

HIV (non)-disclosure and the criminal law

**Precedents and Practice:
New and Emerging Issues in Sexually Transmitted
and Blood Borne Infections**

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**Richard Elliott
Canadian HIV/AIDS Legal Network**



Canadian
HIV/AIDS
Legal
Network | Réseau
juridique
canadien
VIH/sida



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Objectives of session

- **Cover the basics about about HIV (non) disclosure and the criminal law.**
- **Look at specific circumstances and some illustrative cases.**
- **Understand the legal duties of service providers and clients.**
- **Identify resources that can assist you in your work.**
- **Address your questions regarding HIV (non) disclosure.**

Disclaimer

- This presentation is NOT legal advice. It is legal information.
- The difference between legal **information** and legal **advice** is important.
- Legal information can help you understand the law and legal options, but it is general.
- Legal advice is specifically about your situation and can help you to decide what to do.
- If you want legal advice, you should talk to a lawyer.



Criminal law and HIV (non)-disclosure:

The basics



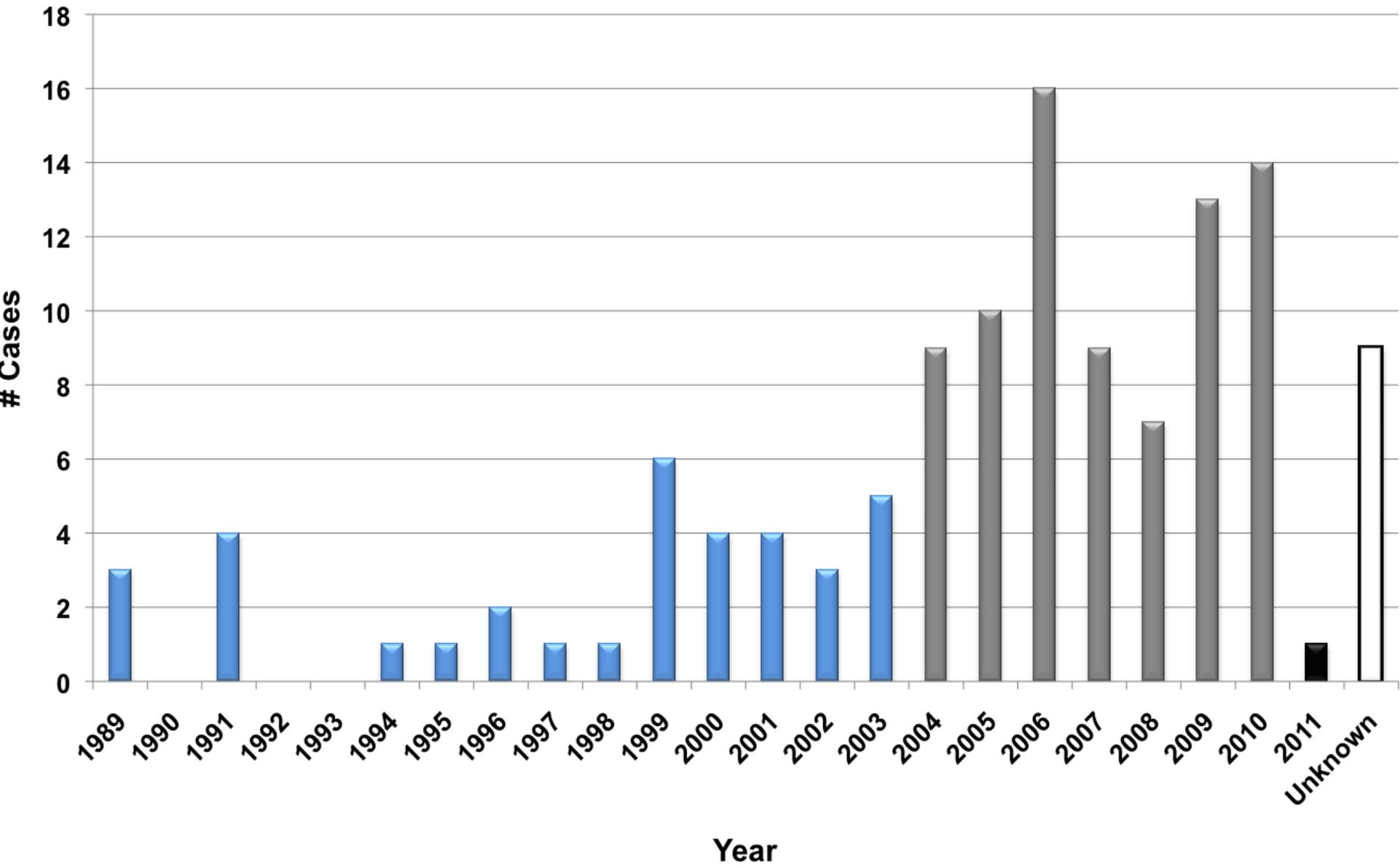
The starting point: presumed role of criminal law in HIV prevention

“It was forcefully contended that these [public health] endeavours may well prove more effective in controlling the disease than any criminal sanctions which can be devised. However, the criminal law does have a role to play both in deterring those infected with HIV from putting the lives of others at risk and in protecting the public from irresponsible individuals who refuse to comply with public health orders to abstain from high-risk activities. This case provides a classic example of the ineffectiveness of the health scheme.
... Through deterrence it [criminal law] will protect and serve to encourage honesty, frankness and safer sexual practices.”

– *Mr. Justice Cory, R. v. Cuerrier (Supreme Court of Canada, 1998)*

HIV non-disclosure cases, Canada, 1989 - end of Feb 2011

Total = 123 cases



HIV and criminal law: key points

- In Canada, a person living with HIV (PHA) can be prosecuted for not disclosing HIV-positive status before engaging in an activity that represents a “**significant risk**” of **HIV transmission**.
- People can be prosecuted even if no sexual partner was infected.
- Criminal law is applied to **exposure**, not just actual HIV transmission.

Law of assault

Assault – Criminal Code section 265(1)

- “A person commits an **assault** when ... without the **consent** of another person, he applies force intentionally to that other person, directly or indirectly.”
- maximum 5 years’ imprisonment

Consent – Criminal Code section 265(3)(c)

- “For the purposes of this section, no consent [to physical contact] is obtained where the complainant submits or does not resist by reason of ... **fraud**.”
- Where there is fraud there is no legally valid consent.

Law of assault

Aggravated assault – Criminal Code section 268

- an assault which “..**endangers the life** of the complainant.”
- maximum 14 years’ imprisonment

Aggravated sexual assault – Criminal Code section 273

- “... in committing a **sexual assault**, wounds, maims, disfigures or **endangers the life** of the complainant.”
- maximum life imprisonment

Law of assault: HIV and fraud

R. v. Cuerrier (Supreme Court of Canada, 1998)

Non-disclosure of (known) HIV+ status amounts to **fraud**, thereby transforming otherwise consensual sex into a (sexual) assault, when:

partner was exposed to a “**significant risk of serious bodily harm**” (i.e., a significant risk of HIV transmission)

and

partner would not have consented to sex had s/he known of the accused person’s HIV+ status



Criminal law and HIV (non)-disclosure:

Case studies and specific circumstances



What constitutes a “significant risk”?

What about...

1. unprotected anal or vaginal sex?

Q: does being insertive vs. receptive partner matter?

2. sex with a condom?

3. oral sex?

4. legal impact of viral load?

1. Unprotected anal/vaginal sex

- *Cuerrier* (SCC, 1998):
 - facts were unprotected vaginal sex between HIV+ man and 2 HIV-negative women
 - SCC articulated “significant risk” test and then found that, in this case, Crown could potentially secure a conviction on this standard

But contra...

“JAT” case (BCSC in Vancouver, May 2010):

- trial judge acquitted HIV+ gay man who had unprotected anal sex as *receptive* partner on 3 occasions: cumulative risk of 0.12% not a “significant” risk (for purposes of law of assault)

Law largely settled (?) – but maybe not entirely.



2. Condom use

- ***R. v. Cuerrier*** (SCC, 1988)
 - “...the careful use of condoms **might** be found to **so reduce the risk of harm that it could no longer be considered significant**”: *Justice Cory (for majority of 4 of 7 judges)*
 - Clear statement that only “unprotected sex” without HIV disclosure would be caught by Criminal Code assault provisions: *Justices McLachlin & Gonthier (2 of 7 judges)*

Most cases after *Cuerrier* are in favour of not criminalizing people who do not disclose but who do use condoms. However, the law is not entirely settled.

- Some cases have explicitly stated a condom removes duty to disclose.
- Others state that the criminal offence is “unprotected sex” (implying that condom use precludes a conviction).
- One trial court decided no duty to disclose where both condoms used and undetectable viral load → but Man CA overturned, saying either would suffice (“*C.L.M.*” appeal heard Feb 8, 2012 at SCC).

Law – and its interpretation – becoming clearer, but still developing.

3. Oral sex

- trial judge agreed with a Crown Prosecutor that unprotected oral sex was “low risk,” and could not be an aggravated assault (“E”, NSSC 2001)
- PHA convicted by a jury of aggravated sexual assault for unprotected oral sex (“A”, OntCJ 2009)... *but was one count among several more serious circumstances; case is perhaps unusual on this point*
- Hamilton, ON crown decided to *stay* criminal charges of aggravated sexual assault concerning unprotected oral sex (after more than 1 year of proceedings) (“JZ”, OntCJ 2010)
- But... very recent charge reported in Ontario against woman with HIV for performing oral sex (case still pending).

Law – and its interpretation – still developing.

4. Reduced viral load

- Switzerland (Geneva Ct Justice, 2009): *Prosecutor* appealed conviction: “*One shouldn't convict people for hypothetical risks*”
- Canada:
 - BCCA has refused to set a specific risk threshold for triggering a duty to disclose, but has accepted that accused PHA’s viral load is “highly relevant” to assessing the degree of risk (“*W*”, BCCA 2009)
 - ManCA (“*C.L.M.*”) and QueCA (“*D.C.*”) (both in 2010) have accepted that undetectable viral load – and corresponding risk reduction – can be sufficient to find no “significant risk”, and therefore no duty to disclose (under criminal law). Appeals to SCC heard on Feb 8, 2012; decisions anticipated later in 2012.

Law is still developing.



Mabior case (1)

- **HIV positive man faced numerous charges related to his failure to disclose his HIV status to numerous HIV negative women prior to vaginal intercourse.**
- **The Mabior case is the most thorough analysis by courts to date of what “significant risk” means. The judge examined in detail evidence about:**
 - Condom use (effectiveness of condoms, proper use)
 - Viral load (Swiss statement and reaction to it)

Mabior case (2) – trial judgment

[117] ...”The latter date was the last reading of a viral load on the accused’s files. The issue of infectivity and possible transmission, even with a condom, must be considered. With respect to the condom there can, of course, be failure, breakage or improper utilization. That being said, there was “a lower risk” when protection was utilized according to medical and scientific evidence. I am persuaded that the combination of an undetectable viral load and the use of a condom would serve to reduce the risk below what would be considered a significant risk of serious bodily harm. The facts and medical evidence in this case have brought me to the conclusion that consent would not, in this particular circumstance, be vitiated.”
[emphasis added]

Mabior case (3) – Court of Appeal

- **Overtaken trial judge.**
- **Ruled that EITHER careful condom use (following list of criteria) OR undetectable viral load will suffice to reduce the risk of transmission so it is no longer “significant” ... and therefore no duty to disclose in those circumstances.**
- **Under appeal before SCC; Manitoba AG arguing that requirement of “significant risk” should be removed, and disclosure is always required by people with HIV in any instance.**

Concern about unfairness

- “... recognizing the **overbreadth** of the theory upon which he founds his reasons, [Cory J.] attempts to limit it by introducing an *ad hoc* qualifier: there must be a “significant risk of serious bodily harm” before consent is vitiated. This limitation, far from solving the problem, introduces new difficulties.... **[I]t introduces uncertainty. When is a risk significant enough to qualify conduct as criminal? In whose eyes is “significance” to be determined — the victim’s, the accused’s or the judge’s? What is the ambit of “serious bodily harm”? ... The criminal law must be certain. If it is uncertain, it cannot deter inappropriate conduct and loses its *raison d’être*. Equally serious, it becomes unfair.** People who believe they are acting within the law may find themselves prosecuted, convicted, imprisoned and branded as criminals. Consequences as serious as these should not turn on the interpretation of vague terms like “significant” and “serious”.

– *Madam Justice McLachlin, R. v. Cuerrier (Supreme Court of Canada, 1998)*



Key info for clients

“Don’t assume **that the person knows that you have HIV.**”

“Exposing someone to a significant risk of HIV infection is the crime ... you can be charged and convicted even if you don’t pass on HIV.”

“It doesn’t matter **to the criminal law**

- *Where you met the person*
- *What they “are” to you*
- *Whether the sex is for fun, money, drugs*
- *That you are scared the person will tell other people”*

“Ignorance of the law **is not a defence.**”



Reducing clients' risk of prosecution

A person living with HIV can reduce the risk of being criminally charged by ...

- avoiding sex that has a high risk of HIV transmission
- gathering evidence that s/he disclosed HIV status before engaging in sex that has a significant risk of transmitting HIV
- not sharing needles or other injection drug use equipment
- advising her medical team of her HIV status during pregnancy and delivery
- not breast feeding her infant(s)



Criminal law and HIV (non)-disclosure:

Resources



Responding to the Criminalization of HIV Transmission or Exposure:

Resources for lawyers and advocates

www.aidslaw.ca/lawyers-kit

See also:

www.aidslaw.ca/stopcriminalization

Disclosure of HIV Status After *Cuerrier*: Resources for Community Based AIDS Organizations

After *Cuerrier*:
Canadian Criminal Law and the Non-Disclosure of HIV-Positive Status

Criminal Law and HIV

1 Criminalization of HIV exposure: current Canadian law

There has been a growing concern about the criminalization of HIV exposure. This article discusses the current Canadian law on this issue, including the *Cuerrier* decision and the impact of the *Law Society of Ontario* report.

What does a person have to do to avoid criminal liability for HIV exposure?

Under the current law, a person is criminally liable for HIV exposure if they have sex with another person and do not disclose their HIV status. This is true even if the person is not aware of their own HIV status.

Is disclosure sufficient to avoid criminal liability?

Yes, disclosure is sufficient to avoid criminal liability. However, the disclosure must be in writing and must be made before sex. The *Cuerrier* decision established that a person can be criminally liable for HIV exposure even if they disclose their status to their partner.

What are the consequences of criminal liability for HIV exposure?

A person found guilty of criminal liability for HIV exposure can be sentenced to a maximum of five years in prison. This is a significant penalty, especially for someone who is not a violent offender.

What are the arguments for and against criminalization of HIV exposure?

Proponents of criminalization argue that it is necessary to protect public health and to ensure that people with HIV are held accountable for their actions. Opponents argue that criminalization is stigmatizing and does not address the underlying issues of HIV transmission.

Privacy Protection and the Disclosure of Health Information: Legal Issues for People Living with HIV/AIDS in Canada

Published by the Canadian HIV/AIDS Legal Network

Canadian HIV/AIDS Legal Network HIV/AIDS POLICY & LAW REVIEW

Volume 1, Number 1, December 2004

Canada's 2003 renewed drug strategy — an evidence-based review

Also included: AIDS 2006 Supplement

"Vectors, Vessels and Victims" HIV/AIDS and Women's Human Rights in Canada

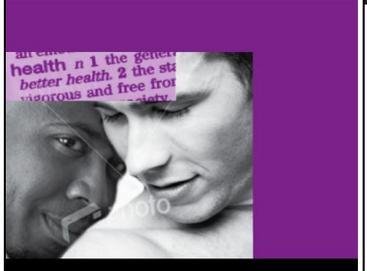
Canadian HIV/AIDS Legal Network



Pozitively Healthy
a gay man's guide to sex and health



HIV disclosure:
a legal guide for gay men in Ontario



POZ PREVENTION
Knowledge and practice guidance for providing sexual health services to gay men living with HIV in Ontario.

Criminal Law, Public Health and HIV Transmission: A Policy Options Paper

UNAIDS

Canada Communicable Disease Report / Révisé des maladies transmissibles au Canada

CCDR+RMTC

1 March 2005 - Volume 31 - Number 5

CONTAINED IN THIS ISSUE:

- Persons who fail to disclose their HIV status: conclusions reached by an expert working group
- Persons who fail to disclose their HIV status: conclusions reached by an expert working group
- Persons who fail to disclose their HIV status: conclusions reached by an expert working group

POLICY BRIEF

Criminalization of HIV Transmission

Introduction

In some countries, criminal law is being applied to those who transmit or expose others to HIV infection. There are no data indicating that the broad application of criminal law to HIV transmission will achieve either criminal justice or prevent HIV transmission. Rather, such application risks undermining public health and human rights. Because of these concerns, UNAIDS urges governments to limit criminalization to cases of intentional transmission, i.e. where a person knows he or she is HIV positive status, acts with the intention to transmit HIV, and does so in fact transmit it.

In other instances, the application of criminal law should be rejected by legislators, prosecutors and judges. In particular, criminal law should not be applied to cases where there is no significant risk of transmission or where the person:

- did not know that he or she was HIV positive;
- did not understand how HIV is transmitted;
- disclosed his or her HIV-positive status to the partner, a risk he or she honestly believed the other person was aware of his/her status through some other means;
- did not disclose his or her HIV-positive status because of fear of violence or other serious negative consequences;
- took reasonable measures to reduce risk of transmission, such as practicing safer sex through using a condom or other precautions to avoid higher risk acts; or
- previously agreed on a level of mutually acceptable risk with the other person.

States should also:

- avoid introducing HIV-specific laws and instead apply general criminal law to cases of intentional transmission;
- issue guidelines to limit public law and prosecutive discretion in application of criminal law by clearly and narrowly defining "intentional" transmission, by requiring that a sexual partner's responsibility for HIV transmission be clearly established beyond a reasonable doubt, and by clearly defining the circumstances and circumstances that should mitigate against criminal penalties; and
- ensure any application of general criminal laws to HIV transmission is consistent with their international human rights obligations.

Other resources for more info

- Canadian HIV/AIDS Legal Network: www.aidslaw.ca/criminallaw
- AIDS & Law Exchange (AIDSLEX): www.aidslex.org
- Edwin J. Bernard, “Criminal HIV Transmission” [blog]: <http://criminalhivtransmission.blogspot.com/>
- GNP+ “Global Criminalisation Scan”:
<http://www.gnpplus.net/content/blogcategory/19/44/>
- Ontario Working Group on Criminal Law and HIV Exposure:
www.ontarioaidsnetwork.on.ca/clhe/
- HALCO (Ontario): www.halco.org
- COCQ-SIDA (Québec): www.cocqsida.com
- UNAIDS. *Criminalization of HIV Transmission: Policy Brief* (2008)
- OSI, *10 reasons to oppose the criminalization of HIV exposure or transmission*
- ATHENA & AIDS Legal Network, *10 Reasons why criminalisation of HIV exposure or transmission harms women*



Contact

Richard Elliott or Cécile Kazatchkine

Canadian HIV/AIDS Legal Network

Tel: +1 416 595 1666

relliott@aidslaw.ca OR ckazatchkine@aidslaw.ca

More information

www.aidslaw.ca/criminallaw

www.aidslaw.ca/stopcriminalization



Criminal law and HIV (non)-disclosure:

Quick quiz



Quiz questions:

Are the following statements TRUE or FALSE?

- People living with HIV must disclose their HIV infection to all of their sex partners.
- If you know that a client is having unsafe sex with someone who doesn't know the client is HIV+, you must report this to the police.
- Before sex, people must ask their partners if they have HIV or other STIs. If a person does not ask, then the partner has no legal obligation to disclose his or her HIV status or STIs.

Quiz questions:

Are the following statements TRUE or FALSE?

- People living with HIV must disclose their HIV infection to all of their sex partners.

ANSWER: FALSE.

- If you know that a client is having unsafe sex with someone who doesn't know the client is HIV+, you must report this to the police.

ANSWER: FALSE.

- Before sex, people must ask their partners if they have HIV or other STIs. If a person does not ask, then the partner has no legal obligation to disclose his or her HIV status or STIs.

ANSWER: FALSE.



Criminal law and HIV (non)-disclosure:

Other issues and questions

Criminal law and MTCT of HIV (1)

- **First charges related to birth & mothering (Hamilton, ON, May 2005)**
 - Woman followed guidelines for prevention of MTCT during birth of first child, who is HIV negative.
 - During second pregnancy, she changed medical team during second pregnancy, did not advise her medical team of her HIV status, and was alleged to have stopped taking HIV meds (partly because of religious beliefs about God protecting her child).
 - Alleged to have breast fed infant.
 - Second child is HIV positive.

Criminal law and MTCT of HIV (2)

- **Charges relate to events after birth**
 - In Canada, foetus does not have rights until born and viable.
 - Alleged that child deprived of opportunity to start ARV treatment immediately after birth.
 - Alleged that mother exposed child to HIV risk by breast feeding.
 - Mother faced three criminal charges: (1) **criminal negligence causing bodily harm**, (2) **failing to provide the necessaries of life**, and (3) aggravated assault.

Criminal law and MTCT of HIV (3)

Issues:

- duty of HIV positive pregnant woman to disclose status to medical team
- risk of mother – infant transmission via breast feeding

Outcome:

- pled guilty to failing to provide necessaries; other charges withdrawn
- 6 month conditional sentence (“house arrest”) and 3 years probation
- “New issues” not resolved
- both children apprehended by Children's Aid Society, court granted order for Crown wardship with no access to the parents



Key info for clients

“Don’t assume **that the person knows that you have HIV.**”

“Exposing someone to a significant risk of HIV infection is the crime ... you can be charged and convicted even if you don’t pass on HIV.”

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Reducing clients' risk of prosecution

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- gathering evidence that he disclosed his HIV status before engaging in sex that has a significant risk of transmitting HIV
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Criminal law and HIV (non)-disclosure:

Other issues and questions

Public health law (1)

- **SCC and other court decisions on criminal prosecutions do not directly affect public health legislation or powers.**
- **But should affect public health **practice** ...**
 - information given to people in HIV-antibody pre & post-test counselling should include information about legal duty to disclose... but needs to be done at right time, in right way
 - information about legal duty to disclose should be accurate – i.e., based on court decisions
 - contact tracing and other intervention should be based on risk of transmission.



Public health law (2)

Manitoba

- *The Public Health Act, CCSM, Chapter P210*
- *Disease Control Regulation, Reg. 26/2009*
- *Reporting of Diseases and Conditions Regulation, Reg. 37/2009*
- *Public Health Personnel Regulation, Reg. 28/2009*



Public health law (3)

- **Duty to Report HIV/AIDS**
 - health professionals
 - while attending to a person, forms the opinion that the person has or may have a sexually transmitted disease, shall as soon as possible make a report to the director person in charge of a laboratory
 - any “designated” person
- **No duty on ASO workers who are not health professionals.**



Some common questions:

- **How do I counsel people with HIV about disclosure obligations? And what do I document about this discussion?**
- **Health care providers have been told not to discuss “legal obligations” because we can’t give legal advice. So at what point does it become legal advice?**

Some common questions:

- **How do we balance a duty to an HIV-positive person who hasn't yet informed his or her partner with a duty to a contact person whom we know (or think) is exposed? How long do we wait before notifying such a contact?**
- **How do we counsel (and document that counselling) with a person who will not disclose to partner(s) because of a fear of physical abuse or of losing shelter, or are doing sex work?**
-
- **Public health nurses also receive community complaints from people who claim they have been exposed by someone. If the complainant reports to the police we know it will often end up in court. What advice should they provide and document?**

Compulsory HIV testing (1)

The Testing of Bodily Fluids and Disclosure Act, SM 2008, c 19 (came into force in June 2008)

- **Law enables a person who has come into contact with a bodily fluid of another person to get a court order requiring the other person to provide a sample of the fluid. The sample will be tested to determine if that person is infected with certain communicable diseases.**
 - Victim of a crime; while providing emergency medical assistance; a firefighter, emergency medical responder or peace officer; or in other circumstances.

Compulsory HIV testing (2)

- **Two types of testing orders that can be made.**
 - Expedited testing order can be made by a justice of the peace with no notice to the person who will be the subject of the order.
 - Expedited testing order is not valid if the subject of the order objects to it by the deadline set out in the order.
 - An application for a standard testing order can be made to a judge.