

An Update on HIV Non-Disclosure Prosecutions in Ontario

Six-Minute Criminal Lawyer

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Introduction

The Supreme Court wrote in 1998 that “[t]he possible consequence of engaging in unprotected intercourse with an HIV-positive partner is death” and that “[w]ithout disclosure of HIV status there cannot be a true consent”.² While the legal framework established by the Supreme Court in 1998 still applies in HIV non-disclosure prosecutions, both of these statements must be reassessed in light of changing scientific understanding and the prosecutorial directives and legal decisions that have followed.

In December 2017, the Minister of Health and Long-term Care and the Attorney General of Ontario released a joint statement on World AIDS Day recognizing that medical treatment for HIV has advanced significantly in recent years and, with timely diagnosis and treatment, HIV is now a chronic but manageable condition for many.³ Recent prosecutorial directives from federal and provincial governments acknowledge that the transmission of HIV – and thus the risk of death – is *not necessarily* a possible result of even unprotected sexual intercourse. In certain circumstances, the disclosure of HIV-positive status is *not* required for consent to sexual activity.

This paper will (1) provide a brief refresher on the law of HIV non-disclosure; (2) describe the current science on risk of HIV transmission, (3) summarize the federal and provincial prosecutorial directives now in place, and (4) point counsel to recent legislative and jurisprudential developments to consider when prosecuting and defending these cases.

A brief refresher on the law: *Cuerrier* and *Mabior*

In *Cuerrier*⁴ and *Mabior*⁵, the Supreme Court established the legal framework under which HIV non-disclosure cases are now most commonly prosecuted: an accused’s failure to disclose their

¹ We would like to thank Richard Elliott at the Canadian HIV/AIDS Legal Network and Ryan Peck at the HIV & AIDS Legal Clinic Ontario for sharing with us their research and draft writings on this subject.

² *R. v. Cuerrier*, [1998] 2 S.C.R. 371, at paras. 126-127 [*Cuerrier*].

³ Attorney General Yasir Naqvi and Eric Hoskins, Minister of Health and Long-term Care, Statement released in response to release of the Federal report on Criminal Justice System’s Response to Non-Disclosure of HIV (December 1, 2017), online: <http://clhe.ca/wp-content/uploads/Ontario-AG-and-MOHLTC-WorldAIDSDay2017statement.pdf>.

⁴ *Cuerrier*, *supra* note 2.

⁵ *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584 [*Mabior*].

HIV-positive status is a type of fraud which may vitiate consent to sexual intercourse under s. 265(3)(c).

In *Cuerrier*, the Supreme Court ruled that fraud capable of vitiating consent has two elements: dishonesty and deprivation. The *dishonesty* must be related to obtaining consent to engage in sexual activity. It may be a deliberate lie about HIV status or the failure to disclose HIV status. To establish that dishonesty resulted in *deprivation* – which may consist of actual harm or simply a risk of harm – the Crown needs to prove that the dishonest act had the effect of exposing the person consenting to a “significant risk of serious bodily harm”.⁶ The Crown must also prove that the complainant would have refused their consent had they know the accused’s HIV-positive status.⁷ The Court in *Cuerrier* found that the risk of contracting AIDS as a result of engaging in unprotected sexual intercourse met the test.⁸

In *Mabior*, the Supreme Court clarified that a significant risk of serious bodily harm in HIV non-disclosure cases is established by a ‘realistic possibility of HIV transmission’. A realistic possibility is one that is not speculative.⁹ Based on the evidence before it, the Court concluded that there was no realistic possibility of transmission when the accused had a low viral load (less than 1,500 copies of HIV per mL of blood) at the time of intercourse *and* a condom was used.¹⁰ The Supreme Court found that neither condom use nor antiretroviral therapy *alone* would reduce the risk of transmission below the ‘realistic possibility’ threshold.¹¹

The current scientific consensus

The Supreme Court in *Mabior* emphasized that its conclusions in that case do not preclude the common law from adapting as treatment improves.¹² Therefore, counsel on an HIV non-disclosure case must assess whether, in the circumstances of the case, there was a *realistic possibility* of transmission in light of current scientific understanding.

Recognizing that the criminal law is sometimes applied in a manner inconsistent with contemporary medical and scientific evidence, a group of leading HIV scientists developed a consensus statement on the science of HIV in the context of criminal law.¹³ This statement has

⁶ *Cuerrier*, *supra* note 2, at paras. 126-128.

⁷ *Ibid*, at para. 130.

⁸ *Ibid*, at paras. 125-139.

⁹ *Mabior*, *supra* note 5, at paras. 93, 101, 104.

¹⁰ *Ibid*, at paras. 93, 104.

¹¹ *Ibid*, at paras. 98-99, 101.

¹² *Ibid*, at paras. 95, 104.

¹³ Françoise Barré-Sinoussi et al, “Expert consensus statement on the science of HIV in the context of criminal law” (2018) 21:7 *Journal of the International AIDS Society* 1 at 2; available online at: <https://onlinelibrary.wiley.com/doi/full/10.1002/jia2.25161> [Consensus Statement].

been further endorsed by scientists around the world and by international organizations including the Joint United Nations Programme on HIV/AIDS.

The Consensus Statement confirms that viral load and condom use are key factors in determining risk of transmission. Having a viral load that is low or undetectable significantly decreases or eliminates a person's chances of transmitting HIV. Recent analyses of studies involving both heterosexual and male couples found no case of HIV transmitted by a person with an undetectable viral load. Various studies showed no cases of transmission with viral loads below 200 copies/mL of blood, between 50 and 500 copies/mL of blood, and below 400 copies/mL of blood, depending on the study.¹⁴

HIV cannot be transmitted in a single act of sexual activity when a condom has been used correctly – worn throughout the sexual act without its integrity being compromised. This is because the condom creates an impermeable barrier through which HIV cannot pass. Where the prosecution is based on multiple sexual acts over time, condom use will dramatically reduce the probability of transmission, even when accounting for instances of incorrect use or breakage. For example, consistent use of male condoms during vaginal sex reduces the possibility of HIV transmission by at least 80%.¹⁵

In addition to drawing general conclusions about viral load and condom use, the Consensus Statement looked at these factors in conjunction with specific sexual acts that are commonly the subject of HIV prosecutions. Its authors used a scale to describe the likelihood of transmission during a single, specific act: low possibility (transmission is possible but the likelihood is low), negligible possibility (transmission is extremely unlikely, rare or remote), and no possibility (transmission is either biologically impossible or effectively zero).¹⁶ The conclusions drawn, based on review of the evidence, are as follows:

Oral sex (including oral-penile and oral-vaginal): The possibility of HIV transmission from oral sex performed on a person who is HIV-positive varies from **none** to **negligible**, depending on the context – even when the person does *not* have a low viral load and/or a condom is *not* used. The few clinical studies investigating transmission through oral sex have failed to find any cases of HIV transmission. Furthermore, there is **no possibility** of transmission when the HIV positive partner has a low viral load *or* a condom is properly used.¹⁷

Vaginal-penile intercourse: When the person who is HIV-positive does *not* have a low viral load and a condom is *not* used, the possibility of HIV transmission through vaginal-penile intercourse is **low**. The chance of transmission decreases still further when no ejaculation occurs inside the

¹⁴ *Ibid*, at 4.

¹⁵ *Ibid*, at 3-4; see also *Mabior*, *supra* note 5, at para. 98.

¹⁶ Consensus Statement, *supra* note 13, at 3.

¹⁷ *Ibid*, at 5.

HIV-negative partner's body. The possibility of HIV transmission in circumstances of low viral load *or* condom use varies from **none** to **negligible** depending on the context. There is **no possibility** of transmission when a condom is used correctly or when the person who is HIV-positive has an undetectable viral load.¹⁸

Anal-penile intercourse: When the person who is HIV-positive does *not* have a low viral load and a condom is *not* used, the possibility of transmission through anal-penile intercourse is **low**, whether the receptive partner is male or female. The chance of transmission decreases when the person who is HIV-positive takes the receptive, rather than insertive, role. If the insertive partner is HIV-positive, the chance of transmission decreases if that person does not ejaculate inside the receptive partner. There is a **negligible** possibility of transmission when the person who is HIV-positive has a low viral load. As with vaginal-penile intercourse, there is **no possibility** of transmission when a condom is used correctly or when the person who is HIV-positive has an undetectable viral load.¹⁹

It is self-evident that when there is no possibility of transmission, as defined in the Consensus Statement, the 'realistic possibility of transmission' test in *Mabior* will not be met. It may be that a 'negligible possibility' – a risk of transmission that is extremely unlikely, rare or remote – also fails to rise to the level of a *realistic* possibility.²⁰

The Consensus Statement also addressed the current outlook for people living with HIV. Studies have consistently shown that antiretroviral therapies have radically increased life expectancy, that life expectancy has continued to improve over time, and that the long-term health and quality of life of people living with HIV has drastically improved.²¹ Indeed, life expectancy for a young person with HIV starting treatment now approaches that of a young person in the general population.²² Effective treatment often involves taking a single pill each day.²³ The Supreme Court in *Mabior* left open the possibility that, with further medical advances, the death rate may decline to the point where the risk of death is virtually eliminated. In such a case, the *aggravated* element of aggravated sexual assault would not be made out.²⁴

¹⁸ *Ibid*, at 5-6.

¹⁹ *Ibid*, at 6. For more information about estimated risks associated with various sexual acts, see Justice Canada's summary of a Public Health Agency of Canada meta-analysis: Canada, Department of Justice, Criminal Justice System's Response to Non-Disclosure of HIV (December 1, 2017), at 8-10, online: <https://www.justice.gc.ca/eng/rp-pr/other-autre/hivnd-vihnd/hivnd-vihnd.pdf> [*Criminal Justice System's Response*].

²⁰ Note that, in *Criminal Justice System's Response*, *supra* note 19, at 8, 10, a negligible risk is described as a theoretical possibility of transmission that cannot be ruled out based on scientific data – but where no instances of transmission have been confirmed. A 'negligible' risk thus described could be considered speculative. The Court in *Mabior* made it clear that the criminal law should not capture "any risk, however small" (paras. 85, 87, 90) and should not capture situations where there is a "speculative" possibility rather than a realistic one (para. 101).

²¹ Consensus Statement, *supra* note 13, at 7.

²² *Ibid*.

²³ *Ibid*.

²⁴ *Mabior*, *supra* note 5, at para. 92.

Recent changes to prosecutorial guidance

On December 1, 2018 – the 30th anniversary of World AIDS Day – the Attorney General of Canada announced the new Directive Regarding Prosecutions of HIV Non-Disclosure Cases.²⁵ The Directive was designed to harmonize federal prosecutorial practices with the scientific evidence on risks of sexual transmission. The government recognized that HIV non-disclosure is first and foremost a public health matter: “the over-criminalization of HIV non-disclosure discourages many individuals from being tested and seeking treatment and further stigmatizes those living with HIV or AIDS.”²⁶

The Attorney General directed the Director of Public Prosecutions as follows:

- (a) The Director shall not prosecute HIV non-disclosure cases where the person living with HIV has maintained a suppressed viral load, i.e., under 200 copies per mL of blood, because there is no realistic possibility of transmission.
- (b) The Director shall generally not prosecute HIV non-disclosure cases where the person has not maintained a suppressed viral load but used condoms or engaged only in oral sex or was taking treatment as prescribed, unless other risk factors are present, because there is likely no realistic possibility of transmission.
- (c) The Director shall prosecute HIV non-disclosure cases using non-sexual offences, instead of sexual offences, where non-sexual offences more appropriately reflect the wrongdoing committed, such as cases involving lower levels of blameworthiness.
- (d) The Director shall consider whether public health authorities have provided services to a person living with HIV who has not disclosed their HIV status prior to sexual activity when determining whether it is in the public interest to pursue a prosecution against that person.²⁷

This new federal Directive came one year after the Department of Justice released a report that examined the criminal justice system’s response to HIV non-disclosure.²⁸ The new Directive reflects key findings and conclusions from the report:

- Sexual activity, regardless of condom use, with an HIV positive person who is taking HIV treatment as prescribed and has maintained a suppressed viral load (i.e., under 200 copies of HIV per mL of blood) poses a negligible risk of transmission. A person living with HIV who takes their treatment as prescribed is acting responsibly and the criminal law should not apply.²⁹

²⁵ Directive, Government Notice, (December 8, 2018) Canada Gazette, Part I, Vol. 152, No. 49 (*Director of Public Prosecutions Act*), at 4322-4323, online: <http://gazette.gc.ca/rp-pr/p1/2018/2018-12-08/pdf/g1-15249.pdf>.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Criminal Justice System’s Response*, *supra* note 19.

²⁹ *Ibid.*, at 29.

- Certain types of sexual activity with HIV positive persons pose a low risk of transmission. The ‘realistic possibility of transmission’ test is likely not met in these circumstances:
 - Sex without a condom or oral sex with a person who is on treatment, but has not maintained a suppressed viral load;
 - Sex with a condom with a person who is not on treatment; and,
 - Oral sex with a person who is not on treatment.

The criminal law should therefore generally not apply to those on treatment and those not on treatment but using condoms or engaging only in oral sex unless other risk factors are present. These risk factors include failing to adhere to the prescribed treatment regimen (compared with proper adherence for those on treatment but without a suppressed viral load); engaging in multiple acts of sexual intercourse over a significant period, especially with inconsistent condom use (compared with an isolated sexual act with effective condom use); ejaculating during oral sex by the person with HIV (compared with oral sex without ejaculation and cunnilingus).³⁰

- HIV non-disclosure cases involve a broad range of conduct, reflecting both higher and lower levels of culpability. Cases involving recklessness – rather than intention to transmit HIV – involve lower levels of blameworthiness. In such cases, non-sexual offences may more appropriately reflect the accused’s wrongdoing as the accused is not intending to put others at risk purely for sexual gratification. Non-sexual offences that may be appropriate include assault, nuisance, and criminal negligence. Non-criminal responses should be considered in cases where high risk conduct is the result of lack of access to health care and other services.³¹
- Collaboration between public health and criminal justice officials at all stages of the criminal justice process may lead to more appropriate outcomes in HIV non-disclosure cases. Information from public health authorities about whether a person has been acting responsibly may impact decisions about whether the criminal justice system should be engaged at all. The criminal law has a role to play in cases where public health interventions have failed to address high risk conduct. Exposure cases that involve intentional conduct may be more serious than those involving reckless conduct; in the latter cases, public health interventions may be more effective.³²

This Directive applies only to the prosecution of cases under federal jurisdiction – i.e. in Yukon, the Northwest Territories and Nunavut.

In Ontario, the provincial Ministry of the Attorney General responded to the release of the Department of Justice’s report with its own guidelines for Crowns prosecuting HIV non-disclosure cases, effective December 1, 2017. This new guidance is contained within a Prosecution Directive governing the prosecution of sexual offences against adults that forms part of the Crown

³⁰ Ibid, at 29-30.

³¹ Ibid, at 18, 23, 29-31.

³² Ibid, at 30-31.

Prosecution Manual.³³ The provincial Directive describes two scenarios in which “a failure to disclose does not result in criminal liability for exposure to HIV”:

- (1) The Directive states that there is no ‘realistic possibility of transmission’ where a condom is used and the accused had a low viral load. This is consistent with the Supreme Court’s ruling in *Mabior*.
- (2) The Directive also states that, based on the scientific conclusions drawn by the Public Health Agency of Canada, there is no ‘realistic possibility of transmission’ in cases where the accused is on antiretroviral therapy and has maintained a suppressed viral load for six months. As noted in the federal Directive, a suppressed viral load means fewer than 200 copies of the HIV virus per mL of blood.

By highlighting only these two scenarios, the Ontario Directive does not go as far as the more recent Federal Directive. Advocacy groups have called for provincial governments to follow the federal government’s lead and direct that those using condoms or engaging only in oral sex should not be prosecuted.³⁴

Other considerations flowing from recent legislative and jurisprudential developments

Using expert evidence to accurately assess the risk of transmission

Even in cases where the Crown is proceeding with the prosecution, and has made out a *prima facie* case of transmission risk, defence counsel may raise a reasonable doubt by adducing evidence to show that there was no realistic possibility of transmission in the circumstances of the case. In this regard, the defence bears this tactical burden.³⁵ It will likely be necessary to call an expert witness to provide up-to-date evidence on risk of transmission. This was done successfully in the recent case of *C.B.* – the trial judge accepted the expert’s evidence that there was no realistic possibility of transmission given the accused’s having an undetectable viral load for over six months, even in the absence of condom use.³⁶ Similarly, in *J.T.C.*, an expert’s conclusion that the risk of transmission by the accused was approaching zero or infinitesimally small led the judge to conclude there was no realistic possibility of transmission during one act

³³ Ontario, Ministry of the Attorney General, *Crown Prosecution Manual*, Prosecution Directive: Sexual Offences Against Adults (Effective date: December 1, 2017), online: https://files.ontario.ca/books/crown_prosecution_manual_english_1.pdf [Crown Prosecution Manual].

³⁴ Camille Bains, “Groups want provinces to have consistent policies on limiting HIV prosecutions”, *National Post* (February 4, 2019) online: <https://nationalpost.com/pmn/news-pmn/canada-news-pmn/calls-for-provinces-to-have-consistent-policies-on-limiting-hiv-prosecutions>.

³⁵ *Mabior*, *supra* note 5, at para. 105.

³⁶ *R. v. C.B.*, 2017 ONCJ 545, at paras. 87-91. But see early post-*Mabior* cases in which the absence of condom use was determinative, no matter the accused’s viral load: *R. v. Felix*, 2013 ONCA 415, 298 C.C.C. (3d) 121, at paras. 45-50, 57 (viral load not adduced); *R. v. Murphy*, [2013] O.J. No. 3903, at para. 109 (viral load extremely low, under 50 copies/mL of blood, due to long-term treatment). These older decisions are now at odds with the federal and provincial prosecutorial guidelines as well as the most recent scientific literature in this area.

of unprotected sex.³⁷ In these cases, the trial judge acquitted the accused despite the circumstances not conforming with the Supreme Court’s conclusion in *Mabior* (low viral load + condom use). In addition to key factors such as condom use and the viral load of the HIV-positive partner, other factors that may be relevant to the *realistic possibility* analysis, and should be explored, include:

- number of instances of penetrative sex;
- position (i.e., receptive or insertive) for oral, vaginal or anal sex;
- duration of penetration;
- ejaculation (and where it occurred);
- use of pre-exposure prophylaxis (PrEP) by the HIV-negative complainant;
- penile circumcision.

Some of these factors have already been identified as relevant or considered in certain reported decisions.³⁸

Using s. 276 to challenge the complainant’s assertion they would not have consented

Even if there was a realistic possibility of transmission, the Crown must still prove beyond a reasonable doubt that the complainant would have refused to engage in sexual activity if they had been aware of the accused’s HIV status.³⁹ As in any case, it is open to the accused to challenge the credibility of the complainant’s statement that they would not have consented had the accused disclosed their HIV status.⁴⁰ However, the Court of Appeal for Ontario has found that evidence of prior sexual conduct is generally not relevant to the issue of whether a complainant would have knowingly consented to sex with an HIV-positive accused. In *R. v. Boone*, 2016 ONCA 227, defence counsel brought a s. 276 application seeking the admission of evidence that, on prior occasions, the complainant had engaged in careless or reckless sex with others who may have been HIV-positive, without inquiring as to their HIV status. The Court of Appeal concluded that the trial judge was wrong to admit this evidence as it engaged the false logic of the twin myths: “evidence of the complainant’s general disposition to expose himself to an unknown risk (i.e., by having casual unprotected sex) is simply not probative of whether or not a complainant would be willing to accept a serious known risk”.⁴¹ The Court did state that there may, however, be rare cases where evidence of the complainant’s prior consent to sexual activity knowing their partner was HIV-positive is sufficiently relevant to the question whether the complainant would have consented to sex knowing the accused was HIV-positive.⁴²

³⁷ *R. v. J.T.C.*, 2013 NSPC 105, at paras. 55, 60, 63, 100.

³⁸ E.g., *R. v. J.A.T.*, 2010 BCSC 766; *R. v. Nduwayo*, 2010 BCSC 1277; *R. v. J.U.*, 2011 ONCJ 457; *R. v. Thompson*, 2016 NSSC 134.

³⁹ *Cuerrier*, *supra* note 2, at para. 130.

⁴⁰ *R. v. Boone*, 2016 ONCA 227, at para. 44.

⁴¹ *R. v. Boone*, 2016 ONCA 227, at paras. 37-38, 40.

⁴² *Ibid*, at para. 42. See also *R. v. Clarke*, 2013 ONSC 3232.

The Sex Offender Information Registration Act

The obligation to comply with sex offender registries following a conviction for a sexual offence is an important consideration in prosecuting and defending HIV non-disclosure cases.

The federal *Sex Offender Information Registration Act (SOIRA)*⁴³ places obligations on those convicted of sexual offences to register certain personal information, including residence and employment details, and to update that information as it changes. Section 490.012 of the *Criminal Code*⁴⁴ makes the imposition of a *SOIRA* order mandatory when an accused has been convicted of one of a list of designated sexual offences. Section 490.013 prescribed the length of the order – 10 years, if the offence is prosecuted summarily or the maximum sentence is two or five years; 20 years, if the maximum sentence is 10 or 14 years; and for life, if the maximum sentence is imprisonment for life. A lifetime *SOIRA* order is also mandatory when a person has been convicted of more than one designated offence or if a person has previously been subject to a *SOIRA* order.⁴⁵

The particular offence charged – and, in the case of sexual offences, the number of offences charged – will impact whether and the length of time a person prosecuted for HIV non-disclosure will be subject to the sex offender registry legislation if convicted. A conviction for HIV non-disclosure prosecuted as an aggravated sexual assault will attract a lifetime *SOIRA* order because the maximum sentence for that offence is imprisonment for life.⁴⁶ If the prosecution involves multiple complainants – and thus multiple counts – convictions will also result in a lifetime *SOIRA* order regardless of whether the charges are prosecuted summarily or by indictment. However, if the Crown chooses to prosecute HIV non-disclosure under a non-sexual offence – as is prescribed by the federal Directive in some cases – or if a plea deal is negotiated for a non-sexual offence, the offender will not be placed on the sexual offender registry.

There are several constitutional challenges to the *SOIRA* regime currently before the courts. In *R. v. Ndhlovu*,⁴⁷ a trial judge in Alberta struck down the *SOIRA* provisions that required her to order the accused to comply with *SOIRA* for life after he pleaded guilty to two counts of sexual assault. The trial judge found that the mandatory registration for all sex offenders upon conviction of two or more offences, without regard to the seriousness of the offences or the offender's propensity to reoffend, is overbroad and grossly disproportionate and thus unjustifiably infringes s. 7 of the *Charter*.⁴⁸ The provision is not saved under s. 1.⁴⁹ This case is being appealed to the Court of

⁴³ *Sex Offender Information Registration Act*, S.C. 2004, c. 10. There is also a provincial registry in Ontario: see *Christopher's Law (Sex Offender Registry)*, 2000, S.O. 2000, c. 1.

⁴⁴ *Criminal Code*, R.S.C. 1985, c. C-46. See ss. 490.011 – 490.02911 for the regime's many nuances.

⁴⁵ *Criminal Code*, R.S.C. 1985, c. C-46, ss. 490.013(2.1), 490.013(4)

⁴⁶ *Criminal Code*, R.S.C. 1985, c. C-46, s. 273.

⁴⁷ *R. v. Ndhlovu*, 2016 ABQB 595, 44 Alta LR (6th) 382 [*Ndhlovu* s. 7 analysis]; *R. v. Ndhlovu*, 2018 ABQB 277 [*Ndhlovu* s. 1 analysis].

⁴⁸ *Ndhlovu* s. 7 analysis, *supra* note 47, at paras. 119, 130.

⁴⁹ *Ndhlovu* s. 1 analysis, *supra* note 47.

Appeal of Alberta and the declaration of invalidity has been stayed pending that appeal.⁵⁰ In Ontario, the same provision (s. 490.013(2.1)) was found not to be overbroad or grossly disproportionate both at the summary conviction appeal level and by the Court of Appeal for Ontario.⁵¹ We understand the appellant is seeking leave to appeal to the Supreme Court.⁵² Because HIV non-disclosure is often prosecuted by way of sexual offences, these challenges will impact HIV non-disclosure cases.

The impact of Bill C-75

Bill C-75⁵³ proposes sweeping procedural changes to the *Criminal Code* that will impact many aspects of the practice of criminal law. The Bill is currently before the Senate after having passed the House of Commons on December 3, 2018. One proposed change is to restrict the availability of the preliminary inquiry to only those offences carrying a maximum sentence of life imprisonment.⁵⁴ A preliminary inquiry will therefore remain available in those HIV non-disclosure cases prosecuted as aggravated sexual assaults but will not be available if the charges for a less aggravated form of sexual assault are laid and will not likely be available for cases prosecuted through non-sexual offences.

Conclusion

Counsel prosecuting and defending HIV non-disclosure cases have an important role to play in ensuring the criminal law keeps pace with the scientific consensus around transmission risk and the potential harm caused by HIV transmission.

Because this is a specialized area of law, counsel prosecuting and defending these cases may want to take advantage of resources available to them. Crowns prosecuting HIV non-disclosure cases in Ontario must consult the Criminal Law Division's Sexually Transmitted Infections Advisory Group at the earliest possible stage, as mandated by the Crown Prosecution Manual Directive.⁵⁵ Counsel defending HIV non-disclosure cases may find the resources available on the Canadian HIV/AIDS Legal Network particularly helpful: <http://www.aidslaw.ca/lawyers-kit>. The resources include a catalogue of relevant case law and links to scientific studies addressing various modes of transmission.

⁵⁰ *R. v. Ndhlovu*, 2018 ABCA 260.

⁵¹ *R. v. Long*, 2015 ONSC 4509; *R. v. Long*, 2018 ONCA 282.

⁵² The materials have not yet been filed.

⁵³ Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess., 42nd Parl., 2018 (as passed by the House of Commons 3 December 2018).

⁵⁴ *Ibid*; see cl. 238, amending s. 535 of the *Criminal Code*.

⁵⁵ Crown Prosecution Manual, *supra* note 33.