareness and sensitivity training for municipal police forces, the RCMP operating in BC, and all Crown Prosecutions counsel should be maintained and, indeed, extended in scope and content to include the lived experience of persons living with HIV, up-to-date scientific and medical information in the areas of epidemiology (including incidence, prevalence and mortality within various demographic cohorts), treatment and prevention, HIV/AIDS stigma and discrimination, and the social contexts of those living with HIV/AIDS (particularly those who are members of society's most marginalized groups). No decision to prosecute arising from an instance of HIV non-disclosure should be taken by a Crown Counsel who has not gone through such training.
13. In all cases and instances, the burden of proof should rest with the Crown and, where conflicting evidence boils down principally to a matter of the accused's "credibility", all of the considerations in Recommendation 12 ought to be brought into play. In other words, the presumption of innocence ought to be especially strong in such cases.
14. At least until such time as the Supreme Court of Canada has had a chance to revisit its rulings in *Mabior* and *D.C.*, the BC Ministry of Justice publish annually a summary of statistics concerning prosecutions arising out of instance of HIV non-disclosure including the number of HIV non-disclosure related investigations, charges, convictions, length of sentence and estimated cost of each case (and in total) that is paid for out of the public purse.