

What Do You Need to Know?

2019 Update on HIV Criminalization in BC



How HIV Non-Disclosure is Treated– What the Federal Criminal Law Says

In Canada, people living with HIV can be charged and prosecuted for not disclosing their HIV-positive status to their sexual partners (often referred to as “HIV criminalization”).

In 2012 the Supreme Court of Canada ruled that, for people living with HIV, **there is a legal duty to disclose one’s HIV-positive status before having sex that poses a realistic possibility of HIV transmission.** (The cases were [R. v. Mabior](#) and [R. v. D.C.](#))

What then is “realistic possibility”? The court stated ruled that there is no obligation to disclose if (1) the accused’s viral load at the time of sexual relations was low (under 1500 copies per ml) ***and*** (2) a condom was used.

Those who don’t disclose their HIV-positive status when a *realistic possibility* of HIV transmission has occurred can face criminal charges. Often people are charged with aggravated sexual assault, which carries a maximum punishment of life imprisonment. People who are convicted of aggravated sexual assault are also placed on the National Sex Offender Registry for life.

People living with HIV have been charged even when:

- they did not intend to transmit HIV,
- they engaged in behaviours that posed little or no risk of transmission, and/or
- they did not, in fact, transmit HIV to their sexual partners.

HIV Non-Disclosure in BC – How It is Decided if Someone Will Be Charged

The section above outlines what the criminal law says and is. However, there is some room for discretion in deciding whether charges should be laid.

Prosecutors in BC – also known as BC Crown Counsel/Crown Prosecutors) -use a set of recommendations called *prosecutorial guidelines* to make decisions about laying charges against people who may or may not have committed a crime.

In cases of alleged HIV non-disclosure, the prosecutorial guidelines that BC Crown Counsel look to is called the Sex-2 policy. The Sex-2 policy says:

In the following specific situations, there would be no realistic possibility of transmission and, therefore, charges should not be approved:

- during each act of vaginal or anal sex a condom was correctly used ***and*** the person living with HIV had a low viral load. (Low viral load is defined as less than 1,500 copies of the virus per ml of blood) [*In other words, using a condom is not enough*]

- the person living with HIV accepted and adhered to a regime of antiretroviral therapy and maintained a *supressed* viral load of less than 200 copies/ml of consecutive measurement every four to six months
- the parties to the sexual act only engaged in oral sex, and no other risk factors were present.

These are the current prosecutorial guidelines, used by the BC Crown Prosecutors to make decisions about whether or not to lay charges in instances of alleged HIV non-disclosure. Each case is unique, however, so if you have questions about a specific situation, please consult a lawyer, as only lawyers can provide legal advice. This information is not intended to be legal advice, nor can it be used as legal advice in counseling people.

For more information on HIV and the law in Canada, visit the [Canadian HIV/AIDS Legal Network](#).

Do service providers (front line workers, peer navigators, etc.) have a legal obligation under the criminal law to report a client’s potentially criminal behaviour?

Information from the [Canadian HIV/AIDS Legal Network](#) says that “Generally speaking, there is no obligation under the criminal law to report a crime to the police or provide the police with information about a client unless such a requirement is set out in a search warrant.” However, there are some circumstances where there may be a specific duty to report (when a child is in “in need of protection” is one such situation).

Please see the Canadian HIV/AIDS Legal Network information sheet, [Criminal Law and HIV Non-Disclosure](#), for details. Please note too, that the information being provided is not legal advice that can be applied to a specific situation or circumstance. If in doubt, consult a lawyer.