

Policy:

**Sexual Transmission, or Realistic Possibility of Transmission, of HIV**

Policy Code:

**SEX 2**

Effective Date:

March 1, 2018

Cross-references:

**CHA 1**

This policy relates to complaints 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 obtained by fraud, there has been an actual transmission or a realistic possibility of transmission of HIV.

In considering this issue, the Supreme Court of Canada has stated (*R v Mabior*, 2012 SCC 47)

*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. [Paragraph 48 in part]*

*... 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. [Paragraph 89 in part]*

*These considerations lead me to conclude that the Cuerrier requirement of "significant risk of serious bodily harm" should be read as requiring 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) [Paragraph 91].*

## Charge Assessment

### A. Responsibility and Notification

All Reports to Crown Counsel covered by this policy must be referred by the Administrative Crown Counsel to a Regional Crown Counsel, Director, or their respective deputy for charge assessment.

A Regional Crown Counsel, Director, their respective deputy, or a designated senior Crown Counsel, should consult with the Resource Crown Counsel on HIV prior to concluding the charge assessment.

### B. The Evidentiary Test

When deciding whether to approve a charge of aggravated sexual assault under this policy, Crown Counsel should consider the evidentiary test under the *Charge Assessment Guidelines* (CHA 1) policy. In these types of cases, the Crown must prove the following:

- the accused knew he or she was HIV positive before the sexual act;
- the sexual act involved an actual transmission, or realistic possibility of transmission, of HIV;
- before the sexual contact, the accused failed to disclose he or she was HIV positive; and,
- the complainant would not have consented had he or she known the accused was HIV positive.

In order to assess whether there was a realistic possibility of transmission of HIV, Crown Counsel should consider the available medical information specific to the accused and the facts of the case. Where there is insufficient medical information to complete a charge assessment, the investigative agency should be requested to obtain further information.

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

Where there was no actual transmission, and where the risk of transmission does not meet the test in *Mabior* (realistic possibility), there is no fraud and no offence.

In certain cases, an HIV positive person may take appropriate steps, depending on the current status of his or her disease, to prevent a realistic possibility of transmission. If the evidence shows the risk was merely speculative, the infected person will not be criminally liable for failing to advise his or her sexual partner of their HIV infection.

For example, as noted in *Mabior supra*:

*This leaves the question of when there is a realistic possibility of transmission of HIV. The evidence adduced here satisfies me 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. [paragraph 94]*

*The conclusion that low viral count coupled with condom use precludes a realistic possibility of transmission of HIV, and hence does not constitute a "significant risk of serious bodily harm" on the Cuerrier test, flows from the evidence in this case. This general proposition does not preclude the common law from adapting to future advances in treatment and to circumstances where risk factors other than those considered in this case are at play. [paragraph 95]*

In completing a charge assessment, Crown Counsel should consider any medical information that the accused may provide in regards to their viral load at the time of the alleged offence.

### C. The Public Interest Test

If Crown Counsel has determined that the evidentiary test is met, then the public interest test in the policy *Charge Assessment Guidelines* (CHA 1) must also be considered. Where one or more of the following public interest factors apply, it will generally be in the public interest to proceed with a prosecution:

- actual transmission of HIV
- repeated sexual acts with one, or more than one, complainant in a manner which significantly increased the opportunity for transmission
- the accused actively deceived or misled the complainant

Where none of the factors set out above are present, Crown Counsel should consider whether the public interest nonetheless requires a prosecution, including to address the harm done to the victim(s), or whether the accused's risk to the public and the general public interest can be, or is being, effectively addressed through proactive measures being taken by the accused under medical supervision, or implemented under provincial legislation. For example, under the *Public Health Act*, medical health officers have the authority to order enforceable conditions, which, if in place, may address the public safety and public interest concerns. Additional information may be required from the police, health officials, the victim(s) or the defence for Crown Counsel to fully consider this aspect of the case.

## Sentencing

Where a person is convicted of an aggravated sexual assault offence in these circumstances, Crown Counsel should seek a pre-sentence report and consult with the Resource Crown Counsel on HIV 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.

## Victim Services

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