

Policy:

Sexual Transmission, or Realistic Possibility of Transmission, of HIV

Policy Code:

SEX 2

Effective Date:

April 16, 2019

Cross-references:

CHA 1

This policy relates to any complaint of aggravated sexual assault under section 273 of the *Criminal Code* where it is alleged that, as a result of a sexual act in which the consent of the complainant was vitiated by fraud, there has been an actual transmission or realistic possibility of transmission of the human immunodeficiency virus (HIV).

Scientific evidence shows that the possibility of HIV transmission varies depending on factors including the nature of sexual activity, viral load, and condom use. Crown Counsel assessing charges under this policy must ensure that current scientific knowledge informs their charge assessment decisions and must exercise caution when considering prosecution.

Proposed charges that fall under this policy raise significant issues of individual and public health, equality, and autonomy. Crown Counsel must carefully balance the need to protect the general public and the individual and sexual autonomy of victims while also ensuring that persons living with HIV are not subject to criminalization or stigmatization solely based on their illness.

In considering this issue, the Supreme Court of Canada has confirmed (*R v Mabior*, 2012 SCC 47, at ¶¶ 48, 89, and 91) that when the complainant's consent to engage in sexual acts was vitiated by fraud, this implicates the individual autonomy of the complainant and negates their human dignity:

In keeping with the Charter values of equality and autonomy, we now see sexual assault not only as a crime associated with emotional and physical harm to the victim, but as the wrongful exploitation of another human being. To engage in sexual acts without the consent of another person is to treat him or her as an object and negate his or her human dignity.

... the values of autonomy and equality enshrined in the Charter support an approach to fraud vitiating consent that respects the interest of a person to choose whether to consent to sex with a particular person or not. The law must strike a balance between this interest and the need to confine the criminal law to conduct associated with serious wrongs and serious harms. Drawing the line between criminal and non-criminal misconduct at a realistic possibility of

transmission arguably strikes an appropriate balance between the complainant's interest in autonomy and equality and the need to prevent over-extension of criminal sanctions. ... These considerations... [require] disclosure of HIV status if there is a realistic possibility of transmission of HIV. If there is no realistic possibility of transmission of HIV, failure to disclose that one has HIV will not constitute fraud vitiating consent to sexual relations under section 265(3)(c).

Charge Assessment

A. Responsibility and Notification

All Reports to Crown Counsel covered by this policy must be referred to Regional Crown Counsel, Director, or their respective deputy for charge assessment ("Charge Assessment Crown Counsel").

The Charge Assessment Crown Counsel should consult with designated HIV Resource Crown Counsel prior to concluding the charge assessment to ensure that their charge assessment decision is informed by the current scientific, medical, and legal knowledge around HIV.

B. The Evidentiary Test

In applying the evidentiary test under the *Charge Assessment Guidelines* (CHA 1) policy, Charge Assessment Crown Counsel must keep in mind the following necessary elements of proof:

- the accused must have known they were living with HIV before the sexual act;
- the sexual act involved an actual transmission, or realistic possibility of transmission, of HIV;
- before the sexual act, the accused failed to disclose they were living with HIV; and,
- the complainant would not have consented to the sexual act had they known the accused was living with HIV.

Where the sexual partner knew of the HIV infection prior to the sexual act and consented to the sexual act, there is no fraud and no offence.

Where there was no actual transmission or realistic possibility of transmission, there is no fraud and no offence.

Depending on the status of their disease, it is possible for a person living with HIV to take appropriate steps to prevent a realistic possibility of transmission. If the evidence shows that the person living with HIV took appropriate steps and the risk of transmission was merely

speculative, the person living with HIV will not be criminally liable for failing to advise their sexual partner of their HIV status. In the following specific situations, there would be no realistic possibility of transmission and, therefore, charges should not be approved:

- during each act of vaginal or anal sex a condom was correctly used and the person living with HIV had a low viral load¹
- the person living with HIV accepted and adhered to a regime of antiretroviral therapy and maintained a suppressed viral load of less than 200 copies/ml of consecutive measurement every four to six months²
- the parties to the sexual act only engaged in oral sex, and no other risk factors were present³

In assessing whether there was a realistic possibility of transmission of HIV, Charge Assessment Crown Counsel should consider all available relevant medical information, including any information about the viral load at the time of the alleged offence, whether provided by the person living with HIV or their medical practitioner.

C. The Public Interest Test

If Charge Assessment Crown Counsel determines that the evidentiary test is met, then Charge Assessment Crown Counsel should also take into account the following specific public interest factors, in addition to those enumerated in *Charge Assessment Guidelines* (CHA 1), in determining whether the public interest requires a prosecution:

1. Public Interest Factors that Weigh in Favour of Prosecution

- HIV was actually transmitted to the complainant through the sexual act(s)
- the person living with HIV engaged in repeated sexual acts that significantly increased the opportunity for transmission to one or more complainants
- the person living with HIV took active steps to deceive or mislead the complainant about their HIV status

1 *R v Mabior*, 2012 SCC 4, paragraph 100, low viral load is defined as less than 1,500 copies of the virus per ml of blood

2 "Risk of Sexual Transmission of Human Immunodeficiency virus with antiretroviral therapy, suppressed viral load and condom use: A systemic review" Canadian Medical Association Journal (November 19, 2018)

3 For example, in the Centers for Disease Control and Prevention online resource "Oral Sex and HIV Risk", found at www.cdc.gov/hiv/risk/oralsex.html, indicates that, "... several factors may increase that risk, including sores in the mouth or vagina or on the penis, bleeding gums, oral contact with menstrual blood, and the presence of other sexually transmitted diseases (STDs)

2. Public Interest Factors that May Weigh Against Prosecution

- a medical health officer has imposed enforceable conditions under the *Public Health Act* upon the person living with HIV, which effectively address any public safety concerns
- the person living with HIV is taking appropriate steps under medical supervision to effectively address the risk to the public
- the person living with HIV is a marginalized or vulnerable person who lacked a support network or other means to access appropriate medical information and treatment
- the person living with HIV correctly used a condom during a single act of vaginal or anal sex and HIV was not transmitted
- despite having a low viral load and correctly using a condom during each act of vaginal or anal sex, if the condom slipped or broke during or after the sex act and the person living with HIV immediately disclosed their HIV status to their partner, making it possible for their partner to seek immediate medical advice and, if appropriate, start on a course of anti-HIV medications (post-exposure prophylaxis)

Victim Services

Where a charge is approved, Crown Counsel or administrative staff should ensure the victim is aware of available victim services programs.

Sentencing

Where a person is convicted of aggravated sexual assault because the consent of the complainant was vitiated by fraud for non-disclosure of HIV, Crown Counsel should seek a pre-sentence report and consult with designated HIV Resource Crown Counsel prior to determining an appropriate position on sentence.

Victims should be given the opportunity to provide a victim impact statement and information pursuant to section 4 of the [Victims of Crime Act](#), and sections 15 and 19 of the [Canadian Victims Bill of Rights](#).

Crown Counsel should consider whether a restitution order is appropriate under section 738 or 739 of the *Criminal Code* and take reasonable steps to provide victims with an opportunity to indicate whether they are seeking restitution for their losses and damages.