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**Criminal Law and HIV/AIDS**

# The *Cuerrier* Case

*In September 1998, the Supreme Court of Canada released its decision in the case of* R *v* Cuerrier. *The Court unanimously concluded that, under Canadian law, a person with HIV/AIDS may be found guilty of the crime of "assault" if they have unprotected sexual intercourse without disclosing their HIV-positive status. (See info sheets 7 and 8 for analysis of the decision.)*

This is one of a series of eight info sheets on Criminal Law and HIV/AIDS.




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## Background

In August 1992, Cuerrier (HC) was told by a public health nurse that he was HIV-antibody positive, and that he should use condoms for sex and tell his sexual partners about his HIV-positive status. He said he could not disclose this in his small community. Soon after, he began a relationship with KM, including frequent unprotected vaginal sex. Sometime either before, or within a week of, their first sexual encounter, KM discussed sexually transmitted diseases (STDs) with HC. He told her of his recent sexual encounters with women who themselves had had numerous partners. KM did not specifically ask about HIV; HC told her he had tested HIV-negative several months earlier, but did not mention his recent positive test result. KM said at trial that she knew the risks of unprotected sex, including HIV and other STDs.

A few months later, both HC and KM had HIV-antibody tests. He tested HIV-positive; she tested HIV-negative. Both were told of HC's infection, and advised to use condoms for sex. KM was told she would need further tests because she might still test HIV-positive. HC said he did not want to use condoms, and that if KM still tested negative in a few months, he would look for a relationship with a woman who was already HIV-positive. They continued having unprotected sex for 15 months. KM later testified that: (1) she loved HC and did not want to lose him; (2) as they had already had unprotected sex, she felt she was probably already infected; (3) however, she would not have had sex with HC had she known his HIV status at the outset. At the time of trial, she tested HIV-negative.

A few months later, HC began a sexual relationship with BH. After their first sexual encounter, she told him she was afraid of diseases, but did not specifically mention HIV. HC did not tell her he was HIV-positive. No condom was used for about half of their 10 sexual encounters. BH then discovered that HC was HIV-positive and confronted him, at which point he said he was sorry and should have told her. BH was not infected.

HC was charged with two counts of aggravated assault, on the theory that his partners' consent to sex was not legally valid. Citing an earlier Ontario case, the trial judge acquitted him on both counts. The BC Court of Appeal agreed, saying there could be no assault because the women had consented to the sex. The Crown appealed to the Supreme Court of Canada.

The BC Persons with AIDS Society (BCPWA), the Canadian AIDS Society, and the Canadian HIV/AIDS Legal Network jointly intervened before the Supreme Court, arguing against the use of the assault provisions of the *Criminal Code* to criminalize non-disclosure of HIV-positive status.

## The Arguments

The prosecution argued that, because HC did not disclose his HIV infection, his partners' consent to sex was not "informed" consent, and/or that the scope of their implied consent had been exceeded. The Crown also argued that, for reasons of public policy, the complainants' consent should be considered legally ineffective.

The BC Court of Appeal had rejected these three arguments, ruling that there was no duty, enforceable by criminal prosecution, requiring a person to provide full disclosure of all known risks associated with sex in order for their partner's consent to be valid: "The criminal law of assault is, indeed, an unusual instrument for attempting to ensure safer sex." The Court of Appeal also noted the arguments of the intervening BCPWA and the BC Civil Liberties Association that criminalization may ultimately be counterproductive in fighting AIDS, by driving people away from getting tested and frustrating education (and treatment) efforts, and that public health measures are better suited for dealing with people unable or unwilling to take precautions to protect others from HIV infections.

The Crown's chief argument, however, was that HC's failure to disclose his HIV-positive status was a "fraud" that rendered his partners' consent legally invalid. The BC Court of Appeal rejected this argument as well, following the established rule that only fraud as to "the nature and quality of the act" (in this case, the sex) would vitiate a partner's consent. On appeal, the Supreme Court based its judgment squarely on this "fraud" argument, but set out a new, different test for "fraud."

## The Supreme Court's Decision

While differing over how broadly "fraud" should be defined in the law of assault, all seven of the Supreme Court judges who heard the case agreed that HC's non-disclosure of his HIV-positive status was a fraud that could vitiate his sexual partners' consent to sex.

Mr Justice Cory, writing for a majority of four judges, ruled the Crown must prove three things to establish "fraud":

- First, there must be conduct that the reasonable person would consider "dishonest." The Court held there is no difference "between lies and a deliberate failure to disclose." Therefore, the non-disclosure of an important fact, such as HIV infection, can be considered "dishonest."
- Second, the Crown must prove this dishonesty resulted in a "significant risk of serious bodily harm" to the person whose consent is being obtained by means of the dishonesty. The Court accepted that infection with HIV is a serious bodily harm, and indicated that unprotected sexual intercourse certainly presents a "significant" risk.
- Third, the Crown must prove beyond reasonable doubt that the person would not have consented to sex if the HIV-positive person had disclosed their status.

The Court states that: "Without disclosure of HIV status there cannot be true consent. The consent cannot simply be to have sexual intercourse. Rather it must be consent to have intercourse with a partner who is HIV-positive."

However, there is some ambiguity in the decision. The Court seems to state categorically that an HIV-positive person must disclose their serostatus to a sexual partner, and is clear that this duty certainly exists in the case of unprotected sexual intercourse. But the judgment also states:

> To have intercourse with a person who is HIV-positive will always present risks. Absolutely safe sex may be impossible. *Yet the careful use of condoms might be found to so reduce the risk of harm that it could no longer be considered significant so that there might not be either [harm or risk of harm].* To repeat, in circumstances such as those presented in this case, there must be a significant risk of serious bodily harm before the section can be satisfied. In the absence of those criteria, the duty to disclose will not arise. [emphasis added]

The full text of the Supreme Court's decision is reported at (1998), 127 CCC (3d) 1, and can be found at <www.droit.umontreal.ca/doc/csc-scc/en/index.html>.

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For more information, see R Elliott. *Criminal Law and HIV/AIDS: Final Report.* Montréal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1997. Copies of the report and the info sheets are available on the Network website at www.aidslaw.ca or through the Canadian HIV/AIDS Clearinghouse (tel: 613 725-3434, email: aids/sida@cpha.ca). Reproduction of this info sheet is encouraged, but copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source of this information. For further information, contact the Network (tel: 514 397-6828; fax: 514 397-8570; email: info@aidslaw.ca). ***The Legal Network cannot provide legal advice*. Ce feuillet d'information est également disponible en français.**

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Criminal Law and HIV/AIDS

# *Criminal Code* Offences Applied in Canadian Prosecutions

*There have been at least 24 cases to date in Canada in which an HIV-positive person has either been charged with a criminal offence for conduct that carries a risk of transmitting HIV (or is perceived to carry some risk), or in which the HIV-positive status of a person has been considered as aggravating the seriousness of their criminal conduct. Five offences in the* Criminal Code *have been invoked in these prosecutions. How well do these different offences fit with the conduct of the accused?*
*(See info sheet 3 for a summary of individual cases.)*

This is one of a series of eight info sheets on Criminal Law and HIV/AIDS.

1. The *Cuerrier* Case
2. *Criminal Code* Offences Applied in Canadian Prosecutions
3. Canadian Criminal Cases and HIV
4. Criminalization: Does It Make Sense?
5. Public Health Laws & Conduct that Risks Transmitting HIV
6. Should the *Criminal Code* Be Amended?
7. The *Cuerrier* Case: Issues for People with HIV/AIDS
8. The *Cuerrier* Case: Issues for Those Working with People with HIV/AIDS

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## Common Nuisance

A person who does an unlawful act, or fails to discharge a legal duty, thereby endangering the lives, safety, or health of the public, or causing physical injury to any person, commits a "common nuisance." This indictable offence carries a maximum penalty of two years in prison (*Criminal Code*, section 180).

This charge has been laid in several cases involving people with HIV/AIDS who put others at risk of contracting HIV. In the first HIV-related criminal prosecution in Canada, an HIV-positive man was charged for donating blood to the Red Cross (*Thornton,* 1989). All other prosecutions for *common nuisance* have involved sexual activity by HIV-positive persons. In the *Summer* (1989) and *Kreider* (1993) cases, the accused men pleaded guilty to the charge for having had unprotected sex without disclosing their HIV infection. In the *Napora* case (1996), the accused was acquitted because it could not be proved that he was responsible for his sexual partner's HIV infection. The *Ssenyonga* case (1992) was the first to address whether this offence could apply, as a matter of law, to sexual activity by an HIV-positive person. An Ontario trial court ruled that sexual relationships with specific individuals did not endanger the health of "the public" generally, and dismissed the charge. However, in the more recent *Hollihan* case (1998), a Newfoundland court rejected this conclusion, saying that "specific individuals are members of the public and it matters not whether deliberate unprotected sex is had with one, one thousand, or one million members."

## Administering a Noxious Thing

It is an indictable offence to administer a poison or "any other destructive or noxious thing" to a person. If the accused acts with the intent of endangering another's life, or causing bodily harm, the maximum penalty is 14 years' imprisonment. The maximum penalty

is only two years' imprisonment if the intent is merely to "aggrieve or annoy" the person (*Criminal Code*, section 245).

There are some difficulties with the use of this offence in HIV cases. If no infection actually results from exposing someone to a bodily fluid (eg, semen), is this fluid "noxious"? Can consensual sex be considered "administration of a noxious thing"? Finally, a conviction requires that the accused act with the intent of endangering life or causing bodily harm. Where someone purposefully administers HIV-contaminated body fluid to another, this requirement might be satisfied (eg, the *Tan* case, 1995). Otherwise, proving the necessary intent will be difficult; in *Ssenyonga* (1992), the charge was dismissed on this basis.

## Assault

It is an assault to "apply force intentionally" to another person without their consent. There is no legally valid consent where a person submits or does not resist by reason of "fraud." *Common assault* carries a penalty of up to five years' imprisonment. *Aggravated assault*, where the assailant "wounds, maims, disfigures or endangers the life of the complainant," carries a maximum penalty of 14 years' imprisonment (*Criminal Code*, sections 265-268).

In some cases, an HIV-positive person has been charged for assaultive conduct, and their HIV infection has been considered an aggravating factor. For example, in the *Thissen* case (1996), the accused pleaded guilty to an aggravated assault charge for biting a police officer. Although there was no evidence that her bite could "endanger" the officer's life (indeed, the officer was not infected), she was charged with *aggravated* assault, and sentenced to two years less a day in prison. The sentence was upheld on appeal (*Thissen*, 1998). In a similar case ( *Taylor*, 1994), a sentence of 10 months was imposed on an HIV-positive man in Québec convicted of aggravated assault for biting a police officer following his arrest on suspicion of drunk driving.

In other cases, an HIV-positive person has been charged with "assault" for engaging in unprotected sex without disclosing their HIV status. The prosecution has argued that not disclosing HIV infection renders the partner's consent to the sex legally invalid, thus making the sexual encounter an assault. In the *Lee* (1991), *Ssenyonga* (1993), and *Cuerrier* (1996) cases, trial courts and an appeal court rejected this argument and acquitted the accused men, ruling that their female partners' consent to the sex was valid despite the men's non-disclosure. However, in its 1998 decision in the appeal of the *Cuerrier* case, the Supreme Court of Canada disagreed with this conclusion. Instead, the Court ruled that not disclosing HIV-positive status *could* render a partner's consent to sex legally invalid where the sexual activity presents a "significant risk of serious bodily harm." Therefore, the HIV-positive person could be convicted of assault. But the Court was also careful to say that there is only a duty to disclose HIV-positive status if this "significant risk" of transmission exists. The Court's decision suggests that "careful use of condoms" *might* be considered to reduce the risk of transmission enough that it is not "significant," meaning there would be no duty to disclose. However, it is not yet clear how the *Cuerrier* case will be interpreted and applied in the future; it should not be assumed that using a condom or otherwise practising "safer sex" relieves the HIV-positive person of the duty to disclose. (See info sheets 1 and 7 for a discussion of this case.)

## Attempted Murder

Attempting murder is an indictable offence carrying a maximum penalty of life imprisonment. A person is guilty of attempted murder if they do something with the intent of causing another's death, or with the intent of causing bodily harm that they know is likely to cause death and show reckless disregard as to whether death ensues from that act or not. It does not matter if it was actually impossible for the act to cause someone's death *(Criminal Code*, sections 229 & 239).

Attempted murder charges have been laid in three HIV-related cases. In the *Lesieur* case (1993), an HIV-positive inmate assaulted prison guards who were restraining him, smearing his blood on cuts on one guard's arm and biting another. He stated that he would infect them with HIV. He was acquitted by the jury of attempted murder, although convicted on charges of assault and uttering threats, and sentenced to four years in prison. In the *Tremblay* case (1994), an HIV-positive man assaulted a teenage girl, smeared blood on her cuts, and told her she would die. While convicted on other charges, he was acquitted of attempted murder because there was no evidence before the court establishing that smearing blood could transmit HIV. In the *McKenzie* case (1993), an HIV-positive man was convicted of attempted murder for having deliberately cut his finger before engaging in a fistfight outside a bar.

Attempted murder charges are inappropriate for most cases of assaultive conduct by HIV-positive individuals. In most cases, the danger of HIV transmission is significantly overstated and, despite the irresponsible behaviour involved in incidents of biting or smearing blood, the intent to kill is probably absent.

## Criminal Negligence Causing Bodily Harm

A person is "criminally negligent" if, in doing anything or omitting to do anything that it is their duty to do, the person "shows wanton or reckless disregard for the lives or safety of other persons." If the negligent conduct caused bodily harm to another person, this is an indictable offence carrying a maximum penalty of 10 years' imprisonment (*Criminal Code*, sections 219 and 221).

The courts have decided that criminal negligence is conduct that is a "marked and substantial" deviation from the care that would have been exercised by a "reasonable person." This means the accused commits the crime as long as the ordinary person would characterize their conduct as grossly negligent. This is an exception to the general rule in criminal law that, in order to be guilty of a criminal offence, a person must have either acted with intent, or acted recklessly in that they were aware their conduct carried an unjustifiable risk of harming another but chose to engage in that conduct anyway.

There is a danger that, in applying *criminal negligence* to cases of HIV transmission, prejudices about people with HIV/AIDS, or groups associated with HIV/AIDS in the public mind, could significantly influence what is judged by "ordinary people" to be "reasonable."

There is also uncertainty as to what conduct by an HIV-positive person would constitute "criminal negligence." It is more justifiable to characterize as "negligent" the failure to take precautions against infecting a sex/injecting partner (ie, using condoms, cleaning needles), rather than make it a criminal offence to not disclose one's HIV status, since other reasons may prevent such disclosure. This fits better with the public health message that everyone is responsible for protecting

against HIV transmission. It also makes sense to restrict criminal sanctions to *unsafe* sex without disclosure. To criminalize the HIV-positive person who, although they do not disclose, actually practices safer sex, would remove any incentive to practice safer sex. This would be counterproductive to the very goal of preventing further transmission.

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Criminal Law and HIV/AIDS

# Canadian Criminal Cases and HIV

*There have been at least 24 cases to date in Canada in which criminal charges have been laid against an HIV-positive person for transmitting HIV or exposing another person to the risk of infection. This info sheet provides a brief summary of these cases.*




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### *R* v *Thornton*[1]

An HIV-positive man was convicted of *common nuisance* for donating blood. He testified that he hoped that removing some of his contaminated blood would reduce the likelihood of developing AIDS, and he believed that his infected blood would be detected by the Red Cross screening system. The court concluded he had endangered the health of "the public," and convicted, with a sentence of 15 months' imprisonment. Both the Ontario Court of Appeal and the Supreme Court of Canada upheld the conviction.

### *R* v *Wentzell*[2]

The accused had unprotected sex on roughly 40 occasions with one woman without disclosing his HIV infection. She was later diagnosed HIV-positive. Wentzell pleaded guilty to *criminal negligence causing bodily harm*. The court agreed he had shown "wanton and reckless disregard" for the complainant's life, and sentenced him to three years in prison.

### *R* v *Lee*[3]

Lee had tested HIV-negative previously but suspected he might be infected. In 1990, he had unprotected sex with a woman who was aware of his history of having sex and sharing needles with a mutual friend, a gay injection drug user. The woman continued to test HIV-negative over a year after having had sex with him. Lee was charged with *aggravated assault* for having engaged in unprotected sex without telling the complainant he was HIV-positive. The court acquitted Lee, noting that he only suspected that he might be HIV-infected and that, despite Lee's failure to disclose his HIV infection, the complainant had given legally valid consent to the sexual activity.

### *R* v *Summer*[4]

Over the course of two years, Summer had unprotected sex with several partners without disclosing his HIV infection. He pleaded guilty to a charge of *common nuisance* for having "endangered the lives and health of the public," and was sentenced to one year in prison and three years' probation. His appeal of the sentence was dismissed.

### *Anonymous woman in BC*

In December 1991, an HIV-positive woman was charged with two counts of aggravated sexual assault after allegedly having unprotected sex with two men. This is the only case to date in Canada where charges have been laid against an HIV-positive woman for having unprotected sex. The outcome of the case is unknown.

### *R v Mercer*[5]

Mercer had unprotected sex with two women without disclosing his HIV infection. Both women later tested HIV-positive. He pleaded guilty to two charges of *criminal negligence causing bodily harm* and was sentenced to 27 months' imprisonment. The Newfoundland Court of Appeal increased the sentence to 11 years' imprisonment. The Supreme Court of Canada refused leave to appeal.

### *R v Kreider*[6]

The accused had unprotected sex with his partner on three occasions before disclosing his HIV-positive status. She continued to test HIV-negative and subsequently had protected sex with him. He pleaded guilty to *common nuisance* and was sentenced to one year in prison.

### *R v Ssenyonga*[7]

The accused had unprotected sex with several women without disclosing his HIV infection. He was charged with four different offences with respect to each of three women who later tested HIV-positive. The charges of *common nuisance* were dismissed on the ground that having sex with specific individuals did not endanger the safety or health of "the public." Charges of *administering a noxious thing* were dismissed because of insufficient evidence that he could have foreseen the "substantial certainty" of transmitting HIV by having unprotected sex. The judge acquitted Ssenyonga on the charges of *aggravated sexual assault*, finding the complainants had given legally valid consent to the sexual activity in question, even though he had not disclosed his HIV-positive status. Only the charges of *criminal negligence causing bodily harm* remained outstanding. Ssenyonga died before the trial judge could deliver his judgment; no verdict was rendered.

### *R v Lesieur*[8]

The accused, an HIV-positive inmate, assaulted prison guards trying to restrain him, smearing his blood on cuts on one guard's arm and biting another guard, while stating he would infect them with HIV. He was acquitted on the charge of *attempted murder*, but convicted on other charges of assault and uttering threats, and sentenced to four years' imprisonment.

### *R v McKenzie*[9]

An HIV-positive man was charged with attempted murder for deliberately cutting his finger before engaging in a fistfight outside a bar. Medical testimony estimated the risk of HIV transmission to the other combatant to be 0.3% at most. He was convicted and sentenced to three years in prison.

### *R v Michel*[10]

The accused was charged with *aggravated* sexual assault for allegedly having sexually assaulted a woman while knowing he was HIV-positive. He was convicted of simple sexual assault and sentenced to five years' imprisonment.

### *R v Taylor*[11]

An HIV-positive man was charged with *attempted murder* and *aggravated assault* for biting a police officer following his arrest for drunk driving. He was acquitted on the attempted murder charge, as the Crown could not prove any intent to kill beyond a reasonable doubt. However, he was convicted on the assault charge and sentenced to 10 months in prison.

### *R v Trudeau*[12]

An HIV-positive woman was charged with *uttering death threats* and *aggravated assault* after stabbing another woman with a syringe possibly containing HIV-contaminated fluid, after the latter refused to supply her with drugs. Upon pleading guilty, she was sentenced to 30 months' imprisonment.

### *R v Tremblay*[13]

An HIV-positive man smeared his blood on a teenage girl's cuts and told her she would die. She was not infected. He was convicted of assault causing bodily harm, but as there was no medical evidence proving that HIV could be transmitted

by smearing blood, he was acquitted on charges of *attempted murder* and *uttering death threats*.

### *R* v *Napora*[14]

The accused had unprotected anal sex with two other men without disclosing his HIV-positive status. He was acquitted on two counts of *common nuisance*, since the evidence established that his partner could have already been infected. The trial judge noted that "the criminalization of consensual, but unprotected, high risk sexual activity may well have a negative effect on the HIV testing program."

### *R* v *Tan*[15]

Tan was charged with *aggravated assault* and *administering a noxious thing* for allegedly deliberately injecting her lover with HIV-contaminated blood. She was acquitted because there was insufficient evidence to show either that she had injected him at all, or that her conduct had been the source of the complainant's HIV infection, given his past sexual and injection drug use practices.

### *R* v *Winn*[16]

An HIV-positive man was convicted of *aggravated assault* for having endangered the life of his victim in the course of the assault, which included beatings and ejaculation in her mouth, vagina, and onto an open facial wound caused by him. His HIV infection was treated as a factor aggravating the seriousness of the assault. He was sentenced to 12 years' imprisonment; this was upheld on appeal.

### *R* v *Bonar*[17]

An HIV-positive man died in 1996 before his trial on charges of *aggravated assault* and *criminal negligence causing bodily harm* for "knowingly infecting a woman with HIV."

### *R* v *Thissen*[18]

An HIV-positive transgendered sex worker was charged with *aggravated assault* for biting an undercover police officer during a scuffle when he tried to arrest her, allegedly for propositioning him on the street. She pleaded guilty to the charge, meaning the Crown was not required to prove that her bite to the officer's hand could "endanger [his] life." She was sentenced to two years less a day in prison. A term of her additional three-year probation was a prohibition on engaging in unprotected sex (even after disclosing her HIV-positive status to a partner). The sentence was upheld on appeal.

### *Anonymous Montréal man*

A gay man was charged with *common nuisance*, *criminal negligence causing bodily harm*, *aggravated assault*, and *sexual assault* after his ex-partner complained to police that he had contracted HIV through unprotected sex with the accused. The complainant alleged that his accused ex-partner had not disclosed his HIV status. The accused pleaded not guilty in May 1996, and was reported as being close to death.

### *Anonymous man in Gatineau*[19]

A newspaper reported that an HIV-positive man was charged in November 1997 with *criminal negligence* and *aggravated sexual assault* for allegedly having had unprotected sexual intercourse with his partner between 1993 and 1997, without disclosing his status.

### *R* v *Mitchell*[20]

An Ontario trial court ruled that an HIV-positive woman had committed *aggravated assault* for biting a police officer (drawing blood), thereby "endangering her life." The court also found the accused not criminally responsible on account of mental disorder, but because the accused posed "a significant threat to the safety of the public," ordered that she be detained in a mental health facility. This order is subject to future review.

### *R* v *Cuerrier*[21]

The accused was charged with two counts of *aggravated assault* for having unprotected sex with two women without disclosing his HIV infection. He was acquitted on both counts in January 1995 (on a motion for a directed verdict of acquittal). The BC Court of Appeal upheld this decision, agreeing that the two complainants had given valid consent to the sexual activity. The Crown appealed further. In September 1998 the Supreme Court of Canada, in the first case considering criminal liability for exposing another to the risk of HIV infection to reach the country's highest court, ruled that it *could* be an assault under Canadian law to engage in sex without disclosing HIV

infection if this created a "significant risk of serious bodily harm," and ordered a new trial. The Court *may* have left open for decision in future cases the possibility that taking precautions (eg, safer sex) might reduce the risk of harm enough so that there would not be a duty to disclose HIV infection to a partner. However, this is not clear. Future court cases may answer this question.

## *R* v *Hollihan*[22]

At a preliminary inquiry, a Newfoundland provincial court ruled that a man accused of having unprotected sex with a woman without disclosing his HIV-positive status would stand trial on the charge of *common nuisance*. In the *Ssenyonga* case (see above), an Ontario court ruled that the health of "the public" was not endangered by an HIV-positive man who had unprotected sex with three specific women. The Newfoundland court rejected this conclusion, saying that "specific individuals are members of the public and it matters not whether deliberate unprotected sex is had with one, one thousand, or one million members."

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[1] [1989 OJ No 1814 (Dist Ct) (QL), aff'd (1991), 3 CR (4th) 381, 1 OR (3d) 480 (CA), aff'd [193] 2 SCR 445, 82 CCC (3d) 530, 21 CR (4th) 215.

[2] Unreported, 8 December 1989, NS County Court, file no CR-10888.

[3] (1991), 3 OR (3d) 726 (Gen Div).

[4] [1989] AJ No 784 (Prov Ct) (QL), aff'd 73 CR (3d) 32 (Alta CA).

[5] (1993), 84 CCC (3d) 41, 110 Nfld & PEIR 41 (CA), leave to appeal to SCC refused, SCC Bull, 4 March 1994, at 348.

[6] (1993), 140 AR 81 (Prov Ct), [1993] AJ No 422 (QL).

[7] [1991] OJ No 544 (Gen Div) (QL) (application for restraining order under HPPA); [1991] OJ No 1460 (Gen Div) (QL) (bail review hearing); (1992), 73 CCC (3d) 216 (Ont Ct Prov Div) (preliminary hearing dismissing common nuisance and administering noxious thing charges); (1993), 81 CCC (3d) 257 (Ont Ct Gen Div) (directed verdict acquitting on assault charges); [1993] OJ No 3273 (Gen Div) (QL) (decision to not deliver judgment on criminal negligence charges).

[8] Unreported, 1993, Québec Superior Court, District of Québec, file no 200-01-008541.

[9] Unreported, 31 March 1993, Court of Québec (Trois-Rivières), Morand J; see: Trois ans de prison pour tentative de meurtre par transmission du sida. *La Presse*, 1 April 1993, at A15.

[10] Unreported, trial conducted October 1994, BC Supreme Court; see [1996] BCJ No 1970 (CA) (QL); [1996] BCJ No 3024 (CA) (QL).

[11] Unreported, 28 January 1994, Court of Québec (Joliette), Hétu J, File no 705-01-3385-1939; see B Guillot-Hurtubise. Ten Months' Imprisonment for Biting Police Officer. *Canadian HIV/AIDS Policy & Law Newsletter* 1994; 1(1): 6.

[12] Unreported, 26 April 1994, Court of Québec (Montréal), Bonin J, File no 500-01-475-944; see B Guillot-Hurtubise. 30 Months' Imprisonment for Syringe Attack. *Canadian HIV/AIDS Policy & Law Newsletter* 1994; 1(1): 6.

[13] Unreported, 20 February 1994, Court of Québec (Montréal), Cadieux J, File no 500-01-017674-935; see R. Jürgens. HIV-Positive Man Acquitted of Attempted Murder Charge for Smearing Blood on Victim. *Canadian HIV/AIDS Policy & Law Newsletter* 1995; 1(3): 8-9.

[14] Unreported decision, 24 February 1995 (Alta QB, Edmonton) (motion for directed verdict of acquittal); unreported decision, 27 November 1994 (not guilty verdict).

[15] Unreported, 23 May 1995, Alta QB, Edmonton, Ritter J.

[16] (1998), 38 OR (3d) 159 (CA), aff'g (1995), 25 OR (3d) 750, 43 CR (4th) 71.

[17] Unreported; see *BCPWA News*, September/October 1998, at 12.

[18] 31 WCB (2d) 176 (Ont Ct Prov Div), aff'd [1998] OJ No 1982 (CA) (QL).

[19] Unreported; see: Un sidéen trop discret a été accusé de négligence criminelle. *Le Journal de Montréal*, 30 November 1997, at 19; HIV-Positive Man Faces Criminal Charges. *Canadian HIV/AIDS Legal Network* 1997/98; 3(4)/4(1): 46.

[20] [1998] OJ No 713 (Prov Div) (guilty verdict); [1998] OJ No 715 (Prov Div) (disposition hearing).

[21] (1998), 127 CCC (3d) 1 (SCC), rev'g 91996), 111 CCC (3d) 261 (BCCA), aff'g 26 WCB (2d) 378 (BCSC).

[22] [1998] NJ No 176 (Nfld Prov Ct) (QL).

For more information, see R Elliott. *Criminal Law and HIV/AIDS: Final Report.* Montréal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1997. Copies of the report and the info sheets are available on the Network website at www.aidslaw.ca or through the Canadian HIV/AIDS Clearinghouse (tel: 613 725-3434, email: aids/sida@cpha.ca). Reproduction of this info sheet is encouraged, but copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source of this information. For further information, contact the Network (tel: 514 397-6828; fax: 514 397-8570; email: info@aidslaw.ca). ***The Legal Network cannot provide legal advice*. Ce feuillet d'information est également disponible en français.**

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**Criminal Law and HIV/AIDS**

# Criminalization: Does It Make Sense?

*Is criminalizing behaviour that risks transmitting HIV a good way to deal with those individuals who, knowing they are HIV-positive, engage in behaviours that can transmit HIV without using precautions and without informing their partners about their HIV status? Are public health laws better suited to such cases?*

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## Concerns

There is widespread concern about the use of criminal sanctions to prosecute persons who engage in activities that risk transmitting HIV, and about proposals to amend the *Criminal Code* to create an HIV-specific offence. In particular, it is feared that an HIV-specific criminal offence would further stigmatize HIV/AIDS and other sexually transmitted diseases (STDs), as well as people with the disease and some of the populations most affected by it, such as gay and bisexual men, injection drug users, and sex workers.

Would public health laws not be better suited than criminal law to deal with those individuals who, knowing that they are HIV-positive, engage in behaviours that can transmit HIV without using precautions and without informing their partners about their HIV status? Before resorting to criminal prosecutions as social policy, we should consider whether it will be counterproductive, ultimately doing more harm than good.

## Arguments for Criminalization

Proponents of criminalization argue that HIV-positive people who place others at risk of infection should be criminally prosecuted, because it is necessary to punish and deter such conduct. How valid is this position?

*Punishment*: The punishment of criminal sentences is usually reserved for harm that is intentional or reckless. But very few instances of HIV transmission are intentional, and only a few HIV-positive individuals recklessly disregard others' safety. Using criminal prosecutions as punishment would only be justified in a handful of cases, and is irrelevant to the vast majority of cases of HIV exposure. Most "HIV transmission" laws go beyond criminalizing the intentional or reckless infection of others. One law proposed (but not passed) in Canada outlawed sex for any person who "knows or reasonably should know" they are HIV-positive, even if they disclosed to their partner *and* took precautions, such as using condoms. This approach actually carries no incentive to practise safer sex: if sex is criminal even when safe, why bother with precautions?

*Deterrence*: Courts have stated that, rather than punishing after the fact, deterring harmful conduct is, and should be, the primary function of criminal sanctions. But those few HIV-positive people who deliberately infect others are unlikely to be deterred by the remote threat of imprisonment. It is also doubtful whether criminalization will significantly deter people from the activities that account for most cases of HIV transmission: sex and drug use. The history of prohibitions on alcohol, drugs, prostitution, and gay sex shows that

the criminal law is ineffective in preventing such intimate and complex human behaviour. "In most cases where the criminal law has been used against AIDS carriers there was no motive or advanced planning. Spontaneous behavior driven by human anguish, despair, or passion is difficult to prevent." (L Gostin. The Politics of AIDS. *Ohio State Law Journal* 1989; 49: 1017.)

## Arguments against Criminalization

Not only are criminal prosecutions unlikely to be effective in addressing most instances of HIV transmission; such a coercive social response may do more harm than good. History indicates that punitive and coercive policies are counterproductive to promoting public health. Criminal prosecutions are unlikely to deter risky sex or needle sharing, but will instead deter those most at risk from getting tested, which in turn will prevent access to medical treatments and support services after a diagnosis of HIV infection. Recognizing this, Parliament repealed the law making "communicating venereal disease" a crime in 1985.

Invoking criminal sanctions surrounds HIV/AIDS and people living with the disease with further stigma, making it even more difficult to provide effective education about preventing HIV infection (especially for socially marginalized communities most at risk). If risk activities by HIV-positive people become criminal offences, this will inhibit open discussion about reducing risks and changing behaviour, especially if counselors or public health personnel are required to report those suspected of engaging in unsafe sex or sharing needles to police. Moreover, applying criminal law to risk activities invites intrusion into people's private lives, and will probably disproportionately affect those already identified in the public mind with the epidemic and subject to social disapproval – sex workers, gay and bisexual men, injection drug users, immigrants, and prisoners.

Finally, threatening criminal prosecution of the person who exposes someone else to HIV may create a false sense of security among HIV-negative people: "To the extent public health policy states everyone should assume their partners are infected and should take measures accordingly, that policy is undermined by the false belief that criminal sanctions have helped them reduce the risk." (FJ Hernandez. In: Closen et al. Criminalization of an Epidemic. *Arkansas Law Review* 1994; 46: 921.)

## Criminalization: The Costs Outweigh the Benefits

The limited benefit to be gained from prosecutions must be weighed against the social and economic costs of applying state sanctions. Public policy aimed at criminalizing HIV transmission/exposure would appear to be "getting tough" in the fight against AIDS. In reality, it will do little or nothing to stem the spread of HIV, and diverts resources and attention from the policies and initiatives that make a real difference, such as: education; access to testing, support services, and the means of protecting against infection (eg, safer-sex materials, needle-exchange programs, etc); and initiatives addressing the roots of people's vulnerability to HIV infection (such as poverty, violence against women and children, homophobia, barriers to education, and substance use).

Arguments against criminalization (or arguments in favour of limiting the scope of criminal prosecutions) outweigh arguments that existing criminal offences, or perhaps a new HIV-specific offence in the *Criminal Code*, represent a desirable response to conduct that risks transmitting the virus. In almost all cases, public health measures offer a better alternative. A coordinated response between prosecutors and public health officials is needed that uses the least intrusive and restrictive measures first, and only proceeds to more coercive interventions if they are absolutely necessary to prevent HIV transmission. Criminal prosecution should be a last resort: it is not, and cannot be, a sufficient response to conduct to risky behaviour by people with HIV/AIDS, and should not be the first response.

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Criminal Law and HIV/AIDS

# Public Health Laws & Conduct that Risks Transmitting HIV

*As opposed to criminal prosecutions, do public health laws offer better alternatives for dealing with situations where an HIV-positive person does not take precautions to prevent infecting others? If so, how should those interventions be approached? Are public health powers subject to misuse, like the criminal law?*

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*One reason people tend to accept uncritically the criminalization of HIV is that they do not compare it to other possible methods of dealing with the problem.*
*- MA Bobinski, 1994*

## The Elements of Public Health Laws

Public health laws differ in each province, but all serve three primary functions:

- They classify transmissible diseases and specify what rules apply to each.
- They impose obligations on infected persons to seek medical treatment, and a duty on some other persons (doctors, teachers, etc) to report suspected cases of infection.
- They grant health authorities wide powers to be exercised for the protection of public health. At their most coercive, these laws are *quasi-criminal*. Health officials may compel examination and medical treatment of people suspected of having a transmissible disease, and generally may order infected persons to conduct themselves so as to avoid infecting others. For example, a public health official might issue an order prohibiting an HIV-positive person from having unprotected sex and/or ordering them to disclose their HIV infection to partners. In every province, health authorities have the power to detain people (generally in a health-care setting) to prevent the spread of transmissible diseases.

## Public Health Powers versus Criminal Prosecutions

Proponents of criminalizing HIV-positive individuals whose activities risk infecting others argue that this is required to punish and denounce objectionable conduct, to rehabilitate offenders, to prevent harm to others by incarcerating the infected person, and to deter both the specific offender and the public generally from engaging in similar conduct in the future. Which of these goals are important? Can public health laws achieve the same thing while doing less overall harm to public health initiatives?

*Punishing and denouncing*

Public health interventions do not have punishment as their goal, although criminal sentences do. But is punishing people who risk infecting others the most important objective? Punishment is only justified where it is deserved, so this argument only justifies prosecutions in cases where conduct is clearly morally blameworthy. Criminal sentences are usually reserved for those who intentionally or recklessly harm others; only a handful of HIV-positive people actually attempt to infect others or recklessly disregard the safety of others.

But punishment is often about seeking revenge, which opens the door further to social prejudices and misinformation. People with HIV/AIDS are often seen as blameworthy for their own infection, especially if they are gay, sex workers, or injection drug users. People are often punished for who they are as much as for what they have done. But discrimination and stigma toward communities affected by HIV/AIDS already harm efforts to prevent HIV transmission. An approach that invokes the state's power to punish rather than addresses the reasons why people engage in risk activities, makes this problem worse. When misguided moralizing and scapegoating have already worsened the HIV/AIDS epidemic, can we afford to let a desire for punishment dominate public policy?

*Rehabilitating and restraining*

Public health powers are better suited than criminal sentences for "rehabilitating" people who place others at risk of HIV infection. Changes in sexual or drug-using behaviour are more likely if we address the reasons why someone engages in risky sex or shares needles, rather than put them in prison. Also, imprisoning someone with HIV may well increase, not decrease, the likelihood of infecting others. Since there is less access to condoms in prisons, and no access to clean needles, unsafe sex and sharing injection equipment is more common "inside."

*Deterring similar conduct*

Ultimately, if preventing the spread of HIV is the most important objective, then deterring people from risky sex or sharing needles must be the priority. Public health interventions are more flexible and can be better tailored to the individual circumstances of the person with HIV/AIDS than the blunt tool of the criminal law. Increasingly coercive interventions can be adopted if less coercive and punitive measures fail. Different approaches may be adopted for those whose ability to take precautions is limited (for reasons of mental illness, for example) or for those who resist taking precautions. Also, in-person contact with a public health worker is more likely to result in changes in behaviour than the more remote, generalized possibility of criminal prosecution. And if a given person is not deterred from risky sex or sharing needles by a public health order and the threat of imprisonment for breaching that order, then it is unlikely they will be any more deterred by the threat of criminal sanctions. While highly publicized criminal prosecutions and sentences might arguably be more significant in deterring others from similar conduct, history shows that sex and injection drug use, the two activities accounting for most HIV transmission, are not likely to be deterred by legal prohibitions.

*Conclusion*

On balance, public health interventions offer a better response to risk activity by HIV-positive people than the criminal law. They offer more flexibility and are more likely to be effective. Individualized interventions, which protect the confidentiality of those affected, are also less likely to contribute to misinformation about HIV and how it is transmitted, and less likely to further stigmatize all people with HIV/AIDS as "potential criminals" and "dangers to public health" in the public mind.

## Preventing the Misuse of Public Health Powers

Several provinces have developed, or are developing, policies and protocols for managing public health interventions in cases of persons who risk transmitting HIV to others. The general consensus is that interventions should be the least invasive, least restrictive, reasonably available and likely to be effective.

These policies also recognize the need for proper safeguards to prevent the misuse of public health powers, since these can be used to infringe individual liberty and privacy (such as prohibitions on certain sexual activity, orders to disclose HIV-positive status, or detention orders), and the exercise of these powers may be different in each health unit. Guidelines for health officials in determining appropriate interventions have been proposed, and it has been recommended that prosecutors should consult with public health officials before laying criminal charges, which should be a last resort. Public health orders (for example, to refrain from sex, or to detain someone) should be time-limited and automatically reviewed by an appeal board. People subject to such orders should be guaranteed the right to a lawyer, and in the case of detentions, public health officials should be required to prove beyond a reasonable doubt that detention is required to prevent a person from conduct that risks infecting others with a transmissible disease.

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Criminal Law and HIV/AIDS

# Should the *Criminal Code* Be Amended?

*Should Parliament amend the* Criminal Code *to make it a crime for someone with HIV to engage in certain activities because there may be a risk of transmitting the virus? Doesn't the* Criminal Code *already address this? Is there any reason to single out HIV for specific treatment? Are criminal prosecutions a helpful way to respond to the few HIV-positive people who place others at risk of infection?*

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Public policy aimed at criminalizing HIV transmission/endangerment would do little or nothing to stem the spread of HIV. But it would divert attention and resources from the policies that make a real difference and that Canadian provinces and territories and the federal government need to continue to pursue.

## The US Approach: "HIV Exposure" or "Criminal Transmission" Laws

Several US states have passed laws specifically criminalizing certain behaviour by people with HIV. Some states make it a crime not to disclose HIV-positive status before engaging in certain activities. In most of these states, taking precautions to prevent transmission (such as using a condom) does not protect against criminal liability. Other states criminalize certain *legal* acts (such as donating blood) if done by an HIV-positive person, or if done simply by someone belonging to a "high risk group." Finally, some states have imposed harsher sentences for *illegal* acts (such as prostitution) if the offender is HIV-positive. Many states have adopted more than one of these approaches. In most cases, the prosecution only has to prove the prohibited behaviour took place, and need not prove HIV was actually transmitted or even that the accused knew the conduct could transmit the virus.

## The Canadian Approach: No HIV-Specific Offence

*Communicating venereal disease is no longer a specific criminal offence*

In 1919, Parliament passed a law making it a crime to "communicate" a venereal disease, knowingly or by culpable negligence. There was no liability where the person "had reasonable grounds to believe, and did believe" that they had no communicable venereal disease at the time. Two federal special committees concluded that the law was ineffective and counterproductive because it drove underground those who were at risk of infection, thereby hindering education and treatment that would reduce the transmission of diseases. Parliament repealed the law in 1985, recognizing that it had not been applied for over 50 years and that the transmission of STDs was a matter of public health rather than criminal law.

*Proposals to amend the* Criminal Code

In 1998, a private member's bill (Bill C-290) was introduced to make it an offence for any person, knowing that they are HIV-positive, to "knowingly do any act that may expose a person" to HIV. The bill proposed that it would not be a crime if the HIV-positive person first informed their partner of the risk of infection and the partner "knowingly consented in taking such a risk." The bill did not proceed.

More recently, in October 1995, a Reform Party MP introduced a bill (Bill C-354) that would have made it a crime for an HIV-positive person to engage in any act of sexual intercourse, even if they disclose their status to a partner and use a condom. The bill specified two new offences for "wilful or reckless" acts by a person who "knows or should reasonably know" that they are HIV-positive: "criminal infection," carrying a maximum penalty of life imprisonment, if the act transmitted HIV; "reckless infective behaviour," with a penalty of up to seven years in prison, if the act did not actually transmit HIV. The session of Parliament ended before Bill C-354 could proceed past first reading in the House of Commons.

## Should Parliament Create an HIV-Specific Criminal Offence?

No. There is no need to create a specific offence relating to HIV transmission or exposure. In the vast majority of cases, public health measures offer a better alternative to criminalization (see info sheet 5: Public Health Laws & Conduct that Risks Transmitting HIV). And in the few cases in which criminal sanctions may be appropriate, existing *Criminal Code* offences such as *assault* or *criminal negligence causing bodily harm* can be used (see info sheet 2: *Criminal Code* Offences Applied in Canadian Prosecutions, and info sheets 1 and 7 about the *Cuerrier* case).

Creating an HIV-specific criminal offence would be counterproductive to public health. Criminalization generally, and an HIV-specific offence in particular, sends the misleading message that the law will protect against the risk of infection. This would undermine HIV/AIDS education campaigns that stress that it is the responsibility of everyone – people who are HIV-negative as well as people who are HIV-positive – to take precautions, and that try to ensure that all people have the information and support they need to discharge this responsibility.

An HIV-specific offence would further stigmatize all people with HIV as potential criminals, while portraying uninfected people as potential "innocent victims." There is no reason to single out people with HIV for specific treatment under the criminal law, just as other forms of conduct that harm, or risk harming, others do not require specific treatment under the *Criminal Code*. Criminalizing HIV transmission or exposure is likely to further marginalize those who are most at risk of HIV infection, and make it harder to create an environment in which education, treatment, and support programs are most likely to be effective in preventing HIV transmission.

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Criminal Law and HIV/AIDS

# The *Cuerrier* Case: Issues for People with HIV/AIDS

*In September 1998, the Supreme Court of Canada unanimously decided in the case of* R *v* Cuerrier *that HIV-positive persons may be guilty of the crime of "assault" if they engage in unprotected sexual intercourse without disclosing their HIV-positive status. The decision raises several questions for people with HIV/AIDS. (See Info Sheet 1 for the background of the case.)*

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## What Does the Court's Decision Say?

The Supreme Court's decision indicates that "deliberate deceit" (lying) about one's HIV-positive status before sex is a "fraud" that makes a partner's consent to engage in sexual activity legally invalid. This means that the physical sexual contact that follows the "deliberate deceit" is an "assault."

The more complicated question is whether simply not disclosing one's HIV-positive status before sex may also be a "fraud" that makes a partner's consent legally invalid. The Supreme Court decided that it *may* be a fraud if, in the circumstances, the HIV-positive person had a duty to disclose. The judgment says that in such circumstances:

> The consent cannot simply be to have sexual intercourse. Rather it must be consent to have intercourse with a partner who is HIV-positive. True consent cannot be given if there has not been a disclosure by the accused of his HIV-positive status.

But the judgment is not clear as to exactly when, or under what circumstances, the duty to disclose HIV-positive status exists. According to the Court, there is only a duty to disclose if failing to disclose would expose the sexual partner to a "*significant* risk of *serious* bodily harm." Infection with HIV (and, according to the Court, possibly other sexually transmitted diseases) is a serious bodily harm. But what is a "significant" risk of infection that triggers the duty to disclose?

## When Is Disclosure of HIV-Positive Status Required before Sex?

According to the Court, the greater the risk of harm associated with the act, the greater the duty to disclose. But the Court offers little guidance beyond this, saying simply: "the nature and extent of the duty to disclose, if any, will always have to be considered in the context of the particular facts presented." It is the courts, and not the HIV-positive person, who will decide whether, in a given set of

circumstances, there was a duty to disclose because there was a "significant risk" of transmitting HIV.

The *Cuerrier* decision makes it clear that HIV-positive status must be disclosed before *unprotected* vaginal and anal intercourse. But what about *protected* sexual intercourse? What about "low" or "negligible" risk activities? How risky must a given activity be to carry a "significant" risk? The Court does not provide clear answers to these questions.

## Is Disclosure Required if the Person Practises "Safer Sex"?

In at least some cases of *protected* sex, the duty to disclose *may* not arise. The Court says:

> To have intercourse with a person who is HIV-positive will always present risks. Absolutely safe sex may be impossible. Yet the careful use of condoms might be found to so reduce the risk of harm that it could no longer be considered significant so that there might not be either [harm or risk of harm].

But it is *not* clear from the decision that using condoms will be enough to avoid a criminal charge of assault for not disclosing HIV-positive status before sex. This is only a possible interpretation. Another issue is also not clear: if careful condom use *may* reduce the risk below the level of (legally) "significant," will other "safer sex" precautions be treated similarly by the courts in other cases? The HIV-positive person *might* not be required to disclose if the sex consists of only "low" or "negligible" risk activities. But the *Cuerrier* judgment does not expressly mention these other precautions, and gives no indication of just how "safe" sex must be to avoid the duty to disclose.

Some of these questions may be answered in future cases. What *is* certain is that disclosing HIV-positive status before sex (either "high" or "low" risk) will prevent a criminal charge.

## What if Disclosing May Result in Violence toward the HIV-Positive Person?

The Court does not address the question of whether an HIV-positive person must still disclose before having sex that carries a "significant" risk of transmission, even if disclosing to a sexual partner is likely to result in violence. A court may consider this in a future case, and it *may* be possible to argue that the HIV-positive person is not required to disclose in such a circumstance. However, there is currently no clear answer in the law for an HIV-positive person in this situation.

## Does a Person with HIV/AIDS Have a Duty to Disclose outside the Sexual Context?

It remains to be seen what effect the *Cuerrier* case may have for HIV-positive people outside the sexual context.

*The health-care setting*

Physical contact is common between health-care workers and patients. In almost all circumstances, *universal precautions* should be adequate to reduce the risk of transmitting HIV below the level of a (legally) "significant risk." Therefore, in such circumstances an HIV-positive health-care worker would have no duty to disclose to patients, and vice versa. But in the case of "exposure-prone" invasive procedures, a court could decide the risk of transmission is "significant" and therefore there is a duty on the part of the HIV-positive health-care worker or patient to disclose before the procedure is conducted.

HIV-positive health-care workers will also need to consider guidelines or policies developed by their professional regulatory bodies and/or employers about when disclosure of HIV (and other conditions) may be required, and when they should seek advice about performing certain procedures. In all likelihood, a worker following these policies would not be

engaging in any procedures posing a "significant" risk of transmission, meaning criminal liability is unlikely.

*Sharing drug injection equipment*

If an HIV-positive person injects someone else with equipment they have already used, without disclosing their status, an assault charge could be laid because the physical contact of injecting the other person presents a "significant" risk of transmitting HIV. According to the Court's decision, if the risk of transmission is not "significant," then there is no duty to disclose HIV-positive status. It is not clear whether taking precautions (such as properly cleaning injection equipment before injecting another person) could reduce the risk of transmission enough so that it is not (legally) "significant."

Nor is it clear that even disclosing HIV-positive status before injecting another person will be enough to avoid criminal charges. The *Cuerrier* decision recognizes that someone may legally consent to unprotected sex with a partner they know to be HIV-positive. But, for reasons of "public policy," the courts may not treat injection drug use in the same way, and may not accept that someone can legally consent to being injected using HIV-contaminated equipment in the course of using illegal drugs. Again, whether this will be the case is unclear. The only sure way for an HIV-positive injection drug user to avoid criminal liability is not to share injection equipment.

Unlike sex, sharing needles or other injection equipment does not necessarily involve direct physical contact creating a risk of transmitting HIV. It is doubtful that a charge of "assault" could be laid where the person sharing the used equipment injects themselves, as there is no physical contact between the HIV-positive person and the person sharing the equipment. However, in these circumstances other criminal charges might be laid where the HIV-positive person knows their own status and lets the other person use their contaminated equipment.

## What are the Implications for an HIV-Positive Person Accessing Services?

There is concern that the *Cuerrier* decision may discourage some HIV-positive people (or people at risk) from getting tested for HIV, or from accessing support services (some of which may help in changing behaviour to reduce the risk of transmitting HIV).

Records kept by a doctor or a testing clinic that link a positive HIV test result to a person's name might be used in court to prove that a person criminally charged for engaging in risky activity knew they were HIV-positive. This means the availability of anonymous testing may be even more important to ensure that some people at risk of being HIV-positive are not discouraged from getting tested. Notes kept by a physician, a public health nurse, or some other counselor might also be used in court to show that an accused HIV-positive person was counseled about how HIV is transmitted and the risks associated with different activities, as well as how to lower the risks (eg, safer sex), but still engaged in unprotected sexual activity.

An HIV-positive person who tells a physician, psychiatrist, or other counselor that they are engaging in unprotected sex (or perhaps another risky activity) without disclosing their status might be admitting to the crime of assault. Both HIV-positive people seeking counseling and their counselors need to be aware that there is no absolute rule of confidentiality covering discussions with a counselor. The counselor might end up having to testify in a criminal prosecution against the person, and any records of such conversations might be used as evidence. Aside from the issue of criminal prosecutions, if a counselor becomes aware that the person they are counseling presents a serious risk of harm to someone else, the counselor may have a duty

to warn the person at risk if they can identify them. The person warned might decide to file criminal charges against the HIV-positive person for having put them at risk of infection.

An up-front discussion between the counselor and the HIV-positive person they are counseling is warranted, so that the decision about what to reveal to the counselor is made with the knowledge that the counselor may be required to breach confidentiality about some things.

***The information on this sheet is not legal advice.***

*People who have questions about whether they or someone they know has a duty to disclose or is risking criminal prosecution should consult a criminal lawyer familiar with HIV/AIDS issues.*

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For more information, see R Elliott. *Criminal Law and HIV/AIDS: Final Report.* Montréal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1997 and R Elliott. *After Cuerrier: Canadian Criminal Law and the Non-Disclosure of HIV-Positive Status. Montréal: Canadian HIV/AIDS Legal Network, 1999*. Copies of the reports and the info sheets are available on the Network website at www.aidslaw.ca or through the Canadian HIV/AIDS Clearinghouse (tel: 613 725-3434, email: aids/sida@cpha.ca). Reproduction of this info sheet is encouraged, but copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source of this information. For further information, contact the Network (tel: 514 397-6828; fax: 514 397-8570; email: info@aidslaw.ca). ***The Legal Network cannot provide legal advice*. Ce feuillet d'information est également disponible en français.**

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Criminal Law and HIV/AIDS

# The *Cuerrier* Case: Issues for Those Working with People with HIV/AIDS

*Criminal prosecutions for activity that risks transmitting HIV have implications not just for people with HIV/AIDS. What do such cases mean for public health authorities? What legal or ethical obligations may exist for professionals or organizations who have information about someone's HIV status or learn that an HIV-positive person is risking transmission to others?*

This is one of a series of eight info sheets on Criminal Law and HIV/AIDS.

1. The *Cuerrier* Case
2. *Criminal Code* Offences Applied in Canadian Prosecutions
3. Canadian Criminal Cases and HIV
4. Criminalization: Does It Make Sense?
5. Public Health Laws & Conduct that Risks Transmitting HIV
6. Should the *Criminal Code* Be Amended?
7. The *Cuerrier* Case: Issues for People with HIV/AIDS
8. The *Cuerrier* Case: Issues for Those Working with People with HIV/AIDS

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## Criminal Prosecutions and Public Health Practice

There have been a number of HIV-related criminal cases in Canada, including the 1998 *Cuerrier* decision of the Supreme Court of Canada. What are the implications for those in the public health field?

First, public health officials and front-line nurses need accurate information as to what obligations to disclose HIV-positive status the criminal law may impose. The *Cuerrier* case says that a person with HIV (or another sexually transmitted disease that causes "serious bodily harm")could be charged with *assault* if they do not disclose their status to their partner before engaging in sexual activity if that activity carries a "significant" risk of transmission. This definitely includes vaginal or anal sex without a condom. Disclosure *may* also be legally required before engaging in "low risk" activities (such as oral sex without a condom, or vaginal or anal sex using a condom), because courts *may* consider even a "low" risk to be "significant." But currently this is unclear. The safest way to avoid possible criminal charges is always to disclose, or to engage only in activities that pose "negligible risk" (eg, oral sex using a condom or latex barrier) or "no risk" of transmission of HIV or another STD (eg, not sharing injection equipment). Contact an AIDS service organization for information about the risks of various activities. (See info sheets 1 and 7 about the *Cuerrier* case.) Charges laid in some other cases (such as *common nuisance* or *criminal negligence*) might be applicable even where the risk of transmission is lower than "significant," but this remains unclear. (See info sheets 2 and 3 about other criminal charges.)

Second, this information needs to be incorporated into routine counseling that should be given, both *before* and *after* taking an HIV test, by the public health nurse or private physician who provides the testing. People getting tested need to understand that criminal charges might be laid if they know their status and put someone else at "significant risk" of being infected with HIV or another sexually transmitted disease that causes "serious bodily harm." HIV-related criminal prosecutions highlight the importance of ensuring that everyone (and not just people with HIV/AIDS) knows how to protect themselves and their partners against HIV transmission.

Third, criminal charges should be a measure of last resort. Public health authorities and front-line workers first need to make appropriate use of the more flexible options available under public health law for dealing with individuals who do not take precautions to prevent transmitting HIV or other serious STDs to others. More coercive, intrusive measures should only be used if less intrusive measures have not succeeded.

## Search Warrants and Subpoenas

In pursuing criminal charges, prosecutors need to prove the accused person knew they were HIV-positive and engaged in a risky activity (such as unprotected sex) without disclosing their status to their partner. Prosecutors will likely want more evidence than just the testimony of the "complainant" (the person who was infected or put at risk). This has implications for those who have confidential information about a person's HIV status or conduct.

Prosecutors might seek to obtain a person's HIV test results from the physician who ordered the test, from public health authorities, or from the lab that tested the blood sample. Prosecutors could also seek evidence from someone who provided counseling or other support services to an accused person. For example, a person with HIV might tell a counselor at an AIDS service organization that they have had unprotected sex without disclosing their status. If the HIV-positive person were criminally charged, a search warrant to seize the counselor's records could be issued, or the counselor could be compelled by a court order (a *subpoena*) to testify about the conversation. A court might decide this evidence is "hearsay" and cannot be admitted at a trial, or might put limits on how this evidence could be used. Nonetheless, this may affect what information people choose to discuss with service providers.

## Is There a "Duty to Warn" Someone at Risk?

Canadian law recognizes that it is important to protect the confidentiality of medical information and information disclosed to professionals such as doctors, therapists, or lawyers. But a professional may learn that an HIV-positive person is putting someone at risk of HIV infection through unprotected sex or sharing drug injection equipment without disclosing their status. If the person is unwilling to disclose, is there an ethical or legal obligation to breach confidentiality in order to warn the person at risk? Can professionals be sued for breaching confidentiality? Can they be sued for negligence if they do not breach confidentiality and the person at risk is harmed?

The issue of a "duty to warn" has received limited consideration in Canadian law. In two cases, Alberta courts have ruled that a psychiatrist who learns that a patient presents a "serious danger" to another person may have a legal duty "to take reasonable steps" (including breaching the patient's confidentiality if necessary) to protect that person. Whether such a duty exists will depend on the nature of the risk and whether the person at risk can be identified. In other provinces, social workers and police have also been found negligent for not warning someone about a known risk of harm. The Supreme Court has indicated that a psychiatrist (or other professional) may be *permitted* to breach their patient's confidentiality if there is an "imminent" and "clear risk" of "serious bodily harm or death" to an "identifiable person or group." However, the Supreme Court has not ruled on whether some professionals (or other service providers) are *required* to breach confidentiality in such circumstances.

In determining who may have a duty to warn, and the extent of that duty, applicable professional guidelines or statutory obligations must be considered. For example, public health legislation in several provinces says that confidentiality of health information may be breached in the interest of "protecting public health." Also, public health authorities are generally required by legislation or policy to anonymously notify a person's partners who may have been infected ("partner notification"). Therefore, in all likelihood, public health nurses and officials have a "duty to warn," although this has not been considered by a court. This needs to be made clear by public health nurses in pre- and post-test counseling for HIV.

## Developing Guidelines for CBOs

Community-based organizations (CBOs) serving people with HIV/AIDS may become aware that someone is putting an identifiable person at risk of infection without their knowledge, or be faced with a request that confidential records be produced for use in criminally prosecuting an HIV-positive person for risky conduct. They may wish to develop policies for dealing with confidential information about a person's HIV status and risk activities, and the disclosure of that information. Legal advice should be sought in preparing such policies. In any event, counselors should make it clear to anyone they are counseling that disclosing certain information (such as having sex that risks transmitting HIV without disclosing their HIV-positive status) *may* trigger a counselor's obligation to breach confidentiality, and that the counselor *may* be compelled to reveal that information in a criminal prosecution.

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