

The Criminalization of HIV Non-Disclosure: What Do You Need to Know?

30th Anniversary Conference of CANAC

May 13, 2022

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hepatitis C, and harm reduction.*

Overview of Presentation

- What the Law says about Criminalization of HIV Non-Disclosure
- Positions taken on the use of Criminal Law in Canada
- Impacts of Criminalization on PLWH
- Positive Women Revisited (video)
- Legal Obligations for health care workers
- Practice tips for health care workers
- Advocacy opportunities
- Other issues
- Resources
- Acknowledgements



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The Law



What the Law says

- Currently, it remains a crime in Canada – categorized as aggravated sexual assault – not to disclose one’s sexual status with consenting sexual partners, even when there is little to no risk of transmission (e.g. where condoms are used.) And even if no actual transmission occurs.
- 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**. 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 (under 1500 copies/ml). Whether a person might be prosecuted and convicted for not disclosing their HIV-positive status in other circumstances continues to evolve, and depends on court decisions and on directives and guidelines governing prosecutors (where they exist).
- 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.

What the Law says *(cont.)*

- **Suppressed viral load:** In Ontario, British Columbia, Quebec and Alberta there should be no prosecution against someone with HIV for alleged HIV non-disclosure if they were under treatment and had a “suppressed viral load” (under 200 copies/ml) at the time they had sex, regardless of whether a condom was used. In the territories, the federal directive does not specify that the person living with HIV must be on treatment; it simply says that having a suppressed viral load suffices. There is some variation across jurisdictions about how long viral load must be suppressed before the sexual activity to avoid prosecution.
- **Condom use:** In the territories, there should “generally” be no prosecution for not disclosing if a condom was used (unless “other risk factors” were present), regardless of the person’s viral load. In British Columbia, using a condom “is a factor that may weigh against prosecuting someone for alleged HIV non-disclosure.”
- **Oral sex:** Regardless of a person’s viral load, in British Columbia there should be no prosecution if a person only engaged in oral sex (if no “other risk factors” were present), while in the territories, there should “generally” be no prosecution (unless “other risk factors” were present).

What the Law says *(cont.)*

- The charge of aggravated sexual assault carries a maximum punishment of life imprisonment. If convicted, people 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 transmit HIV to their sexual partners – the majority of convictions are in fact where NO transmission has occurred.

CANAC's Own Position Statement on HIV Criminalization (2013)

Canada's use of the criminal law in relation to HIV has been recognized as overly broad and punitive by a wide range of stakeholders including the federal government, the House of Commons Standing Committee on Justice and Human Rights, international health agencies and human rights bodies, Canada's HIV and scientific communities, and women's rights advocates. As well as CANAC....

*The Canadian Association of Nurses in AIDS Care (CANAC) believes that the criminal law is an ineffective and inappropriate tool to prevent HIV exposure and transmission. The use of criminal law impedes HIV prevention efforts by dissuading people from accessing needed HIV diagnostic and treatment services. It also compromises the ability of PLWH to openly and honestly communicate with nurses. Furthermore, it places the responsibility of HIV prevention solely on PLWH, and undermines the public health message that HIV prevention is a responsibility shared by all individuals regardless of HIV status. **HIV affects individuals, families, communities, and populations; it must therefore be addressed as an individual and public health issue, not through the blunt instrument of the criminal law.** Strategies to address HIV prevention, treatment, and care should focus on the health and human rights of PLWH, and must acknowledge that this population already faces complex health, interpersonal, family, and social challenges. In light of the current situation in Canada, we recommend that nurses advocate for the rights of PLWH, and practice in line with their provincial professional and ethical standards.*



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Impacts



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Who is being charged and prosecuted?

- As of 2022, there have been well over 200 prosecutions for alleged HIV non-disclosure in Canada.
- The vast majority of cases have taken place in three provinces: Ontario, Quebec, and British Columbia.
- The HIV Legal Network did a comprehensive review of HIV Criminalization in Canada from 1989 to 2020. Select high-level findings include:
 - Most HIV prosecutions do not involve HIV transmission, demonstrating that most HIV cases are about alleged or real exposure to the virus, rather than transmission.
 - Trends suggest that HIV non-disclosure cases have very high rates of conviction and that a large proportion of cases result in prison sentences.
 - The criminal law is still used disproportionately against people living with HIV from some racialized populations. Black men are disproportionately represented among those prosecuted for alleged HIV non-disclosure. Black and Indigenous people are convicted at a higher rate, acquitted at a lower rate, and are more likely to face prison sentences than their white peers.

Who is being charged and prosecuted? *(cont.)*

- In recent years, there has been a reduction in prosecutions, and particularly against people with a suppressed viral load, reflecting community advocacy and greater understanding of the available scientific evidence. But people living with HIV continued to be charged and convicted for HIV non-disclosure in cases in which their sexual activities pose a negligible risk of HIV transmission or no risk at all.
- There remains an urgent need for the criminal legal system to be better guided by science and by human rights principles in responding to HIV, and for government action to end the harms of HIV criminalization in Canada.

Source: <https://www.hivlegalnetwork.ca/site/hiv-criminalization-in-canada-key-trends-and-patterns-1989-2020/?lang=en>

Impacts on people living with HIV

- What are the real-life impacts of using “the blunt instrument of the criminal law” on people living with HIV?
- Dr. Alexander McClelland’s work – as part of his doctoral research over the course of two years, Alex interviewed 16 people who had been charged and convicted of aggravated sexual assault for HIV non-disclosure, and put on the sex offender registry. Outside of incarceration, harms included:
 - PTSD and psychological distress arising from being understood as a violent rapist (after consensual sex), Police surveillance and enforced sex offender programs.
 - Barriers to community reintegration and family reunification, including vigilantism and negative media coverage.

All had tried to commit suicide or had long periods of suicidal ideation.

<https://www.hivlegalnetwork.ca/site/harms-of-sex-offender-registries-in-canada-among-people-living-with-hiv/?lang=en>

“I’m on the registry that is for rapists and pedophiles, I really don’t feel like I belong there. I am on there because of HIV. I have to let people know when I am working or when I am volunteering. They need to keep tabs on me.” Quote from an Indigenous woman who was required to register because of an aggravated sexual assault conviction for non-disclosure.



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A close-up photograph of a red rose with a white center, set against a dark background. The rose is the central focus, with its petals clearly visible. The text is overlaid on the rose.

Positive Women

Exposing Injustice

Revisited / Révisé

Thoughts/reflections on the VIDEO?



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Health Care Providers



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Do service providers, nurses and other health care workers have a legal obligation under the criminal law to report a patient or 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](#) 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/patient to consult a lawyer.**

Some suggested “practice tips” for nurses, and other public health workers

1. Offer anonymous testing wherever and whenever possible, for HIV and for other STIs.
2. When doing testing, do not ask the person getting tested for details such as # and sex/gender of partners, what activities they engage in, dates of their sexual encounters, etc.
3. Advise people to seek anonymous testing, and not to provide details such as those above.
4. If details arise, record as little as possible while meeting your professional standards. If discussion arises, talk in "hypothetical" or general terms only (e.g., in addressing someone's questions about risk associated with different activities, symptoms of infection, etc.)

Some suggested “practice tips” for nurses, and other public health workers *(cont.)*

5. In post-test counseling (after a positive test result)
 - (a) do NOT prioritize communicating about criminalization of nondisclosure - this is additional trauma.
 - (b) if/when the issue of obligations to disclose to sexual partners arises, try to refer your client/patient to resources such as those from the HIV Legal Network.
6. Depending on your relationship with the client/patient, consider an assessment before getting tested about risks arising should the result be positive (e.g. intimate partner violence, possible legal jeopardy for non-disclosure, consequences for immigration status, and other considerations.)

Thoughts on practice tips?
Other tips to share?



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Advocacy



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How CANAC members can advocate for policy change

“In light of the current situation in Canada, we recommend that nurses advocate for the rights of PLWH, and practice in line with their provincial professional and ethical standards.” From CANAC’s 2013 Position statement

1. **U=U (Undetectable = Untransmittable).** A person living with HIV on antiretroviral therapy (ART) who has an undetectable viral load (under 200 copies/mL) cannot transmit HIV through sex.

Endorse the U=U Consensus Statement (INTERNATIONAL) and make colleagues aware.

On World AIDS Day 2018 U=U was officially endorsed by the federal government and Public Health Agency of Canada (PHAC).



How CANAC members can advocate for policy change *(cont.)*

2. Support the Community Consensus Statement and calls for legal reform being led by the Canadian Coalition to Reform HIV Criminalization to limit HIV criminalization to actual, intentional transmission, and to put an end to the use of sexual assault offences in these cases. This statement is supported by more than 170 organizations across Canada – but not yet CANAC. After further consultations, there will be the opportunity to act in 2022.
3. Depending on what province you are working in, speak publicly to / advocate for the introduction of prosecutorial guidelines to limit the use of the criminal law – or to change existing provincial prosecutorial guidelines and policies (BC, Ontario, Quebec, Alberta) to adopt directives that at a minimum reflect the limits on the use of the criminal law that have been articulated by the [Attorney General of Canada](#) (which are in effect for the three territories).
4. Fight HIV stigma with evidence and compassion.

Other ideas for advocacy?
What have you done?



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Other related legal and policy issues on our radar

1. Use of Public Health Orders – in Alberta and in BC. Instances where public health has utilized the police in order to try and manage individuals and their viral loads.
2. Out of care watch lists - There is a watch list program in BC, called Retain, through the Centre for Excellence, which seeks to flag people who are considered out-of-care for intensified engagement with public health authorities. Such watch lists are very common in the United States.
3. Current litigation before the Supreme Court R vs. Kirkpatrick, involving ‘condom refusal’, could potentially broaden the law that applies to HIV non-disclosure too, and more people living with HIV could face criminal charges. It could further distort sexual assault law outside of the HIV context, which is under prosecuted and under enforced. HIV Legal Network and others are actively involved.

Other related legal and policy issues on our radar *(cont.)*

4. **Molecular HIV Surveillance (MHS) Technology** - A practice innovated in BC and exported around the world seeking to identify, manage and control HIV outbreaks. The general aim is to rapidly identify similar strains of the virus that can be connected into clusters, and to intervene with “enhanced public health” approaches to connect people to treatment and care or testing and stop transmission. Human rights concerns include:
- Consent and autonomy;
 - Lack of community consultation;
 - Increased stigma on targeted communities;
 - Privacy and data protections;
 - Whether or not the technology can be used to “prove” direct transmission; and,
 - How MHS may intensify HIV criminalization within communities already marginalized and oppressed.
 - **“We are people, not clusters.”**

Additional Resources and Recommended Reading

- [The HIV Legal Network and partner organizations: The Criminalization of HIV Non-Disclosure in Canada: Current Status and The Need for Change \(2019\)](#)
- [The HIV Legal Network: HIV and Criminalization overview on issues and advocacy](#) *(continuously updated)*
- [The Criminalization of HIV Non-Disclosure in Canada - Experiences of People Living with HIV \(2019\) – Alex McClelland](#)
- [CARCERAL PUBLIC HEALTH: HIV SURVEILLANCE, TREATMENT & CRIMINALIZATION \(2022\) - Alex McClelland](#)
- [Legal and Clinical Implications of HIV Non Disclosure: A Practical Guide for HIV Nurses in Canada \(2013\) – CATIE and CANAC](#)
- [Canadian Coalition to Reform HIV Criminalization](#)

Additional Resources and Recommended Reading

- [U=U: The Backstory](#) #UEQUALSU / @PreventionAC
- [Molecular HIV Surveillance: A Global Review of Human Rights Implications](#)



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Acknowledgements

The HIV Legal Network: www.hivlegalnetwork.ca

CATIE: www.catie.ca

Dr. Alexander McClelland: www.alexandermcclelland.ca

Prevention Access Campaign: www.preventionaccess.org



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Thank you!
Any questions or comments?

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