

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 - former section on “venereal disease” repealed in 1985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

- ***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

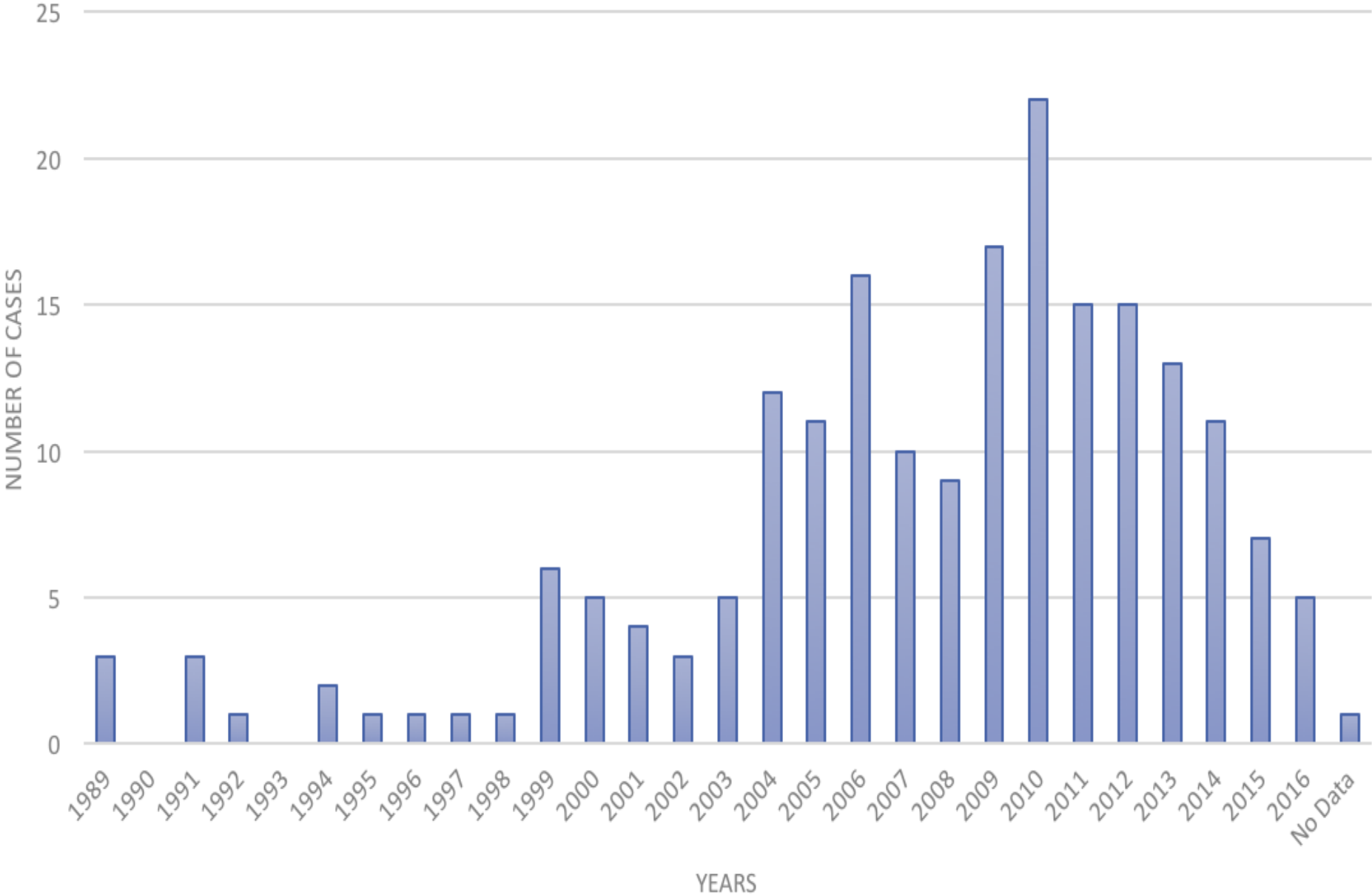
- Some questions:
 - What about **oral sex**?
 - Will **either** condom **or** low/undetectable viral load ever suffice on their own to negate liability?

HIV criminalization: trends and patterns

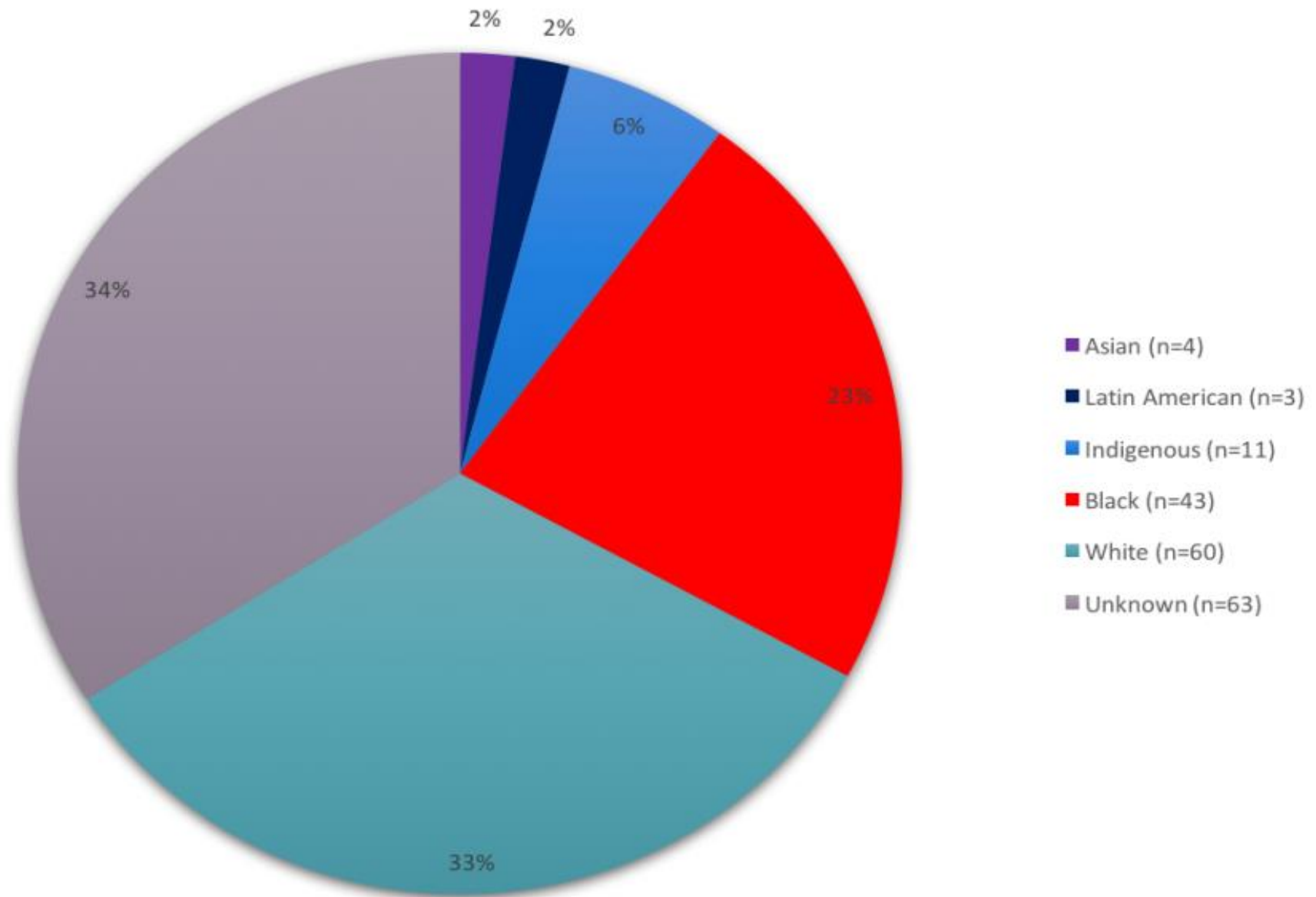
- as of the end of 2016, at least 184 people had been charged to for HIV non-disclosure in Canada (in 200 cases)
 - majority of cases against MSW
 - increasing number of gay men & other MSM prosecuted
 - steady proportion of prosecutions are against WSM (disproportionately Indigenous, marginalized)
 - 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)

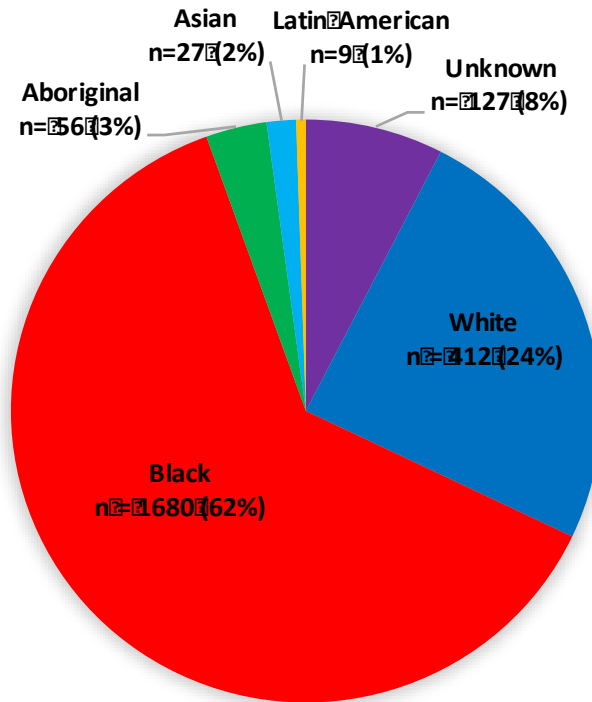


HIV non-disclosure, race/ethnicity of Individuals charged, Canada 1989-2016 (n=184)



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)

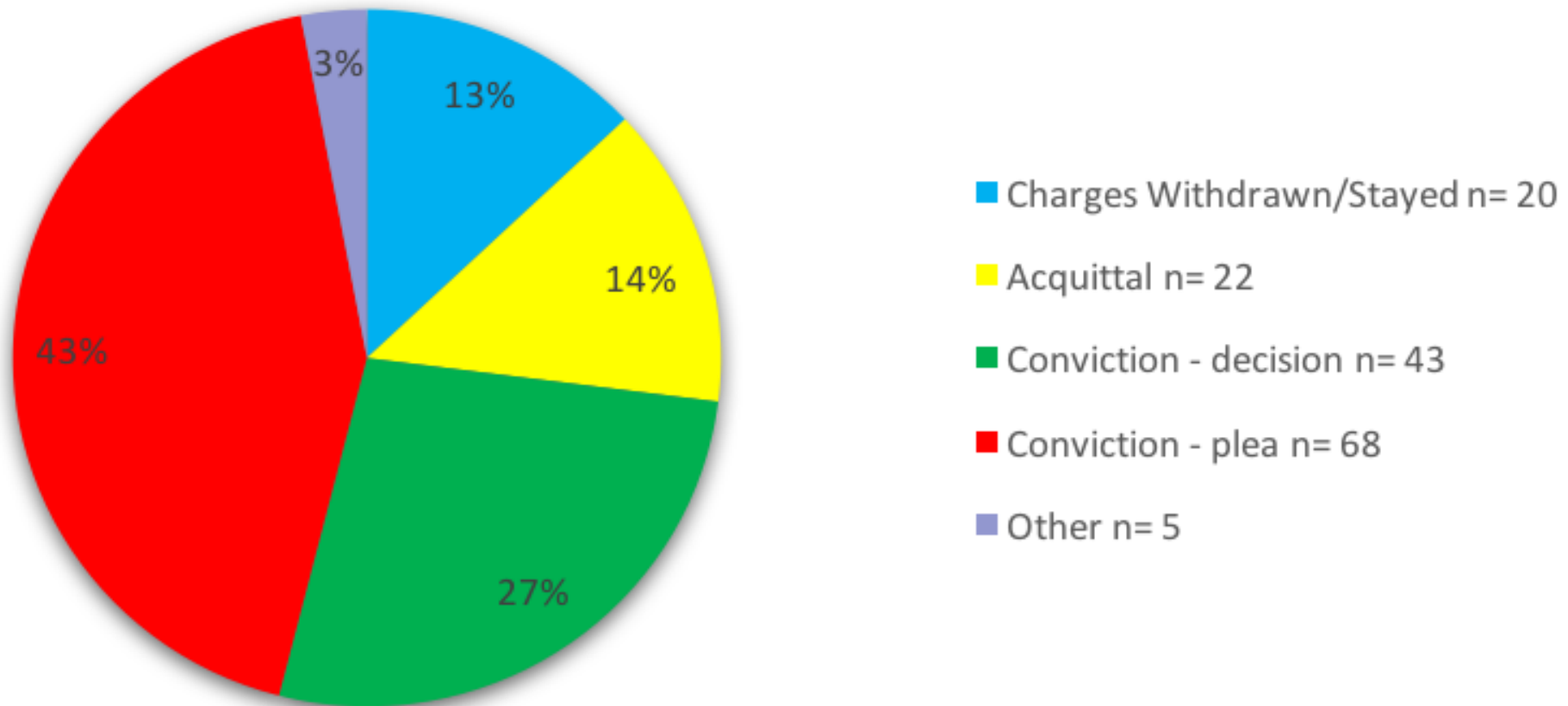
| Sex of partner(s) | Number of Men Charged | Percentage of Men Charged |
|-------------------|-----------------------|---------------------------|
| Female | 101 | 62% |
| Male | 40 | 25% |
| Both | 3 | 2% |
| Unknown | 18 | 11% |



Disposition of cases

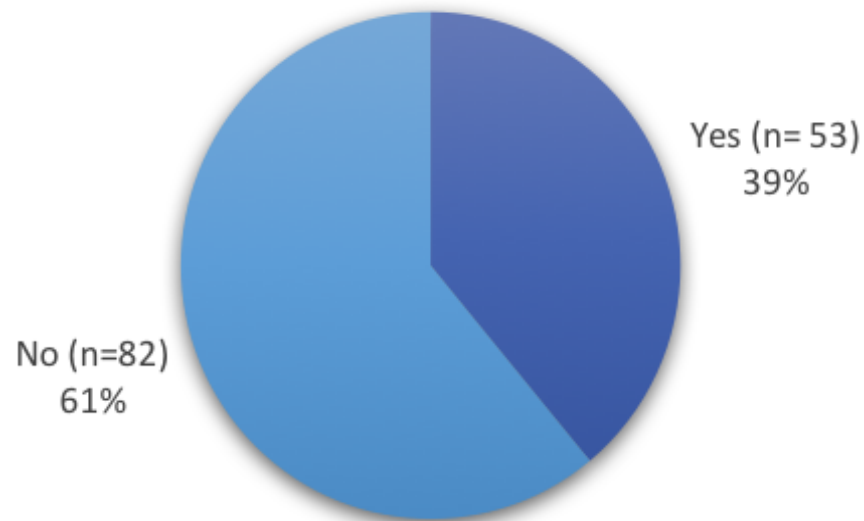
- re cases in which HIV status of complainant is known, majority of prosecutions (61%) are for exposure, not actual transmission
- significant majority of cases in which charges are laid (70%) end in conviction (vs. 27% conviction rate for sexual assault generally)
- harsher sentencing vs. other sexual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

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



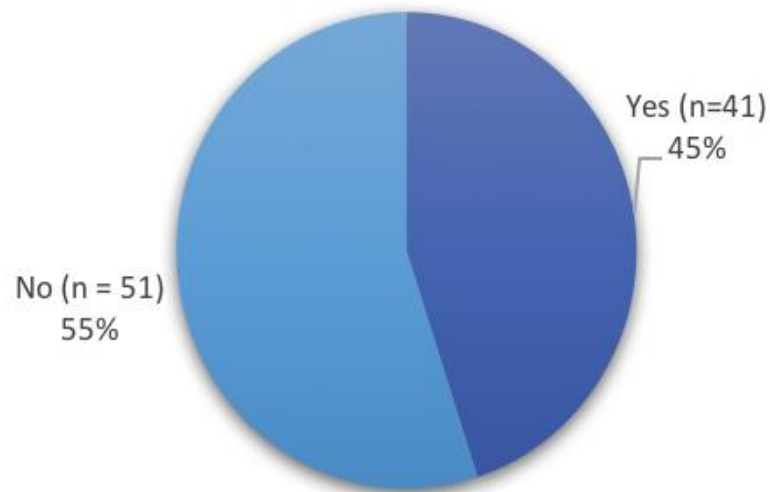
Prosecutions: Exposure > transmission

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



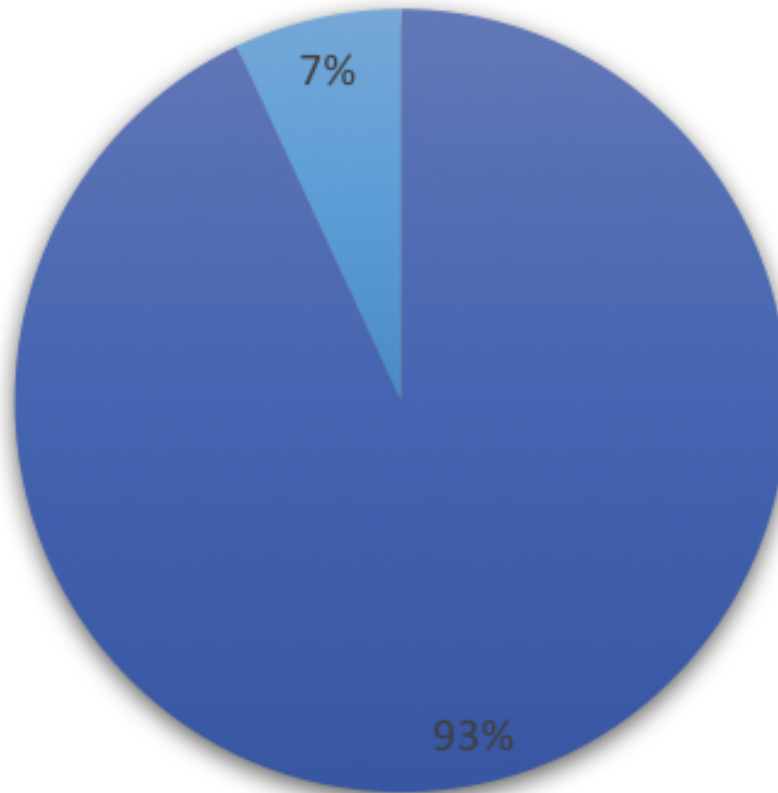
Convictions: exposure > actual transmission

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)**



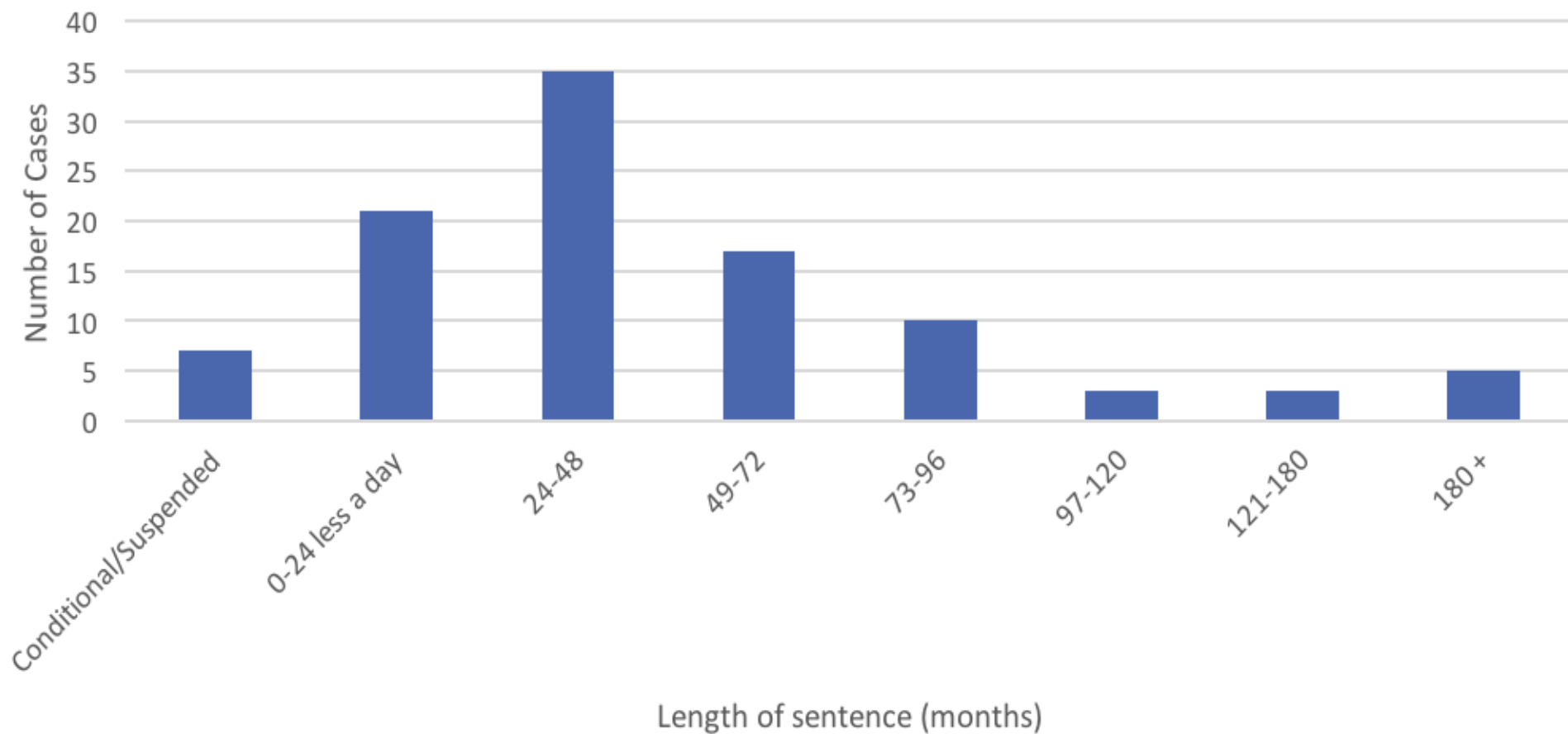
■ Prison Sentence (n= 94)

■ 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 MPH¹, Mark Tyndall MD FRCPC ScD², Jean-Guy Baril MD³, Julio SG Montaner MD FRCPC⁴,
Rupert Kaul MD FRCPC PhD⁵, Catherine Hankins CM MD PhD CCFP FRCPC⁶

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.

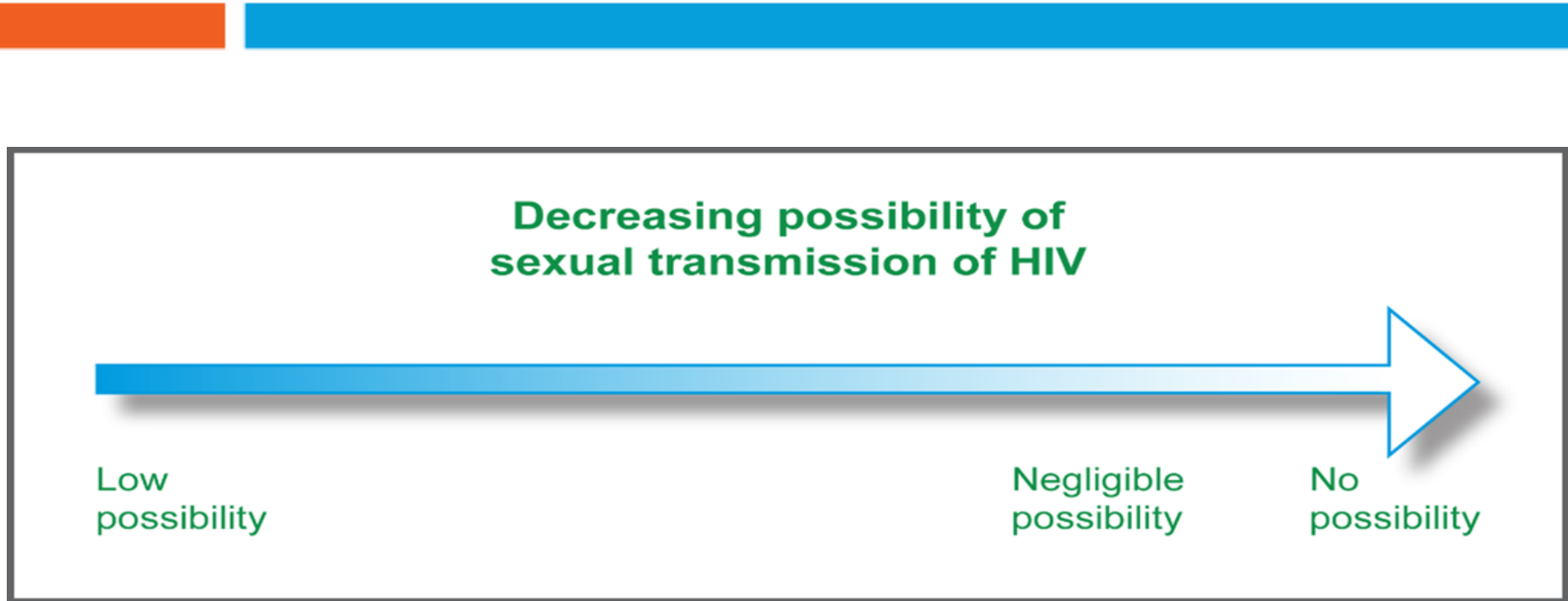
METHOD: To promote an evidence-informed application of the law

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)



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

| ACTIVITY | POSSIBILITY OF TRANSMISSION |
|--|-----------------------------|
| Vaginal-penile sex | |
| no condom, no effective ARV | low |
| with condom | negligible |
| with effective ARV | negligible |
| Anal-penile sex | |
| no condom, no effective ARV | low |
| with condom | negligible |
| with effective ARV | likely negligible |
| Oral sex | |
| 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 |
| Biting and spitting | |
| 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

- ❑ 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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- Elton John AIDS Foundation

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www.aidslaw.ca/criminalization



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