

Managing your health

CHAPTER 21 UPDATE 2013

This insert, produced in early 2013, updates Chapter 21, Legal issues to reflect current Canadian law. The following text replaces the section HIV transmission and the criminal law, pages 292 to 294.

HIV transmission and the criminal law

In Canada, the Criminal Code sets out criminal offences. The Criminal Code applies across the country, in every province and territory. People with HIV have been charged and convicted of a number of crimes—including aggravated assault, aggravated sexual assault and attempted murder—for not disclosing their HIV status to a sexual partner before having sex. What's more, an HIV-positive person can be charged and convicted of a crime even if the other person does not become infected with HIV.

The law about HIV, sex and disclosure is complex and we cannot provide answers to all of the questions you may have. Also, the law can change at any time. Speak with a lawyer familiar with HIV-related issues to make sure you get up-to-date legal information and advice about your particular circumstances.

HIV disclosure and sex

According to two Supreme Court of Canada decisions in 2012, an HIV-positive person has a legal duty to disclose his or her HIV status to a sexual partner before having any sex that poses a “realistic possibility” of HIV transmission. What does this mean?

- A person living with HIV **does not** have to disclose his or her HIV status before having **vaginal sex** if a condom is used **and** the HIV-positive person has a “low” HIV viral load at the time of sex. In one of the 2012 decisions, the Supreme Court of Canada found that an HIV viral load of 1,500 copies or less of the virus per millilitre of blood counted as “low”—this includes anyone with an undetectable viral load. Whether 1,500 will be the standard for defining “low” is not yet clear, so make sure you have the most current information.
- A person with HIV **does** have a legal duty to disclose his or her HIV status before having:
 - vaginal, frontal¹ or anal sex **without** a condom, regardless of viral load; or
 - vaginal, frontal or anal sex when viral load is **higher than “low,”** even when a condom is used.

Note that these legal definitions are different from the language used to talk about the risk of transmission with different kinds of sex. Sex acts that carry a “realistic possibility” of transmission from a legal perspective may have a low risk of transmission.

The Court's decisions left unanswered some important questions about HIV disclosure and sex:

- We cannot say for certain that a person who uses a condom **and** has a “low” viral load does not have a legal duty to disclose his or her HIV status before **anal sex** or **frontal sex** because the Supreme Court did not specifically address these issues.
- It is not clear how the law applies to the different kinds of **oral sex** (with or without a condom or other latex barrier).

1. Frontal sex is what is commonly referred to as vaginal sex. This term is sometimes used by trans men or people on the trans masculine spectrum who feel more comfortable with this language.

- A person *may* have a duty to disclose when a condom breaks during sex. The law is not clear on this issue. Disclosure might increase the risk that the sex partner will lodge a complaint with the police. At the same time, a person may also want to consider factors beyond the law in deciding whether to disclose in this situation. Disclosure might help to reduce the partner's risk of HIV infection. With disclosure, the partner has information that may help him or her decide whether to seek PEP (post-exposure prophylaxis) with anti-HIV drugs. However, disclosure might also cause the sex partner to react badly.
- A person *may* have a legal duty to disclose his or her HIV-positive status before having sex with a person he or she knew was already HIV positive. However, we don't know of any cases where an HIV-positive person has been charged for not disclosing to another person living with HIV.
- A person who knows that he or she likely has HIV (but has not received an HIV-positive test result) *may* have a legal duty to tell sexual partners about this risk before having sex that poses a realistic possibility of transmission. We don't know of any cases where a person without an HIV-positive diagnosis was convicted of not disclosing the *potential* risk of HIV infection to his or her sex partner.

Pregnancy, HIV exposure and criminal law

Criminal charges cannot be laid against someone who is pregnant for failing to take steps to prevent the transmission of HIV during pregnancy or labour (for example, refusing to take anti-HIV drugs during pregnancy). However, following the birth, a parent who risks transmitting HIV to an infant by not telling the healthcare provider of their HIV status, refusing medications for the child or breastfeeding/² chestfeeding could face criminal charges or child protection proceedings.

HIV disclosure and sharing drug use equipment

As far as we know, no Canadian court has yet decided whether an HIV-positive person who uses recreational or street drugs has a legal duty to disclose his or her HIV status to someone with whom he or she is sharing drug-use equipment (for example syringes, needles, crack pipes, etc.). Sharing certain drug-use equipment (such as needles and syringes for injecting) is a high-risk activity for transmitting HIV. Therefore, it is safest to assume that police and courts would consider that sharing equipment poses a realistic possibility of HIV transmission, meaning a person would have a legal duty to disclose his or her HIV-positive status before sharing.

2. Chestfeeding refers to nursing an infant using one's chest. It is a term sometimes used by people on the trans masculine spectrum who feel more comfortable with this language.