A scan of Canadian reported cases of the criminalisation of HIV/AIDS non-disclosure: 1989 to 2024.[1]

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Abstract

This study examined Canada's criminalization of HIV non-disclosure to assess the criminal justice system's response and included a review of literature, government reports, laws, and policies concerning the prosecutions between 1989 to 2024. We reviewed 162 reported cases to assess the types of offences and outcomes, prosecution distribution across the country, and accused and complainant characteristics. The literature points out that Canadian courts often overlook medical advancements, disproportionately criminalising HIV non-disclosure compared to other sexually transmitted infections. Our findings confirmed that, and revealed that over time, public nuisance, sexual, and criminal negligence offences were applied. The accused were predominantly male, and although most were noted to be Caucasian, those who were identified as Black, Indigenous, or 2SLGBTIQ+ were disproportionately criminalised. Most cases were prosecuted in Ontario and Québec, and the accused and complainants were most often known to each other as casual, dating, or in long-term relationships. We argue for the reassessment of the criminalisation of HIV non-disclosure, considering Directive 5.12 and Standing Committee's Report (2019) both of which are a move in the right direction; however, charges continue post 2019, as do the stigmatising effects of prosecution, and the need for more education and public health interventions.

Keywords: *non-disclosure of HIV; HIV/AIDS; sexual offence; case law; criminalisation of HIV non-disclosure.*

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A scan of Canadian reported cases of the criminalisation of HIV/AIDS non-disclosure: 1989 to 2024.[2]

Human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS) are still widely misunderstood diseases. Most assume that a diagnosis of HIV/AIDS is easily attainable, quickly spreadable, and terminal. Medical advancements reveal that this is not the case. Misinformation influences how Canadians living with HIV are treated, and often that treatment is clouded in shame, stigma, social isolation, and in some cases criminalisation, all of which act as barriers for others to get tested and educated. Advancements in medicine bring us to a time when receiving the diagnosis is no longer a death sentence. Advancements in the treatment of HIV/AIDS with the use of highly active antiretroviral therapy (HAART) and combined antiretroviral therapy (cART) drugs have resulted in a reduction in transmission risk and rates, and mortality risks (Arkell & Harrigan, 2023; Gagnon & Vézina, 2018).

We must therefore question the value of continued criminalisation of the non-disclosure of this specific medical disease. This was the basis for our exploration of judicial decisions across Canadian courts from 1989 to 2024. We approached this evidence critically to examine how cases are prosecuted, their dispositions, how the ethnicity and sexual orientation of accused persons is identified, and the relationship between accused(s) and complainant(s). We analysed 162 Canadian criminal cases across all jurisdictions that involved prosecuting the non-disclosure of HIV/AIDS. Results included 20 cases for the non-disclosure of other diseases, in addition to or instead of HIV such as Hepatitis or Syphilis. We reflected on the criminal justice system's response to HIV, including an analysis of the types of offence charges, descriptions about the

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complainant(s) and accused(s), and a summary of the fundamental Supreme Court's decisions in *R v Cuerrier,*[3] *R v Mabior*,[4], and *R v D.C.*.[5]

We commenced the study with several hypotheses. One was that a disproportionate number of accused persons would be gay or trans; two, more accused persons would not be Caucasian; three, we believed that ss. 271-273 sexual assault offences would be the most frequent charge; four, we expected an uneven distribution among provinces; five, we expected that accused and complainants were known to each other; and six, we expected most cases to be for HIV non-disclosure.

Furthermore, the leading cases from the Supreme Court of Canada are signposts that have guided how non-disclosure cases have been prosecuted and should be prosecuted in Canadian courts. Our position is that criminal courts still lag behind medical realities and that non-disclosure of HIV/AIDS is stigmatised and criminalised more so than any other (more transmittable) sexually transmitted infection.

Canada has a competent public health agency[6] that in conjunction with government and regional health services, addresses and responds to communicable diseases (among other things). One method used by some provinces is an order under their respective health act, which can direct persons or agencies to act for the protection of society. Ontario and Alberta, for example, used such orders during the COVID pandemic to shut down businesses and restrict gatherings (Alberta Ministry of Health; Government of Ontario, n.d.). Our criminal courts respond to

[3] *R v Cuerrier,* 1998 2 S.C.R. 71
[4] *R v Mabior*, 2012 SCC 47
[5] *R v D.C.*, 2012 SCC 48
[6] Public Health Agency of Canada. See https://www.canada.ca/en/public-health.html

HIV/AIDS in such a vigorous way that it has produced long-lasting legal, health, social, employment, and psychological consequences to Canadians living with HIV/AIDS.

It wasn't until 2019 that the *Report of the Standing Committee on Justice and Human Rights* recommended ending prosecutions of non-disclosure "except in cases where there is actual transmission of the virus." *Directive 5.12 Prosecutions involving Non-Disclosure of HIV Status*)[7] from the Public Prosecution Service of Canada directs prosecutors to use non-sexual offences when charges are called for, and it directs them not to prosecute cases of non-disclosure where the accused has a suppressed viral load. This Directive is a step in the right direction however, our research revealed that 12 accused were prosecuted for non-disclosure between 2019 to 2024,[8] and in only one unique accused case was a complainant(s) infected.

Facing a criminal charge has a detrimental effect on everyone. The more common scenario involves two consenting adults engaging in sexual activity, and the complainant later learns that the other person is HIV-positive. Yet there is value in prosecuting cases where the

[7] https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p5/ch12.html

[8] Under subsection 10(2) of the *Director of Public Prosecutions Act*:

(a) The Director shall not prosecute HIV non-disclosure cases where the person living with HIV has maintained a suppressed viral load, i.e., under 200 copies per ml of blood, because there is no realistic possibility of transmission.
(b) The Director shall generally not prosecute HIV non-disclosure cases where the person has not maintained a suppressed viral load but used condoms or engaged only in oral sex or was taking treatment as prescribed, unless other risk factors are present, because there is likely no realistic possibility of transmission.
(c) The Director shall prosecute HIV non-disclosure cases using non-sexual offences, instead of sexual offences, where non-sexual offences more appropriately reflect the wrongdoing committed, such as cases involving lower levels of blameworthiness.
(d) The Director shall consider whether public health authorities have provided services to a person living with HIV who has not disclosed their HIV status prior to sexual activity when determining whether it is in the public interest to pursue a prosecution against that person.

accused has the intentional intent to infect and harm sexual partners.[9] Prosecuting such cases may serve to deter and denounce such intentional conduct in line with the purpose and principles of sentencing in Canada.

The Debate

The debate on HIV non-disclosure involves two themes: the tension between public health objectives and the role of the criminal justice system; and the harm from criminalising HIV non-disclosure. Although some scholars may agree that the criminal justice system can serve as a deterrent to reduce HIV transmission, they also point out that the justice system may undermine public health efforts and discourage individuals from seeking testing or disclosing their status (Burris & Cameron, 2008; Jimba et al., 2014; Novak, 2021). Scholars also emphasise the disconnect between the legal and healthcare systems, as criminalisation can lead to negative consequences, such as stigma and discrimination, which may deter individuals from accessing healthcare services, including testing and treatment (Burris & Cameron, 2008; Jimba et al., 2014; Novak, 2021). Non-disclosure criminalisation does not consider scientific progress in HIV treatment. While legal frameworks can positively impact individuals living with HIV/AIDS, they can also create barriers, such as people being afraid to get tested from fear of being criminalised (Canadian Coalition to Reform HIV Criminalization, 2017; HIV Legal Network, 2019; Jimba et al., 2014; Novak, 2021).

[9] In 2023, the Ontario Court of Appeal (ONCA) substituted manslaughter convictions for first-degree murder and sentenced him to life imprisonment. The ONCA set aside the aggravated assault convictions and dismissed his sentencing appeal, which means his life sentence remains as does his Dangerous Offender designation (from August 2, 2011). On April 4, 2009, Johnson Aziga was convicted for engaging in penetrative sexual activity with 11 different women without disclosing to them his knowledge that he was HIV positive. The two murder convictions arose from the deaths of two women.

Criminal law extends beyond enforcement, impacting societal norms and perpetuating stigma. Arguments against criminalising HIV non-disclosure centers on public health objectives, infringement of individual rights, confusing legislation, and discriminatory application (Canadian Coalition to Reform HIV Criminalization, 2017; Jimba et al., 2014; Novak, 2021). Approaches such as promoting testing, providing support, and free treatment, better align with public health goals and protection of vulnerable groups (Canadian Coalition to Reform HIV Criminalization, 2017; Jimba et al., 2014; Novak, 2021).

The literature offers a consistent narrative that the legal system fails to account for the complexities of HIV transmission, prevention and treatment advances, leading to unjust prosecutions and convictions (Adam et al., 2016; McCall, 2018; Novak, 2021). This is overly punitive and ineffective (Novak, 2021; Odhiambo et al., 2023) along with policies that generate fear, make it difficult for people to get tested, to follow their treatment plans, and to understand their viral load and transmission risk (Adam et al., 2016; McCall, 2018; Novak, 2021; Odhiambo et al., 2023). It is therefore imperative to critically examine how the law has been applied to the non-disclosure of HIV across Canada.

Methodology

Our scan of criminal cases related to the prosecution of non-disclosure of HIV involved reviewing publicly available case reporters on three legal databases. A reported case is the written decision from a judge that explains their reasoning and relevant legal principles (Dvorkina & Macfarlane, 2017). It is important to note that not every matter that appears in every court in Canada is reported, and some are published in public databases such as the Canadian Legal Information Institute (CanLII), while others are found in paid legal databases such as Quicklaw (Lexis Nexis) or LawSource (Carswell). Two Google Sheets spreadsheets

were created—one dedicated to results found in the Canadian legal databases and the other to the literature reviewed.

Spreadsheet one itemised all available cases from all jurisdictions across Canada between 1989 to 2024, using the search terms "HIV" and "non-disclosure." We itemised each case's features, such as sex, race, and number of accused; sex, race, and number of complainants; relationship between accused and complainant; offences; disposition, including appeals; aggravating and mitigating factors; whether complainants were infected; and deportation orders. Analysis involved the formulas and tools available in the Google Sheets software.

Spreadsheet two included annotations for scholarly publications between 1996 and 2024 using key search terms such as "HIV" and "non-disclosure," "HIV AND Criminalization," "non-disclosure," "AIDs AND STI," "criminal charges AND (HIV OR AIDS)". The literature was collected through Google, Google Scholar, and the [redacted] University Library databases. We noted the discipline (policy, law, medical, etc.), source and year, methodology, findings, and an annotation of articles. Pi AI and ChatGPT were used to assist in summarising the methodology and findings of sources and to capture the key points in a concise manner (Inflection AI, 2023; OpenAI, 2023). Analysis of the literature involved using the tools within the Google Sheets spreadsheet software, resulting in groups of annotations into themes of race, sex, and sexual orientation.

This approach brought together a legal and scholarly perspective to help gain a deeper understanding of the criminalisation of HIV non-disclosure from both practical and theoretical standpoints. This helped support and contextualise what was found in the literature.

The study had limitations due to its reliance on publicly reported case reporters from three legal databases. Not every court case heard across Canada is reported in these databases.

More English-language cases were found on these databases, with only a few cases in French that we translated from our rudimentary knowledge of the language and with the assistance of Google Translate.

What is HIV?

Human immunodeficiency virus (HIV) was first discovered globally in 1983 (Norris, 2011). Up to the end of 2023, the World Health Organization (WHO, 2024b) estimated that approximately 39.9 million people globally are living with HIV. Incidence has decreased by 39% since 2010, with 1.3 million new infections recorded in 2023. Additionally, HIV-related deaths have also decreased significantly. In 2023, 630,000 people died from HIV-related causes globally, marking a 51% reduction since 2010 (Joint United Nations Programme on HIV/AIDS, & WHO, 2024b). This decrease represents a 69% reduction in HIV-related deaths since the peak in 2004, which can be accredited to education and testing, early detection, advancements in medication (antiretroviral therapies), and improved quality of living (CHEST, 2024; UNAIDS, 2024).

Of the 39.9 million people globally living with HIV, approximately 65% live in the Africa region (WHO, 2024b). As of 2023, there were 4 million people living with HIV in the Americas with around 2.7 million residing in Latin America and the Caribbean region (WHO, 2024a). Canada represents a small portion of the world's HIV cases, with an estimated 62,790 individuals living with HIV as of 2020 (Challacombe, 2024).

With the development of the AIDS Case Reporting and Surveillance System in 1982, the first reported case of AIDS in Canada was identified in February of that year. Although not officially recognised at the time, the first medical case of HIV/AIDS occurred in 1979 when a retroactive review of historical medical files was conducted (Health Canada, 1996). Since 1996,

the Canadian Mortality Database shows that the number of annual deaths attributed to HIV infection has been declining. The lowest recorded number of deaths attributed to HIV/AIDS (105) was reported in 2019 (Statistics Canada, 2024a). The mid-1990s revealed the highest number of deaths and infections in Canada, with 1,764 deaths in 1995 (Public Health Agency of Canada, 2022; Statistics Canada, 1997; UNAIDS, 2024), largely assumed to be from people who were infected throughout the mid-1980s before medical awareness and treatment advanced. During the 1980s and 1990s, misinformation, stigma, homophobia, and limited treatment options led to a culture of fear surrounding HIV/AIDS (Galletly & Pinkerton, 2006; Mykhalovski et al., 2010), resulting in the belief that such a diagnosis was a death sentence and transmission was effortless. That fear, social trepidation, and stigma lead the courts to criminalise non-disclosure of HIV/AIDS (Dej & Kilty, 2012).

HIV and acquired immunodeficiency syndrome (AIDS) no longer equate to immediate death or even a terminal diagnosis. Medical advancements reveal there are two strains of the disease: HIV-1, which was discovered in 1981 and can be found throughout the world; and HIV-2, which was discovered in 1986 and is mostly isolated to western Africa (Lackie, 2010). HIV attacks an individual's immune system, specifically, the CD4-positive T cells and macrophages, all of which are key cells within the immune system that work to fight infections (Lackie, 2010). The devastation of the virus comes through its actions within the immune system. By creating antibodies in the CD4 cells, HIV attacks and replicates itself (Arkell, 2020; Canadian Aids Society, 2013). During this process, the borrowed immune system cells are ultimately destroyed (Public Health Canada, 1996), and it depletes CD4 cell levels, weakening the immune system's ability to fight infections such as pneumonia. The immune system becomes deficient, and the infections that may invade a person's body during this stage of the disease are known as

opportunistic infections (e.g., pneumonia or influenza, certain cancers, and tuberculosis) (WHO, 2005). An individual may live for ten, fifteen, or even twenty years before the final stage of HIV emerges, known as AIDS; however, the arrival of an opportunistic infection causes complications that may kill the person instead of AIDS. Still, the case is that tuberculosis remains the leading cause of death in such patients (CHEST, 2024).

The Measure of the Virus in the Blood

According to the Center for Disease Control and Prevention in the United States (2016), a healthy individual living without HIV will have between 500 and 1,800 CD4 cells per cubic millimetre (mL) of blood. Once an individual has a CD4 count of 200 or below, AIDS is diagnosed. An AIDS diagnosis may still be declared if the CD4 count is above 200 if other opportunistic infections are also present (*Pittman Estate v Bain*, 1994 7489 ONSC).

Another measure of the virus is the total viral load (VL) count within the blood. A test measures the number of HIV copies in one millilitre of blood. This viral load count is a key measurement in the diagnosis and treatment of HIV/AIDS (and a key aspect of non-disclosure criminal cases). The more of the virus that is detected in the blood, the faster the CD4 count will fall (Carter & Hughson, 2014). However, viral load can fluctuate greatly depending on factors such as the length of time the patient has had the virus and the availability and quality of treatment, as well as the overall health of an individual before diagnosis. The International Association of Providers of AIDS Care (2024) quantifies having a high VL if a measurement of 100,000 copies of HIV RNA[10] per millilitre of blood exists. Low levels are described as a

[10] RNA is a nucleic acid composed of nucleotides, which are in turn composed of a phosphate group and other elements. RNA is like a copy of the DNA, which is more protected inside the nucleus of the cell. It is allowed to go out of the nucleus, and thus it is used as the cell's reference for its functions, most notably the synthesis of protein. As an analogy, the DNA is the master

measurement of under 10,000 copies/ml (Wolitski, 2016) (which is another key aspect of non-disclosure criminal cases).

Viral load levels in other bodily fluids (e.g., saliva) may produce different results, and external factors such as vaccines and other sexually transmitted infections may also cause viral loads to spike and fluctuate (AETC National Coordinating Resource Center, 2014). But with advancements in treatment and health determinants, people living with HIV can achieve a state known as an undetectable viral load. This is when a test indicates a VL between 20 to 50 copies/ml (AETC National Coordinating Resource Center, 2014; Sewell et al., 2017), which is well below the 10,000 copies/ml baseline. Most viral load tests used in Canada cannot detect HIV in the blood if there are fewer than 40 to 50 copies/ml of the virus, but some newer tests can detect as few as 20 copies/ml (Harrigan, 2022). Viral load "appears to be an important predictor of transmission, regardless of the route of transmission" (Public Health Agency of Canada, 2013, p. 9). Undetectable levels do not mean that HIV does not exist within the blood; rather, that the amount of virus is so extremely low that, consequently, its impact on the body is low, and the risk of transmission to another person is also low (this is another key aspect of non-disclosure criminal cases).

In *R v Nduwayo* (2010), Dr. David Patrick shared medical findings that an estimated rate of transmission during sexual activity between a male and female is 1 in 1000 (0.1%). In *R v D.C.,* (2010), another expert testified that "when the viral load is undetectable, the risk of transmission decreases to 1 in 10,000" (*D.C. v R.,* 2010, at para. 97). Others have concluded that HIV viral load suppression (i.e., below 50 copies/mL of blood) reduces the possibility of HIV

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plan (so it is kept safely inside, to prevent damage), the RNA is the copy of that plan, and the RNA is used as reference as to what protein is to be produced (Blatt, 2015).

transmission during vaginal intercourse to 0/100 person years[11] (Loutfy, et al., 2013). Other medical studies (Canadian AIDS Society, 2013) have suggested that regardless of whether viral loads are low or undetectable, antiretroviral medications greatly reduce transmission rates and that the risk of HIV transmission will decrease "89 to 96 percent when the HIV-positive partner is treated with HAART and ART medications, irrespective of whether the viral load is low or undetectable" (Cohen et al., 2011, p. 101).

Transmission Risk

Achieving accuracy in determining HIV transmission rates during sexual activity is a complex equation, as a variety of factors can influence the risk of transmission. The type of sexual activity, the type of protection used, the occurrence (or not) of ejaculate, male circumcision, the presence of other STIs, in addition to HIV viral loads, are just some of the factors that research indicates may influence the risk of the transmission of the virus (Public Health Agency of Canada, 2012). A study with these variables in mind involved a systematic, meta-analytic, and narrative review of cases between January 2001 and May 2012 (Paquette et al., 2013; Public Health Agency of Canada, 2013). Estimates for the sexual transmission of HIV per sex act were noted as:

- From 0.5% to 3.38% (with mid-range estimates of 1.4% to 1.69%) for receptive anal intercourse (where the receiver is not infected).
- From 0.06% to 0.16% for insertive anal intercourse (where the inserter is not infected).

[11] Person years is the estimate of the actual time-at-risk in years, months, or days that all persons contributed to a study. This means there will be on average zero HIV transmissions through vaginal intercourse if we watch 1,000 people for one year (Tenny & Boktor, 2023).

- From 0.08% to 0.19% for receptive vaginal intercourse (where the female is not infected).
- From 0.05% to 0.1% for insertive vaginal intercourse (where the male is not infected).

Due to biological differences of male and female genitalia, it is more difficult for a man to contract HIV from an infected woman than it is for a woman to contract it from an infected man. Studies are limited on the transmission risks between non-heterosexual partners (Becasen et al., 2019; Rodger et al., 2019).

By 2010 we see the courts incorporating science to determine realistic risk. Justice Fenlon in *R v J.A.T.*, (2010) used scientific thresholds to conclude that "three incidents of unprotected anal intercourse at a risk of 4 in 10,000 per occurrence … falls short of that standard" (para. 56).

How Non-Disclosure is Criminalised

The criminalisation of HIV non-disclosure has been debated among legal scholars and advocates (Adam et al., 2016). Understanding the pre-existing social injustices contributing to the over-criminalisation of marginalised groups is essential in informing policy reforms and addressing issues of systemic discrimination within the Canadian legal system.

Much of the literature focused on the legal implications of *Cuerrier* and *Mabior*, and how these court decisions have faced significant criticism, particularly from a public health perspective (McCall, 2018; Novak, 2021; Singh & Busby, 2021). Advocates argue against stigmatising people living with HIV/AIDS, which hinders public health efforts and discourages treatment-seeking (McCall, 2018; Novak, 2021; Singh & Busby, 2021). Criminalisation is met with resistance by some trial and appeal courts too, as they support that low viral loads reduce the realistic risk of transmission (Adam et al., 2016). Medical and legal experts advocate for

reforming non-disclosure law to align with contemporary medical knowledge and public health objectives (McCall, 2018; Novak, 2021; Singh & Busby, 2021). But despite the prevalence of HIV-specific criminal prosecutions for non-disclosure, there is a lack of empirical evidence that supports how prosecutions are effective in preventing HIV transmission (Mykhalovskiy, 2015). Instead, emotional harm is experienced by individuals affected by HIV non-disclosure laws, and fear of criminalisation prevents people from getting tested (Bogosavljević & Kilty, 2023; Singh & Busby, 2021).

Fraud

When the criminal charge is a sexual offence, in addition to viral load and non-disclosure of one's HIV status to a sexual partner(s), the courts examine whether fraud vitiated the partner's right to consent to sexual activity. The foundation of any sexual offence is that consent was not obtained. This could be because one partner was unconscious or so intoxicated that they could not communicate consent (s. 273.1(1)). Consent is also not obtained when the partner is underage, is impaired cognitively from dementia for example, or when there has been fraud (s. 265(3)(c)). Fraud (s. 380(1)) is defined in law as using deceit, falsehood, or other fraudulent means, whether ascertained or not, of any property, money or valuable security, or any service.[12] In the sexual context, person B consented to sexual activity under the conditions and information that person A communicated to them. If it can be proven that person A lied or omitted facts to

[12] The court emphasized that proof of the element of fraud: (1) dishonesty and (2) deprivation or risk of deprivation, are required to establish that consent to the sexual activity was displaced by fraud. The *Criminal Code* charge often used at the time was s. 178 (nuisance) which has since been repealed and replaced as s 180). *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, SC 2019, c 25 (Assented to 2019-06-21). https://canlii.ca/t/53rgg

person B, that could constitute fraud, thereby vitiating consent to sexual activity. For example, had I known that person A was HIV-positive, I would not have consented to sex with them.

For a conviction for sexual assault (ss. 271-273), the prosecutor must prove beyond a reasonable doubt that: (1) the accused committed the act that a reasonable person would see as dishonest (e.g., was not truthful about their disease status); (2) that there was harm, or a realistic risk of harm to the complainant as a result of that dishonesty (e.g., risk of transmission); and (3) that the complainant would not have consented to the sexual act had they known the accused's true health status (Adam et al., 2016).

The leading case of criminalisation of non-disclosure based on fraud was *R v Cuerrier*, (1998, 2 SCR 371). The case was dismissed at trial on the basis that the complainant had consented to sexual activity with the accused, and the prosecutor's appeal was dismissed by the British Columbia Court of Appeal. But at the Supreme Court of Canada, the majority held that a complainant's consent to sexual activity may be vitiated by fraud when the accused conceals or fails to disclose that they are HIV positive.[13] The belief at the time and often referenced going

[13] The Court in *Cuerrier* clarified the significant risk test and case law parameters for establishing fraud:

1. Since HIV poses a risk of serious bodily harm, the operative offence for failure to inform a sexual partner of one's HIV status is aggravated sexual assault (para. 2);
2. The Cuerrier approach to consent, namely, a "significant risk of serious bodily harm", remains valid and accords the concept of consent meaningful scope (para. 58);
3. A "significant risk of serious bodily harm" is established within the meaning of Cuerrier where there is a "realistic possibility of transmission of HIV" such that "the deprivation element of the Cuerrier test is met" (emphasis in original para. 84);
4. Where a realistic possibility of transmission of HIV exists, disclosure of HIV status prior to sexual relations is required. Conversely, if no such realistic possibility exists, the failure to disclose one's HIV-positive status will not constitute fraud vitiating consent to sexual relations (para. 91); and
5. As a general matter, "a realistic possibility of transmission of HIV is negated if (i) the accused's viral load at the time of the sexual relations was low, and (ii) condom protection was used" (emphasis in original para. 94).

forward was that "because of the deadly consequences of the risk of HIV infection on an unknowing victim" (*R v Phelan,* 2013 NLCA 33, at para 30), a person must disclose. In our environmental scan, we discovered that from 1998 (post-*Cuerrier*), 70 cases were prosecuted in this manner until the next substantive SCC decision in 2012.

The Supreme Court revisited fraud vitiating consent in *R v Mabior*, 2012 SCC 47. They clarified the realistic risk of transmission given that medical advancements outline risks. *Mabior* held that the duty to disclose one's positive status would only arise if the activity posed a significant risk of serious bodily harm, and in the absence of such risk, the duty to disclose is not required.

> The *Cuerrier* requirement of 'significant risk of serious bodily harm' should be read as requiring disclosure of HIV status *if* there is a realistic possibility of transmission of HIV. If there is no realistic possibility of transmission of HIV, failure to disclose that one has HIV will *not* constitute fraud vitiating consent (*R v Cuerrier,* 1988 2 SCR 71, at para 91). [emphasis added]

Mabior demanded that prosecutions keep pace with scientific evidence that clarifies what is a realistic risk of transmission and how the law should be open to adapting to future advances in medicine. Also in 2012, *R v D.C.,* 2012 SCC 48, realistic risk was revisited (including whether a condom had been used to mitigate that risk). The trial judge convicted D.C. of ss. 271 and 273. The Court of Appeal of Québec concluded that the trial judge's reasoning as to whether a condom was used was a reasonable inference but it set aside the convictions because even without condom use, the requirement of a significant risk of serious bodily harm was not met,

because of the absence of detectable HIV copies (VL) in D.C.'s blood (para. 2). The SCC reaffirmed again that a low VL does not constitute a realistic risk of transmission, and consequently not disclosing one's HIV status does not constitute fraud vitiating the complainant's consent to sexual activity.

Despite *Mabior* and subsequent rulings, the fact remains that a Canadian can still be criminally charged because of not disclosing their HIV/AIDS status to a sexual partner(s). Criminalising individuals living with HIV/AIDS has adverse effects not only on them. Stigma, fear of social alienation, and criminal prosecution prevent others from getting tested. As far back as 1995 (in *R v Napora,* 1995 9249 ABKB), Justice Veit cautioned against the criminalisation of non-disclosure, fearing it is a potential barrier to others not getting tested:

> … if a person knew that they might be charged criminally with having consensual, unprotected, high risk sex, they may decide not to get tested, or not to get tested under their real names. This reluctance might well have a negative effect on the work of those epidemiologists who are working towards the arrest of this virus in our communities. (para 16)

In 2008, the Goudge Report articulated the roles and responsibilities of trial judges as gatekeepers in this matter. The British HIV Association and the Expert Advisory Group on AIDS/EAGA released a joint position statement on the use of antiretroviral therapy in the reduction of HIV transmission. It noted that HAART/ART use is as effective as consistent condom use in limiting viral transmission (Fidler et al., 2013). A Canadian study (Loutfy et al.,

2013), analysed transmission rates between heterosexual serodiscordant couples[14] when the HIV-positive partner has an undetectable VL and is on a combination of antiretroviral therapy. Their study suggested that transmission rates were 0/100 person years.

Although we may not be living in a generation of fear like the one found in the 1980s when paranoia and homophobia were intensely prevalent and pervasive, HIV/AIDS remain greatly misunderstood diseases that are plagued by stigma in Canada (Canadian HIV/AIDS Legal Network, 2012; Cornett, 2011; Glauser, 2010). The structural stigma surrounding HIV has played a significant role in perpetrating over-criminalisation, negative societal attitudes, legal policies, and access to support and treatment for those affected (Gagnon & Vézina, 2018). This stigma seeps into our criminal justice system as criminalisation of non-disclosure. Society and its moral lenses drive lawmakers towards criminalising certain behaviours. From the early 1990s, the Canadian government responded to society's fear by criminalising the non-disclosure of HIV/AIDS. Over subsequent decades, those laws were challenged, revised, and reapplied, but no other communicable disease has undergone such a litigious history. More communicable and highly transmissible infections/diseases (such as Herpes, Hepatitis, or Syphilis) have not been prosecuted for non-disclosure (WHO, 2023; Xu et al., 2010), and in only 15 of our cases they are included in prosecutions along with HIV non-disclosure, but minimised in the case reporter.

Criminal Charges

Canada's punitive approach to HIV non-disclosure has garnered international attention for having one of the highest global counts of HIV criminalisation cases (HIV Justice

[14] Serodiscordant couples is a term defined as a couple wherein one person is HIV-positive and one who is HIV-negative. The term "mixed serostatus" is also used synonymously. "Sero" refers to blood serum. "Serostatus" refers to whether someone has HIV infection or not.

Worldwide, 2019; Patterson et al., 2022). Canada's *Criminal Code* has no specific HIV non-disclosure criminal offence, but other criminal charges have been applied throughout the decades.

In the 1980s and 1990s, courts used ss. 157-159[15] (all of which have been repealed). These were repealed in 1987 because there was a need to clarify sexual offence laws and address concerns about its vague and subjective nature, including the subjective nature of what is considered 'indecent' (Dostal, 2023) (see Table 1). Occasionally, other charges were used, such as common nuisance (see Table 2). Common nuisance (s. 180) is when an individual commits an illegal act or neglects to act when there is a legal responsibility, that endangers the lives, safety, health, property or comfort of the public; or obstructs the public in the exercise or enjoyment of any right that is common. A conviction has no mandatory minimum sentence of imprisonment, but a possible imprisonment not exceeding two years.

Later on, the most frequently used offence was for aggravated sexual assault (s. 273). Section 273 is understood to include sexual assault that wounds, maims, disfigures, or endangers the life of the complainant. Since HIV transmission was considered life-endangering (at one time), this charge was applied in many HIV non-disclosure cases (see Table 3). A conviction for aggravated sexual assault carries no mandatory minimum sentence of imprisonment (unless a firearm is used) but a possible maximum of life imprisonment plus registration on the national sex offender registry. Other charges that have been applied in HIV non-disclosure cases are criminal negligence causing bodily harm (s. 221), which is when someone acts or fails to act in a way that shows wanton or reckless disregard for the lives or safety of other persons. A

[15] Gross indecency (ss 157 and 158), and anal intercourse (s 159). See Nicol (2017).

conviction carries no mandatory minimum sentence of imprisonment and a possible maximum sentence of 10 years.

Over-Criminalisation of Marginalised People

There is concern about the over-criminalisation of marginalised groups, including Indigenous, Black/African Canadians, and gay/trans Canadians for various offences. We queried whether these groups experience over-representation in HIV non-disclosure cases. In Hastings et al.'s review (2017) of the post-*Mabior* era (2012-2016), almost half (48%) of those charged were Black men, compared to 30% before 2012. Hastings et al. noted that out of the 18 women who faced charges, 42% were Indigenous. The gender distribution remained consistent before and after the *Mabior* decision, according to their analysis, with 89% of those charged being men and 11% being women before the decision, 91% being men and 9% being women following the decision. An analysis of 2015-2016 cases by the Canadian HIV/AIDS Legal Network (2017) revealed that only 12 people were charged, including five Black men and five gay men.

Despite medical advancements, people living with HIV can still face criminal charges and prosecution. They face violations of confidentiality, courtroom bias, higher conviction rates, challenges with healthcare, and disregard for their personal experiences and circumstances (Baral et al., 2023; Gagnon & Vézina, 2018; Odhiambo et al., 2023).

Indigenous Peoples and Black/African Canadians

According to various studies, Black/African Canadians living with HIV have been targeted more frequently by the Canadian criminal justice system (Canadian HIV/AIDS Legal Network, 2017; Hastings et al., 2017; Hastings et al., 2024). Racial stereotypes frequently subject Black individuals to over-policing and over-surveillance, discouraging them from seeking help from healthcare professionals (Odhiambo et al., 2023). Black people living with

HIV face obstacles because of the structural violence ingrained in institutional practices, policies, and legal and cultural frameworks (Odhiambo et al., 2023).

Other studies indicate that Indigenous women make up a large portion of those charged with HIV non-disclosure (Hastings et al., 2024; Patterson et al., 2022). Hastings et al. (2024) point out that HIV criminalization is another "form of structural violence" (p. 10) perpetrated against Indigenous peoples in colonial states, exacerbating not only to interpersonal violence but also hindering the understanding and physical and mental well-being (Cross, 2020; Krüsi et al., 2018; Patterson et al., 2022).

Sex and Sexual Orientation

Sex and sexual orientation are sometimes noted in non-disclosure cases. Hastings et al. (2017) found that men (including one transgender woman) made up 88% of all those charged in Canada by the end of 2016, while women made up 10%; 26% of charges were brought against men who had sex with men, and 1% of charges involved male and female partners as accused (Hastings et al., 2017). The Hastings et al. study shared that since the 2012 *Mabior* decision, there has been a 12% increase in charges against men who have sex with male partners (38% total cases), while charges related to sex involving heterosexual couples remained low (4% total cases). It's unclear whether this increase can be attributed to the *Mabior* decision or is an indication that sexual orientation bias remains a conscious or unconscious bias[16] in the decision to prosecute cases.

[16] Unconscious bias is a natural cognitive process rooted in the human brain's need to categorize and process vast amounts of information quickly. Various factors shape these biases, including cultural norms, media portrayals, personal experiences, and socialization. In the workplace, unconscious bias can manifest in various forms, such as racial, gender, age, and disability biases (Egale, 2024).

Stigma against the 2SLGBTIQ+ community remains in and out of the courtroom, making it difficult for individuals, especially those living with HIV, to access support (Nadarajah, 2024). People on the rainbow face high rates of discrimination and violence when they seek help, such as heightened risks of abuse and sexual violence, particularly against transgender women and trans women of colour (Cross, 2020; Nadarajah, 2024). This increased vulnerability exposes them to greater risks of HIV and sexually transmitted infections (Nadarajah, 2024). Furthermore, the fear of criminalisation, violence, and discrimination deters many in the 2SLGBTIQ+ community from disclosing their HIV-positive status to partners and medical professionals, while others lack knowledge, have self-stigma, and struggle to find adequate resources (Baral et al., 2023; Cross, 2020; Nadarajah, 2024; Sauermilch et al., 2023).

Findings

We explored the prosecutions of HIV non-disclosure cases to determine how the criminal justice system responds, and to assess the types of offences and outcomes, prosecution distribution across the country, and accused and complainant characteristics.

From 1989 to 2024, Canadian courts have used various offences to criminalise the non-disclosure of one's HIV status to another sexual partner(s); most often, sexual assault offences have been used (ss. 271-273) or ss. 150-153[17] in the case when the complainant is a young person. According to a study by the House of Commons, the *Report of the Standing Committee on Justice and Human Rights* (2019), revealed that since 1989, "at least 200 individuals have been prosecuted for non-disclosure of their [HIV-positive] status" (p. 15).

[17] Consent underage no defence (s. 150), sexual interference (s. 151), invitation to sexual touching (s. 152).

Our examination of Canadian cases from 1989 to 2024 revealed 131 unique cases (i.e., an accused person on trial or, in some cases, more than one accused person on trial for the same case) with a combined total of 162 case reporters. The 162 reporters include trials and appeals of the unique cases. And our scan revealed 233 unique complainants. The review revealed findings that confirmed and contradicted some of our hypotheses.

From the 131 unique cases, 15 involved prosecutions of HIV non-disclosure along with non-disclosure of another sexually transmitted disease, such as Hepatitis A, B, or C, Syphilis, Herpes, and/or Gonorrhea.

Criminal Charges

There are various charges brought against those who failed to disclose their HIV status.[18] We hypothesised that most charges would be sexual offences regardless of the year or decade, and indeed that was the case. From 1989 to 2024, 74 out of 131 unique cases included sexual offence charges. Other cases included assault offences (26 of 131), and seven cases involved criminal negligence offences. Combining all guilty plea cases, convictions at trials and held at appeals, resulted in a total of 112 convictions.

In 2018, Directive 5.12 of the Public Prosecution Service of Canada guided prosecutors to consider criminal negligence offences (instead of sexual offences) in instances where a realistic risk of transmission or intent to transmit can be shown. In concert with the House of Commons Report of the Standing Committee on Justice and Human Rights (2019), "the Committee strongly believes that the use of criminal law to deal with HIV non-disclosure must be circumscribed immediately and that HIV must be treated as a public health issue" (chapter

[18] See Appendix A for a legend of *Criminal Code* offences included in the review.

5.1). Although in the right direction, sexual offence charges persisted. From 2019 to 2024, we found 16 unique cases that still included sexual offence charges instead of negligence offences despite the Directive.

Distribution

As we hypothesised, the distribution of prosecuted cases across Canada varied considerably. Ontario and British Columbia had the most prosecutions (63 and 23 unique cases, respectively), which could be accounted for by their larger populations, prosecutorial motivation, or something else. Québec (13) and Alberta (10) were next, with Nunavut, New Brunswick, and Prince Edward Island having no prosecutions. Consult Image 1: Map.[19]

Around the time of the *Mabior* decision (2012-2013), 17 cases were prosecuted (seven from Ontario, three from British Columbia, two from Québec, two from Nova Scotia, and one from Manitoba, Newfoundland, and the Northwest Territories). Between 2014-2019, 12 (out of 24 cases) were prosecuted in Ontario.

Accused Persons

Of the 131 unique cases examined, 112 accused were male, 17 were female (12.8%), two were not identified, and in two cases, there were two male co-accused.

Race

Where race was noted, the accused was identified as Black or of African descent in 14 cases (all male), First Nations (eight were male and three were female), Asian (one female), and Southeast Asian (one male), for a total of 27 cases (20.4%).

[19] "Canada location map 2" by MapGrid is licensed under CC BY-SA 4.0. This map was used and annotated to provide a visual description of this distribution.

In five cases, the accused was identified as Caucasian (three males), and the remaining reporters did not make note of the accused's race. We hypothesised that there would be a disproportionate number of unique cases involving marginalised accused, but that could not be determined with so many cases failing to note the accused's race, sexual orientation, criminal, or vulnerable status.

There were 23 unique accused who were prosecuted for non-disclosure that involved cases with three or more complainants. We can speculate whether they should be defined as serial offenders, but what is clear is that four accused knowingly continued to engage in unprotected sex after their diagnosis and education from public health officials. This intentional behaviour fits better with the purview to prosecute rather than prosecuting consensual acts between gay partners.

Leone (Caucasian male) was diagnosed in 1997 and despite repeated interactions with health officials, failed to disclose his HIV-positive status to female partners. He was convicted in 2008 of 15 counts of aggravated sexual assault for drugging and raping some victims, and some victims were aged 16. Five complainants tested positive and two of the infected women attempted suicide (CBC News, 2008).

Aziga (male from Africa) was diagnosed in 1996 and despite repeated interactions with health officials, failed to disclose his HIV-positive status to his wife and other female sexual partners. He was convicted in 2008 and 2009 of first-degree murder (later reduced to manslaughter on appeal) and aggravated sexual assault pertaining to 13 complainants. Seven women tested positive, and two died as result of complications from their HIV infection (*R v Aziga*, 2023 ONCA 12).

Boone (Caucasian male) was convicted in 2012 of three counts of attempted murder and aggravated sexual assault after failing to disclose his HIV-positive status to his male partners. Evidence revealed he expressed an intention "to mark" partners. For some cases he was prosecuted with a Caucasian male co-accused. Seven of the 11 complainants tested positive (*R v Boone,* 2013 ONSC 79).

Mabior (male from Africa) was diagnosed in 2004 and despite repeated interactions with health officials, failed to disclose his HIV-positive status. He was convicted in 2008 of sexual assault, aggravated sexual assault, and sexual interference with a minor. There were nine female complainants, two of whom were under the age of consent (16). No complainants were recorded as testing positive (*R v Mabior*, 2012 SCC 47).

Marginalised Persons

Another of our hypotheses was that the accused would be a marginalised person in some manner other than race. Our analysis revealed seven accused identified as sex workers (six females). One male accused was described as unhoused, six accused were noted to have prior involvement with the criminal justice system (two females), and two accused were male youths. This totalled 16 cases (12.1%). Additionally, two accused were identified as transgender, while 16 male accused individuals who identified as gay or bi-sexual. This accounted for a total of 18 cases (13.6%). Furthermore, 14 accused (10.6%), which included five females and nine males, were described as vulnerable either because of a mental illness, a disability, or having an addiction.

Combining all these descriptors, there were 48 cases (36%) that identified the accused as marginalised in some way. We might consider that criminalisation of HIV non-disclosure is an example of structural violence against marginalised people. Medical anthropologists and

sociologists concur that criminalisation consequences "result from structural processes, forces, and forms of violence that interface to shape and constrain the agency of individuals" (Odhiambo et al., 2023, pp. 2-3). Although not every case reporter noted marginalisation descriptors, when it is present, prosecuting reinforces fear and stigma of criminalisation to the community.

Relationship Between Accused and Complainant(s)

The type of relationship between the accused and complainants was most often described as boyfriend/girlfriend (45 cases) or casual acquaintances (40), with the majority being heterosexual encounters. 22 cases involved a public warning or the public as the complainant.[20] Eight cases involved child abuse; seven cases involved married/common-law partners; four cases involved friends; three cases involved parents as accused; and two cases did not describe the relationship.

In the cases involving 17 females accused (12.8% of the cases), nine were for public nuisance or notification offences, three were girlfriends to men, two were casual acquaintances, and one female was described as a friend of the complainant. One female accused was married/common-law, and one female accused was a parent to the complainants.

Complainants

There was a total of 233 unique complainants, 41 of whom became infected because of the sexual encounter. Only 32 complainants were male (13.7%), 76 were identified as female (32.6%), in five cases there were male and female complainants, and in 47 cases (20.2%) there

[20] A case where the public is noted as a complainant means that there is not a person who has come forward reporting a crime, but rather the police and/or the public health authority issue a warning or request charges because they believe the public is at risk of harm. For example, one case involved an accused who was engaged in survival sex work, was in active addiction, who was HIV-positive and unable or unwilling to take preventative measures to reduce the risk of transmission.

were two or more female complainants, which mirrors the gendered nature of other sexual offences (Conroy, 2024; Cotter, 2021).

In the 22 cases where 'the public' was noted as the complainant, an accused was prosecuted in addition to the state warning the public and/or seeking other complainants to come forward. These accused were women involved in sex work or women declared as "unfit" parents for failing to care for themselves and thereby putting their children at risk for infection. We can critique these decisions, asking whether realistic risk is present from everyday interactions between a mother and child, or is this another form of shame being used to criminalise HIV and women in particular?

Race

In no case reporters was the race of the complainants identified except in *R v Aziga*[21], which included 11 female complainants, only some of whom were noted as African women.

Marginalised Status

Female complainants were identified as sex workers in two cases. In other cases, two females out of four complainants were described as unhoused, 10 (out of 17 youth) were female, two females (out of 15) were described as gay, one complainant was identified as being transgender, and nine female complainants (out of 12) were described as vulnerable either because of a mental illness, disability, or addiction. Like the findings for accused persons, several complainants (51 or 21.8%) were described as marginalised in some way.

[21] *R v Aziga*, 2011 ONSC 4592

Conclusion

The results of our study, supported by the literature, confirm several of our hypotheses. Indeed, sexual offences were the most frequently used charges in prosecutions regardless of the decade, including the years post-Directive 5.14 (which directed criminal negligence offences to be used). There was an uneven distribution of prosecutions for non-disclosure across the provinces and territories, and almost all cases involved HIV non-disclosure versus other sexually transmitted infections. Most cases involved male accused and most complainants were female.

Contradicting our hypothesis that non-Caucasian accused would be over-represented, the majority was described as Caucasian or their ethnicity was not described in case reporters. Only 36% of accused persons were described as a person of colour. Although over one-third of cases are significant, it does not equate to a majority of the unique cases that were studied; however, it is an over-representation compared to the general population. Black Canadians represent 4.3% of the total population, and Indigenous people represent 5% of the total population in 2021 (Statistics Canada, 2024b; 2024c); whereas, in our study, they represented 10.7% and 8.4% respectively.

Our position remains that the criminalisation of non-disclosure of HIV is damaging. We contend that prosecutions should remain for accused who reveal an intention to infect others and/or ignore public health messaging. Our findings confirm that an over-broad criminalisation of HIV non-disclosure exists despite the SCC rulings or prosecutorial directives. A reassessment of the criminalisation process is necessary, including more stringent directives to prosecutors in all jurisdictions.

While our findings present how marginalised groups are being overrepresented in HIV non-disclosure prosecutions, it is essential to recognise and address the potential for

discrimination within the justice system. Continued research and dialogue are needed to better understand the impact of HIV non-disclosure laws on all communities and to develop more equitable and effective approaches in education, prevention, and law.

Canada should adopt a legislative approach guided by public health principles such as harm-reduction, least restrictive means, reciprocity, and transparency (Singh & Busby, 2021). Approaches should incorporate evidence-based thresholds for intent and risk while avoiding the perpetuation of stigma (Novak, 2021). Principles of harm-reduction could include wider public education, such as stigma-free testing to reassure Canadians that testing positive does not equate to a prosecution. And that education includes access to condoms and medications.

Despite *Directive 5.12* (2019), which directs prosecutors to use non-sexual offences when charges are called for and not to prosecute cases of non-disclosure where the accused has a suppressed viral load, another directive should nullify it. We contend that no prosecutions be initiated if the accused has a suppressed viral load.

We also suggest that all levels of judges be trained on the medical thresholds for risk of HIV infection. The SCC's decision in *R v Mabior*, 2012 SCC 47, makes it clear that disclosure is not legally required when the HIV-infected person's viral load is low. When all judges are trained, they become educated triers of fact and break the cycle of prosecuting unnecessary non-disclosure cases.

References

Adam, B. D., Globerman, J., Elliott, R., Corriveau, P., English, K., & Rourke, S. (2016). HIV positive people's perspectives on Canadian criminal law and non-disclosure. *Canadian Journal of Law and Society, 31*(1), 1–23. https://doi.org/10.1017/cls.2016.3

AETC National Coordinating Resource Center. (2014, April). *CD4 and Viral Load Monitoring.* https://aidsetc.org/topic/hiv-testing-diagnosis

Alberta Ministry of Health. (n.d.). *COVID-19 info for Albertans.* https://www.alberta.ca/coronavirus-info-for-albertans

Arkell, C. (2020). *HIV Transmission*. https://www.catie.ca/sites/default/files/2023-07/fs-hiv-transmission-EN-08-18-2020.pdf

Arkell, C., & Harrigan, M. (2023). *HIV treatment and an undetectable viral load to prevent HIV transmission.* https://www.catie.ca/sites/default/files/2023-06/fs-tasp-06152023-en.pdf

Baral, S., Millett, G., Syarif, O., Turpin, N., & Schwartz, S. (2023). There is no path to ending AIDS by 2030 without improving human rights. *Journal of the International AIDS Society, 26*(12). https://doi.org/10.1002/jia2.26197

Becasen, J. S., Denard, C. L., Mullins, M. M., Higa, D. H., & Sipe, T. A. (2019). Estimating the prevalence of HIV and sexual behaviors among the US transgender population: A systematic review and meta-analysis, 2006-2017. *American Journal of Public Health*, *109*(1), 1–8. https://doi.org/10.2105/AJPH.2018.304727

Bogosavljević, K., & Kilty, J. M. (2023). Prosecuting and propagating emotional harm: The criminalisation of HIV nondisclosure in Canada. *Canadian Journal of Law and Society, 38*(1), 109–128. https://doi.org/10.1017/cls.2023.4

Burris, S., & Cameron, E. (2008). The case against criminalization of HIV transmission. *JAMA Network, 300*(5), 578–581. https://doi.org/10.1001/jama.300.5.578

Canadian Aids Society. (2013). *HIV Transmission: Factors that Affect Biological Risk.* https://www.cdnaids.ca/wp-content/uploads/HIV_Transmission_Factors_that_Affect_Biological_Risk.pdf

Canadian Coalition to Reform HIV Criminalization. (2017). *Canadian Consensus Statement on Ending Unjust HIV Criminalization: FAQ.* https://www.hivcriminalization.ca/community-consensus-statement/#:~:text=The%20Community%20Consensus%20Statement%20outlines,against%20people%20living%20with%20HIV

Canadian HIV/AIDS Legal Network. (2012). Where reason fears to tread: Ongoing HIV ignorance and discrimination in criminal and civil settings in the United States. *HIV/AIDS Policy & Law Review, 16*, 65-71. https://sagecollection.ca/resource/where-reason-fears-tread-ongoing-hiv-ignorance-and-discrimination-criminal-and-civil/

Canadian HIV/AIDS Legal Network. (2017). *Exploring Avenues to Address Problematic Prosecutions Against People Living with HIV in Canada*. https://canadacommons.ca/artifacts/1216945/exploring-avenues-to-address-problematic-prosecutions-against-people-living-with-hiv-in-canada/1770046/

CBC News. (2008, April 4). *Man who spread HIV sentenced to 18 years.* CBC News. https://www.cbc.ca/news/canada/man-who-spread-hiv-sentenced-to-18-years-1.730875

Center for Disease Control and Prevention. (2016). *Living with HIV/AIDS.* http://www.cdc.gov/hiv/resources/brochures/livingwithhiv.htm#q3

Challacombe, L. (2024). *The Epidemiology of HIV in Canada*. https://www.catie.ca/the-epidemiology-of-hiv-in-canada

CHEST. (2024, December 1). For People Living With HIV/AIDS, TB Is Still the Leading Cause *of Death*. https://www.chestnet.org/newsroom/press-releases/2024/12/world-aids-day-2024#:~:text=Education%2C%20prevention%20strategies%2C%20and%20new,since%20the%20peak%20in%202004

Cohen, M. S., Chen, Y. Q., McCauley, M., Gamble, T., Hosseinipour, M. C., Kumarasamy, N., Hakim, J. G., Kumwenda, J., Grinsztejn, B., Pilotto, J. H. S., Godbole, S. V., Mehendale, S., Chariyalertsak, S., Santos, B. R., Mayer, K. H., Hoffman, I. F., Eshleman, S. H., Piwowar-Manning, E., Wang, L., … Fleming, T. R. (2011). Prevention of HIV-1 infection with early antiretroviral therapy. *New England Journal of Medicine, 365*(6), 493–505. https://doi.org/10.1056/NEJMoa1105243

Conroy, S. (2024, April 26). *Recent trends in police-reported clearance status of sexual assault and other violent crime in Canada, 2017 to 2022.* https://www150.statcan.gc.ca/n1/pub/85-002-x/2024001/article/00006-eng.htm

Cornett, M. (2011). Criminalization of the Intended Transmission or Knowing Non-Disclosure of HIV in Canada. *McGill Journal of Law & Health, 5*(1), 61-102. https://canlii.ca/t/7j9

Cotter, A. (2021, August 25). *Criminal victimization in Canada, 2019.* https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00014-eng.htm

Criminal Code, RSC 1985, c C-46.

The Criminalization of HIV Non-Disclosure in Canada. Report of the Standing Committee on Justice and Human Rights, 1st Sess, 42nd Parl, 2019.

https://www.ourcommons.ca/Content/Committee/421/JUST/Reports/RP10568820/justrp28/justrp28-e.pdf

Cross, C. K. (2020). The dangers of disclosure: How HIV laws harm domestic violence survivors. *Washington Law Review, 95*(1), 83–139. https://digitalcommons.law.uw.edu/wlr/vol95/iss1/5

D.C. v R., 2010 QCCA 2289 https://canlii.ca/t/2fv44

Dej, E., & Kilty, J. M. (2012). "Criminalization creep": A brief discussion of the criminalization of HIV/AIDS non-disclosure in Canada. *Canadian Journal of Law and Society, 27*(1), 55–66. https://doi.org/10.3138/cjls.27.1.055

Directive of the Attorney General issued under section 10(2) of the Director of Public Prosecutions Act. (2018). 5.12 Prosecutions involving Non-Disclosure of HIV Status. https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p5/ch12.html

Dostal, P. (2023). *History of Gross Indecency (Repealed Offence).* https://criminalnotebook.ca/index.php?title=History_of_Gross_Indecency_(Repealed_Offence)&oldid=82290

Dvorkina, M., & Macfarlane, J. (2017). *Reading and Understanding Case Reports, National Self-Represented Litigants Project*. The National Self-Represented Litigants Project. https://canlii.ca/t/27tc

Egale. (2024). *Unconscious bias in the Canadian workplace.* https://egale.ca/awareness/unconscious-bias/

Fidler, S., Anderson, J., Azad, Y., Delpech, V., Evans, C., Fisher, M., Gazzard, B., Gill, N., Lazarus, L., Lowbury, R., Orton, K., Osoro, B., Radcliffe, K., Smith, B., Churchill, D., Rogstad, K., & Cairns, G. (2013). Position statement on the use of antiretroviral therapy to reduce HIV

transmission, January 2013: The British HIV association (BHIVA) and the expert advisory group on AIDS (EAGA). *HIV Medicine*, *14*(5), 259–262. https://doi.org/10.1111/hiv.12025

Gagnon, M., & Vézina, C. (2018). HIV Criminalization as "Risk Management": On the importance of structural stigma. In Orsini, M., Gagnon, M., & Hindmarch, S. (2018). *Seeing Red: HIV/AIDS and public policy in Canada*. University of Toronto Press.

Galletly, C.L., & Pinkerton, S.D. (2006). Conflicting messages: How criminal HIV disclosure laws undermine public health efforts to control the spread of HIV. *AIDS and Behavior, 10*(5), 451-461. https://doi.org/10.1007/s10461-006-9117-3

Glauser, W. (2010). HIV-related criminal cases based on fear, not science, say advocates. *CMAJ. Canadian Medical Association Journal*, *182*(12), 573-574. https://doi.org/10.1503/cmaj.109-2235

Goudge, S.T., "Inquiry into Pediatric Forensic Pathology in Ontario (report): Volume 2 (2008) Ontario Ministry of the Attorney General at 75 http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/v2_en_pdf/Vol_2_Eng.pdf

Government of Ontario. (n.d.). *COVID-19: Government service changes and public closures.* https://www.ontario.ca/page/covid-19-government-service-changes-and-public-closures

Harrigan, M. (2022). *HIV treatment.* CATIE. https://www.catie.ca/hiv-treatment-1

Hastings, C., French, M., McClelland, A., Mykhalovskiy, E., Adam, B., Bisaillon, L., Bogosavljevic, K., Gagnon, M., Greene, S., Guta, A., Hindmarch, S., Kaida, A., Kilty, J., Massaquoi, N., Namaste, V., O'Byrne, P., Orsini, M., Patterson, S., Sanders, C., … Wilson, C. (2024). Criminal Code reform of HIV non-disclosure is urgently needed: Social science perspectives on the harms of HIV criminalization in Canada. *Canadian Journal of Public Health, 115*(1), 8–14. https://doi.org/10.17269/s41997-023-00843-9

Hastings, C., Kazatchkine, C., & Mykhalovskiy, E. (2017). *HIV Criminalization in Canada: Key Trends and Patterns.* Canadian HIV/AIDS Legal Network. https://canadacommons.ca/artifacts/1214216/hiv-criminalization-in-canada/1767315/

Health Canada. (1996). *AIDS in Canada.* http://publications.gc.ca/collections/Collection/H43-53-29-1996E.pdf

HIV Justice Worldwide. (2019). *Study on the Criminalization of HIV Non-disclosure.* https://www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10474034/br-external/HIVJusticeWorldwide-e.pdf

HIV Legal Network. (2019). *HIV Criminalization.* https://www.hivlegalnetwork.ca/site/our-work/criminalization/?lang=en

Inflection AI. (2023). *Pi AI.* https://pi.ai

International Association of Providers of AIDS Care. (2024). *Viral load.* https://www.iasociety.org/

Jimba, M., Amiya, R., Cope, J., & Poudel, K. (2014). HIV/AIDS at the intersection of public health and criminal justice: Toward an evidence-informed, health- and human rights-based approach. In *The Routledge Handbook of International Crime and Justice Studies* (1st ed., pp. 541–564). Routledge. https://doi.org/10.4324/9780203837146-35

Joint United Nations Programme on HIV/AIDS, & World Health Organization. (2024). *HIV data and statistics.* https://www.who.int/teams/global-hiv-hepatitis-and-stis-programmes/hiv/strategic-information/hiv-data-and-statistics

Krüsi, A., Ranville, F., Gurney, L., Lyons, T., Shoveller, J., & Shannon, K. (2018). Positive sexuality: HIV disclosure, gender, violence and the law-A qualitative study. *PloS One, 13*(8), 1-16. https://doi.org/10.1371/journal.pone.0202776

Lackie, J. (2010). HIV. In J. Lackie (Ed.)., *Oxford Dictionary of Biomedicine*. pp. 153-229. Oxford University Press. https://doi.org/10.1093/acref/9780199549351.001.0001

Loutfy, M. R., Wu, W., Letchumanan, M., Bondy, L., Antoniou, T., Margolese, S., Zhang, Y., Rueda, S., McGee, F., Peck, R., Binder, L., Allard, P., Rourke, S.B., & Rochon, P. A. (2013). Systematic review of HIV transmission between heterosexual serodiscordant couples where the HIV-positive partner is fully suppressed on antiretroviral therapy. *PLOS Online*, *8(*12), 1-12. https://doi.org/10.1371/journal.pone.0055747

McCall, B. (2018). Scientific evidence against HIV criminalisation. *The Lancet (British Edition), 392*(10147), 543–544. https://doi.org/10.1016/S0140-6736(18)31732-X

Mwanje, K. A., Ejoku, J., Ssemogerere, L., Lubulwa, C., Namata, C., Kwizera, A., Wabule, A., Okello, E., Kizito, S., Lubikire, A., Sendagire, C., & Andia Biraro, I. (2019). Association between CD4 T cell counts and the immune status among adult critically ill HIV-negative patients in intensive care units in Uganda. *AAS Open Research*, *2*(2), 1-13. https://doi.org/10.12688/aasopenres.12925.1

Mykhalovskiy, E. (2015). The public health implications of HIV criminalization: past, current, and future research directions. *Critical Public Health, 25*(4), 373–385. https://doi.org/10.1080/09581596.2015.1052731

Mykhalovskiy, E., Betteridge, G., & Mclay, D. (2010). *HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario.* https://www.ohtn.on.ca/Documents/Publications/HIV%20non-disclosure%20and%20the%20criminal%20law.pdf

Nadarajah, S. (2024). Gender-Diverse Individuals and the Carceral State: Conditions of Confinement and Sentencing Reform. *Queen's Law Journal, 49*(2), 41-72.

Durakovic, S., & Tavcer, D.S. (2025). A scan of Canadian reported cases of the criminalisation of HIV/AIDS non-disclosure 1989-2024. *Deconstructing Criminology 1*(2), 102-146. DOI.

https://link.gale.com/apps/doc/A793577815/CPI?u=mtroyalc&sid=bookmark-CPI&xid=2cbda31d

Nicol, J. (2017). *Legislative Summary of Bill C-32: An Act related to the repeal of section 159 of the Criminal Code.* https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/421C32E

Norris, S. (2011). *HIV/AIDS – Past, Present and Future*. https://publications.gc.ca/collections/collection_2011/bdp-lop/bp/2011-86-eng.pdf

Novak, A. (2021). Toward a critical criminology of HIV criminalization. *Critical Criminology, 29*(1), 57–73. https://doi.org/10.1007/s10612-021-09557-1

Odhiambo, A.J., O'Campo, P., Nelson, L.R.E., Forman, L., & Grace, D. (2023). Structural violence and the uncertainty of viral undetectability for African, Caribbean and Black people living with HIV in Canada: An institutional ethnography. *International Journal for Equity in Health, 22*(1), 1-19. https://doi.org/10.1186/s12939-022-01792-4

OpenAI. (2023). *ChatGPT* (Mar 14 version) [Large language model]. https://chat.openai.com/chat

Paquette, D., Demers, A., Gale-Rowe, M., & Wong, T. (2013). A synopsis of the current evidence on the risk of HIV transmission. *Canadian Communicable Disease Report, 39*(1), 9-16. http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/13vol39/briefs-resumes/dr-rm39-01b-eng.php

Patterson, S., Nicholson, V., Gormley, R., Carter, A., Logie, C. H., Closson, K., Ding, E., Trigg, J., Li, J., Hogg, R., de Pokomandy, A., Loutfy, M., & Kaida, A. (2022). Impact of Canadian human immunodeficiency virus non-disclosure case law on experiences of violence from sexual partners among women living with human immunodeficiency virus

in Canada: Implications for sexual rights. *Sage Journals*, *18*, 1-14. https://doi.org/10.1177/17455065221075914

Pittman Estate v. Bain, 1994 7489 ONSC https://canlii.ca/t/1wc23

Public Health Agency of Canada. (2012). *Summary: Estimates of HIV Prevalence Rates in Canada, 2011.* https://publications.gc.ca/collections/collection_2012/aspc-phac/HP37-16-2011-eng.pdf

Public Health Agency of Canada. (2013). *HIV Transmission Risk: A Summary of Evidence.* https://www.catie.ca/sites/default/files/HIV-TRANSMISSION-RISK-EN.pdf

Public Health Agency of Canada. (2022). *HIV in Canada surveillance report to December 31, 2020*. Government of Canada. https://www.canada.ca/en/public-health/services/publications/diseases-conditions/hiv-canada-surveillance-report-december-31-2020.html

Rodger, A. J., Cambiano, V., Bruun, T., Vernazza, P., Collins, S., Degen, O., Corbelli, G. M., Estrada, V., Geretti, A. M., Beloukas, A., Raben, D., Coll, P., Antinori, A., Nwokolo, N., Rieger, A., Prins, J. M., Blaxhult, A., Weber, R., Van Eeden, A., Brockmeyer, N. H., … PARTNER Study Group. (2019). Risk of HIV transmission through condomless sex in serodifferent gay couples with the HIV-positive partner taking suppressive antiretroviral therapy (PARTNER): Final results of a multicentre, prospective, observational study. *Lancet*, *393*(10189), 2428–2438. https://doi.org/10.1016/S0140-6736(19)30418-0

R v Aziga, 2011 ONSC 4592 https://canlii.ca/t/fmhrk

R v Aziga, 2023 ONCA 12 https://canlii.ca/t/jttcf

R. v. Boone, 2013 ONSC 79 https://canlii.ca/t/g22q0

R v Cuerrier, [1998] 2 S.C.R. 371 https://canlii.ca/t/1fqr9

R v D.C., 2012 SCC 48 https://canlii.ca/t/ft1pt

R v J.A.T., 2010 BCSC 766 https://canlii.ca/t/29xpk

R v Mabior, 2012 SCC 47 https://canlii.ca/t/ft1pq

R v Napora, 1995 9249 ABKB https://canlii.ca/t/28q30

R v Nduwayo, 2010 BCSC 1277 https://canlii.ca/t/2cj7m

R v Phelan, 2013 NLCA 33 https://canlii.ca/t/fxgdw

Sauermilch, D., Siegel, K., Hoppe., Roth, G., & Meunier, E. (2023). Attitudes toward HIV-positive status disclosure among U=U-Aware sexual and gender minority individuals in the USA: A consensual qualitative research approach. *Sex Res Soc Policy, 20,* 692–704. https://doi.org/10.1007/s13178-022-00710-1

Sewell, J., Daskalopoulou, M., Nakagawa, F., Lampe, F. C., Edwards, S., Perry, N., Wilkins, E., O'Connell, R., Jones, M., Collins, S., Speakman, A., Phillips, A. N., Rodger, A. J., & Antiretrovirals, Sexual Transmission Risk and Attitudes (ASTRA) Study Group. (2017). Accuracy of self-report of HIV viral load among people with HIV on antiretroviral treatment. *HIV Medicine*, *18*(7), 463–473. https://doi.org/10.1111/hiv.12477

Singh, D., & Busby, K. (2021). Criminalizing HIV non-disclosure: Using public health to inform criminal law. *Manitoba Law Journal, 42*(3). 89-121. https://themanitobalawjournal.com/wpcontent/uploads/articles/MLJ_42.3/42.3_Singh.pdf

Statistics Canada. (1997). *Deaths.* https://www150.statcan.gc.ca/n1/daily-quotidien/990513/dq990513aeng.htm#:~:text=In%201997%2C%20a%20total%20of,number%20rose%202.2%25%20to%20103%2C684.

Statistics Canada. (2024a). *Table 13-10-0394-01 Leading causes of death, total population, by age group* [Data Table]. https://doi.org/10.25318/1310039401-eng

Statistics Canada. (2024b, March 20). *Indigenous Peoples Technical Report, Census of Population, 2021.* https://www12.statcan.gc.ca/census-recensement/2021/ref/98-307/index-eng.cfm

Statistics Canada. (2024c, February 2). *Black History Month 2024... by the numbers.* https://www.statcan.gc.ca/en/dai/smr08/2024/smr08_278

Tenny, S., & Boktor, S.W. (2023, April 10). Incidence. StatPearls Publishing. https://www.ncbi.nlm.nih.gov/books/NBK430746/

UNAIDS. (2024). *Global HIV & AIDS statistics — Fact sheet.* https://www.unaids.org/en/resources/fact-sheet

Wolitski, R. (2016, July). *Viral suppression: The struggle is real*. https://blog.aids.gov/?s=viral+load

World Health Organization. (2023). *Herpes simplex virus.* https://www.who.int/news-room/fact-sheets/detail/herpes-simplex-virus

World Health Organization. (2024a). *HIV/AIDS.* https://www.paho.org/en/topics/hivaids

World Health Organization. (2024b). *HIV and AIDS.* https://www.who.int/news-room/fact-sheets/detail/hiv-aids

Xu, J. J., Zhang, M., Brown, K., Reilly, K., Wang, H., Hu, Q., Ding, H., Chu, Z., Bice, T., & Shang, H. (2010). Syphilis and HIV seroconversion among a 12-month prospective cohort of men who have sex with men in Shenyang, China. *Sexually Transmitted Diseases*, *37*(7), 432–439. https://doi.org/10.1097/OLQ.0b013e3181d13eed

Appendix A

Table 1

Legend of Criminal Code Sections and their Descriptions used in Case Reporters

Section Number	Brief Description
s. 129	Obstructing a peace officer
s. 140	Mischief
s. 145	Escape lawful custody
s. 150	Sexual activity with someone underage
s. 151	Sexual interference
s. 152	Invitation to sexual touching
s. 155	Incest (formerly buggery)
s. 156	Indecent assault
s. 157	Gross indecency (repealed)
s. 159	Anal intercourse (repealed)
s. 160	Bestiality
s. 163	Possession of child pornography
s. 172	Corrupting children
s.180	Nuisance and/or endangering the lives, safety & health of the public (formerly s. 176)
s. 213	Solicitation for sexual purposes in public / stopping traffic
s. 215	Failure to provide the necessaries of life
s. 221	Criminal negligence causing bodily harm
s. 231	First-degree murder
s. 239	Attempted murder
s. 246	Overcoming resistance by choking
s. 264	Criminal harassment; uttering threats
s. 265	Assault
s. 266	Assault
s. 267	Assault with a weapon, threat, or causing bodily harm
s. 268	Aggravated assault
s. 270	Assaulting a peace officer
s. 271	Sexual assault
s. 272	Sexual assault with a weapon, threat, or causing bodily harm
s. 273	Aggravated sexual assault
s. 273(b)	Attempted aggravated sexual assault
s. 276	Application for admissibility of evidence
s. 279	Kidnapping or forcible confinement
s. 305	Publish a defamatory libel

s. 334	Theft
s. 341	Fraud
s. 344	Robbery
s. 346	Extortion
s. 347	Criminal interest rate
s. 362	False pretenses
s. 366	Forged document
s. 434	Arson
s. 463	Accessory to a criminal offence
s. 523	Failure to comply with release conditions
s. 733	Breach of probation order
s. 742	Breach of conditional sentencing order
s. 752	Breach of probation order or bail conditions

Image 1:

Distribution of Unique Cases Prosecuted Across Canada 1989-2024.

Note: This image is of a map of Canada that shows the distributions of unique cases prosecuted across Canada with a number hovering over each province and territory. The total number of HIV related cases is 131. The image use is "Canada location map 2" by MapGrid is licensed under CC BY-SA 4.0. This map was used and annotated to provide a visual description of this distribution.

Appendix B

Table 2

Criminal Code Charges Used in HIV Non-Disclosure Cases in Canada by Decade

Decade	Section(s) of the Criminal Code	Charge Description	Context
1980s–1990s	ss. 157–159 (repealed)	Anal intercourse and related offenses	Repealed due to concerns over discrimination and constitutional issues
	s. 176 (now s. 180)	Common nuisance	Used in cases involving endangerment to public health
	s. 221	Criminal negligence causing bodily harm	Applied when HIV exposure resulted in significant harm
	s. 268	Aggravated assault	Key charge for non-disclosure cases where transmission occurred, or risk was perceived
	s. 271	Sexual assault	Used when non-disclosure occurred during consensual sex
	s. 273	Aggravated sexual assault	Most used charge in serious non-disclosure cases
2000s	ss. 150, 151	Sexual interference; Sexual touching	Applied where complainant was under 16
	s. 180	Common nuisance	Continued use in public health endangerment cases
	s. 268	Aggravated assault	Persistent charge for exposure/transmission
	ss. 271, 273	Sexual assault; Aggravated sexual assault	Used when deception vitiated consent
2010s	s. 151	Sexual touching	Used where the complainant was a minor
	s. 163	Child pornography & corrupting morals	Used in cases involving minors
	ss. 172, 173	Luring a child; Indecent acts/public nuisance	Reflected expansion of charges beyond direct transmission

	ss. 271–273	Sexual assault series	Still primary charges in non-disclosure cases
2020s	ss. 151–155	Offences against children	Continues trend of youth-related charges
	ss. 271, 272	Sexual assault with a weapon; threats to a third party	Expanded charges for more severe cases
	s. 221	Criminal negligence causing bodily harm	Reappeared in cases with harm

Appendix C

Table 3

Frequency of Criminal Code offences used in HIV Non-Disclosure Cases in Canada by Decade

	Criminal Code Section									
Decade	**151**	**163**	**180**	**231**	**239**	**266**	**268**	**271**	**273**	**279**
1987 & 89	0	0	3	0	0	0	0	0	0	0
1990-99	0	0	2	0	0	1	3	0	2	0
2000-09	2	0	1	1	0	0	8	4	15	2
2010-15	2	3	0	0	0	2	3	7	25	1