

# Litigation and defence in practice:

## Canadian jurisprudence on HIV criminalization

**Lawyers for HIV & TB Justice:  
Strategic Litigation, Legal Defence & Advocacy Training**

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Canadian HIV/AIDS Legal Network

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# Canada and HIV criminalization: the law and its application... so far

# Canada: the law

- federal *Criminal Code*, largely administered by 10 provincial governments (except in 3 territories in north)
- no HIV-specific provision
  - former section on “venereal disease” repealed in 1985
- HIV criminalization via judicial interpretation and application of general *Criminal Code* provisions such as:
  - Administering a noxious thing
  - Common nuisance
  - Criminal negligence causing bodily harm
  - Attempted murder
  - **Aggravated sexual assault**

# Canada: the law

➤ ***R v. Cuerrier*, [1998] 2 SCR 371:**

- HIV/STI non-disclosure amounts to **fraud** invalidating consent, thus transforming consensual sex into a **sexual assault**, when
  - ❑ there is a “**significant risk** of serious bodily harm”
  - and
  - ❑ the complainant would not have consented to sex had they known accused person’s status.
- exposing person to risk (of HIV) “endangers life” → **aggravated** (sexual) assault

# Canada: the law

- ***R. v. Mabior*, 2012 SCC 47; *R. v. D.C.*, 2012 SCC 48**
  - specifically in the case of HIV (as opposed to other STIs):  
“significant risk” = a “**realistic possibility**” of transmission
  - at least re penile-vaginal sex, no realistic possibility in case of **low viral load** AND a **condom** being used
    - NB: “low” viral load = < 1500 copies/mL

# Canada: the law

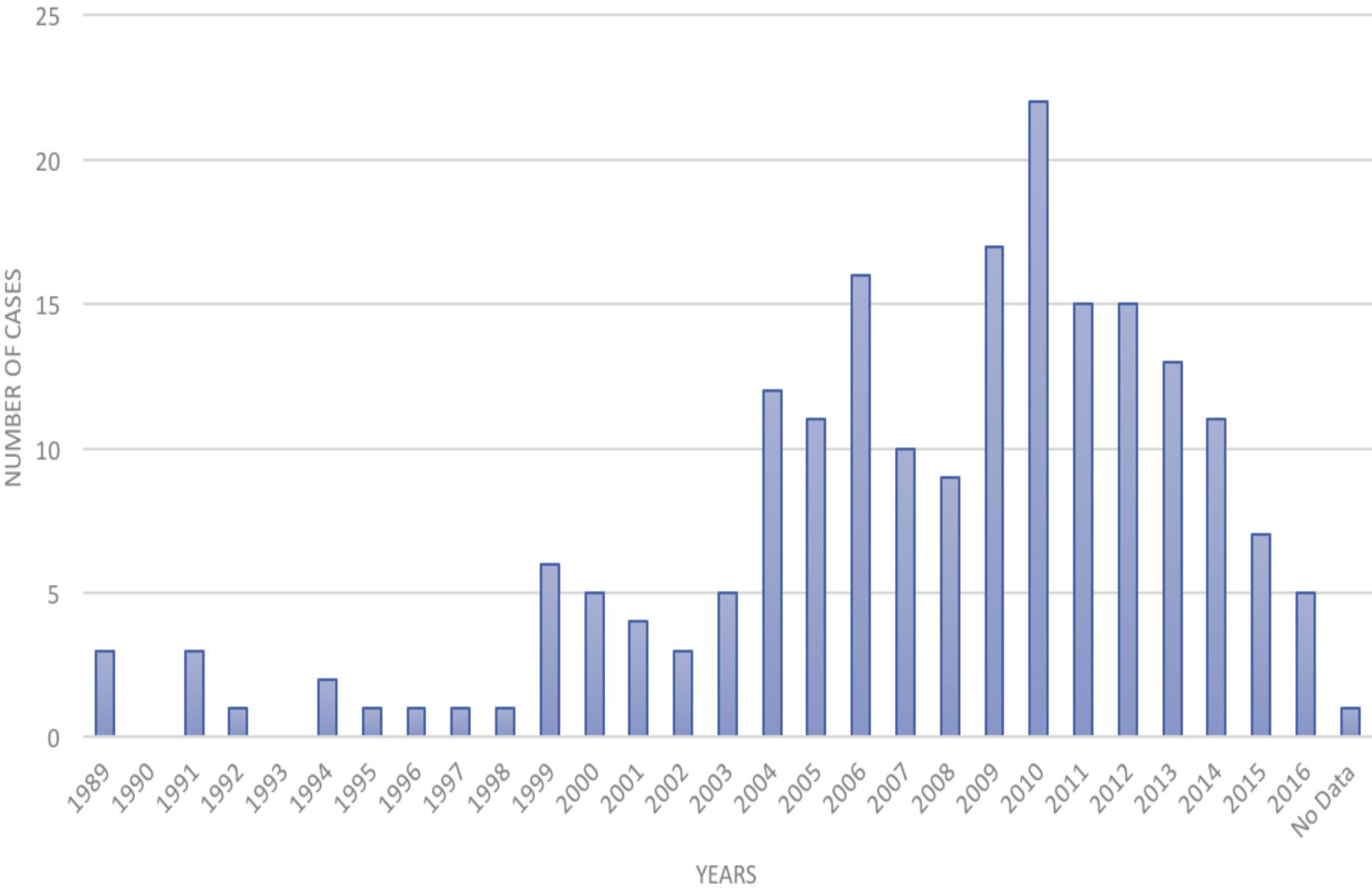
- Some questions:
  - What about **oral sex**?
  - Will **either** condom **or** low/undetectable viral load ever suffice on their own to negate liability?

# HIV criminalization: trends and patterns

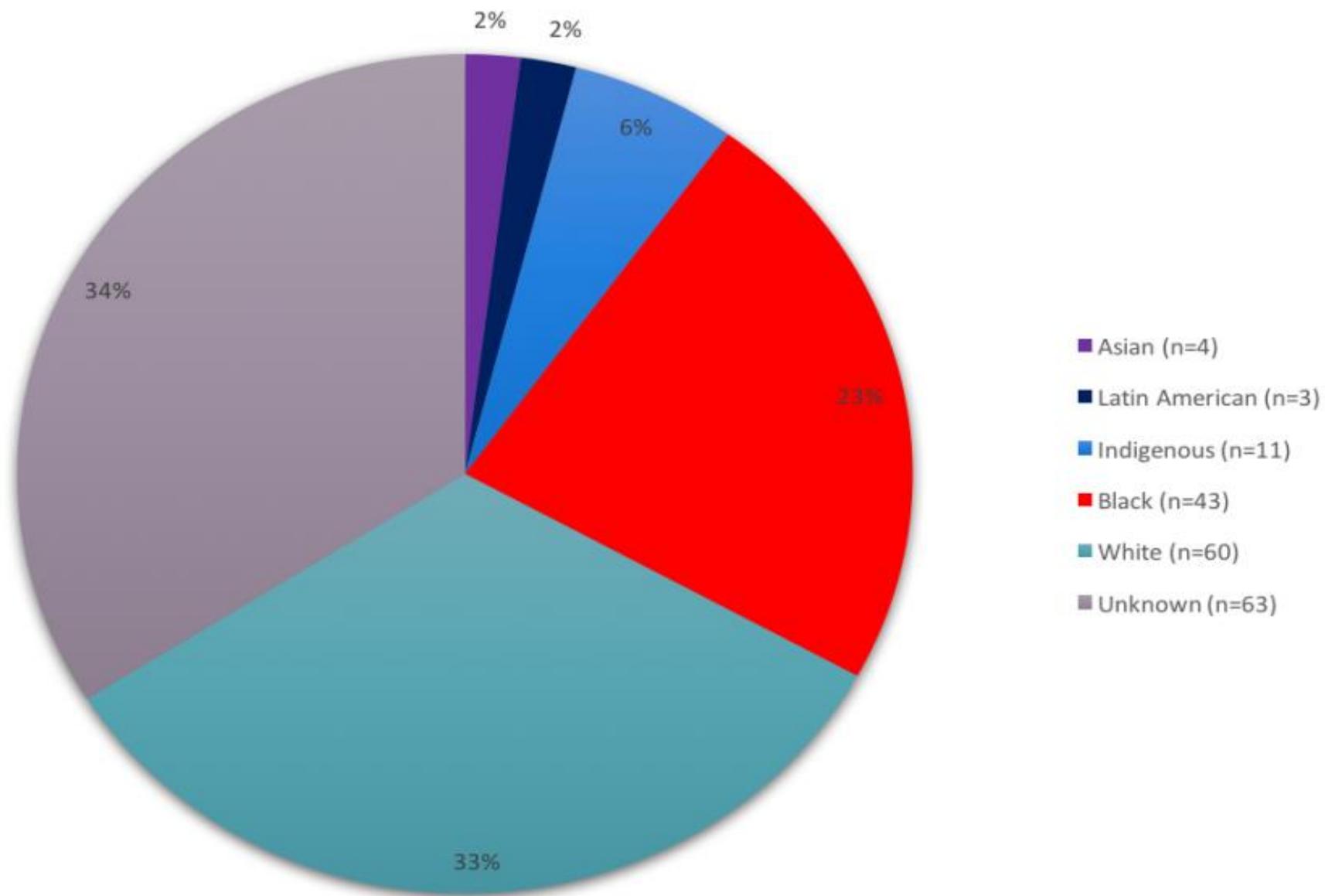
- as of the end of 2016, at least 184 people had been charged to for HIV non-disclosure in Canada (in 200 cases)
  - majority of cases against MSW
  - increasing number of gay men & other MSM prosecuted
  - steady proportion of prosecutions are against WSM (disproportionately Indigenous, marginalized)
  - Black men appear disproportionately prosecuted... and disproportionately covered in media
- prosecutions almost exclusively for HIV, not other STIs

Source: C. Hastings et al., *HIV Criminalization in Canada: Key Trends and Patterns* (CHLN, 2017).

# HIV non-disclosure cases, Canada 1989-2016 (n=200)

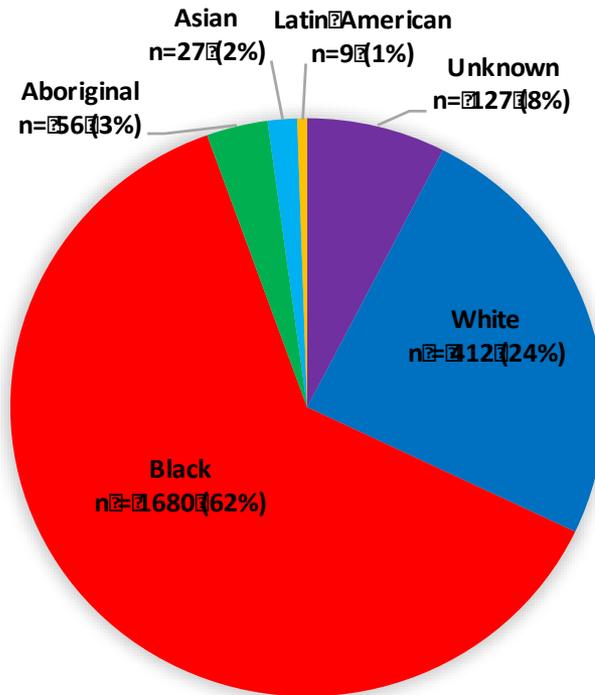


# HIV non-disclosure, race/ethnicity of Individuals charged, Canada 1989-2016 (n=184)



# Media coverage in Canada of prosecutions by race and ethnicity

HIV NON-DISCLOSURE, NEWS STORIES PUBLISHED ON INDIVIDUALS CHARGED BY RACE, CANADA 1989-2015 (N=1680)



Source: E. Mykhalovskiy et al, “Cold, Callous & Deliberately Duplicitous”: Racialization, Immigration and the Representation of HIV Criminalization in Canadian Mainstream Media” (Oct 2016).

# Sexual Orientation of Men Charged, Canada, 1989–2016 (n=162)

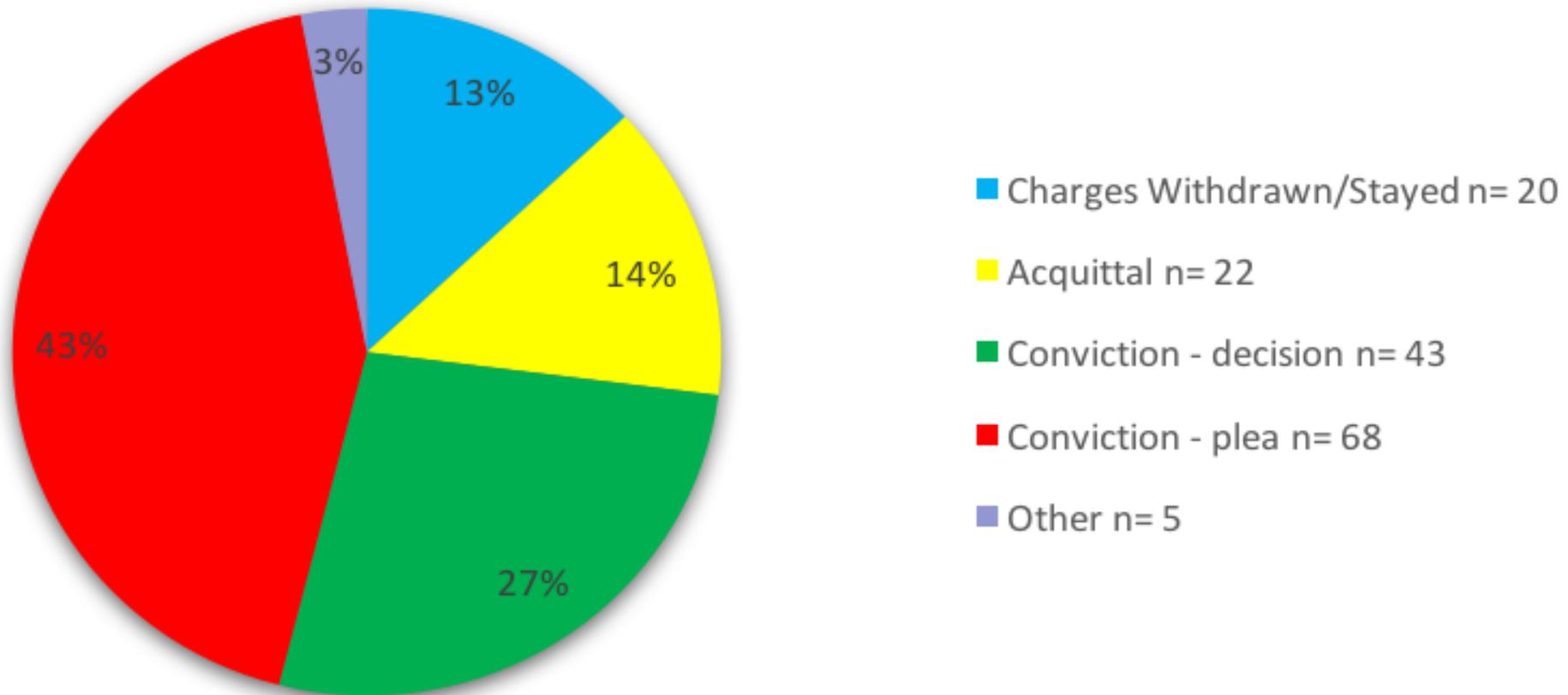
Sex of partner(s)	Number of Men Charged	Percentage of Men Charged
Female	101	62%
Male	40	25%
Both	3	2%
Unknown	18	11%



# Disposition of cases

- re cases in which HIV status of complainant is known, majority of prosecutions (61%) are for exposure, not actual transmission
- significant majority of cases in which charges are laid (70%) end in conviction (vs. 27% conviction rate for sexual assault generally)
- harsher sentencing vs. other sexual assault convictions

## Disposition of HIV non-disclosure cases, Canada, 1989-2016 (n=158)



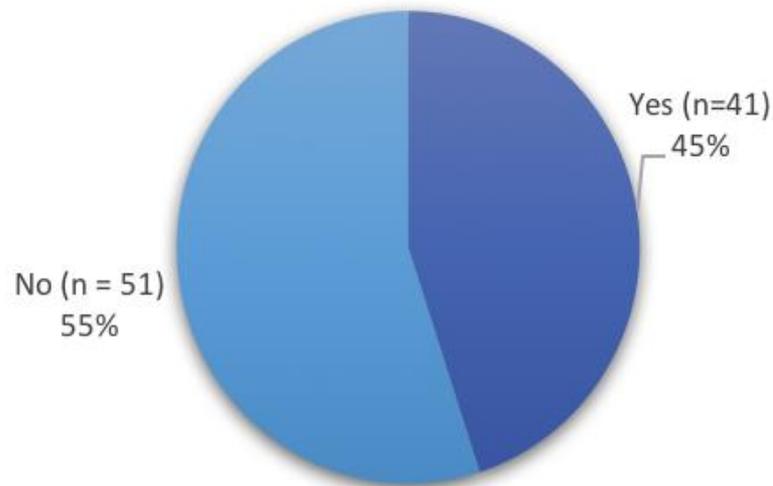
# Prosecutions: Exposure > transmission

## HIV transmission in HIV non-disclosure cases, Canada, 1989-2016 (n=135)



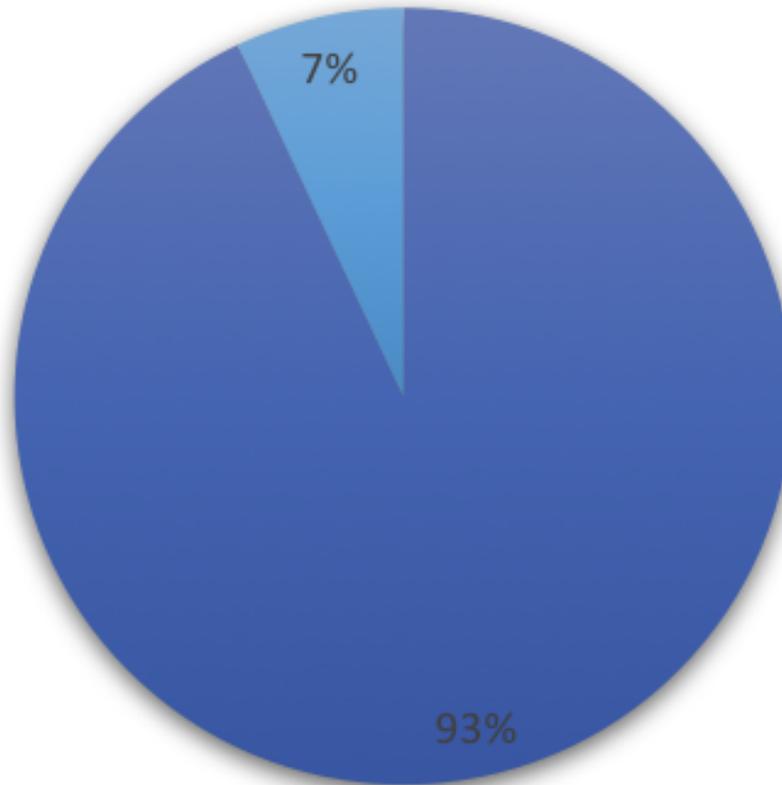
# Convictions: exposure > actual transmission

HIV transmission in HIV non-disclosure cases that ended in conviction, Canada, 1989-2016 (n=92)



# Sentencing

**Sentence upon conviction in HIV non-disclosure cases,  
Canada, 1989-2016 (n=101)**



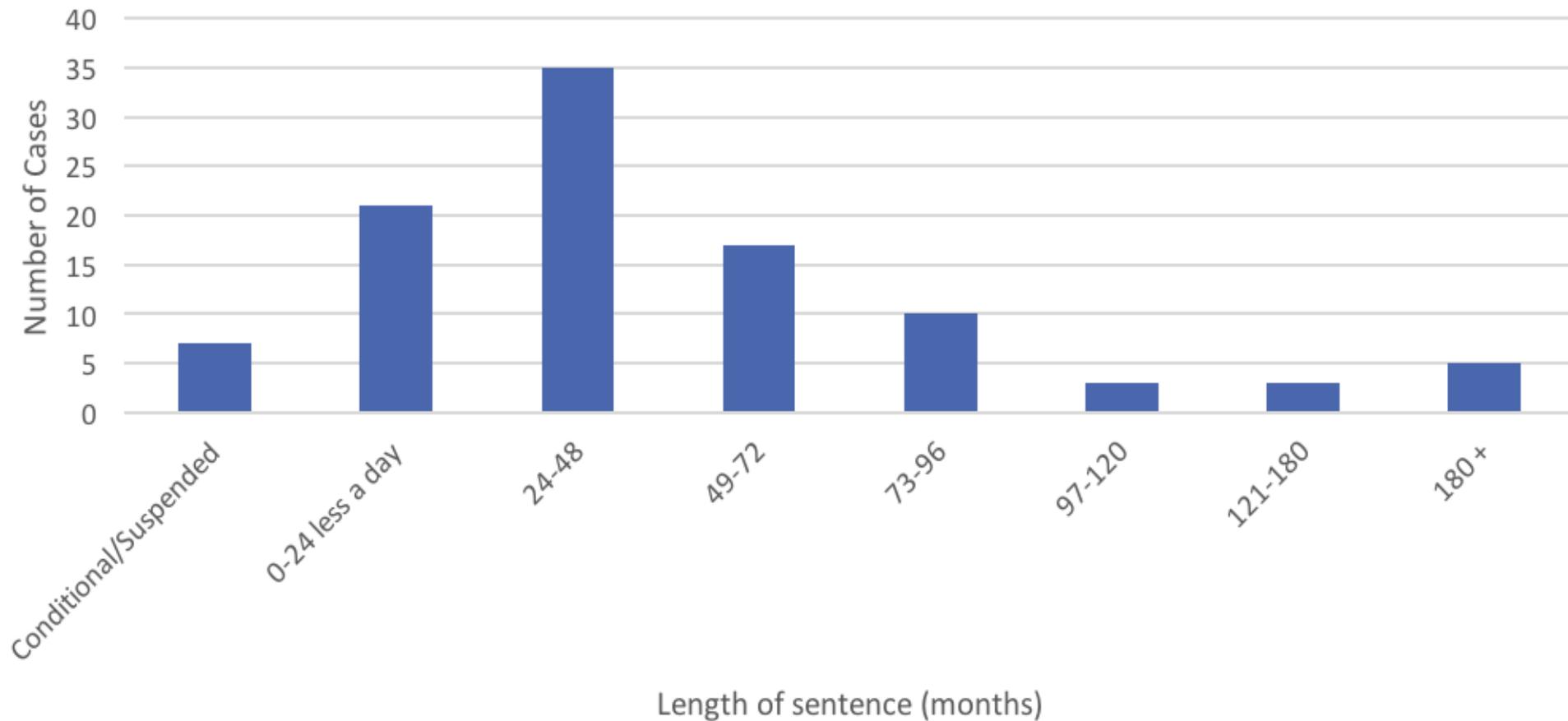
■ Prison Sentence (n= 94)

■ Conditional or Suspended Sentence (n=7)



# Sentencing

Length of Sentence, HIV non-disclosure cases, Canada, 1989-2016  
(n=101)





# Bringing science to justice



# Developments in science

- “Swiss statement” (2008)
- HPTN 052 results (2011)
- CDC risk estimates (2012)
- **Canadian consensus statement (2014)**
- HPTN 052 further results (2016)
- PARTNER study (2016)
- “U=U” statement (2016)
- ...international scientific consensus building

# Canadian scientific consensus (2014)

- 79 leading scientific experts on HIV
- addresses per-act possibility of transmission through sex, biting & spitting
- concern for overly-broad use of criminal law, miscarriages of justice

## CONSENSUS STATEMENT

### Canadian consensus statement on HIV and its transmission in the context of criminal law

Mona Loutfy MD FRCPC MPH<sup>1</sup>, Mark Tyndall MD FRCPC ScD<sup>2</sup>, Jean-Guy Baril MD<sup>3</sup>, Julio SG Montaner MD FRCPC<sup>4</sup>,  
Rupert Kaul MD FRCPC PhD<sup>5</sup>, Catherine Hankins CM MD PhD CCFP FRCPC<sup>6</sup>

M Loutfy, M Tyndall, J-G Baril, JSG Montaner, R Kaul, C Hankins. Canadian consensus statement on HIV and its transmission in the context of criminal law. *Can J Infect Dis Med Microbiol* 2014; In Press.

**INTRODUCTION:** A poor appreciation of the science related to HIV contributes to an overly broad use of the criminal law against individuals living with HIV in cases of HIV nondisclosure.

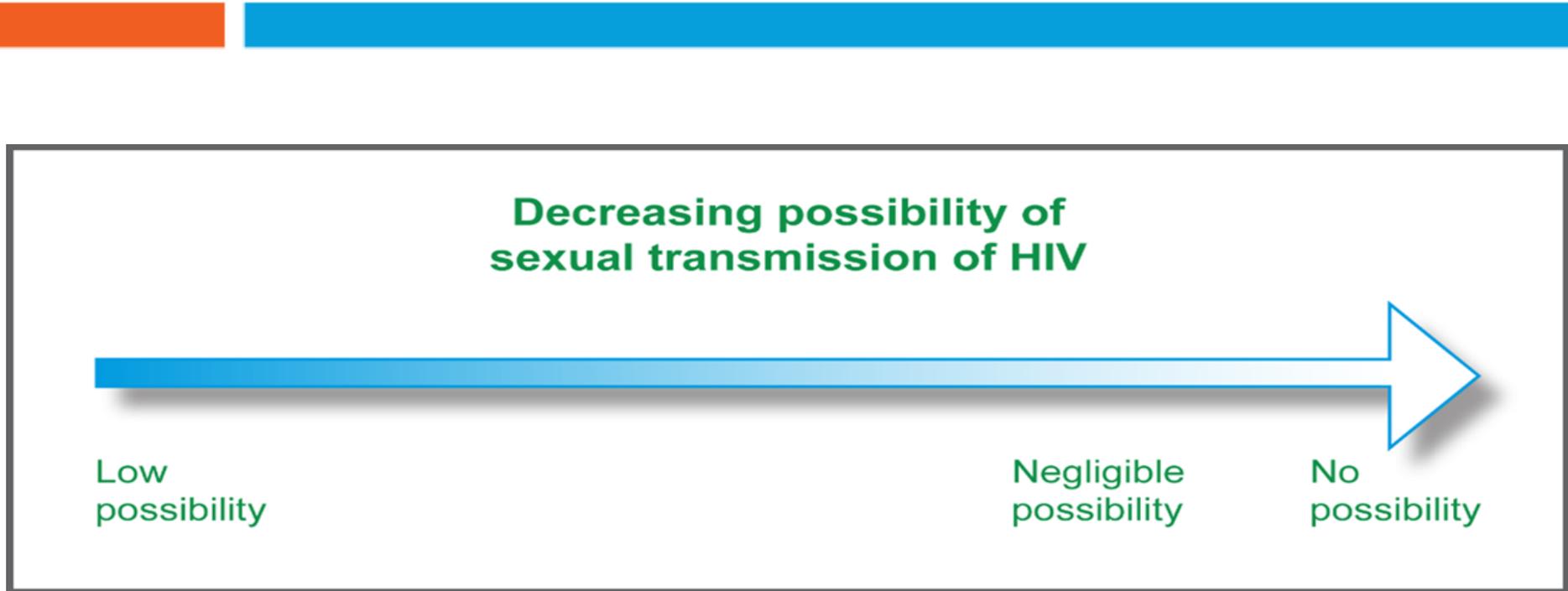
**METHOD:** To promote an evidence-informed application of the law

Un document consensuel canadien sur le VIH et sa transmission dans le contexte de la justice criminelle

**INTRODUCTION :** En raison d'une mauvaise appréciation des données scientifiques liées au VIH, la justice criminelle est beaucoup trop mise à contribution contre les personnes qui vivent avec le VIH et ne divulguent pas leur maladie.

M Loutfy et al, "Canadian consensus statement on HIV and its transmission in the context of criminal law," *Canadian Journal of Infectious Disease and Medical Microbiology* 2014; 25(3): 135-140

# Canadian scientific consensus (2014)



ACTIVITY	POSSIBILITY OF TRANSMISSION
<b>Vaginal-penile sex</b>	
no condom, no effective ARV	low
with condom	negligible
with effective ARV	negligible
<b>Anal-penile sex</b>	
no condom, no effective ARV	low
with condom	negligible
with effective ARV	likely negligible
<b>Oral sex</b>	
performed by HIV+ partner	no
performed on HIV+ partner, with no condom & no effective ARV	negligible
performed on HIV+ partner, with either condom or effective ARV	negligible
<b>Biting and spitting</b>	
being spat on	no
being bitten, no breaking of skin	no
being bitten, no blood in saliva	no
being bitten, skin broken & blood in saliva	negligible

# New consensus: “U=U” (2016)

- “There is now evidence-based confirmation that the risk of HIV transmission from a person living with HIV (PLHIV), who is on Antiretroviral Therapy (ART) and has achieved an undetectable viral load in their blood for at least 6 months is **negligible to non-existent.**”

*Undetectable = Untransmittable:*

*Risk of sexual transmission from a person living with HIV who has an undetectable viral load:*

<http://www.preventionaccess.org/consensus>

- NB: for purposes of this statement, an undetectable viral load is defined as <200 copies/ml

# Canada: the law revisited

- Interpretation of *Mabior* contested in courts based on scientific evidence (re viral load)
  - OntCA (2013)... if no condom, then viral load irrelevant
  - 10 cases of prosecutions where low/undetectable viral load (9 of them in Ontario)

*but contra...*

- some Ontario cases of charges withdrawn, reduced
- some trial courts critical of SCC and OntCA approach
  - *R v JTC* (NSPC, 2013)
  - *R v Thompson* (NSSC, 2016; NSCA, 2018)
  - *R v CB* (OSCJ, 2017)

# Law & its application evolving

- Justice Canada report, 1 Dec 2017
- New guidance for prosecutors
  - Ontario (Dec 2017) – re viral load <200 copies/mL
  - Federal guidance?
  - British Columbia guidance?
- Future cases ... some key objectives:
  - consolidate viral load defence
  - re-establish condom defence

# Some lessons

- Reforming legislation vs. **informing judicial interpretation and application of general laws**
- Sexual assault law as frame for criminalization
- Critical importance of:
  - science
  - judicial education
  - extra-legal advocacy

# Selected resources

Legal Network's page on HIV criminalization:  
[www.aidslaw.ca/criminalization](http://www.aidslaw.ca/criminalization)

- ❑ Includes **bilingual *Resource Kit*** for lawyers and other advocates, with links to:
  - ❑ Scientific material
  - ❑ Key cases and policy documents
  - ❑ Various films, including

*Positive Women: Exposing Injustice*  
[www.PositiveWomenthemovie.org](http://www.PositiveWomenthemovie.org)

*Consent: HIV non-disclosure and sexual assault law*  
[www.consentfilm.org](http://www.consentfilm.org)

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- Canadian Coalition to Reform HIV Criminalization
- Elton John AIDS Foundation

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