

HIV and the Criminal Law in Ontario

People in Canada who face criminal charges related to HIV non-disclosure are typically charged with sexual assault, on the theory that not disclosing one's HIV-positive status, when legally required, makes their partner's consent to sex invalid. Often, a charge of aggravated sexual assault is laid, on the theory that HIV infection "endangers the life" of their partner.



Under Canada's current criminal law, the duty to disclose one's HIV-positive status does not apply to all sexual activity. According to a Supreme Court of Canada¹ decision in 2012, people living with HIV have to disclose their HIV status to partners before sexual activity that poses "a realistic possibility" of HIV transmission.

The Supreme Court's decision recognized that there is no realistic possibility of HIV transmission when a condom is used and the person with HIV has a viral load of under 1,500 copies/ml of blood.

Since that decision, Ontario has recognized that having a low enough viral load could, on its own, mean there is no realistic possibility of transmission. On December 1, 2017, Ontario's Attorney General announced² that, effective immediately, provincial prosecutors will no longer prosecute cases of alleged HIV non-disclosure where a person on antiretroviral therapy can demonstrate that their HIV has been "suppressed" - which means a viral load under 200 copies/ml of blood - for at least 6 months prior to the alleged sexual activity.

On December 1, 2018, the federal government announced³ a directive to help limit unjust prosecutions against people living with HIV in Canada. While very important, this directive governs federal prosecutors, who handle criminal prosecutions only in the three territories in Canada. It does not apply to Ontario or other provinces.

¹ *R. v. Mabior*, 2012 SCC 47.

² Ontario, Ministry of the Attorney General. *Crown Prosecution Manual – D. 33: Sexual Offences against Adults*, updated December 1, 2017. Available at <https://www.ontario.ca/document/crown-prosecution-manual/d-33-sexual-offences-against-adults#section-0>.

³ Announcement available at <https://www.newswire.ca/news-releases/attorney-general-of-canada-to-issue-directive-regarding-prosecutions-of-hiv-non-disclosure-cases-701701791.html>.

As of the date of publication of this factsheet, based on the Ontario policy and recent court cases, here is guidance for people living with HIV in Ontario:

No duty to disclose

- A person living with HIV who is on antiretroviral therapy and has a viral load of under 200 copies/ml blood for at least 6 months does not have a duty to disclose their HIV status before anal, vaginal or oral sex. This is the case whether or not a condom is used.
- A person living with HIV who has a viral load between 200 and 1500 copies/ml blood does not have a duty to disclose their HIV status before anal, vaginal or oral sex if a condom is used properly and does not break.

Duty to disclose

Prosecutions may take place in all other circumstances when a person living with HIV does not disclose their HIV status before anal, vaginal or oral sex (prosecutions based on oral sex alone are less likely). For example:

- A person living with HIV who has a viral load between 200 and 1500 copies/ml blood has a duty to disclose if no condom is used. If a condom is not used properly or breaks, and there is no disclosure, a prosecution may still take place.
- A person living with HIV who has a viral load of over 1500 copies/ml blood has a duty to disclose, regardless of whether a condom is used.

If you are threatened with criminal charges, please contact the HIV & AIDS Legal Clinic Ontario (HALCO) immediately. If you are contacted by police about criminal charges, please do not answer any questions (other than providing basic information such as name and date of birth) and contact HALCO immediately.

Anyone living with HIV in Ontario can contact the HIV & AIDS Legal Clinic Ontario (HALCO) for free legal advice: 416-340-7790 or toll-free 1-888-705-8889.



HALCO, in partnership with people living with HIV and others, will continue to engage in law reform activities to ensure that the criminal law is brought in line with science and human rights in a manner that is supportive of HIV-related care, treatment and prevention.

You can find more information on our website: www.halco.org

This document contains general information and is not legal advice.