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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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  - former section on “venereal disease” repealed in 1985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


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

- Unknown (n=63) 33%
- White (n=60) 34%
- Black (n=43) 23%
- Indigenous (n=11) 6%
- Latin American (n=3) 2%
- Asian (n=4) 2%
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)

- **White**: 412 (24%)
- **Black**: 1680 (62%)
- **Aboriginal**: 56 (3%)
- **Unknown**: 127 (8%)
- **Asian**: 27 (2%)
- **Latin American**: 9 (1%)

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

<table>
<thead>
<tr>
<th>Sex of partner(s)</th>
<th>Number of Men Charged</th>
<th>Percentage of Men Charged</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female</td>
<td>101</td>
<td>62%</td>
</tr>
<tr>
<td>Male</td>
<td>40</td>
<td>25%</td>
</tr>
<tr>
<td>Both</td>
<td>3</td>
<td>2%</td>
</tr>
<tr>
<td>Unknown</td>
<td>18</td>
<td>11%</td>
</tr>
</tbody>
</table>
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)

- Charges Withdrawn/Stayed n= 20
- Acquittal n= 22
- Conviction - decision n= 43
- Conviction - plea n= 68
- Other n= 5
Prosecutions:
Exposure > transmission

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

- Yes (n=53) 39%
- No (n=82) 61%
Convictions:
exposure > actual transmission

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

- Yes (n=41): 45%
- No (n=51): 55%
Sentence upon conviction in HIV non-disclosure cases, Canada, 1989-2016 (n=101)

93% Prison Sentence (n=94)
7% Conditional or Suspended Sentence (n=7)
Sentencing

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

- Conditional/Suspended: 5 cases
- 0-24 less a day: 20 cases
- 24-48 months: 35 cases
- 49-72 months: 15 cases
- 73-96 months: 10 cases
- 97-120 months: 5 cases
- 121-180 months: 3 cases
- 180+ months: 5 cases

Length of sentence (months)
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

<table>
<thead>
<tr>
<th>ACTIVITY</th>
<th>POSSIBILITY OF TRANSMISSION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vaginal-penile sex</td>
<td></td>
</tr>
<tr>
<td>no condom, no effective ARV</td>
<td>low</td>
</tr>
<tr>
<td>with condom</td>
<td>negligible</td>
</tr>
<tr>
<td>with effective ARV</td>
<td>negligible</td>
</tr>
<tr>
<td>Anal-penile sex</td>
<td></td>
</tr>
<tr>
<td>no condom, no effective ARV</td>
<td>low</td>
</tr>
<tr>
<td>with condom</td>
<td>negligible</td>
</tr>
<tr>
<td>with effective ARV</td>
<td>likely negligible</td>
</tr>
<tr>
<td>Oral sex</td>
<td></td>
</tr>
<tr>
<td>performed by HIV+ partner</td>
<td>no</td>
</tr>
<tr>
<td>no condom, no effective ARV</td>
<td>negligible</td>
</tr>
<tr>
<td>performed on HIV+ partner,</td>
<td></td>
</tr>
<tr>
<td>with condom</td>
<td>negligible</td>
</tr>
<tr>
<td>performed on HIV+ partner,</td>
<td></td>
</tr>
<tr>
<td>with either condom or effective ARV</td>
<td>negligible</td>
</tr>
<tr>
<td>Biting and spitting</td>
<td></td>
</tr>
<tr>
<td>being spat on</td>
<td>no</td>
</tr>
<tr>
<td>being bitten, no breaking of skin</td>
<td>no</td>
</tr>
<tr>
<td>being bitten, no blood in saliva</td>
<td>no</td>
</tr>
<tr>
<td>being bitten, skin broken &amp; blood in saliva</td>
<td>negligible</td>
</tr>
</tbody>
</table>
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 = Untransmitable:
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

- 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
    - Consent: HIV non-disclosure and sexual assault law
      www.consentfilm.org
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