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Law's Sexual Infections

Kyle Kirkup
University of Ottawa

Kyle Kirkup*

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In 2019, the House of Commons Standing Committee on Justice and Human Rights published its study on the criminalization of HIV non-disclosure in Canada. The report recommended removing HIV non-disclosure from sexual assault laws in Canada. This constituted a welcome development for many HIV advocates. Yet other recommendations proved more controversial. In order to counter the exceptional targeting of HIV, the Committee proposed an offence for the non-disclosure of all infectious diseases. This article uses the proposal to develop three arguments. First, the idea of creating an offence for all infectious diseases finds its origins in criminal laws dating back to the mid-nineteenth century. Second, the report relied on HIV's exceptional criminal treatment to justify the creation of a new general offence. Third, the proposal reflects what Reva Siegel has called "preservation through transformation." In the face of HIV advocates' successful contestation of the terms of HIV criminalization, lawmakers distanced themselves from earlier penal justifications and developed new, seemingly more contemporary rationales to defend the status quo.

En 2019, le Comité permanent de la justice et des droits de la personne de la Chambre des communes a publié son étude sur la criminalisation de la non-divulgation du VIH au Canada. Le rapport recommandait de retirer la non-divulgation du VIH des lois sur les agressions sexuelles au Canada. Cette recommandation a été accueillie favorablement par de nombreux défenseurs du VIH. Cependant, d'autres recommandations se sont avérées plus controversées. Afin de contrer le ciblage exceptionnel du VIH, le Comité a proposé d'ériger en infraction la non-divulgation de toutes les maladies infectieuses. Cet article s'appuie sur cette proposition pour développer trois arguments. Premièrement, l'idée de créer un délit pour toutes les maladies infectieuses trouve son origine dans les lois pénales datant du milieu du XIXe siècle. Deuxièmement, le rapport s'appuie sur le traitement pénal exceptionnel du VIH pour justifier la création d'une nouvelle infraction. Troisièmement, la proposition reflète ce que Reva Siegel a appelé « la préservation par la transformation ». Face à la contestation réussie des termes de la criminalisation du VIH par les défenseurs de la cause, les législateurs ont pris leurs distances par rapport aux justifications pénales antérieures et ont élaboré de nouvelles justifications, apparemment plus contemporaines, pour défendre le statu quo.

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Introduction

In 2019, the House of Commons Standing Committee on Justice and Human Rights published its study on the criminalization of HIV non-disclosure in Canada.[1] After hearing expert testimony from thirty-one witnesses and receiving six briefs from civil society organizations, the report made a series of recommendations designed to limit the "overly broad and punitive" use of the criminal law against people living with HIV.[2] Importantly, the report recommended removing HIV non-disclosure from the ambit of sexual assault laws in Canada.[3] This constituted a welcome

1. Canada, House of Commons, Standing Committee on Justice and Human Rights, *The Criminalization of HIV Non-Disclosure in Canada*, 42-1, No 28 (June 2019) (Anthony Housefather), online (pdf): <www.ourcommons.ca/Content/Committee/421/JUST/Reports/RP10568820/justrp28/justrp28-e.pdf> [perma.cc/W83S-HNQU]. See also HIV Legal Network, "Media Reporting: HIV and the Criminal Law" (2020) at 4, online (pdf): *HIV Legal Network* <www.hivlegalnetwork.ca/site/media-reporting-hiv-and-the-criminal-law/?lang=en> [perma.cc/JE5V-TNGQ].
2. House of Commons, *ibid* at 3.
3. *Ibid* ("[t]he Committee agrees with witnesses that the use of sexual assault provisions to deal with HIV non-disclosure is overly punitive, contributes to the stigmatisation and discrimination against people living with HIV, and acts as a significant impediment to the attainment of our public health objectives. The consequences of such a conviction are too harsh and the use of sexual assault provisions to deal with consensual sexual activities is simply not appropriate" at 23).

development for many HIV advocates. Yet other recommendations proved more controversial.[4] In particular, the study proposed the creation of a "specific offence in the *Criminal Code* related to the non-disclosure of an infectious disease (including HIV) when there is actual transmission, and that prosecutions related to such transmission only be dealt with under that offence."[5] In order to counter the exceptional targeting of HIV—easily the most criminalized infectious disease in Canada—members of the Committee elected to create an offence that would apply to the non-disclosure of all infectious diseases. Targeting *all* infectious diseases, the logic went, would address longstanding concerns that the criminal law perpetually singles out HIV.[6] The report was issued late in the life of the 42nd Parliament and, to date, the government has not signalled that it intends to introduce legislation that would bring the recommendations to life. In late 2022, Minister of Justice and Attorney General of Canada David Lametti commenced yet another round of public consultations on reforming the law of HIV non-disclosure.[7] The 2019 House of Commons proposal, however, invites us to take stock of the relationship between sexually transmitted infections (STIs), law reform, social change, and the carceral state.

This article develops three central arguments. The first is historic. The proposal to create an offence for all infectious diseases is not a new one. It finds its origins in a series of criminal laws—none of which are cited in the 2019 study—dating back to the mid-nineteenth century. The second argument draws on theories of HIV exceptionalism.[8] Lawmakers

4. See e.g. *Ibid* ([t]he New Democratic Party dissented on the findings of the report in part because "the majority of the committee has recommended a new criminal offence on transmission of communicable diseases presumably in the effort to avoid creating an HIV specific offence in the Criminal Code. In doing so the majority has opened the door to criminal sanctions for those with other diseases such as TB and Hepatitis C, rather than recognising that all communicable diseases including HIV are better dealt through existing public health measures" at 41).

5. *Ibid* at 2.

6. *Ibid* ("[t]he Committee believes that a new offence should be created in the Criminal Code to cover HIV non-disclosure cases in specific circumstances. The new offence should not be limited to HIV but cover the non-disclosure of infectious diseases in general. The Committee is of the view that people living with HIV should not be treated differently than people living with any other infectious disease" at 23).

7. Department of Justice Canada, News Release, "Reforming the criminal law regarding HIV non-disclosure: Government of Canada launches public consultation" (20 October 2022), online: <www.canada.ca/en/department-justice/news/2022/10/reforming-the-criminal-law-regarding-hiv-non-disclosure-government-of-canada-launches-public-consultation.html> [perma.cc/E7F5-UJ9N]. See also Department of Justice Canada, *Public Consultation Paper: HIV Non-Disclosure* (Ottawa: Department of Justice, 2022), online (pdf): <www.justice.gc.ca/eng/cons/hiv-vih/pdf/Consultation_paper_Survey_Questions_HIV_Non_Disclosure_Consultation_EN.pdf> [perma.cc/JU7T-SJ69].

8. See e.g. R Bayer, "Public Health Policy and the AIDS Epidemic. An End to HIV Exceptionalism?" (1991) 324:21 New Engl J Med 1500, DOI: <10.1056/NEJM199105233242111>; Julia H Smith &

relied on HIV's exceptional treatment within the criminal legal system to justify the creation of a new general offence. The study proposed to ratchet up the punishment for other infectious diseases in order to redress the criminal legal system's unfair treatment of HIV.[9] The third argument, one grounded in theories of social change and law reform, suggests that the proposal reflects what Reva Siegel has called "preservation through transformation."[10] In the face of HIV advocates' successful contestation of the terms of HIV criminalization, lawmakers distanced themselves from the original justifications for targeting people living with HIV. At the same time, they developed new rationales to defend continuing to criminalize sexual encounters marked by contagion and disease.

The article proceeds in three parts. Part I traces the history of criminalizing sexual contagion, which finds its origins in the United Kingdom—and long before the beginning of the HIV/AIDS epidemic beginning in the early 1980s. It also examines the history of the *Criminal Code* offence of communicating a venereal disease, which remained on the books from 1919 until its repeal in 1985. Part II draws on the literature on HIV exceptionalism to demonstrate how Canadian courts interpreted the fraud provision of the *Criminal Code* (s. 265(3)(c)) to criminalize people living with HIV who, under certain circumstances, failed to disclose their status to sexual partners. The section proceeds to explain why the 2019 House of Commons proposal to create a general offence designed to target all infectious diseases constitutes an effort to redress the criminal legal system's longstanding exceptional treatment of HIV. Part III draws on theories of law reform and social change to demonstrate how legal regimes under scrutiny invent new criminological techniques of sexual governance that ultimately preserve the status quo. An offence that purports to apply to all infectious diseases may, in practice, become a de facto HIV-specific offence. To make this argument, the section analyzes the very small body of reported decisions where STI non-disclosure or transmission has been targeted under Canadian criminal law. These cases reveal an ambivalence to criminalization that is rarely afforded in the

Alan Whiteside, "The History of AIDS Exceptionalism" (2010) 13 J Intl AIDS Society 47, DOI: <10.1186/1758-2652-13-47>.

9. For further discussion of "ratcheting up" and "ratcheting down" in the context of inequality and criminal law reform, see Aya Gruber, "Murder, Minority Victims, and Mercy" (2014) 85 U Colo L Rev 129, online (pdf): <lawreview.colorado.edu/wp-content/uploads/2014/01/10.-85.1-Gruber_Final_Web.pdf> [perma.cc/X2YP-RCVX]. See also Kim Shayo Buchanan, "When is HIV a Crime? Sexuality, Gender and Consent" (2014) 99:4 Minn L Rev 1231 at 1338–1342, online (pdf): <www.minnesotalawreview.org/wp-content/uploads/2015/05/Buchanan_pdf.pdf> [perma.cc/WNV4-P552].

10. Reva Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy" (1995-1996) 105 Yale LJ 2117 at 2119, DOI: <10.2307/797286>.

context of HIV non-disclosure. The article ends by underscoring the need to reimagine the stories we tell ourselves about STI transmission and non-disclosure. STI non-disclosure and transmission may constitute little more than one potential outcome of an active sexual life.

I. *The Anglo-American history of criminalizing sexual contagion*

Like virtually all Anglo-American jurisdictions, Canada has a long history of attempting to use the criminal law to regulate the transmission of contagious diseases, particularly when the diseases are alleged to be spread by marginalized groups. What follows below is a brief survey of historic laws from the United Kingdom that sought to target the spread of sexual contagion. The section then shifts to explain how this approach migrated into Canada via the *Contagious Diseases Act* (1865–1870) and later the *Criminal Code* offence of communicating a venereal disease (1919–1985).

1. *Sexual contagion laws in the United Kingdom and Canada*

Canadian criminal offences targeting infectious diseases are rooted in nineteenth century laws from the United Kingdom, which initially sought to target the transmission of venereal diseases between members of the armed forces and sex workers.[11] These encounters were treated as especially risky, and proponents of such laws tended to argue that criminal punishment promised to deter the spread of STIs.[12] In 1864, the United Kingdom passed the *Contagious Diseases Act*, which had the express goal of regulating female sex workers, who had been largely blamed for the spread of venereal diseases.[13] The law initially only applied in certain naval ports and army towns. Police were granted the authority to detain women suspected of prostitution and to demand that they undergo medical examinations.[14] If the women were found to be infected with a venereal disease, they were placed into isolated 'lock hospitals' for treatment until they were deemed to be cured.[15] In the years that followed, the Ladies National Association mobilized to have lawmakers in the United Kingdom

11. Pamela Cox, "Compulsion, Voluntarism, and Venereal Disease: Governing Sexual Health in England after the Contagious Diseases Acts" (2007) 46:1 J British Studies 91 at 104, DOI: <10.1086/508400>.
12. Gregg S Meyer, "Criminal Punishment for the Transmission of Sexually Transmitted Diseases: Lessons from Syphilis" (1991) 65:4 Bull History Medicine 549 at 552.
13. James Chalmers, "Disease Transmission, Liability and Criminal Law" in AM Viens, John Coggon & Anthony S Kessel, eds, *Criminal Law, Philosophy and Public Health* (Cambridge, UK: Cambridge University Press, 2013) 124 at 133, DOI: <10.1017/CBO9781139137065.007>.
14. Cox, *supra* note 11 at 95.
15. *Ibid*.

suspend the law in 1883, and proceeded to have it repealed altogether in 1886.[16]

The united provinces of Upper and Lower Canada enacted their own *Contagious Diseases Act* in 1865. Reflecting Canada's colonial legal inheritances, the legislation was modelled after the United Kingdom.[17] Brought into force almost three decades prior to the enactment of the first comprehensive *Criminal Code* in 1892, legislators created the act in an effort to protect military men from the supposed public health threat posed by female sex workers carrying venereal diseases. The law authorized sex workers alleged to be carrying venereal diseases to be detained for up to three months in a hospital certified by the government. It also allowed any individual to go before a justice of the peace and swear an oath that a sex worker with a venereal disease had been plying her trade in one of the areas captured by the act. Unlike the United Kingdom's iteration of the law, which applied only in certain naval ports and army towns, the Canadian version applied to all major urban centres in Upper and Lower Canada. After being detained by a police officer, the law gave the sex worker two options: she could either voluntarily submit for a physical examination or be arrested.[18]

Following the passage of the legislation, government officials in the united provinces of Upper and Lower Canada found it virtually impossible to enforce.[19] The government failed to certify any hospitals as facilities that could be used to detain, inspect, and treat sex workers alleged to be carrying venereal diseases. In addition, the legislation contained a clause providing that the provision would only remain in force for five years. Having failed to certify any hospitals, the legislation in the united provinces of Upper and Lower Canada expired in September 1870 and was never re-introduced. Writing about the government's decision not to re-enact the legislation, legal historian Constance Backhouse explains,

> That Canadian legislators chose not to reenact the law or enforce it probably reflected their ambivalence over its efficacy. They may also have been affected by the bitter controversy that raged in England over the parent country's counterpart legislation, in which middle- and upper-

16. *Ibid*. See also James Chalmers, *Legal Responses to HIV and AIDS* (Oxford: Hart, 2008) at 129-130.

17. (Province of Canada), 1865, 29 Vict, c 8.

18. See *ibid* at Schedule 2 & ss 11-16, cited by Constance B Backhouse, "Nineteenth-Century Canadian Prostitution Law Reflection of a Discriminatory Society" (1985) 18:36 Social History/ Histoire sociale 387 at 390-393.

19. Backhouse, *supra* note 18 at 392, n 22. According to Backhouse, the *Canadian Gazette, 1865–1871* contained no reports of any hospitals being certified as lockup and treatment facilities under the Act.

> class women attacked the acts as state recognition of vice and profoundly discriminatory against women and the lower classes.[20]

While the legislation was never enforced, the passage of the *Contagious Diseases Act* in 1865 foreshadowed the extent to which actors in Canada would endeavour to regulate sex marked by notions of deviance, illness, and contagion vis-à-vis the criminal law—particularly when the sex took place between members of marginalized communities.

2. Criminal Code*: Communicating a venereal disease (1919–1985)*

Following World War I, and the outbreak of venereal diseases such as syphilis and gonorrhoea associated with the migration of people across jurisdictions,[21] Canada again attempted to criminalize and contain the practices of contagious sex.[22] While the transmission of venereal diseases had never before been an offence at common law, the Canadian government introduced a new *Criminal Code* offence in 1919 designed to target the spread of sexual contagion.[23] Much like the 2019 House of Commons proposal, the offence was designed to apply broadly. Significantly, the 1919 offence did not contain the sorts of wartime-related geographical limits imposed by the United Kingdom's 1864 *Contagious Diseases Act*.

The 1919 Canadian law made it an offence, punishable on summary conviction, to communicate a venereal disease to another person knowingly or with culpable negligence. The act defined venereal disease as "syphilis, gonorrhoea, or a soft chancre."[24] Reasonable grounds of belief on the

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20. *Ibid* at 392.

21. For a discussion of this history, see AM Brandt, "The Syphilis Epidemic and its Relation to AIDS" (1988) 239:4838 Science 375.

22. For further discussion of the emergence of this *Criminal Code* offence, see Janice Dickin McGinnis, "Law and the Leprosies of the Lust: Regulating Syphilis and AIDS" (1990) 22 Ottawa L Rev 49.

23. *An act to amend the Criminal Code*, SC 1919, c 46, s 8. Section 316A of the *Criminal Code* provided:

> (1) Any person who is suffering from venereal disease in a communicable form, who knowingly or by culpable negligence communicates such venereal disease to any other person shall be guilty of an offence, and shall be liable upon summary conviction to a fine not exceeding five hundred dollars or to imprisonment for any term not exceeding six months, or to both fine and imprisonment.
>
> Provided that a person shall not be convicted under this section if he proves that he had reasonable grounds to believe that he was free from venereal disease in a communicable form at the time the alleged offence was committed.
>
> Provided, also, that no person shall be convicted of any offence under this section upon the evidence of one witness, unless the evidence of such witness be corroborated in some material particular by evidence implicating the accused.
>
> (2) For the purposes of this section, "venereal disease" means syphilis, gonorrhea, or soft chancre.

24. *Ibid*, s 316A(2).

part of the accused person that they were "free from venereal disease in a communicable form" operated as a complete defence, and individuals could not be convicted upon the uncorroborated evidence of only one person. The offence was punishable by a fine not exceeding $500, a term of imprisonment not exceeding six months, or both.[25] The government made minor amendments to the offence in 1927,[26] 1953–1954,[27] 1970,[28] and 1985[29] to reflect the increasing punishments for a range of summary conviction offences across the *Criminal Code*. However, the offence remained virtually unchanged until its repeal in 1985.[30]

During the almost seven decades where communicating a venereal disease remained a *Criminal Code* offence, there appears to have been only one reported decision.[31] In the 1926 decision of *R v Leaf*, the criminal act of communicating gonorrhoea was not even the central focus of the Crown's case. Rather, the accused person was charged with "unlawful act" manslaughter after his sexual partner died of complications thought to be related to acquiring gonorrhoea. The Crown used the underlying offence of communicating a venereal disease to secure a manslaughter conviction. In a brief reported decision affirming the conviction, the Saskatchewan Court of Appeal noted: "The prisoner was shown by the evidence to have been guilty of the offence dealt with by section 316(a) of *The Criminal Code,* namely, communicating venereal disease by culpable negligence. The woman to whom he communicated the disease died, and according to the medical evidence her death was directly attributable to the disease so communicated."[32] While Parliament may have signalled a desire to punish practices of contagious sex, however ambivalent, the dearth of reported cases suggests that enforcement remained elusive. This historic pattern

25. *Ibid*.
26. *Criminal Code*, RSC 1927, c 36. Section 317 of the *Criminal Code*.
27. *Criminal Code*, SC 1953-54, c 51. Section 239 of the *Criminal Code*.
28. *Criminal Code*, RSC 1970, c C-34. Section 253 of the *Criminal Code*.
29. *Criminal Code*, RSC 1985, c C 46. Section 289 of the *Criminal Code* provides:
    (1) Every one who, having venereal disease in a communicable form, communicates it to another person is guilty of an offence punishable on summary conviction.
    (2) No person shall be convicted of an offence under this section where he proves that he believed on reasonable grounds that he did not have venereal disease in a communicable form at the time the offence is alleged to have been committed.
    (3) No person shall be convicted of an offence under this section on the evidence of only one witness, unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.
    (4) For the purposes of this section, "venereal disease" means syphilis, gonorrhea or soft chancre. RS, c C-34, s 253.
30. RSC 1985, c 27 (1st Supp), s 41.
31. For an account of this history, see Richard Elliott, *Criminal Law and HIV/AIDS: Final Report* (Montreal: Canadian HIV/AIDS Legal Network and Canadian AIDS Society, 1996).
32. *R v Leaf* (1926), 20 Sask LR 542, 45 CCC 236 (CA) at para 3.

may bolster the argument that the sort of general offence envisioned by the 2019 House of Commons report may not be a general offence in practice. Unlike its punitive approach to HIV, the Canadian criminal legal system has tended to be indifferent in its rendering of STI non-disclosure and transmission.

With virtually no enforcement, Parliament repealed the offence in 1985 in the early days of the HIV/AIDS epidemic. While the record is somewhat opaque on this point, Parliament appears to have repealed the offence for two reasons. First, the legislature concluded that the transmission of venereal diseases was better understood as a public health issue than as a criminal law issue. Second, the legislature pointed to the ineffectiveness of the prohibition—there had not been a standalone conviction for communicating a venereal disease for the better part of a century.[33] In addition, two different Parliamentary committees—the Fraser Committee on pornography and prostitution and the Badgely Committee on sexual offences against children and youth—recommended that the offence be repealed altogether.[34] In calling for the repeal of the offence, the Fraser Committee described it as "hopelessly outdated" and as failing to "reflect modern knowledge on, or practice in relation to, sexually transmitted diseases."[35] It concluded: "We agree with the Badgley Committee that effective initiatives to combat and treat sexually transmitted diseases lie in the field of improved public health practice and administration."[36]

Ultimately, while an infectious disease offence may appear to be a novel invention of 2019, its historic antecedents can be found over a century and a half earlier in the United Kingdom. The Parliament of Canada did not repeal the modern predecessor to the 2019 House of Commons proposal until 1985. The lack of reported cases about a general offence that remained on the books from 1919 to 1985 may provide clues about the criminal legal system's ambivalence to criminalizing STIs. Such an ambivalent posture is rarely adopted in the context of modern HIV-related prosecutions. A general offence on the books is unlikely to be a general offence in practice.

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33. Canadian Bar Association Ontario, *Report of the Committee to Study the Legal Implications of AIDS* (Toronto: Canadian Bar Association, 1986) at 61.
34. Special Committee on Pornography and Prostitution, *Pornography and Prostitution in Canada* (Ottawa: Minister of Supply & Services Canada, 1985) (Paul Fraser) [Fraser Committee]; Committee on Sexual Offences Against Children and Youth, *Sexual Offences Against Children* (Ottawa: Minister of Supply & Services, 1984) (Robin Badgley) [Badgely Committee].
35. Fraser Committee, *supra* note 34 at 556.
36. *Ibid*.

II. *HIV exceptionalism*

This section draws on the literature on HIV exceptionalism to demonstrate how Canadian courts interpreted the fraud provision of the *Criminal Code* (s 265(3)(c)) to criminalize people living with HIV who, under certain circumstances, failed to disclose their status to sexual partners. With this discussion in place, the section proceeds to explain why the 2019 House of Commons proposal to create a general offence designed to target all infectious diseases constitutes an effort to redress the criminal legal system's longstanding exceptional treatment of HIV.

1. *Theorizing HIV exceptionalism*

First appearing in the *New England Journal of Medicine* in 1991, "HIV exceptionalism" was designed to describe the myriad societal and institutional processes through which HIV is treated differently from other infectious diseases.[37] Because HIV has been constructed in exceptional terms, policy and legal actors have typically described it as requiring responses that go above and beyond other communicable diseases.[38]

In the early days of the epidemic, when HIV came to be known variously as "GRIDS," a "gay cancer," and a "gay plague,"[39] criminal law actors were not particularly interested in punishing people for non-disclosure or transmission. There are at least two accounts we might offer to help explain this dynamic. First, gay men who later learned that they had been exposed to HIV without their knowledge during a sexual encounter were often constructed as blameworthy subjects engaged in risky and promiscuous activities. Police and prosecutors seemed less interested in targeting HIV non-disclosure and transmission when the complainants themselves could not be readily cast as innocent victims of crime seeking protection from the state.[40] A second explanation we might offer for the dearth of early criminal law prosecutions foregrounds the long history marked by violence, harassment, and discrimination that queer communities experienced, and continue to experience, at the hands of the police. We can think of the 1981 Toronto Bathhouse Raids as being but one example of a range of practices undertaken by criminal law actors to target queer communities.[41] In view of this dynamic, it is hardly surprising that gay men would not instinctively consider reaching out to the police with

37. Bayer, *supra* note 8.
38. Smith & Whiteside, *supra* note 8.
39. Kyle Kirkup, "The Gross Indecency of Criminalizing HIV Non-Disclosure" (2020) 70:3 UTLJ 263 at 276 [Kirkup, "Gross Indecency"], DOI: <10.3138/utlj.2019-0054>.
40. Shayo Buchanan, *supra* note 9 at 1290.
41. Kirkup, "Gross Indecency," *supra* note 39 at 270-271.

allegations of HIV non-disclosure or transmission. Yet such dynamics did not hold. As it became clearer that HIV was not only moving across queer networks, but also into mainstream, heterosexual society, criminalization efforts escalated. This happened without any expression of the will of the Parliament of Canada to create HIV-specific *Criminal Code* offences.

2. *The criminalization of HIV non-disclosure*

Beginning in the late 1980s, Canadian courts began to invent new criminological techniques to govern people living with HIV who failed to disclose their status, or where they put others at risk of contracting the condition. HIV was constructed as exceptionally deserving of punishment under the criminal law. What follows below is a sketch of the emergence of this dynamic.

The *Criminal Code* has never contained any specific offences related to the non-disclosure or transmission of HIV. The current approach is the product of judge-made law. The *Criminal Code* provides a broadly applicable definition of consent in section 265(1).[42] This definition applies to all forms of assault, including sexual assault and aggravated sexual assault. Section 265(3) sets out the circumstances under which no consent is obtained. Importantly, section 265(3)(c) provides that fraud vitiates consent. In the early days of the HIV/AIDS epidemic, the meaning of fraud became the site of significant contestation, as police, lawyers, and judges attempted to determine which activities would have the legal effect of vitiating consent (for example, HIV non-disclosure) and which would not (for example, the man who tells a prospective sexual partner that he is single but is actually married).

Beginning in the late 1980s, police, Crown prosecutors, and judges began to construct instances where individuals failed to disclose their HIV-positive status to sexual partners as the type of fraud that was capable of vitiating consent under section 265(3)(c). One of the impediments to this approach, however, was an expansive body of common law authorities dating back to 1888 requiring that, to vitiate consent, fraud needed to relate to the nature and quality of the act or the identity of the person with whom

42. *Criminal Code*, *supra* note 29 at s 265(1) provides:
265 (1) A person commits an assault when
(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

the complainant was having sex. In *R v Clarence*, for example, most of the court held that a man's failure to disclose that he had gonorrhea to his wife did not vitiate her consent to sexual intercourse. Justice Stephen, writing for the majority, reasoned: "[T]he only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act."[43] The High Court of Australia in the 1957 decision of *Papadimitropoulos v The Queen* reviewed the common law authorities on the meaning of fraud and drew a similar conclusion, namely that "consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing. But once the consent is comprehending and actual the inducing causes cannot destroy its reality."[44] The Supreme Court of Canada approvingly cited the common law limits on fraud for assault, as articulated in *Clarence* and *Papadimitropoulos*, in a 1967 decision.[45] The *Criminal Code* eventually codified the common law limitations on fraud for assault. Indeed, until 1983, the Code provided that consent to sexual intercourse was vitiated when it was obtained "by false and fraudulent representations as to the nature and quality of the act."[46] The non-disclosure of an individual's HIV-positive status would seem incapable of meeting the strict requirements of this codified common law rule.

Parliament significantly overhauled the law of sexual assault in 1983. One of the most important changes was the introduction of a general

43. *R v Clarence*, (1888) 22 QBD 23 at 44, [1886-90], All ER Rep 133 [*Clarence*].
44. *Papadimitropoulos v The Queen*, (1957) 98 CLR 249, [1958] ALR 21 (HCA) [*Papadimitropoulos*].
45. *Bolduc and Bird v The Queen*, [1967] SCR 677 at 681, [1967] SCJ No 6 (QL).
46. Immediately prior to 1983, the general assault provision (RSC 1970, c C-34, s 244) provided:
A person commits an assault when (a) without the consent of another person or with consent, where it is obtained by fraud, he applies force intention to the person of the other, directly or indirectly.
The rape provision set out in s 143 provided:
143. A male person commits rape when he has sexual intercourse with a female person who is not his wife,
(a) without her consent, or
(b) with her consent if the consent
(i) is extorted by threats or fear of bodily harm,
(ii) is obtained by personating her husband, or
(iii) is obtained by false and fraudulent representations as to the nature and quality of the act.
The indecent assault provision (s 149) stated:
149. (1) Every one who indecently assaults a female person is guilty of an indictable offence and is liable to imprisonment for five years.
(2) An accused who is charged with an offence under subsection (1) may be convicted if the evidence establishes that the accused did anything to the female person with her consent that, but for her consent, would have been an indecent assault, if her consent was obtained by false and fraudulent representations as to the nature and quality of the act.

definition of consent, which applied to all forms of assault, including sexual assault. For our purposes, the discursive shift in 1983 from "false and fraudulent representations as to the nature and quality of the act" to the general wording of "fraud" became hotly contested in the 1998 decision in *R v Cuerrier*, one of two leading HIV non-disclosure decisions in Canada.[47] The Crown argued that by shifting from "false and fraudulent representations as to the nature and quality of the act" in the offences of rape and indecent assault to the more general "fraud," Parliament intended to oust a long body of common law precedents—and to expand the power of fraud to vitiate consent. The defence rejected this contention. Rather than revealing Parliament's intent to expand fraud and upend over one hundred years of common law precedent, the shift in language from "false and fraudulent representations as to the nature and quality of the act" to simply "fraud" was easy to explain: The definition of consent needed to apply to all forms of assault, whether sexual or otherwise. The previous fraud wording was too specific to apply to an overhauled definition of consent.[48]

The Court in *Cuerrier* split three ways in interpreting the meaning of fraud. Justice Cory, writing for the majority, introduced a definition of fraud from the commercial context, which he proposed to adapt for use in the context of sexual assault. Commercial fraud typically requires both dishonesty and deprivation. Applied to HIV non-disclosure, the first requirement of a dishonest act was to be assessed objectively to determine whether the accused person either was deliberately deceptive or simply failed to disclose their status. Justice Cory would draw no distinction between deliberate falsehoods and failures to disclose because the "possible consequence of engaging in unprotected intercourse with an HIV-positive person is death."[49] The second requirement was that the dishonesty result in deprivation, either in terms of actual harm or a risk of harm. Recognizing that such an approach, if left unconstrained, could significantly expand the contours of the criminal law, Justice Cory qualified the test such that the Crown would have to "establish that the dishonest act (either falsehoods or failure to disclose) had the effect of exposing the person consenting to a significant risk of serious bodily harm."[50] What constituted significant risk of serious bodily harm, he suggested, would be decided on the facts of

47. *R v Cuerrier*, [1998] 2 SCR 371, 162 DLR (4th) 513 [*Cuerrier*]. The Supreme Court of Canada's other leading decision on HIV non-disclosure is *R v Mabior*, 2012 SCC 47 [*Mabior*]. It was released with the short companion case of *R v DC*, 2012 SCC 48 [*DC*].

48. For a synthesis of these competing arguments, see *Cuerrier*, *supra* note 47 at paras 29-41.

49. *Ibid* at para 126.

50. *Ibid* at para 128.

each case.[51] He further suggested that, while "[a]bsolutely safe sex may be impossible," the "careful use of condoms might be found to so reduce the risk of harm that it could no longer be considered significant so that there might not be either deprivation or risk of deprivation."[52]

Justice L'Heureux-Dubé would have gone further, introducing an unqualified conception of fraud, one that would include any deceit inducing consent to contact. In her view, this broad conception of fraud was in keeping with Parliament's objectives in overhauling the law of sexual assault in 1983. Had her view carried the day, the Crown would only have been required to prove beyond a reasonable doubt that the accused acted "dishonestly in a manner designed to induce the complainant to submit to a specific activity, and that absent the dishonesty, the complainant would not have submitted to the particular activity, thus considering the impugned act to a non-consensual application of force."[53] Justice L'Heureux-Dubé was critical of Justice Cory's attempt to limit the scope of section 265(3) by creating the "significant risk of serious bodily harm test."[54] Her approach would have significantly expanded the use of section 265(3)(c) to vitiate consent. Without any internal limitations, all deceptions designed to induce the complainant to have sex—from "I am HIV-negative" to "I am not married" to "I am going to take you on a romantic vacation"—could be captured by section 265(3) of the *Criminal Code*.

Justice McLachlin (as she then was) refused to adopt the amended commercial definition of fraud preferred by Justice Cory, nor the unqualified version of fraud envisioned by Justice L'Heureux-Dubé. Justice McLachlin was clearly troubled by the prospect of expanding the scope of the criminal law without a clear expression of Parliamentary intent. She worried that such overbroad approaches would undermine the work of public health experts in attempting to combat the spread of HIV.[55] She also worried about the implications for historically marginalized communities. As she put it, "[B]ecause homosexuals, intravenous drug users, sex trade workers, prisoners, and people with disabilities are those most at risk of contracting HIV, the burden of criminal sanctions will impact most heavily on members of these already marginalized groups."[56]

In the face of this dynamic, Justice McLachlin would have modified the common law rule from *Clarence*, such that deceit about HIV status that

51. *Ibid* at para 139.
52. *Ibid* at para 129.
53. *Ibid* at para 16.
54. *Ibid* at para 19.
55. *Ibid* at para 55.
56. *Ibid*.

induces consent would be treated as fraud within the meaning of section 265(3)(c). The test for deception would be objective, focussing on whether the accused person "falsely represented to the complainant that he or she was disease-free when he knew or ought to have known that there was a high risk of infecting his partner."[57] The test for inducement would be subjective, in the sense that the trier of fact would have to be satisfied beyond a reasonable doubt that the fraud actually induced the consent.[58] While questions remain about how such an approach would have operated in practice had it formed the majority opinion of the court, Justice McLachlin's opinion likely would have had the effect of criminalizing fewer instances of HIV non-disclosure, as it would require both objective deception and subjective inducement.

The *Cuerrier* decision was the subject of considerable criticism. Among other things, commentators noted that the framework left people living with HIV with considerable confusion about the circumstances under which they were legally required to disclose their status. Others expressed concern that HIV had been singled out as uniquely capable of triggering carceral responses.[59] Other commentators offered justifications for why HIV should be treated differently when compared to other morally wrong, but not criminal, forms of deception and non-disclosure. Carissima Mathen and Michael Plaxton, for example, explained that people living with HIV who fail to disclose their status are uniquely criminally culpable because, by failing to disclose that they have a deadly disease, they treat a sexual partner "as if she had no plans or priorities beyond her own immediate sexual gratification."[60] They further sought to justify why HIV,

57. *Ibid* at para 70.
58. *Ibid*.
59. For critical commentary on the case, see e.g. Elaine Craig, "Personal Stare Decisis, HIV Non-Disclosure, and the Decision in Mabior" (2015) 53:1 Alta L Rev 207, DOI: <10.29173/alr285>; Isabel Grant, Martha Shaffer & Alison Symington, "Focus: R v Mabior and R v DC: Sex, HIV, and Non-Disclosure, Take Two: Introduction" (2013) 63:3 UTLJ 462, DOI: <10.3138/utlj.0302>; Martha Shaffer, "Sex, Lies, and HIV: Mabior and the Concept of Sexual Fraud' (2013) 63:3 UTLJ 466, DOI: <10.3138/UTLJ.63.3.0301-1>; Alison Symington, "Injustice Amplified by HIV Non-Disclosure Ruling" (2013) 63:3 UTLJ 485, DOI: <10.3138/UTLJ.0303-3>; Kirkup, "Gross Indecency," *supra* note 39; Kyle Kirkup, "Releasing Stigma: Police, Journalists and Crimes of HIV Non-Disclosure" (2015) 46:1 Ottawa L Rev 127, online <canlii.ca/t/744> [perma.cc/863U-VTVM]; Emily MacKinnon & Constance Crompton, "The Gender of Lying: Feminist Perspectives on the Non-Disclosure of HIV Status" (2012) 45:2 UBC L Rev 407; Alana Klein, "Criminal Law, Public Health, and Governance of HIV Exposure and Transmission" (2009) 13:2–3 Intl JHR 251, DOI: < 10.1080/13642980902758143>; Isabel Grant, "The Boundaries of the Criminal Law: The Criminalization of the Non-Disclosure of HIV" (2008) 31:1 Dal LJ 123, online: <canlii.ca/t/t12t > [perma.cc/CJ8P-P7BX]; Terry Skolnik, "Criminal Law During (and After) COVID-19" (2020) 43:4 Man LJ 145, online: <canlii.ca/t/sxmn> [perma.cc/SM3K-B735].
60. Carissima Mathen & Michael Plaxton, "HIV, Consent and Criminal Wrongs" (2011) 57:4 Crim LQ 464 at 483.

and not the myriad other deceptions and non-disclosures associated with sex, should be exceptionally criminalized: "This line of reasoning might give some clues as to why other forms of deception and non-disclosure, though morally wrong, do not *objectify* in a comparable way: they do not similarly diminish or demean the plans and projects *generally* that the victim of the deception has."[61] Of course, many STIs can also be lethal, particularly if they remain untreated. For example, the Human Papilloma Virus (HPV) is spread through oral, vaginal, and anal sex. HPV can cause life-threatening cancers of the cervix, vagina, vulva, penis, anus, and throat. If we accept that HIV and HPV are both potentially deadly, we might ask why HIV has been uniquely targeted by the criminal law. One reply is that HIV is singled out by the criminal legal system not because it is uniquely deadly, but because it is uniquely stigmatized.[62]

Over a decade after *Cuerrier*, the Supreme Court would again consider the exceptional criminalization of HIV non-disclosure in its 2012 decision in *R v Mabior*.[63] Responding to many of the criticisms directed at the *Cuerrier* decision, Chief Justice McLachlin, writing for a unanimous court, explained that a person living with HIV may be found guilty of aggravated sexual assault under section 273 of the *Criminal Code* if he "fails to disclose HIV-positive status before intercourse and there is a realistic possibility that HIV will be transmitted."[64] She further explained: "If the HIV-positive person has a low viral count as a result of treatment and there is condom protection, the threshold of a realistic possibility of transmission is not met, on the evidence before us."[65]

What the foregoing doctrinal history misses is that HIV-related prosecutions have not been equitably distributed across Canadian society. A 2017 study, for example, tracked 184 HIV non-disclosure prosecutions in Canada. It found that, since the *Mabior* decision in 2012, almost half (48%) of all people charged where the race was known were Black men.[66] The study found that, following *Mabior*, 38% of men were charged in cases that involved male partners, and 4% of men were charged when sex

61. *Ibid* at 484, n 84 [emphasis in text].
62. For further discussion, see Kirkup, "Gross Indecency," *supra* note 39.
63. *Mabior*, *supra* note 47. See also *DC*, *supra* note 47.
64. *Mabior*, *supra* note 47 at para 4.
65. *Ibid*.
66. Colin Hastings, Cécile Kazatchkine & Eric Mykhalovskiy, "HIV Criminalization in Canada: Key Trends and Patterns" (2017) at 4, online (pdf): *HIV Legal Network* <www.hivlegalnetwork.ca/site/hiv-criminalization-in-canada-key-trends-and-patterns/?lang=&lang=en> [perma.cc/NVX2-B2SV]. See also Eric Mykhalovskiy & Glenn Betteridge, "Who? What? Where? When? And with What Consequences? An Analysis of Criminal Cases of HIV Non-Disclosure in Canada" (2012) 27:1 CJLS 31, DOI: <10.3138/cjls.27.1.031>.

with both male and female partners took place.[67] The study also found that Indigenous women were significantly overrepresented (42%) among the women who faced charges related to HIV non-disclosure.[68] Not only is the Supreme Court's legal standard notoriously difficult to apply. HIV non-disclosure prosecutions are steeped in troubling narratives rooted in sexual, racial, and gendered hierarchies.[69] HIV non-disclosure is yet another crime that is not borne equitably by members of Canadian society.

The Department of Justice recognized the exceptional treatment of HIV non-disclosure when it published a report in 2017. The report found: "HIV is treated in an exceptional way by the criminal justice system compared to other transmissible diseases (e.g., hepatitis B, C, and human papillomavirus). Prosecutions for non-disclosure of HIV appear disproportionately and discriminatory given their relatively high number in comparison to prosecutions for non-disclosure of other transmissible diseases."[70] One year after the publication of the report, Attorney General of Canada Jody Wilson-Raybould issued a directive to the director of public prosecutions. The directive was designed to limit prosecutions in Yukon, the Northwest Territories, and Nunavut, where the federal government has jurisdiction over the administration of criminal justice. Among other things, the directive required that prosecutors in the territories not prosecute people with suppressed viral loads or where condoms were used.[71] In practice, this may mean that fewer prosecutions are brought forward in the territories, as the directive moves away from the higher standard developed in *Mabior* by not requiring both a low viral load and the use of a condom to avoid triggering the legal duty to disclose.[72]

Building on these developments, the Standing Committee on Justice and Human Rights in 2019 heard from expert testimony from thirty-one witnesses and received briefs from six civil society organizations. The hearings were replete with examples of expert testimony that, like the Department of Justice Report in 2017, identified the exceptional treatment of HIV under the criminal law. Citing evidence from Jennifer Klinck, the

67. Hastings, Kazatchkine & Mykhalovskiy, *supra* note 66 at 5.
68. *Ibid*.
69. See e.g. Shayo Buchanan, *supra* note 9 at 1342.
70. Department of Justice Canada, *Criminal Justice System's Response to Non-Disclosure of HIV* (Report) (Ottawa: Department of Justice, 2017) at 17, online (pdf): <www.justice.gc.ca/eng/rp-pr/other-autre/hivnd-vihnd/hivnd-vihnd.pdf> [perma.cc/MY5U-ZQQA].
71. Attorney General of Canada, *Directive of the Attorney General Issued under section 10(2) of the Director of Public Prosecutions Act: Prosecutions involving Non-Disclosure of HIV Status* (Ottawa: Public Prosecution Service of Canada, 2018), online: <www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p5/ch12.html> [perma.cc/J8XF-HK4B].
72. *Mabior*, *supra* note 47 at para 4.

Chair of the Egale Canada Legal Issues Committee, and Dr. Isaac Bogoch, an infectious disease specialist, the House of Commons report described the "peculiar and discriminatory treatment reserved to people with HIV by the criminal justice system, compared to the treatment reserved to people living with any other transmissible diseases."[73]

In the face of the argument that HIV had been unfairly targeted by the criminal legal system, the 2019 House of Commons study proposed to treat all infectious diseases the same by creating a new offence. Describing the rationale for this proposed approach, the Committee stated: "The Committee believes that a new offence should be created in the Criminal Code to cover HIV non-disclosure cases in specific circumstances. The new offence should not be limited to HIV but cover the non-disclosure of infectious diseases in general. The Committee is of the view that people living with HIV should not be treated differently than people living with any other infectious disease."[74] In this statement, the Committee demonstrated its understanding of the exceptional treatment of HIV under the criminal law. By proposing the creation of a new general offence, people living with HIV would no longer be "treated differently than people living with any other infectious disease."[75] Institutional actors proposed to redress HIV exceptionalism by introducing a new offence purporting to criminalize all infectious diseases equally.

III. *Preservation through transformation*

Over the past four decades, HIV advocates have actively resisted the criminalization of HIV non-disclosure and transmission. As Alexander McClelland explains, "Grassroots activists have held demonstrations, legal experts have fought and intervened in legal cases, medical experts have spoken out based on their expertise, and other forms of social action and resistance have taken place."[76] While activists' law reform efforts have resulted in change at the institutional level—in the form of studies, prosecutorial directives, and a proposal to create a new general offence—it has not always been of the sort they envisioned. This section explains why the 2019 proposal to create a general infectious disease offence may, in reality, become a de facto HIV-specific offence. To develop this argument, this section analyzes the very small body of reported decisions

73. House of Commons, *supra* note 1 at 9-10.
74. *Ibid* at 23.
75. *Ibid*.
76. Alexander McClelland, "Histories of Living in a Negative Relation to the Law: Resistance to HIV Criminalization" in Kelly Fritsch, Jeffrey Monaghan & Emily van der Meulen, eds, *Disability Injustice: Confronting Criminalization in Canada* (Vancouver: UBC Press, 2022) at 74.

where STI non-disclosure or transmission has been targeted under the existing legal framework developed in *Cuerrier* and *Mabior*. These STI cases reveal an ambivalence to criminalization that is rarely afforded to HIV non-disclosure. In the end, the proposal to create a new offence for all infectious diseases may reflect what Siegel has called "preservation through transformation."

1. *The perils of a new offence*

In 2017, the Canadian Coalition to Reform HIV Criminalization issued a national Community Consensus Statement endorsed by more than 170 civil society organizations across the country. The statement called for criminal prosecutions to be limited to cases of actual, intentional transmission of HIV. It further called on lawmakers to remove HIV non-disclosure from the reach of sexual assault law and to ensure that other *Criminal Code* provisions used to target people living with HIV were appropriately limited.[77] What law reform advocates were given in 2019, however, was a proposal from lawmakers to create an offence for all infectious diseases.

A skeptical observer might ask whether an offence designed to target all infectious diseases will actually do so in practice. In recent years, at least thirteen U.S. states have amended their HIV criminalization laws to include other STIs, such as hepatitis B and C.[78] However, such laws are rarely enforced outside the context of HIV.[79] Given the longstanding stigma directed at HIV, along with the "homophobia, racism, and gender stereotyping that shape exaggerated fears and moral judgments about AIDS and HIV in the broader society," it seems unlikely that all STIs would be treated equally under such a regime.[80] As Kim Shayo Buchanan explains, "Law reforms that criminalize other STIs seem in practice to serve as window dressing. The criminalization of a broader swath of sexual deceptions might address the discriminatory social meaning of HIV criminalization, but the absence of political will to do so suggests, again, that HIV crimes enforce a particularized stigma."[81]

77. Canadian Coalition to Reform HIV Criminalization, "Community Consensus Statement" (2017), online: *HIV Criminalization* <www.hivcriminalization.ca/community-consensus-statement/> [perma.cc/MHY5-ELAL]

78. Brad Sears, Shoshana K Goldberg & Christy Mallory, "The Criminalization of HIV and Hepatitis B and C in Missouri: An Analysis of Enforcement Data from 1990 to 2019" (February 2020) at 7, online (pdf): *UCLA Williams Institute* <williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-MO-Feb-2020.pdf> [perma.cc/7BH6-ZNJ9].

79. Shayo Buchanan, *supra* note 9 at 1340.

80. *Ibid* at 1338.

81. *Ibid* at 1341.

2. *STI non-disclosure cases*

The handful of reported decisions where STIs other than HIV have been prosecuted under the framework developed by the Supreme Court in *Cuerrier* and *Mabior* provide a window into how a newly minted offence applying to all infectious diseases might operate in practice. This small body of caselaw reflects an ambivalence about STI non-disclosure prosecution that is rarely offered in the context of comparator HIV-related prosecutions.

While the framework developed by the Supreme Court in *Cuerrier* and modified in *Mabior* has always purported to encompass STIs beyond HIV, the empirical reality is that there are almost no reported cases that actually do so. While reported decisions are an admittedly imperfect measure of particular charging patterns, an exhaustive review of reported decisions published between 1998 (when *Cuerrier* was released) and the end of 2021 (the end date of this study) found only seven cases related to alleged sexual assaults on adults involving STIs other than HIV.[82] Despite significant increases in the prevalence of STIs such as syphilis, chlamydia, and gonorrhea in Canada,[83] reported decisions appear to only engage questions of the non-disclosure or transmission of two STIs—namely, hepatitis C and genital herpes. Both the lack of reported cases, along with the attendant reasoning offered by judges in these cases, may reflect an ambivalence to criminalization that is rarely afforded in the context of HIV. This suggests that a newly created offence designed to apply to all infectious diseases would likely become a de facto HIV offence. What follows below is a summary of these reported decisions in chronological order, followed by a short analysis of each decision.

Citation	Sexually Transmitted Infection	Disposition
R v Jones, 2002 NBQB 340	Hepatitis C	Not guilty of aggravated sexual assault.
R v Sherman, 2010 ONCA 462	Genital herpes	Convicted of sexual assault.
R v H(J), 2012 ONCJ 753 *R v H(J)*, 2014 ONSC 2288	Genital herpes	Ontario Court of Justice accepted a guilty plea for sexual assault. Conditional discharge.

82. Two research assistants independently searched for all reported decisions available on electronic databases (Canadian Legal Information Institute, LexisNexis, and Westlaw) from 1998 to 2021 where adults were accused of committing at least one offence related to the non-disclosure or transmission of a STI other than HIV (e.g. genital herpes; hepatitis C).

83. Public Health Agency of Canada, *Report on Sexually Transmitted Infections in Canada, 2017*, (Report) (Ottawa: Public Health Agency of Canada, 2019), online (pdf): <www.canada.ca/content/dam/hc-sc/documents/services/publications/diseases-and-conditions/sexually-transmitted-infections-canada-2017-infographic/STI_2017_20191113_EN.PDF> [perma.cc/8RUT-24VT].

R v Williams, 2013 ONSC 4354	Hepatitis C	Not guilty of aggravated sexual assault.
FW v Edmonton (Police Service), 2014 ABLERB 054	Genital herpes	Police dismissed complaint without laying charges. Decision upheld by the Alberta Law Enforcement Review Board.
R v CB, 2017 ONCJ 545	Genital herpes (and HIV)	Not guilty of aggravated sexual assault.
R v JJT, 2017 ONCJ 255	Genital herpes	Not guilty of sexual assault causing bodily harm and not guilty of criminal negligence causing bodily harm.

The first reported decision applying the *Cuerrier* standard outside the context of HIV was *R v Jones* in 2002.[84] It is notable that this decision was brought against a gay man accused of not disclosing his hepatitis C status to two male sexual partners prior to having condomless sex. Justice Garnett of the New Brunswick Court of Queen's Bench found the first complainant to be an unreliable witness whose relationship with the accused had "ended unpleasantly."[85] She further explained: "In particular, I do not believe his testimony that he did not know that Jones had Hepatitis 'C' when he consented to engage in unprotected sex with him. The Crown has therefore failed to prove that the consent given by M. was vitiated by fraud and I therefore find the accused not guilty on count number one."[86] While she found the second complainant to be credible, she was not convinced that the standard developed in *Cuerrier* had been met—the accused person was "never advised to tell his partners about his health"[87] and the likelihood of transmission was less than 1%.[88] This decision, particularly its discussion of condom use, the information medical authorities conveyed to the accused person, and the risk of transmission, reflects an ambivalence to criminalizing hepatitis C that is rarely afforded in the context of HIV.

R v Sherman[89] involved the non-disclosure of genital herpes. In a 2009 unreported decision, Justice Roberts of the Ontario Court of Justice found the accused person guilty of criminal negligence causing bodily harm and sentenced him to twelve months in prison. The accused person failed to disclose his condition to the complainant and had condomless vaginal intercourse with her on several occasions. In a short decision, the

84. *R v Jones*, 2002 NBQB 340 [*Jones*].
85. *Ibid* at para 8.
86. *Ibid* at para 9.
87. *Ibid* at para 29.
88. *Ibid* at para 26.
89. *R v Sherman*, 2010 ONCA 462 [*Sherman*].

Court of Appeal for Ontario endorsed Justice Roberts' reasoning, ruling that the "trial judge's finding flow[ed] from her implicit acceptance of the complainant's evidence that the appellant admitted that he knew he was infected and did not tell her, and from statements made by the appellant in his cross-examination which decided conduct by him that was consistent only with someone who was aware that he was infected and chose to disregard that fact in conducting his relationship with the complainant."[90] This case appears to be the first and only reported decision where, under the *Cuerrier* framework, a conviction was entered for the non-disclosure of a STI other than HIV.

The 2012 decision in *R v H(J)*[91] involved another case related to the alleged non-disclosure of genital herpes. The Ontario Court of Justice accepted the accused person's guilty plea for sexual assault simpliciter—rather than the more serious offence of aggravated sexual assault that is typically used in cases involving HIV non-disclosure. Justice Green explained that the accused person "accepted responsibility for his criminal conduct," was a "contrite first offender with pro-social antecedents," and would experience "certain immigration consequences" if a conviction was entered.[92] Citing the *Sherman* decision as the "sole related decision of which [he was] aware," Justice Green further expressed concern that there is "very little jurisprudential guidance as to the appropriate disposition in cases involving the transmission of herpes through sexual intercourse where otherwise valid consent is vitiated by fraud or non-disclosure."[93] After describing the prevalence of genital herpes in Canada,[94] Justice Green explained that HIV and herpes are qualitatively different: "Unlike HIV, there is little common intelligence about the risks associated with genital herpes or the ease with which it may be transferred from one person to another during the course of their sexual activity."[95] He then concluded by expressing doubt about the prospect of general deterrence in cases involving the non-disclosure of genital herpes: "Other than treating the offender as a lamb to be sacrificed on the altar of general deterrence, there seems little point in making him the object of a sentence driven by the possibility of deterring others."[96] The judge therefore granted the accused person a conditional discharge and placed him on probation for one year.[97]

90. *Ibid* at para 2.
91. *R v H(J)*, 2012 ONCJ 753 [*H(J)*].
92. *Ibid* at para 19.
93. *Ibid* at para 20.
94. *Ibid* at para 24.
95. *Ibid* at para 25.
96. *Ibid* at para 26.
97. *Ibid* at para 37.

From describing the accused person as a remorseful first-time offender, to underscoring the lack of "common intelligence" about genital herpes when compared to HIV, to expressing skepticism about the prospect of general deterrence, the decision in *H(J)* is replete with examples where Justice Green seems animated by an ambivalence towards the charge before him.

The 2013 decision in *R v Williams*[98] involves the non-disclosure of hepatitis C. The accused was charged with a series of offences, including aggravated sexual assault, robbery, aggravated assault, and forcible confinement. In the early morning hours, the complainant was headed home from a friend's apartment. She got into the elevator and encountered the accused, who she alleged "wanted her to do something for him and went to unbuckle his pants." She refused and tried to run away. As she was running through a hallway to get away from the accused, the complainant alleged that he grabbed her neck and bit her forehead and cheek in a stairwell. The complainant underwent monthly blood tests for one year but did not contract hepatitis C.[99] Justice Dunnet was not satisfied beyond a reasonable doubt than aggravated sexual assault took place, nor was she satisfied beyond a reasonable doubt that a sexual assault occurred in the stairwell. The accused was therefore acquitted on this charge,[100] but ultimately convicted of theft and assault causing bodily harm.[101]

FW v Edmonton (Police Service)[102] involved a complaint to the Alberta Law Enforcement Review Board after the Edmonton Police Service declined to lay charges in a case where a man allegedly failed to disclose that he had genital herpes to a sexual partner who later contracted the infection. After speaking with a member of the Edmonton Police Service's Sexual Assault Unit and meeting with the complainant, two officers "advised [the complainant] that the *Criminal Code*, and health legislation in Alberta, did not support laying a criminal charge."[103] Troubled by this result, the complainant repeatedly contacted the Edmonton Police Service. Police further investigated the matter and contacted a Crown Prosecutor, but ultimately concluded that "this conduct would not amount to an offence."[104] The complainant proceeded to have this decision reviewed by the Alberta Law Enforcement Review Board. The Review Board examined the Edmonton Police Service's decision that there was

98. *R v Williams*, 2013 ONSC 4354 [*Williams*].
99. *Ibid* at para 17.
100. *Ibid* at paras 58-71.
101. *Ibid* at para 85.
102. *FW v Edmonton (Police Service)*, 2014 ABLERB 054 [*FW*].
103. *Ibid* at para 2.
104. *Ibid* at para 3.

insufficient evidence which, if believed, could lead a reasonably and properly instructed person to decide that the investigation was negligent.[105] The Board therefore concluded that the decision of the Edmonton Police Service was reasonable.[106] This reported decision involving genital herpes, where charges were never laid because "the *Criminal Code*, and health legislation in Alberta"[107] did not support doing so, may reflect an ambivalence on the part of criminal law actors in targeting STIs as zealously as they do when it comes to HIV.

In *R v CB*,[108] the accused person was alleged to have failed to disclose to three complainants that he had both genital herpes and HIV. While none of the complainants contracted HIV, one (K.S.) indicated that she acquired genital herpes and alleged that the accused person had transmitted them to her during sexual intercourse.[109] The accused person was initially charged with three counts of aggravated sexual assault (one for each complainant) for failing to disclose his HIV status. He was also charged with one count of sexual assault causing bodily harm for failing to disclose his genital herpes to K.S.[110] When it came to the count related to genital herpes, Justice Gee held that the Crown had not met its burden for two reasons. The first was the lack of medical evidence: "As such I find that without some medical evidence to assist in determining that Mr. C.B. is the source of K.S.'s HSV [genital herpes] infection, I am left with a reasonable doubt and as such this charge will be dismissed as well." Describing K.S.'s discovery of the accused person's list of medications for genital herpes and HIV, Justice Gee explained that he was further "left with a reasonable doubt that had [C.B.] disclosed [K.B.] would not have consented to the sexual activity complained of in this count."[111] Justice Gee ultimately concluded that the Crown "failed to prove any of the charges against Mr. C.B. beyond a reasonable doubt and as a result all charges are hereby dismissed."[112]

R v JJT involved another acquittal related to the non-disclosure of genital herpes, in this case for the charges of sexual assault causing bodily harm and criminal negligence causing bodily harm.[113] Justice Kinsella of the Ontario Court of Justice held that, by not introducing any medical evidence, the Crown "failed to establish beyond a reasonable doubt that [the

105. *Ibid* at para 23.
106. *Ibid* at para 24.
107. *Ibid* at para 2.
108. *R v CB*, 2017 ONCJ 545 [*CB*].
109. *Ibid* at paras 1-2.
110. *Ibid* at para 3.
111. *Ibid* at para 100.
112. *Ibid* at para 101.
113. *R v JJT*, 2017 ONCJ 255 at para 1 [*JJT*].

complainant] contracted the genital herpes virus from Mr. J.J.T."[114] Even with this evidence, Justice Kinsella would have still acquitted the accused. She explained: "There is no compelling reason to treat an individual who carries the herpes virus should be more [sic] more seriously than one who carries the HIV virus. The evidence before this court is that Mr. J.J.T. had no knowledge that he could transmit the disease, given that he had had it for more than a decade and had never, to his knowledge, infected anyone else. In other words, there is no evidence before the court that Mr. J.J.T. had any reason to believe that there was a reasonable possibility of transmission."[115] This case reveals judicial uncertainty about grafting other STIs such as genital herpes onto the framework developed by the Supreme Court in *Cuerrier* and *Mabior*.

In reviewing these decisions, what is most striking is the ambivalence to the criminalization of non-disclosure or transmission of STIs on the part of police, prosecutors, and judges. These cases may provide a window into what an offence for all infectious diseases—the sort envisioned by the 2019 House of Commons study—might look like in practice. If these cases provide any indication of future directions, it seems likely that HIV will continue to be targeted under a new, supposedly modernized regime. This leads to the conclusion that the 2019 House of Commons' study may constitute what Siegel has called "preservation through transformation." In the face of advocates' successful contestation of the terms of HIV criminalization, lawmakers "gradually relinquish[ed] the original rules and justificatory rhetoric of the contested regime and [found] new rules and reasons" designed to protect the status quo. Advocates had successfully pressured lawmakers to translate HIV non-disclosure into a "more contemporary, and less controversial, social idiom"—in this case, the creation of an offence that would purport to treat all infectious diseases equally. Lawmakers, however, resisted a larger reimagining of the criminal law and sexual contagion.[116] Even under a new offence for all infectious diseases, it is likely that prosecutions for HIV non-disclosure will continue under the guise of a new offence that was expressly designed to respond to the longstanding stigma directed at HIV.

Conclusion

Canadian criminal law is replete with examples where lawmakers have invented new techniques to criminalize sexual contagion. The current approach developed by the Supreme Court in *Cuerrier* and *Mabior*

114. *Ibid* at paras 41-42.
115. Ibid at para 52.
116. Siegel, *supra* note 10 at 2119.

constructs HIV in exceptional terms. While there are a small number of cases where the non-disclosure of genital herpes and hepatitis C have been targeted, the reality is that, since the 1980s, HIV has been treated as an exceptional condition—one that is uniquely deserving of carceral punishment. To its credit, the 2019 House of Commons study recognized, and sought to address, the criminal law's exceptional treatment of HIV. The proposal to remove HIV from the ambit of sexual assault laws in the *Criminal Code* constituted a welcome development for many advocates. However, the recommendation to create an offence for all infectious diseases constituted an antiquated, misguided, and misleading approach to law reform. The reinvigoration of an offence similar to one that was repealed in 1985 runs the risk of becoming a de facto offence targeting HIV. Such an approach reflects what Siegel has called preservation through transformation—it maintains the logic of criminalizing HIV non-disclosure, but does so in a new, seemingly more benign register.

Ultimately, debates about criminalizing the non-disclosure and transmission of STIs may reveal our underlying normative commitments about sex. Writing about HIV non-disclosure, Shayo Buchanan observes that criminalization "seems to protect an inchoate expectation that heterosexuals should be immune from anxiety about HIV—even when they engage in casual, unprotected, or commercial sex."[117] The criminalization of STI non-disclosure and transmission renders criminal a mundane fact of everyday life for some located in marginalized sexual, racial, and gendered hierarchies.[118] When HIV non-disclosure does occur, the criminal legal system is marshalled in the name of a particular—and often privileged—conception of sexual autonomy. This approach ignores the reality that, when people have sex, they sometimes transmit and acquire STIs. Perhaps a better approach to the criminal law's rendering of sex requires a fundamental paradigm shift, one that understands STI non-disclosure and transmission as little more than one potential outcome of an active sexual life. In the end, we may conclude that the law suffers from its own sexual infections.

117. Shayo Buchanan, *supra* note 9 at 1342.
118. *Ibid*.