

HIV CRIMINALIZATION IN CANADA: Key Trends and Patterns

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Current Legal Context

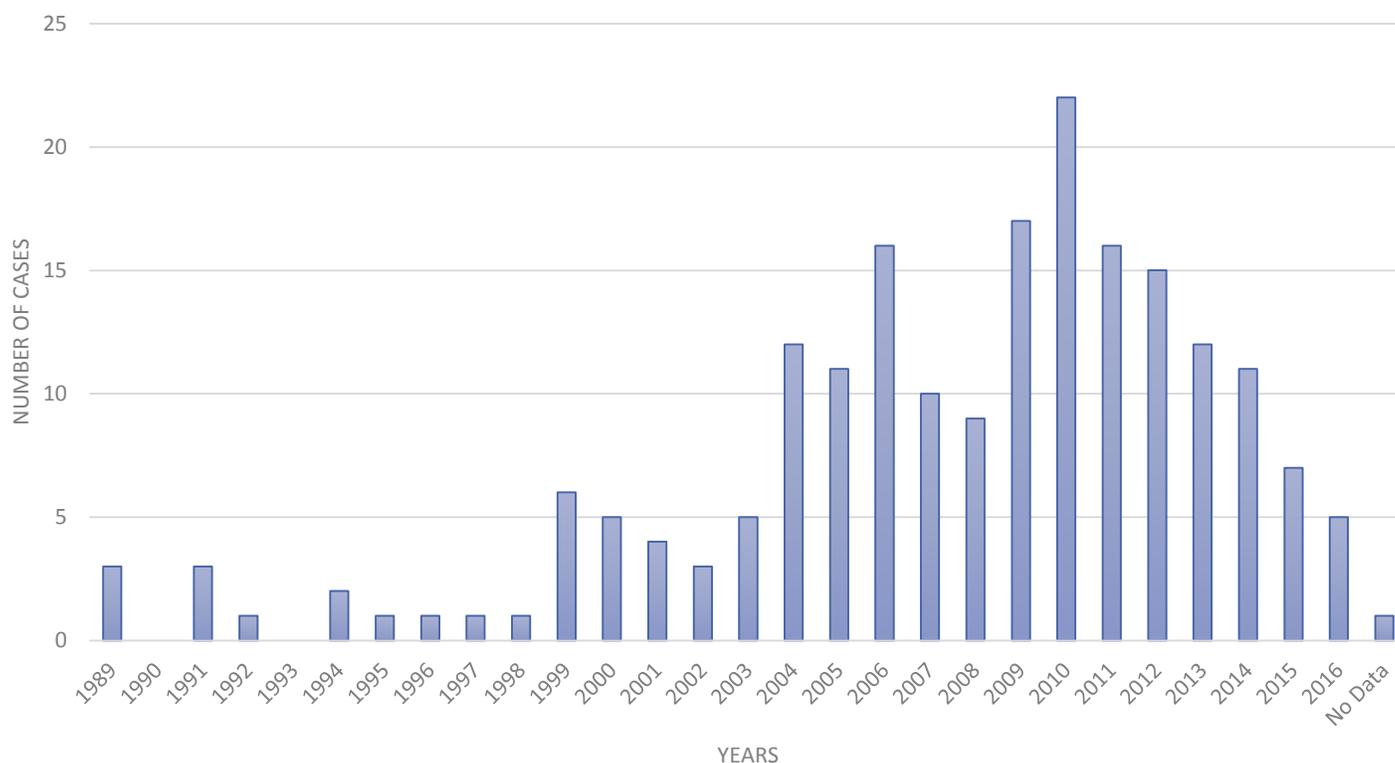
In Canada, people living with HIV can be charged and prosecuted for not disclosing their HIV-positive status to their sexual partners (a phenomenon referred to in this short report as “HIV criminalization”). In 1998, in *R. v. Cuerrier*, the Supreme Court of Canada (SCC) established that people living with HIV have a legal duty to disclose their HIV-positive status to sexual partners before sex that poses a “significant risk” of HIV transmission.¹ In 2012, in *R. v. Mabior* and *R. v. D.C.*, the SCC ruled that there is a legal duty to disclose one’s HIV-positive status before having sex that poses a “realistic possibility” of HIV transmission.² The court stated that “as a general matter, a realistic possibility of transmission of HIV is negated if (i) the accused’s viral load at the time of sexual relations was low and (ii) condom protection was used.”³ Those who do not disclose their HIV-positive status when a realistic possibility of HIV transmission has been posed can face criminal charges, most often for aggravated sexual assault, which carries a maximum punishment of life imprisonment. People living with HIV have been charged even when they did not intend to transmit HIV, engaged in behaviours that posed little or no risk of transmission and/or did not, in fact, transmit HIV to their sexual partners. Research shows that the current use of the criminal law increases stigma and discrimination against people living with HIV, spreads misinformation about HIV, undermines public health initiatives, and ultimately violates the human rights of people who live with HIV.^{4,5}

As part of an effort to contribute to an informed public dialogue on the issue, this short report provides a snapshot of the temporal and demographic patterns of HIV criminalization in Canada from 1989 to 2016. It also updates information on the outcomes of HIV non-disclosure criminal cases. This analysis updates an earlier one covering the period 1989–2010 that was published in 2012.⁶ The SCC’s *Mabior* decision in 2012 was an important development in the criminalization of HIV non-disclosure in Canada. The *Mabior* decision harshened the legal obligation to disclose by introducing the concept of a “realistic possibility” of HIV transmission which can include activities that, based on current scientific evidence, pose a negligible HIV transmission risk. This updated analysis examines the extent to which the landscape of criminal cases related to HIV non-disclosure has changed following the *Mabior* decision.

Methods

There is, as far as we know, no official tracking of HIV non-disclosure criminal cases. Thus, we draw on various methods to establish our best estimate of the temporal, geographic, and demographic patterns of HIV non-disclosure cases in Canada. To update the existing data on criminal cases and defendants, we began with the existing database reported on by Mykhalovskiy and colleagues⁷ in 2016. We supplemented that data with information on criminal trials related to HIV non-disclosure compiled by the Canadian HIV/ AIDS Legal Network, and by reading legal documents identified through the LexisNexis,

Figure 1: HIV Non-disclosure Cases, Canada 1989–2016 (n=200)



Quicklaw, and CanLii databases. In reporting our data, we distinguish between individual defendants and the criminal cases in which they are involved. A person may be involved in more than one criminal case. We borrow from Mykhalovskiy and Betteridge who define a criminal case as “any circumstance in which one or more Criminal Code charges were laid by police against a person based on alleged HIV non-disclosure in the context of sexual activity.”⁸ We similarly “treated as separate cases, charges that were prosecuted in separate proceedings, either at the trial stage or on appeal.”⁹ Finally, we only included cases of HIV non-disclosure in the context of (otherwise) consensual sex. We did not include cases of forced or coerced sex where HIV might be an aggravating factor. While our data includes cases that were stayed, there may be a number of charges that Crown prosecutors have chosen not to pursue of which we are unaware.

Temporal Trends

At least 184 people have faced charges related to HIV non-disclosure in 200 cases in Canada since 1989. Figure 1 shows the yearly number of HIV-related criminal cases in Canada up to the end of 2016.¹⁰ The vast majority of known cases (82% [163/200]) has occurred since January 2004, with a significant proportion (76% [151/200]) of all cases occurring in the ten-year period from 2004 to 2014. There were roughly 10–15 cases per year over this ten-year period. Since the *Mabior* decision¹¹ in 2012, there have been 35 criminal cases related to HIV non-disclosure. In 2013 and 2014, the annual number of cases remained steady at 10–15 per year; however, fewer cases were reported in 2015 (7 cases) and 2016 (5 cases). Continued monitoring of the annual number of criminal cases related to HIV non-disclosure in Canada will determine if this reduction is a temporary or more stable trend.

Geographic Patterns

Figure 2 displays the provincial distribution of HIV non-disclosure criminal cases since 1989. HIV non-disclosure cases are clustered in four provinces. Across Canada, 86% (172/200) of cases have taken place in the provinces of Ontario (107/200), Quebec (27/200), British Columbia (21/200) and Alberta (17/200). It is worth noting that from 1989 to 2016, more than half (54% [107/200]) of all cases in Canada have occurred in Ontario. Figures 3 and 4 show that the large proportion of cases in Ontario is a trend that holds for both the pre- and post-*Mabior* periods.¹² Between 1989–2012, 53% (87/164) of cases took place in Ontario; between 2013–2016, 54% (19/35) of cases occurred in the province.

“At least 10 cases after *Mabior* involved a defendant with a low or undetectable viral load (meaning the risks of transmission were close to zero). Of these 10 cases, 9 occurred in Ontario.”

Figure 2: Provincial Distribution of HIV Non-disclosure Cases, Canada 1989–2016 (n=200)

■ Alberta (n=17) ■ British Columbia (n=21) ■ Manitoba (n=11) ■ Newfoundland (n=6) ■ Northwest Territories (n=1)
■ Nova Scotia (n=7) ■ Ontario (n=107) ■ Quebec (n=27) ■ Saskatchewan (n=2) ■ Yukon (n=1)

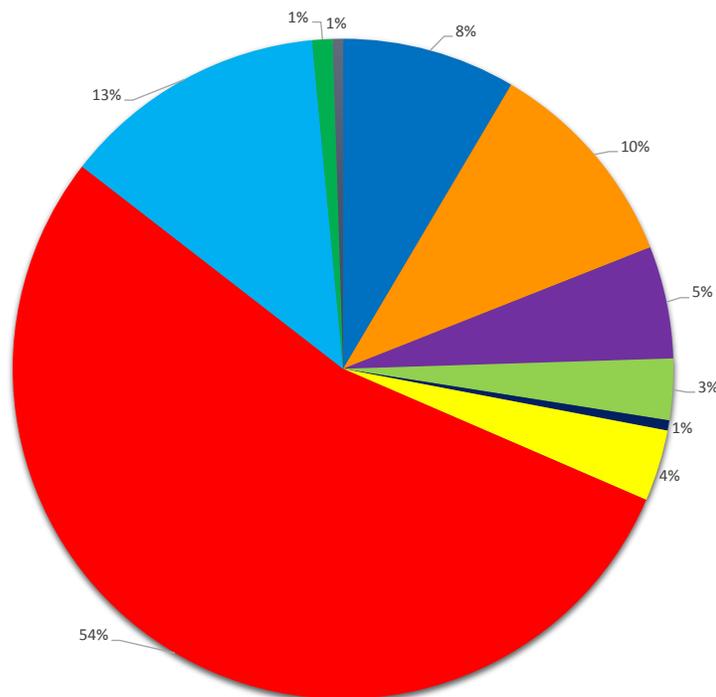


Figure 3: Provincial Distribution of HIV Non-disclosure Cases, Canada 1989–2012 (n=164)

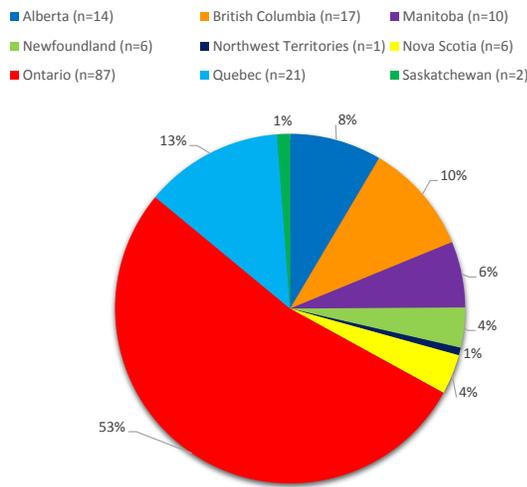
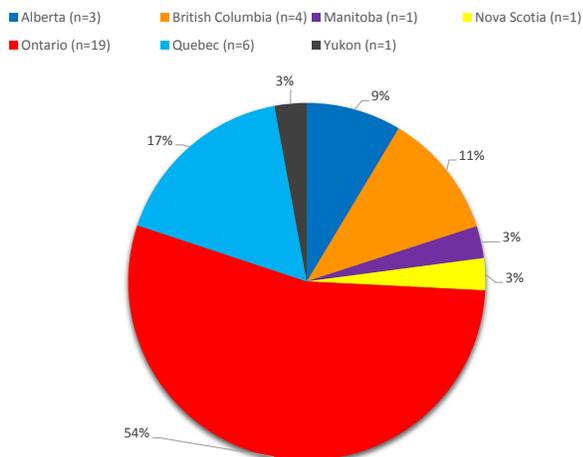


Figure 4: Provincial Distribution of HIV Non-disclosure Cases, Canada 2013–2016 (n=35)



Demographic Patterns

This report provides updated information on how HIV criminalization in Canada is patterned by social relations of race, immigration status, gender, and sexual orientation.

Race and immigration status

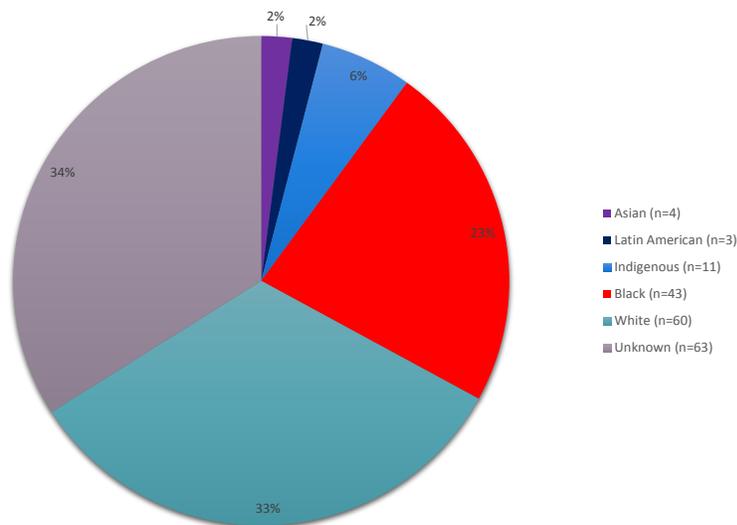
Figure 5 updates the first publicly available, national-level data on the race/ethnicity of the 184 people known to have faced criminal charges related to HIV non-disclosure in Canada since 1989.¹³ The proportional distribution of people charged for HIV non-disclosure is as follows:¹⁴

- 33% (60/184) are White
- 23% (43/184) are Black
- 6% (11/184) are Indigenous
- 2% (4/184) are Asian
- 2% (3/184) are Latin American
- The race/ethnicity of 63 people (34%) is unknown

This data on the race/ethnicity of defendants charged in HIV non-disclosure cases since 1989 supports community concerns about the overrepresentation of racialized communities, particularly Black people living with HIV, in mainstream newspaper coverage of HIV-related criminal cases. Since 1989, 62% (1049/1680) of all newspaper articles about HIV non-disclosure cases have focused on Black defendants.¹⁵ However, our data shows that among people for whom race/ethnicity is known, only 36% (43/121) are Black, while 50% (60/121) are White.¹⁶

Since the *Mabior* decision in 2012, almost half (48% [10/21]) of all people charged for whom race is known are Black men. This is a significant increase from the period prior to 2012, in which 30% (32/105) of people charged for whom race is known are Black men. A high proportion of Black men who faced criminal charges related to HIV non-disclosure in Canada were charged in Ontario: To date, out of at least 41 Black men charged in Canada, 59% (24/41) were charged in Ontario. Since the *Mabior* decision, 5 Black men were charged in Canada, all in Ontario. Sustained tracking of the demographic characteristics of people charged

Figure 5: HIV Non-disclosure: Race/ethnicity of individuals charged, Canada 1989–2016 (n=184)



“Since the *Mabior* decision in 2012, almost half (48% [10/21]) of all people charged, for whom race is known, have been Black men. This is a significant increase from the period prior to 2012 in which 30% (32/105) of people charged for whom race is known were Black men.”

with crimes related to HIV non-disclosure will establish if Black men continue to account for a larger proportion of individuals who face charges.

Of the 184 people who faced criminal charges related to HIV non-disclosure, 18% (33/184) are known to have come to Canada as immigrants or refugees.¹⁷ Immigrant Black men are particularly subject to HIV criminalization. Almost three quarters (71% [29/41])¹⁸ of Black men who faced charges were not born in Canada.¹⁹ Indigenous women in Canada account for a large proportion of women charged. Of the 18 women who faced charges related to HIV non-disclosure, we know the race/ethnicity of 12 women. To date, 42% (5/12) of women charged are Indigenous.

Gender and sexual orientation

Gender and sexual orientation remain the most important demographic factors patterning criminal HIV non-disclosure in Canada. Men (including one female-to-male transgender person) account for 88% (162/184) and women account for 10% (18/184) of all people charged to the end of 2016. The gender of 2% (4/184) of defendants is unknown. The proportion of men and women charged has remained steady through the pre- and post-*Mabior* periods. Prior to the *Mabior* decision, 89% (135/151) of people charged whose gender is known were men and 11% (16/150) were women. In the years following the *Mabior* decision, among people whose gender is known, 91% (30/33)

are men and 9% (3/33) are women. The criminal law in Canada is most often used in cases of HIV non-disclosure between heterosexual sex partners. All female defendants and 62% (101/162) of male defendants faced charges in the context of HIV non-disclosure with an opposite-sex partner.

From 1989 to 2016, 40 men faced criminal charges for HIV non-disclosure in the context of sex with male partners. They represent 25% (40/162) of all men charged. Three men faced charges in cases that involve both male and female partners, and the gender of the partners of 18 male defendants is unknown.

Figures 7 and 8 show that the proportion of men charged who are gay or bisexual has increased since the *Mabior* decision. Prior to 2013, 26% (32/124) of men whose sexual orientation was known were charged in the context of sex with male partners, and 1% (2/124) were charged in cases that involved both male and female partners. In the post-*Mabior* period, 38% (9/24) of men were charged in cases that involved male partners, and 4% (1/24) of men were charged in the context of sex with male and female partners. The use of the criminal law in Canada in cases of HIV non-disclosure between male sex partners is a relatively new phenomenon. Only 6 of the 43 cases (concerning 40 individuals) that involved male partners occurred before 2006. Since 2006, 78% (29/37) of cases have occurred in Ontario.

Figure 6: HIV Non-disclosure: Sexual Orientation of Men Charged, Canada, 1989–2016 (n=162)

Sexual Orientation	Number of Men Charged	Percentage of Men Charged
Heterosexual	101	62%
Homosexual	40	25%
Heterosexual and Homosexual	3	2%
Unknown	18	11%

Figure 7: HIV Non-disclosure: Sexual orientation of men charged, Canada 1989–2012 (n=124)

■ Heterosexual (n=90) ■ Homosexual (n=32) ■ Heterosexual + Homosexual (n=2)

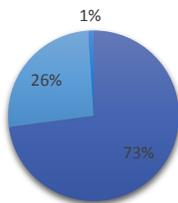
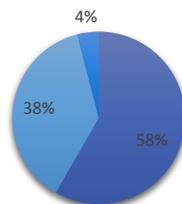


Figure 8: HIV Non-disclosure: Sexual orientation of men charged, Canada, 2013–2016 (n=24)

■ Heterosexual (n=14) ■ Homosexual (n=9) ■ Heterosexual + Homosexual (n=1)



Outcomes of Cases

Disposition of cases

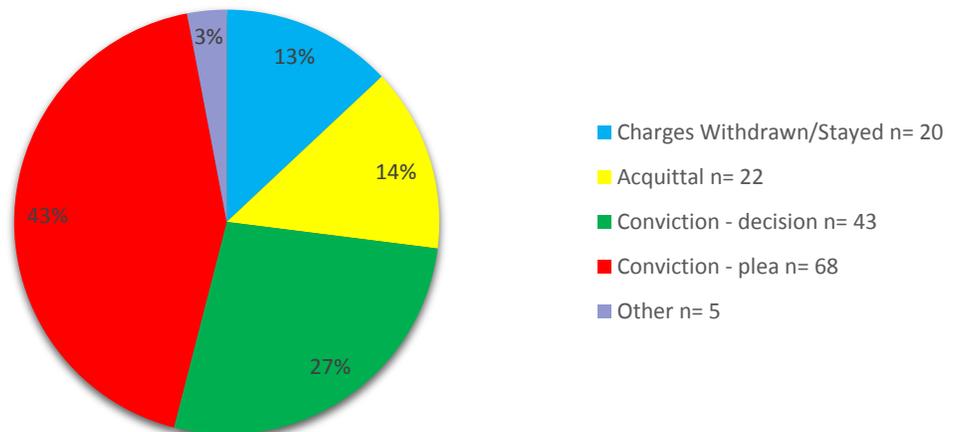
We know the disposition of 158 of the 200 cases of HIV non-disclosure that occurred in Canada since 1989. Figure 9 shows that a significant majority of cases (excluding cases that are ongoing or for which we have no information) ended in conviction. Altogether 70% (111/158) of cases related to HIV non-disclosure ended in a conviction on at least one charge. Meanwhile, 14% (22/158) ended in acquittal, and in 13% (20/158) of cases, charges were stayed or withdrawn. In 5 cases (displayed as “other” in Figure 9) the defendant died (4 people) or was deported (1 person) prior to a verdict. Since 1989, a large proportion of convictions have been the result of a defendant’s guilty plea as opposed to a guilty verdict following trial. Across Canada, 61% (68/111) of cases that ended in a conviction were the result of a guilty plea.²⁰

Making comparisons between the conviction rate in HIV non-disclosure cases in Canada and the conviction rate of other sexual assaults in Canada is challenging because estimates for conviction rates vary depending on how they are reported and the sources of statistical data. For example, trends in sexual assault in Canada may quantify the number of sexual assaults reported to police, the number of reported sexual assaults that are recorded by police as “founded,”²¹ the number of suspects charged for sexual assault, the number of suspects who are then prosecuted, or the number of criminal convictions for sexual assault.²² When the conviction rate for sexual assaults in Canada is based on the number of “charges laid,” it has been estimated that the conviction rate for sexual assault in Canada is 27% (1519/5544). When the conviction rate is based on the number of men prosecuted for sexual assault, it has been estimated that the conviction rate is 54% (1519/2824).²³ This suggests that the conviction rate of 70% in HIV non-disclosure cases, which is based on data that includes people who have been prosecuted as well as people who were charged but not prosecuted, is considerably higher than that typically reported for sexual assaults in Canada.²⁴

Under Canadian criminal law, people living with HIV

“The *Mabior* decision has left people living with HIV open to prosecution in circumstances in which scientific evidence indicates that the risk of transmission is, at most, negligible.”

Figure 9: Disposition of HIV Non-disclosure Cases, Canada 1989–2016 (n=158)



are prosecuted for not disclosing their status before sex, not for transmitting the virus. We use the term “alleged transmission” to refer to all cases in which the complainant is known to be HIV-positive. While the fact of the complainant’s HIV-positive status is not in question in these cases, in at least a few instances it is not entirely clear whether the defendant was the source of the complainant’s HIV.²⁵

Since 1989, there have been 135 cases in Canada in which we know the HIV status of the complainant. In 65 cases, the HIV status of the complainant is not known. Figure 10 shows that there was no HIV transmission in 61% (82/135) of cases in which a person was charged for not disclosing his or her HIV-positive status. The proportion of charges in which there is no HIV transmission has increased since the SCC *Mabior* decision in 2012: 59% (66/111) of cases between 1989–2012 and 67% (16/24) of cases following *Mabior* involved no HIV transmission. The *Mabior* decision widened the scope of the law and resulted in a larger proportion of cases going forward when no HIV transmission occurred. The *Mabior* decision has left people living with HIV open to prosecution in circumstances in which scientific evidence indicates that the risk of transmission is, at most, negligible.^{26,27} According to information available to the Canadian HIV/AIDS Legal Network, at least 10 cases after *Mabior* involved a defendant with a low or undetectable viral load (meaning the risks of transmission were close to zero). Of these 10 cases, 9

occurred in Ontario.

Focusing specifically on the proportion of convictions that involve HIV transmission reveals that people continue to be convicted of serious criminal offences in cases in which they did not, in fact, transmit HIV to their partners.

As Figure 11 indicates, since 1989, more than half of the cases that ended in conviction involved no HIV transmission.

Figure 10: HIV Transmission in HIV Non-Disclosure Cases, Canada 1989–2016 (n=135)

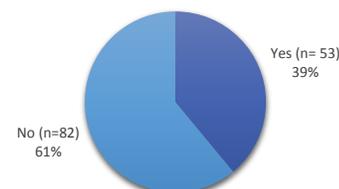
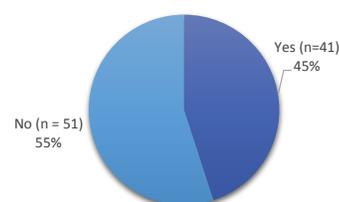


Figure 11: HIV Transmission in HIV Non-disclosure Cases that Ended in Conviction, Canada 1989–2016 (n=92)



Sentences

People living with HIV who are criminally charged for not disclosing their HIV-positive status to sexual partners face harsh punishment. We know the sentence of 101 of the 111 cases that have ended in conviction for criminal offences related to HIV non-disclosure in Canada since 1989.²⁸ In just 7% of cases (7/101), the defendant was given a conditional or suspended sentence and did not face prison time. However, the vast majority (93% [94/101]) of people convicted in HIV non-disclosure cases receive prison sentences.

Figure 12: Sentence Upon Conviction in HIV Non-disclosure Cases, Canada 1989–2016 (n=101)

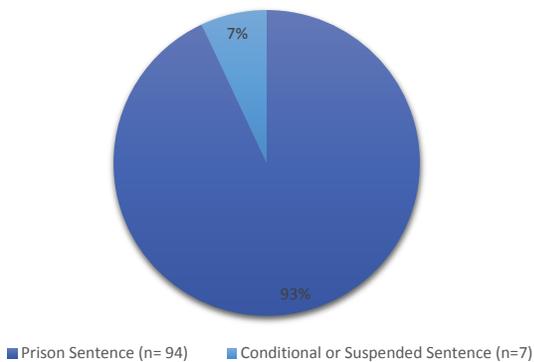


Figure 13 displays the length of sentences handed to people convicted of criminal offences related to HIV non-disclosure. In 72% (73/101) of cases, a defendant was sentenced to over two years in prison. While sentences vary depending on a number of mitigating or aggravating factors, such as the number of complainants and whether there was an allegation of HIV transmission, the average prison sentence for a person convicted of offences related to HIV non-disclosure is 54 months — more than double the average sentence for sexual assaults in Canada, which is 24 months.^{29,30} The mode, or most frequent sentence handed out to those convicted of offences related to HIV non-disclosure, is 24 months. For many of the same reasons that it is challenging to compare the conviction rate of HIV non-disclosure cases in Canada to the conviction rate for other sexual assault cases, it is difficult to relate trends in sentencing for HIV non-disclosure cases to that of other sexual assaults. However, while acknowledging that various factors come to bear on sentencing decisions, it is worth noting that the pattern of harsh sentences handed to

defendants convicted in HIV non-disclosure cases diverges from a reported general decline in the severity of sentences for sexual assault.³¹ Based on the large proportion of people convicted in HIV non-disclosure cases who receive prison sentences, the high percentage of cases in which a defendant received sentences of at least two years, and the greater than average length of sentence that defendants are handed, those convicted in HIV non-disclosure cases appear to receive particularly harsh sentences.

Conclusion

This report provides empirical evidence that substantiates concerns about HIV criminalization raised by Canadian advocates since the SCC decision in *R. v. Mabior*.

First, it provides evidence that the criminal law is increasingly used against people living with HIV from marginalized populations. Since *Mabior*, the proportion of Black men charged in HIV non-disclosure cases has grown. In the pre-*Mabior* period, 30% (32/105) of people charged for whom race is known are Black men. Following the *Mabior* decision, nearly half (48% [10/21]) of people charged for whom race is known are Black men. The proportion of gay men charged in HIV non-disclosure cases has also increased. Before the SCC decision in *R. v. Mabior*, 26% (32/124) of men were charged in cases that involved male partners. In the years following the *Mabior* decision, 38% (9/24) of men were charged in cases that involved male partners.

Second, our data suggests that people living with HIV are often charged and convicted in cases in which the defendants' sexual activities pose a negligible risk of HIV infection, or no risk of HIV infection at all. Since *Mabior*, at least 10 cases involved a defendant with a low or undetectable viral load. Nine of these cases occurred in Ontario. Also, the proportion of cases where no HIV transmission occurred has increased: Prior to the *Mabior* decision, 59% (66/111) of cases involved no HIV transmission. Since *Mabior*, 67% (16/24) of cases have involved no HIV transmission.

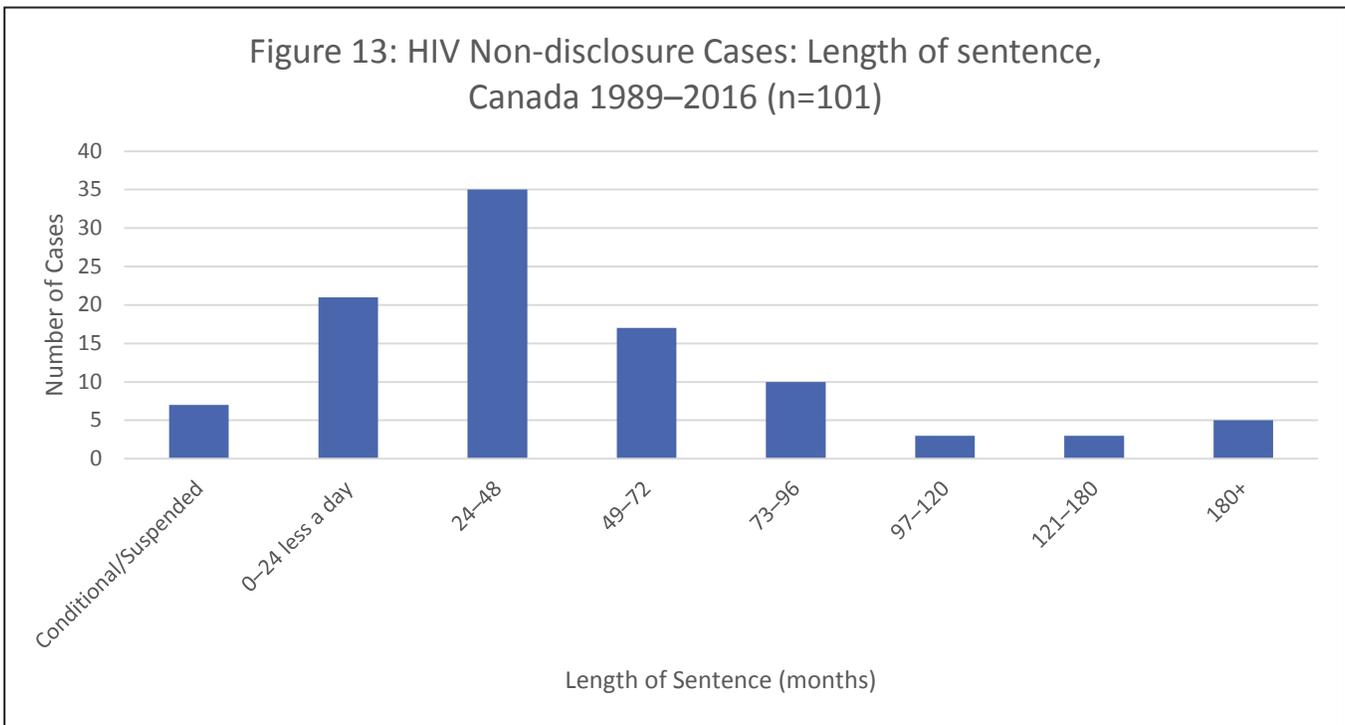
Finally, the Canadian criminal justice system's approach to HIV non-disclosure is exceptionally punitive, especially when compared to other sexual assaults. While it is challenging to draw comparisons between the outcomes of HIV non-disclosure cases and

other sexual assaults, trends suggest that HIV non-disclosure cases have very high rates of conviction and that a large proportion of cases result in prison sentences. The average prison sentence for a person convicted for charges related to HIV non-disclosure (54 months) is more than double the average sentence for sexual assaults in Canada (24 months).

Overall, this report on the temporal trends, demographic patterns and outcomes of HIV criminalization in Canada supports growing consensus on the need to reform criminal justice approaches to HIV non-disclosure. It reinforces advocates' calls to bring science to bear on the law and to limit the overly broad way that the criminal law is used to respond to HIV non-disclosure. The trends, patterns and outcomes identified in this report must continue to be closely monitored in order to encourage evidence-informed responses to reforming unjust and overly broad HIV criminalization.

“Based on the large proportion of people convicted in HIV non-disclosure cases who receive prison sentences, the high percentage of cases in which a defendant received sentences of at least two years, and the greater than average length of sentence that defendants are handed, those convicted in HIV non-disclosure cases appear to receive particularly harsh sentences.”

Figure 13: HIV Non-disclosure Cases: Length of sentence, Canada 1989–2016 (n=101)



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- ² *R. v. Mabior*, 2012 SCC 47 and *R. v. D.C.*, 2012 SCC 48.
- ³ *R. v. Mabior*, 2012 SCC 47 at para 94.
- ⁴ E. Mykhalovskiy, “The Public Health Implications of HIV Criminalization: Past, Current, and Future Research Directions,” *Critical Public Health* 25,4 (2015): 373–85.
- ⁵ P. O’Byrne, A. Bryan, and M. Roy, “HIV Criminal Prosecutions and Public Health: An Examination of the Empirical Research,” *Medical Humanities* 39,2 (2013): 85–90.
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- ⁷ E. Mykhalovskiy, C. Hastings, C. Sanders, M. Hyman and L. Bisailon, “‘Callous, Cold and Deliberately Duplicious’: Racialization, Immigration and the Representation of HIV Criminalization in Canadian Mainstream Newspapers.” A report funded by a grant from the Canadian Institutes of Health Research Centre for Social Research in HIV Prevention, 2016. Available at SSRN: <https://ssrn.com/abstract=2874409> or <http://dx.doi.org/10.2139/ssrn.2874409>.
- ⁸ Mykhalovskiy and Betteridge, 2012, p. 36.
- ⁹ *Ibid.*
- ¹⁰ When a case was resolved by a guilty plea and the date of charge was unknown, we estimated the charge to have occurred one year prior to the guilty plea.
- ¹¹ Throughout this analysis we treat cases that occurred between 1989 through the end of 2012 as “pre-*Mabior*” and cases that have occurred since the beginning of 2013 as “post-*Mabior*.”
- ¹² The one case in our dataset for which the year of the charge is unknown took place in Ontario.
- ¹³ E. Mykhalovskiy et al., 2016.
- ¹⁴ We documented the race of defendants when it was reported in news articles or court documents, or was otherwise known by service providers, lawyers or others in our networks (Mykhalovskiy et al., 2016: 20).
- ¹⁵ *Ibid.*
- ¹⁶ The proportion of White defendants is likely an underestimate. Critical race theorists and whiteness studies scholars have emphasized that within popular culture, whiteness is treated as a normative, neutral and assumed position and therefore is rarely explicitly named or identified. Given that whiteness is a kind of default position or invisible norm, it stands to reason that many of the defendants whose race is not explicitly reported in newspaper coverage of HIV non-disclosure criminal cases are White (Mykhalovskiy et al., 2016: 23).
- ¹⁷ For a qualitative, discursive analysis of the stereotypical and negative ways that mainstream newspapers represent racialized defendants and defendants who came to Canada as immigrants or refugees in HIV non-disclosure cases, see Mykhalovskiy et al., 2016.
- ¹⁸ One Black woman was charged and the gender of one Black person who faced charges is unknown.
- ¹⁹ 19 are from Africa, 7 from the Caribbean, 2 from the United States, and the country of one individual is unknown.
- ²⁰ Too many of the cases that have occurred following the *Mabior* decision are ongoing before the courts to permit a meaningful comparison of conviction rates in the pre- and post-*Mabior* periods.
- ²¹ H. Johnson, “Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault,” in *Sexual Assault in Canada: Law, Legal Practice, and Women’s Activism*, edited by E.A. Sheehy (Ottawa: University of Ottawa Press), 2012, p. 627.
- ²² *Ibid.*, p. 629.
- ²³ *Ibid.*, p. 631
- ²⁴ The conviction rate is even higher (81% [78/96]) in cases involving male defendants and female complainants. The conviction rate for cases involving male defendants and male complainants is 50% (14/28). The conviction rate for cases that involve defendants who are women is 67% (12/17).
- ²⁵ For instance, in *R. v. Schenkels*, 2016 MBQB 44, which we categorize as “alleged transmission,” the complainant tested positive for HIV but the sentencing judge admitted that the direction and timing of the HIV transmission had not been established.
- ²⁶ Canadian HIV/AIDS Legal Network, *HIV Criminalization in Canada: Current Context and Advocacy*, December 2016. Available at <http://www.aidslaw.ca/site/hiv-criminalization-in-canada-current-context-advocacy>.
- ²⁷ M. Loutfy, M. Tyndall, J.G. Baril, J.S. Montaner, R. Kaul and C. Hankins, “Canadian Consensus Statement on HIV and Its Transmission in the Context of Criminal Law,” *Canadian Journal of Infectious Diseases and Medical Microbiology* 25 (2014): 135–40.
- ²⁸ 8 cases in which the defendant was convicted are either ongoing or the sentence is unknown. In 1 case the defendant pled guilty but died before sentencing, and in 1 case the defendant was deported prior to sentencing.
- ²⁹ The mean and mode prison sentence charges of 24 months less a day were rounded up to 24 months.
- ³⁰ Sexual assault offenders are sentenced to 2 years in prison on average. See K. Makin, “How Canada’s sex-assault laws violate rape victims,” *The Globe and Mail*, October 5, 2013. Available at www.theglobeandmail.com/news/national/how-canadas-sex-assault-laws-violate-rape-victims/article14705289.
- ³¹ Johnson, p. 633.

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