



HIV Disclosure Issues: criminal law, public health law & confidentiality

**Pacific AIDS Network Skills Building '09
28 February 2009**

Canadian AIDS Treatment Information
Exchange and the Canadian HIV/AIDS Legal
Network



Objectives for the training

1. Give you practical, take home info and messages about HIV (non) disclosure and the criminal law, public health law and privacy.
2. Provide you with an understanding of the legal duties of PHAs and service providers.
3. Address your questions, concerns and anxieties regarding HIV (non) disclosure and the law.
4. Give you a chance to apply knowledge in a case study.
5. Introduce you to resources that can inform you and assist you in your life/work.

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Outline of today's training



- Disclaimers, legal information & legal advice
- Learning about the criminal law and HIV
- Criminal law & practical considerations
- Q&A
- **Break**
- The role of public health
- Client confidentiality & its limits
- Case study
- Take home messages
- Q&A
- Resources, evaluation & wrap up

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A disclaimer – legal information, not advice



- This presentation is **NOT** legal advice. It is legal information.
- The difference between **legal information** and **legal advice** is important.
- **Legal information** can help you understand the law and legal options, but it is general.
- **Legal advice** is specifically about your situation and can help you to decide what to do.
- If you want **legal advice** you should talk to a lawyer.

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Your disclaimer



- Practising law in British Columbia (*Legal Profession Act*, SBC 1998, c. 9)
 - No person, other than a practicing lawyer, is permitted to engage in the practice of law, except ...
 - “Practice of law” includes giving legal advice
 - Lawyers are regulated and insured

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Your disclaimer (2)



- So you should get used to saying
 - “I am not a lawyer. Only a lawyer can give you legal advice. I can only provide you with information about the law.”
 - See the previous slide for your “script”
 - If you need a lawyer
- By doing so you respect your clients
 - Respects the bounds of your role
 - It protects you and your clients
 - This is part of professionalism

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Getting help with a legal case



- **Legal aid / Legal Services Society (www.lss.bc.ca)**
 - Legal aid offices across BC
 - Legal representation, advice and info
 - Income-tested program
- **Lawyer Referral Service (www.cba.org/bc)**
 - Referral to lawyer who practices in the area
 - \$25 for half-hour interview
- **Canadian HIV/AIDS Legal Network (www.aidslaw.ca)**
 - **Not for legal advice.** For tracking cases, providing info and referrals, and assistance to lawyers working on cases.



Police, prosecutors and the facts



- You or your clients may want guarantees, “the” answer—but there are none.
- There is no guaranteed, fail-safe way for an HIV positive person to avoid being charged with a criminal offence for exposing someone to HIV
 - It appears police and Crown Attorneys are **aggressively pursuing** many of these cases.
 - People lie, or tell different stories about the same events.
 - It is up to the police and the courts to figure out the law and which story is true.



Criminal law “101”



- In order to secure a conviction, Crown must **prove all elements of an offence beyond a reasonable doubt.**

Crime (offence) = actus reus + mens rea



conduct / acts

state of

mind /

intent



The leading cases



- Supreme Court of Canada, Canada’s highest court, has decided two cases involving the criminal law and HIV (non) disclosure
 - Cuerrier (1998)
 - Williams (2003)



Cuerrier



- The General Rule: **The duty to disclose HIV status arises where there is a “significant risk of serious bodily harm” to another person.**
 - “Serious bodily harm” means HIV infection.
 - “Significant risk” definitely includes unprotected sexual intercourse (penis-vagina & penis-anus)

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Cuerrier (2)



- Unprotected Sexual Intercourse
 - A PHA who does not disclose can be charged and found guilty of **assault** or **aggravated assault** or **aggravated sexual assault** under the Criminal Code even if their sexual partner does not become infected with HIV.
 - Assault [max 5 years]
 - Aggravated assault [max 14 years]
 - Aggravated sexual assault [max life]

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Cuerrier (3)



- **Assault** (Criminal Code 265(1))
 - “A person commits an assault when ... without the consent of another person, he applies force intentionally to that other person, directly or indirectly.”

- **Consent** (Criminal Code 265(3)(c))
 - “For the purposes of this section, no consent [to physical contact] is obtained where the complainant submits or does not resist by reason of ... fraud.”
 - “**fraud vitiates consent**”

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Cuerrier (4)



- To secure a conviction for **aggravated (sexual) assault**, the prosecution must prove 3 things beyond a reasonable doubt:
 1. An **act that a reasonable person would see as dishonest**
 - Not disclosing HIV status OR
 - Not telling the truth about HIV status

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Cuerrier (5)



2. A harm or risk of harm as a result of the dishonesty

- Exposure to HIV carries a significant risk of serious bodily harm

3. The dishonest act “**caused**” the person to consent.

- The person would not have consented but for the dishonest act

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Cuerrier & “condom defense”



- The condom “defense” to assault charges?
 - “To have intercourse with a person who is HIV-positive will always present risks. Absolutely safe sex may be impossible. Yet the careful use of condoms **might** be found **to so reduce the risk of harm that it could no longer be considered significant**” - Mr Justice Cory, R v Cuerrier (1998) SCC
- The law is not clear. It is still developing.
 - At least two cases currently before the courts where this is an issue (Mabior in Manitoba, D.C. in Quebec).

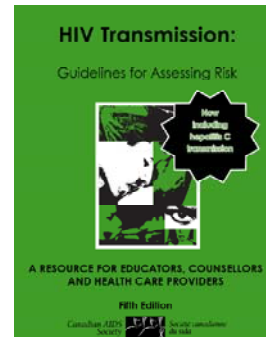
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What is a “significant risk”?



- We don't know for certain what is included in the legal definition of “significant risk.”
 - Canadian courts have not definitively decided whether intercourse with a condom, oral sex and other types of sex carry a “significant risk” of passing on HIV.
 - The risk of passing on HIV during sex is hard to figure out because it can depend on a lot of things, like viral load, effectiveness of condoms, etc.



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Sex between positives... is there a duty to disclose?



- Key question: Does **re-infection** with HIV pose a “significant risk of serious bodily harm” or endanger the person's life?
- Whether a PHA has a legal duty to disclose HIV status to an HIV positive partner will depend upon the medical and scientific evidence in each case.
- We don't know of a single case involving poz-poz sex where police have laid charges.

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Disclosure & the risk of abuse or violence



- Abuse or violence ... is there a duty to disclose?
 - Real and serious risks for HIV-positive women who disclose, including violence.
 - “The nature and extent of the duty to disclose, if any, will always have to be considered in the context of the particular facts presented.” (*R v Cuerrier*)
 - Criminal law permits defences like necessity and duress
- **No court cases** about this... so law is not clear.

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Pregnancy & infants



- First **charges** related to birth & mothering (May 2005)
 - Woman changed medical team during second pregnancy, alleged to have stopped taking HIV meds and failed to advise her medical team of her HIV status.
 - Followed guidelines for prevention of MTCT during birth of first child, who is HIV negative.
 - Alleged to have breast fed infant.
 - Child HIV positive.

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Pregnancy & infants (2)



- Charges relate to events after birth
 - In Canada, foetus does not have rights until born and viable.
 - Alleged that child deprived of opportunity to start ARV treatment immediately after birth.
 - Alleged that mother exposed child to HIV risk by breast feeding.
 - Mother faced three criminal charges: (1) **criminal negligence causing bodily harm**, (2) **failing to provide the necessaries of life**, and (3) aggravated assault.

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Pregnancy & infants (3)



- New issues raised:
 - duty of HIV positive pregnant woman to disclose status to medical team
 - risk of female—infant transmission via breast feeding

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Pregnancy & infants (4)



- Outcome:
 - **“New issues” not resolved by a court**
 - pled guilty to failing to provide necessities; other charges withdrawn
 - 6 month conditional sentence (“house arrest”) and 3 years probation
 - both children apprehended by children's aid, court granted order for Crown wardship with no access to the parents

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Injecting and sharing



- Is it illegal to share injection equipment?
 - Could be an assault or an aggravated assault, or another criminal offence
- No decided cases about this... so law is not clear.

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Criminal law & HIV by the numbers



- Approximately 75 criminal prosecutions for non-disclosure from 1989 to 2008 (that we know about).
- Vast majority of charges and convictions in Canada have been against HIV+ men who have had unprotected sex with women.
- Number of cases of HIV+ women who have had sex with men.
- Around 10 cases against HIV+ men who have had sex with men.

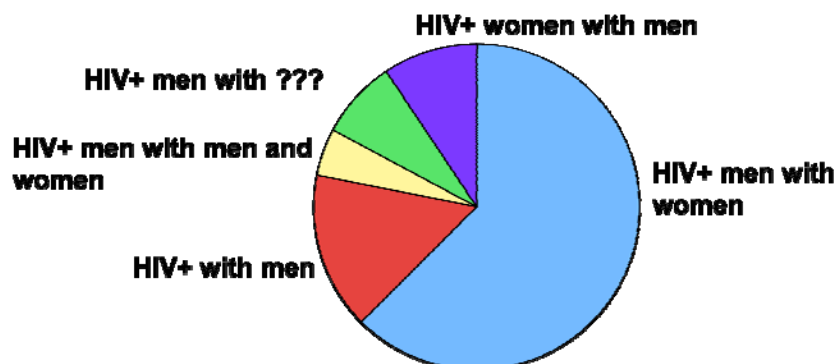
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Criminal law & HIV by the numbers (2)



People charged for not disclosing their HIV status



Canadian HIV/AIDS Legal Network, 2008.

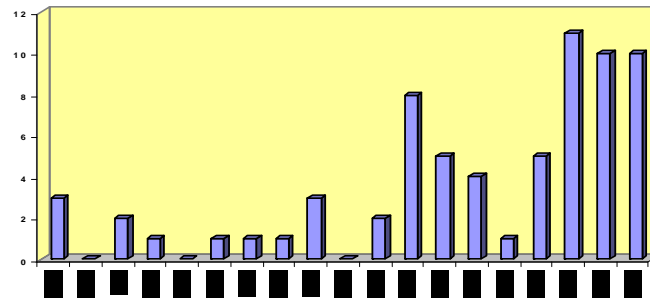
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Criminal law & HIV by the numbers (3)



Criminal charges laid from 1989-2007



Canadian HIV/AIDS Legal Network, 2008.

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Addressing client mis-information about HIV, sex & criminal law



- **“Don’t assume** that the person knows that you have HIV.”
- **“Exposing** someone to a significant risk of HIV infection is the crime ... you can be charged and convicted even if you don’t pass on HIV.”
- **“It doesn’t matter** to the criminal law
 - Where you met the person
 - What they “are” to you
 - Whether the sex is for fun, money, drugs
 - That you are scared the person will tell other people”
- **“Ignorance of the law** is not a defence.”

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Alcohol, drugs and consent to sex ...info for clients



- You have to have an honest and reasonable belief that the person agreed (**consented**) to have sex with you.
- Someone can be too drunk or high to consent to sex.
- You must take reasonable steps to find out if the person is too drunk or high on drugs to give real consent.
- If she is too drunk or high to consent to sex, you could be charged with sexual assault.

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Alcohol, drugs and consent to sex ...info for clients (2)



- Even if you are drunk or high, even really really drunk or high, the other person must consent to have sex with you.
- If you are charged with assault, you cannot defend yourself by arguing ...
 - “I was drunk. I thought that the person had consented.”
 - “I was too drunk to know what I was doing.”
 - “I don’t remember a thing. I blacked out.”

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Risk reduction for clients



- An HIV positive person can reduce the risk of being criminally charged by ...
 - avoiding sex that has a high risk of HIV transmission
 - gathering evidence that he disclosed his HIV status before engaging in sex that has a significant risk of transmitting HIV
 - not sharing needles or other injection drug use equipment
 - advising her medical team of her HIV status during pregnancy / birth
 - not breast feeding her infant(s)

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Making disclosure count



- If you are going to disclose your HIV infection to your sex partner, here are two things you can do to make it count:
 - Avoid code words or hints, like “poz” and “positive.” It is best to say “I am HIV positive” or “I am infected with HIV.”
 - Make sure that he understands what “HIV infection” or “HIV positive” means. Some people still don’t know that: (1) HIV is the virus that causes AIDS. (2) HIV infection is a serious health condition and there is no cure. (3) HIV can be transmitted during some sexual activities.

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Strategies to help prove you disclosed



- Even if you told a person before sex that you are HIV positive, after sex the person might say you never disclosed.
- So you may want to get some evidence or proof you disclosed.
- We can suggest some strategies that might help you prove you disclosed your HIV infection to the guy before you had sex.

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Disclosure & privacy concerns



- **Gossip** can be a problem ... when “friends,” family, strangers and people you have sex with tell other people that you have HIV.
- There is not much you can do to stop these people from disclosing your HIV.
- You can sue the person. The law is complicated, you may need a lawyer. People who win privacy cases have not received much \$.
- And once your HIV status is “out there,” you can’t take back the info.

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Strategies to show you disclose...info for PHAs (2)



- Strategies to help prove you disclosed your HIV status:
 - Have witnesses
 - Double-check
 - Save on-line conversations and emails
 - Create support and counselling records
 - Sign a document
- It is up to you to decide what strategies might work best for you.

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Q & A



- Any questions about the criminal law?

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Law & HIV prevention



- **Presumption** that the criminal law & public health both have a role to play in HIV prevention
 - “It was forcefully contended that these [public health] endeavours may well prove more effective in controlling the disease than any criminal sanctions which can be devised. However, the criminal law does have a role to play both in deterring those infected with HIV from putting the lives of others at risk and in protecting the public from irresponsible individuals who refuse to comply with public health orders to abstain from high-risk activities. This case provides a classic example of the ineffectiveness of the health scheme. ...Through deterrence it [criminal law] will protect and serve to encourage honesty, frankness and safer sexual practices.”
 - Mr Justice Cory, R v Cuerrier (1998) SCC



Law & HIV prevention (2)



- The **criminal law** tries to prevent HIV through imposing a duty of **HIV disclosure**.
- **Public health practice** tries to prevent HIV through **HIV disclosure and safer sex**.
 - Public health will probably want you to **disclose** that you have HIV to every sex partner before you have intercourse or oral sex **and**
 - To **use a condom** every time you have intercourse or oral sex **and**
 - **To not share needles and injecting works**

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Public health law



- Each **province** and territory has its own public health laws.
 - Provincial public health laws apply to Aboriginal people (on and off-reserve), inside and out of traditional communities.
 - Provincial laws and guidelines set the general standards that local/regional health authorities must follow.
 - Each local/regional health authority administers public health programs – staffing, funding, specific policy and practices.

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Public health law (2)



- Public health laws have **3 main functions**:
 1. Classify transmissible diseases and specify the rules that apply to each.
 2. Impose a duty on persons (doctors, teachers, lab techs) to report known and suspected cases of infection with transmissible diseases.
 3. Grant health authorities powers to protect public health.

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Public health powers



- Health Act, RSBC 1996, c 179
 - HIV and AIDS listed as reportable communicable diseases
 - Responsibility for reporting of cases of HIV and AIDS imposed on certain health professionals
 - Medical Officer of Health (MOH) responsible for contact tracing (aka partner notification)

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Public health powers (2)



- Health Act, RSBC 1996, C 179
 - MOH may order in writing a PHA to
 - Comply with reasonable conditions to prevent exposing other to HIV
 - Take medical tests or treatment
 - Go into isolation, modified isolation or quarantine
 - PHA has 10 days to appeal
 - If person does not comply with order, MOH can go to court to enforce order
- *New **Public Health Act** passed by BC Legislature in May 2008, but not yet in force.*

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Client confidentiality



- Clients need to know ...
 1. Is everything I tell my support worker confidential?
No.
 2. Can my support worker disclose my personal information (i.e. HIV status, risk behaviours) to the police, or another person? **Yes.** If so, under what circumstances?
 3. Can my support worker be ordered to testify against me in court? **Yes.**
- When do you go over this with a client?
 - At outset. Respects client's agency and autonomy.

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Client confidentiality (2)



- The **duty of confidentiality** is one way the law protects a person's right to keep personal information private when accessing services.
 - Professionals (like physicians, nurses, registered social workers) are bound by a **legal duty** not to disclose confidential client information.
 - Professionals are also bound by an **ethical duty** not to disclose information (ethical duty of confidentiality).

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Client confidentiality (3)



- **Counsellors, caseworkers** and others who receive confidential information while working or volunteering at an agency **also have a legal duty** to maintain confidentiality.

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Client confidentiality (4)



- Confidentiality is also a **fundamental ethical principle** of counselling
 - Recognizes the powerful role counsellor may play in client's life.
 - Enables client to feel safe sharing information of a highly sensitive and personal nature.
 - Crucial to counselling efforts directed at reducing high risk behavior and encouraging disclosure and voluntary partner notification.

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Limits to client confidentiality



- Limits to confidentiality
 1. Public health law reporting
 2. Criminal investigation & prosecution
 3. Disclosure to prevent harm to a third party (aka “duty to warn”)
 - Disclosure of information under **1 & 2 are required by law.**
 - Disclosure of information under **3 is permitted by law and/or ethical principles.**

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Limits to client confidentiality (2)



- Criminal investigations & prosecutions
 - **Counselling and other records**, membership information, and knowledge of agency staff and volunteers may provide evidence of a criminal offence.
- Under the Criminal Code police can obtain **search warrant** to seize evidence.
 - To obtain, police must establish “reasonable grounds” that search will reveal evidence of commission of an offence.

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Limits to client confidentiality (3)



- A court can issue a **subpoena** ordering a person to testify under oath in a criminal proceeding.
 - May include order to bring anything in their possession or control relating to the proceeding.
 - A person who does not appear in court may be arrested and brought to court.
 - A person who refuses to testify is in contempt of court and may be fined or imprisoned.

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Limits to client confidentiality (4)



- Up to each agency to figure out **its record-keeping practices**.
 - In light of legal and ethical standards that govern agency and professions and potential for legal liability.
- An **ASO faced with a search warrant or subpoena** should advise the client ASAP & seek legal advice.

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Limits to client confidentiality (5)



- **After Cuerrier** Guide at pages 7-6 to 7-10.
 - Examples of search warrants & subpoenas
 - What to do when police show up with a search warrant
 - What to do when you are served with a subpoena

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Privacy, the media and the police



- Media coverage of Canadian HIV epidemic overwhelmingly about criminal charges and behaviour related to exposure / transmission.
- Many cases received **local and national media attention**.
 - There have been a lot of **high-profile cases**. (BC, Manitoba, Saskatchewan, Ontario)
- This media attention singles out HIV positive people as “criminals,” increases **stigma**, and may make it harder for people to disclose.
 - It may also mean some people avoid getting tested.

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Privacy, the media and the police (2)



- Media reports often fuelled by release of information by police.
 - Pictures, names, HIV status, “aggravated sexual assault”
- As “public safety warning” or as part of an investigation.
- Police authority to release information may or may not be found in statutory law.



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Privacy, the media and the police (3)



- BCPWA lodged a complaint about VPD’s disclosure of a person’s HIV status (2006)
 - “... the constraints on the VPD making public individuals’ HIV status seemed to have loosened to the point on complete ineffectuality.”
 - Request VPD to adopt policy permitting release of HIV status only where PHA putting public at risk through ongoing reckless personal behaviour

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Privacy, the media and the police (4)



- Vancouver Police Department
 - Reviewed policies re: public communication of info regarding an individual's health status and communicable disease
 - Concluded that no change in policy required
 - OK to release info for **legitimate investigative purposes**
 - Crime was essentially about non-disclosure of HIV
 - People would only be able to identify themselves as victims of crime if accused's HIV status was disclosed in media release

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Public safety exception



- **Do service providers have a duty to prevent harm?** (another limit on the duty of confidentiality?)
 - The **criminal law does not impose any obligation** on ASO employees or volunteers to inform police or public health about an HIV positive client who is engaging in activity that poses a significant risk of transmitting HIV.
 - **Not a duty, no "shall", not mandatory...**

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Public safety exception (2)



- However, **confidentiality may be breached** (and otherwise confidential information may be disclosed without consent) where there is:
 - a clear risk to an identifiable person or group;
 - the risk is serious bodily harm or death; and
 - the danger is imminent.
- This “test” was recognized by the Supreme Court in *Smith v Jones* (1999) case.

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Public safety exception (3)



- But, any disclosure should be limited as much as possible so as to minimally impair the person’s privacy right.
- **After *Cuerrier*** Guide Chapter 7 contains “Disclosing to Prevent Harm – A Decision-Making Tree” (7-5)
 - For an updated and more detailed version, see the soon to be released, *Poz Prevention: Knowledge and practice guidance for providing sexual health services to gay men living with HIV*.

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Public safety exception (4)



- Provincial laws often contain public safety exceptions to the duty of confidentiality that permit specific people to disclose confidential information without a person's consent
 - Professional codes
 - Public health laws
 - Privacy of health information laws
 - Police laws
 - Freedom of Information & Access laws

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Public safety exception (5)



- **Professionals may have an ethical obligation** to protect a third party from harm by revealing otherwise confidential client information.
 - disclosure to the sexual partner of a PHA “may not be unethical and may be indicated” where a PHA is unwilling or unable to inform the person at risk
 - Canadian Medical Association and Canadian Association of Social Workers take this position

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Public safety exception (6)



- **Hospitals, psychiatrists, social workers and police** have all been found in some circumstances to have a duty to warn someone they can identify as being at risk of harm
 - duty to prevent harm may permit disclosure of personal information even where there is a competing duty to keep the information confidential
- No decided cases about HIV, yet!
 - Three civil lawsuits in Ontario arising out of the Aziga and Leone cases.

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Public safety exception (7)



- Can an ASO be held liable in a civil lawsuit for disclosing a client's info without consent in order to protect someone else?
- No decided cases about HIV.
 - May not be one for a long time. Legal aid for civil cases hard to get.
 - Court would look at legal duties of agency and staff, the reasonableness of agency policy, and the reasonableness of agency conduct.

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Case study – your work



- Identify the issues that your client's situation raises
 - Counselling issues
 - Service provider and agency issues
- Map out a service plan
 - meet your client's needs
 - fulfill your obligations as a service provider
- You will have 15 minutes to complete your work
- Then we will review your service plans (i.e., answers) together

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Case study - Hope



- Hope is 35, a mom and has been HIV +ve for 5 years. Her health has been really good.
- She is single, choosing to focus her energy in her 5 year-old daughter who is negative and doesn't know Hope's status.
- She works part-time, get social assistance when she needs it and is doing fine money wise.
- Hope is a some-times volunteer and client at your agency.
- Three months ago Hope started dating Jim, the courier driver who makes deliveries to your agency. She met him while volunteering at the front desk.
- Hope used to be in an abusive relationship, and got HIV from her ex as a result of unprotected sex.
- Hope does not want to tell Jim about her HIV, or her "history"-out of fear of losing the relationship. Sometimes they don't use condoms when they have intercourse.

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Take home messages for PHAs



- If there is a **significant risk** that you will pass on HIV to your sex partner during sex, you have a legal duty to tell your sex partner your HIV status **before** you have sex.
 - You have to disclose before you **fuck without a condom**.
 - When you **fuck or get fucked with a condom**, have **oral sex** or **another type of sex** you **might** have a legal duty to disclose before sex.
 - We cannot say for certain whether you have a legal duty because we don't know what is included in the **legal definition of “significant risk.”**

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Take home messages for service providers



- People who provide services to PHAs (including ASO and public health staff) should ensure agency policies & counseling practices accurately reflect the law.
 - especially Currier, Williams and “mother” decisions
- Counseling about sex, the criminal law and HIV is not easy.
 - Up-to-date resources can help you in your work with clients.
 - Need for more training and skills-building opportunities.

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Take home messages for service providers (2)



- Counseling about criminal law should ideally be part of positive prevention efforts.
 - This means providing client-centred, culturally appropriate, and standards-based sexual health services to your clients living with HIV.
- The **criminal** law does not impose any legal obligation on you to inform police of an HIV positive client who is engaging in activity that poses a significant risk of transmitting HIV.
 - You cannot be criminally charged as a result of client's behaviour.

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Q & A



- Any questions about anything covered or raised in the workshop?

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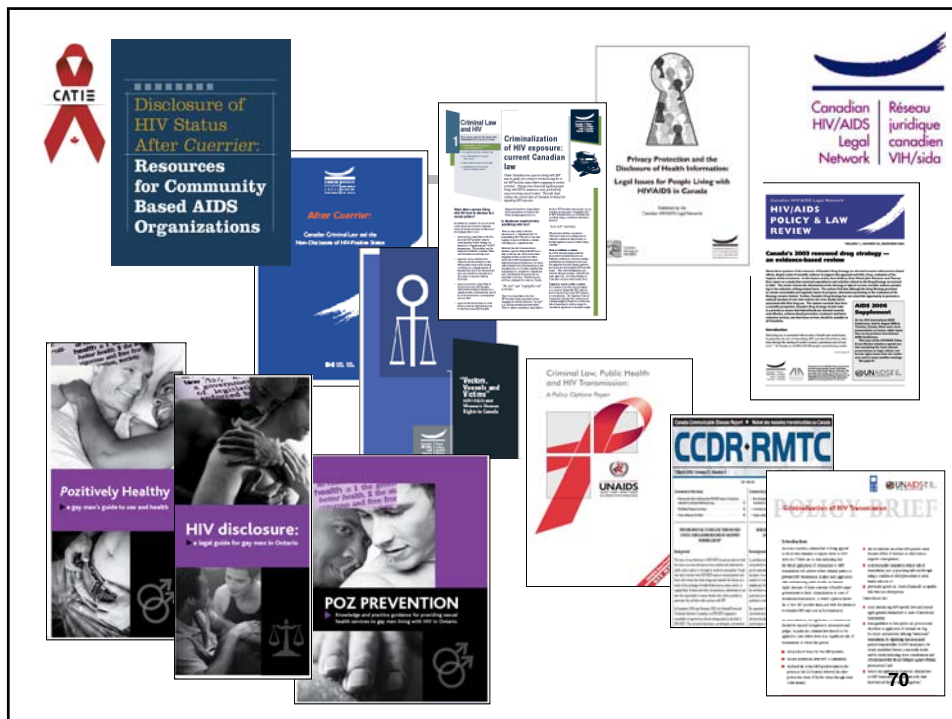


Resources for more info



- **HIV & law**
 - Canadian HIV/AIDS Legal Network www.aidslaw.ca
- **Prevention, care, treatment & support**
 - CATIE www.catie.ca
- Pick up “Key resources on criminal law and HIV” hand-out.
- Sign-up for the new *Poz Prevention resources*, which will be available soon from CATIE.

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Websites



Canadian HIV/AIDS Legal Network www.aidslaw.ca

Criminal HIV Transmission BLOG
<http://criminalhivtransmission.blogspot.com>

UNAIDS www.unaids.org

PHAC (CCDR) www.phac-aspc.gc.ca

HALCO www.halco.org

Toronto People With AIDS Foundation www.pwatoronto.org

BC Persons with AIDS Society www.bcpwa.org

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Thank you



- Public Health Agency of Canada for funding this project.
- Thanks to you, for your questions, perspectives and kind attention.

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Additional Slides



The slides that follow will not form part of the formal presentation, but I can use them to answer questions if it seems appropriate.

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Starting with questions



- People living with HIV must disclose their HIV infection to all of their sex partners.
 - True
 - False

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Starting with questions & answers



- People living with HIV must disclose their HIV infection to all of their sex partners.
 - False

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Starting with questions (2)



- If a service provider knows that a client is having unsafe sex with someone who doesn't know the client is HIV-positive, the service provider must report this to the police.
 - True
 - False

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Starting with questions & answers (2)



- If a service provider knows that a client is having unsafe sex with someone who doesn't know the client is HIV-positive, the service provider must report this to the police.

– False

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Starting with questions (3)



- Before sex, people must ask their partners if they have HIV or other STIs. If a person does not ask, then the partner has no legal obligation to disclose his or her HIV status or STIs

– True
– False

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Starting with questions & answers (3)



- Before sex, people must ask their partners if they have HIV or other STIs. If a person does not ask, then the partner has no legal obligation to disclose his or her HIV status or STIs.

– False

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Williams



- The second Supreme Court Case about HIV (non) disclosure and the criminal law, decided in 2003.

New issues:

- Can someone who is aware he may be HIV positive be criminally charged and convicted for not disclosing? (e.g., people who decide not to test so they don't have to disclose)
- Can an HIV positive person be charged for failing to disclose her status to another positive person?

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Williams (2)



- Actual knowledge vs. awareness of HIV status
 - “Once an individual **becomes aware of a risk** that he or she has contracted HIV, and hence that his or her partner’s **consent has become an issue**, but nevertheless persists in unprotected sex that creates a **risk of further HIV transmission** without disclosure to his or her partner, **recklessness** is established”.
- We don’t know of a single case where charges have been laid.

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Williams (3)



- Sex with a partner known to be HIV positive ... is there a duty to disclose?
 - Whether there is a duty to disclose HIV status to an HIV positive partner will depend upon the medical and scientific evidence in each case.
 - Key question: Does **re-infection** with HIV pose a “significant risk of serious bodily harm” or endanger the person’s life?
- We don’t know of a single case where charges have been laid.

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Mabior & significant risk



- HIV positive man faced numerous charges related to his failure to disclose his HIV status to numerous HIV negative women prior to sexual intercourse.
- The Mabior case is the most thorough analysis by a court of what “significant risk” means. The judge examined in detail evidence about:
 - Condom use (effectiveness of condoms, proper use)
 - Viral load (Swiss Statement and reaction to it)

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Mabior & significant risk (2)



- [117] ...”The latter date was the last reading of a viral load on the accused’s files. The issue of infectivity and possible transmission, even with a condom, must be considered. With respect to the condom there can, of course, be failure, breakage or improper utilization. That being said, there was “a lower risk” when protection was utilized according to medical and scientific evidence. I am persuaded that the combination of an undetectable viral load and the use of a condom would serve to reduce the risk below what would be considered a significant risk of serious bodily harm. The facts and medical evidence in this case have brought me to the conclusion that consent would not, in this particular circumstance, be vitiated.”
[Glenn’s emphasis.]

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Mabior & significant risk (3)



- ... meaning that an HIV positive person does not have a duty to disclose **if** he uses a condom **and** his viral load is undetectable.
- Not clear whether this will become **the law** in Canada – for a number of reasons:
 - this was a decision of a Manitoba court
 - it is a decision of a lower, trial court, and has not been confirmed by a higher, appeal court
 - the decision has been appealed
 - other courts are still free to interpret “significant risk of serious bodily harm” differently

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Mabior & significant risk (4)



- However, we may see Crown Attorneys use this judge’s reasons when advising police and prosecuting similar cases.
- In time we will get a better understanding of the legal significance of the Mabior case.

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Murder charges



- First murder charges (Feb 2005)
 - Man charged with aggravated **sexual** assault for alleged failure to disclose status in relation to 11 women.
 - Two women alleged to have been infected die from HIV-related illnesses.
 - Charges elevated to **first degree murder**.
 - Max life imprisonment without parole for 25 years.
 - Trial started in fall of 2008 and is ongoing as of February 2009.

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Murder charges (2)



New issues:

- opening door to “murder” charges given that HIV is fatal illness without cure
- invites charges of aggravated sexual assault, with higher penalties, in order to “position” case for first degree murder charge should one of the complainants die

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Spitting, biting & scratching



- Spitting at, biting or scratching someone is a crime.
 - In numerous cases police have charged people living with HIV with **aggravated assault** or **assault causing bodily harm** (Criminal Code 267).
 - **bodily harm** means “any hurt or injury to a person that interferes with the health or comfort of the person...” (Criminal Code 2)
 - bodily harm includes the side effects of anti-retroviral medication taken to prevent HIV infection (PEP)

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Spitting, biting & scratching (2)



- In most cases, a police officer or prison guard is the person who has been assaulted.
- A number of PHAs have been convicted, even where the risk of HIV transmission have been negligible to non-existent.
- Sentences have been substantial where there has been a risk of transmission
 - a man who spat blood at in an officer’s eye received a 2 year sentence.

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Public health law & criminal law



- Cuerrier & Williams decisions did not affect public health legislation or powers.
- But should affect public health practice ...
 - information given to people in HIV-antibody pre & post-test counselling must include information about legal duty to disclose
 - information about legal duty to disclose should be accurate – ie: based on court decisions in Cuerrier, Williams and other significant cases
 - contact tracing should be based on risk of transmission.

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Comparing criminal law & public health law



- Criminal law
 - ∞ special responsibility of government
 - ∞ focus on **safety** of community, including crime prevention (**incapacitation, rehabilitation, deterrence**)
 - ∞ action at individual level
 - ∞ addresses the relationships among individuals, enforced by state
 - ∞ includes limited power to enforce community standards of morality
 - ∞ powers of coercion to protect community
 - ∞ **HIV prevention through duty to disclose HIV status**



Comparing criminal law & public health law (2)



- Public health
 - special responsibility of government, often in partnership with civil society
 - focus on interventions to address **health of populations**
 - provision of population-based services focused on the determinants of health and grounded on the scientific methodologies of public health
 - powers of coercion to protect community and individuals within community from disease threats
 - **HIV prevention through reducing HIV risk behaviours (disclosure + risk reduction practices)**



Agency & policy



- ASOs confronting the issue & developing policy.
 - If a policy of disclosure is adopted, it should outline a graduated/measured response which is as protective as possible of client confidentiality.



Agency & policy (2)



- ASOs should consider developing policies on confidentiality & disclosure of client information (including counselling records) that reveal behaviours that risk transmitting HIV.
- ASOs should consider developing counselling guidelines to protect PHA clients and the organization, and to guide staff.
- Knowledge of the legal and ethical issues involved, and PHA/community concerns, should guide policy development.

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Working to change the situation



- Some HIV positive people, community activists and lawyers are working to change the criminal law.
- We do not think that the criminal law is an effective way to prevent HIV transmission.
 - It may result in more cases of HIV.
- We believe that the criminal law increases the stigma against all people with HIV.
- We are fighting for the rights and dignity of people living with HIV.

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