

What Do You Need to Know?

HIV Criminalization in BC



What federal criminal law says about HIV non-disclosure

In Canada, it remains a crime if people living with HIV don't disclose their HIV-positive status to their sexual partners (often referred to as "HIV criminalization").

In 2012 the Supreme Court of Canada ruled that people living with HIV have a legal duty to disclose their HIV-positive status before having sex that poses a *realistic possibility* of HIV transmission. According to the Court, there is no obligation in Canadian criminal law to disclose HIV-positive status when having vaginal or anal sex *if* a condom is used and the HIV-positive partner has a "low" viral load (determined in 2012 as under 1500 copies/ml). Those who didn't disclose their HIV-positive status when a *realistic possibility* of HIV transmission has occurred can face criminal charges.

Whether a person might be prosecuted and convicted for not disclosing their HIV-positive status in other circumstances depend on court decisions and on directives and guidelines governing prosecutors, where they exist.

Several court decisions since have accepted that if a person has an undetectable or suppressed viral load, then this is enough on its own to mean there is no realistic possibility of transmission – and one court in Ontario has acquitted someone based solely on their "low" viral load (under 1500 copies/ml). However, the issue of whether condom use alone is enough to remove the obligation to disclose is less clear. In 2018, a Nova Scotia court accepted that condom use alone was enough to acquit the accused person. But more recently, the Ontario Court of Appeal explicitly rejected this argument: in August 2020, it upheld the aggravated sexual assault conviction of a man living with HIV for non-disclosure, even though it was agreed that condoms were used on all occasions, there was no evidence of incorrect use, and no allegation of transmission.

When charges are laid, most 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 – and convicted – 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 – most convictions are in fact where NO transmission has occurred.

A federal directive [limits prosecutions in Canada's three territories](#). Formal policy for provincial Crown prosecutors has been adopted in Ontario and [British Columbia](#). An advisory has been given to provincial prosecutors in Alberta and Quebec. In the other provinces, there is no guidance.

HIV non-disclosure in BC – how decisions are made about laying charges

There is some room for discretion in deciding whether charges should be laid. Lawyers in BC – who work for the BC Prosecution Service (BCPS) – 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.

The BCPS policy manual for Crown counsel includes a policy addressing cases in which someone is accused of HIV non-disclosure. [The policy](#) says:

Crown Counsel must carefully balance the need to protect the general public and the individual and sexual autonomy of victims while also ensuring that persons living with HIV are not subject to criminalization or stigmatization solely based on their illness.

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 200 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.

The BCPS policy does not clearly say there will or should be no prosecution if the sexual partner living with HIV uses a condom. The policy says that if “the person living with HIV correctly used a condom during a single act of vaginal or anal sex and HIV was not transmitted,” this is a factor that “may weigh against prosecution.” Similarly, it “may” be a factor weighing against prosecution “if the condom slipped or broke during or after the sex act and the person living with HIV immediately disclosed their HIV status to their partner, making it possible for their partner to seek immediate medical advice and, if appropriate, start on a course of anti-HIV medications (post-exposure prophylaxis).”

These then, are the current prosecutorial guidelines used by BC Crown Prosecutors to make decisions about whether to prosecute 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 criminal law in Canada, visit the [HIV 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 [HIV 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 (e.g., when a child is in “in need of protection” is one such situation).

Please see the HIV Legal Network information sheet, [The Criminalization of HIV Non-Disclosure in Canada: Current Status and The Need for Change](#), for details. Please note too, that the information being provided is not legal advice that can be applied to a specific situation or circumstance- nor can it be used as legal advice in counseling people. **If in doubt, encourage your client/member/patient to consult a lawyer.**

Additional resources

[HIV and Criminalization overview on issues and advocacy](#) from the HIV Legal Network

BC Crown Counsel Policy Manual: [Sexual Transmission, or Realistic Possibility of Transmission, of HIV \(Policy code Sex 2\)](#)

[Presentation to Canadian Association of Nurses in HIV Care conference, May 13, 2022](#)