



**LEAF (Women's Legal Education and Action Fund)**

**A Feminist Approach to Law Reform on HIV Non-Disclosure**

**January 2019**

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### 1. Introduction

This position paper outlines and explains LEAF’s position on HIV non-disclosure. Canadian law currently criminalizes HIV non-disclosure where a person who is HIV-positive exposes their sexual partner to a significant risk of serious bodily harm, defined as a realistic possibility of HIV transmission. This area of law has been the subject of significant criticism and law reform efforts, including a recent federal prosecutorial directive,<sup>1</sup> due to its harsh and punitive approach to those living with HIV. It raises issues central to LEAF’s mandate of protecting and promoting women’s equality.

Women’s equality is directly engaged by the law of HIV non-disclosure. Women are often complainants in these cases - the majority of HIV non-disclosure prosecutions occur in the context of heterosexual sexual activity<sup>2</sup> and nearly 20% of women with HIV report having acquired the virus through sexually coercive experiences.<sup>3</sup> In addition, HIV non-disclosure prosecutions have led to an increase in women, as accused persons, being convicted of aggravated sexual assault, and have had particular impact on women from certain communities. Almost 80% of women living

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<sup>1</sup> Department of Justice Canada, *Attorney General of Canada to issue Directive Regarding Prosecutions of HIV Non-Disclosure Cases*, (News Release; Dec 1, 2018) online: <https://www.canada.ca/en/department-justice/news/2018/12/attorney-general-of-canada-to-issue-directive-regarding-prosecutions-of-hiv-non-disclosure-cases.html> [Prosecutorial Directive]

<sup>2</sup> E Mykhalovskiy, G Betteridge & D McLay, *HIV Nondisclosure and the Criminal Law: Establishing Policy Options for Ontario* (Toronto: Ontario HIV Treatment Network, 2010) at 12, online: CATIE <http://www.catie.ca/pdf/Brochures/HIV-non-disclosure-criminal-law.pdf>.

<sup>3</sup> Kevin Ritchie, “Laws criminalizing HIV are putting vulnerable women at greater risk” *Now Toronto* (11 January 2017) online: <https://nowtoronto.com/news/laws-criminalizing-hiv-are-putting-vulnerable-women-at-great/>.

with HIV are Indigenous or racialized women,<sup>4</sup> who already face serious over-criminalization in Canada.<sup>5</sup>

In addition, the development of the law relating to HIV non-disclosure has had a significant impact on the law of sexual assault, to the detriment of women's equality. Feminists have raised concerns that the law of HIV non-disclosure has narrowed the legal scope of consent, shifted established understandings of fraud as a category of behaviour that vitiates consent, and has the potential to reintegrate problematic uses of sexual history evidence and other discriminatory myths in determining the presence or absence of consent. These developments could damage sexual assault law for all women.

LEAF therefore has a strong interest in the coherent development of the law in a manner that recognizes the diverse interests of women. LEAF seeks a legal approach that addresses the equality rights of women both as accused persons and complainants in HIV non-disclosure cases and protects women's equality rights in the law of sexual offences more generally. The following summarizes LEAF's position, which we explain further below:

1. HIV non-disclosure should not be treated as a sexual offence.
2. Where HIV non-disclosure results in actual transmission of the virus, prosecution may be appropriate under non-sexual *Criminal Code* offences, ensuring that those who contract HIV from irresponsible partners receive protection from the criminal law.
3. However, even where transmission takes place, prosecutorial guidelines should ensure that HIV positive women who are victims of violence, coercion or sexual assault are not prosecuted for their failure to disclose their HIV status when that failure is itself a product of the violence or threats of violence committed against them.
4. The law of sexual assault is intended to promote women's equality. As explained below, this requires affirming the broad scope of consent in sexual assault law and ensuring that the approach to fraud in the context of sexual assault prioritizes and protects women's bodily and sexual autonomy.

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<sup>4</sup> Canadian Aboriginal Aids Network, "Fact Sheet on HIV and AIDS: Aboriginal Women and Girls in Canada" (2011) online: <http://caan.ca/wp-content/uploads/2012/05/Womens-Fact-Sheet-EN.pdf> at 252.

<sup>5</sup> Tina Hotton Mahoney, Joanna Jacob and Heather Hobson, "Women in Canada: A Gender Based Statistical Report: Women in the Criminal Justice System" (Statistics Canada: 2017), <http://www.statcan.gc.ca/pub/89-503-x/2015001/article/14785-eng.pdf>, at 39.

In LEAF’s view, this approach will best achieve feminist goals. Removing HIV non-disclosure from sexual assault law would protect the equality-enhancing purpose of sexual assault law by affirming a concept of consent rooted in sexual autonomy. Maintaining non-sexual criminal liability in cases where transmission has taken place would support women whose partners have failed to take responsible steps to prevent transmission, but would at the same time move the law away from the harsh and stringent approach currently taken to those living with HIV. Appropriate prosecutorial guidelines will acknowledge the special vulnerability of marginalized women living with HIV.

In December 2018, the federal government released a prosecutorial directive intended to reduce the over-criminalization of those living with HIV/AIDS.<sup>6</sup> The directive, though it does not apply to provincial prosecutions, marks a significant improvement from the previous approach for the equality rights of women and those living with HIV. However, the comprehensive changes proposed in this paper remain necessary to ensure that all rights at stake receive meaningful protection.

## **2. The Law of HIV Non-Disclosure**

Canada has taken a very punitive approach to the criminalization of people who fail to disclose their HIV status to their sexual partners. Since the 1998 decision in *R. v. Cuerrier*<sup>7</sup> the failure to disclose one’s HIV-positive status has been prosecuted most often as aggravated sexual assault, the most serious form of sexual assault, which is punishable by a maximum life sentence. Unlike with sexual assault generally, these prosecutions have a high conviction rate and have created a great deal of concern within the HIV/AIDS community.<sup>8</sup>

HIV non-disclosure is treated as sexual assault because the courts have interpreted the failure to disclose HIV status as fraud vitiating consent in circumstances where there is a significant risk of bodily harm. The *Criminal Code*<sup>9</sup> makes it an offence to touch someone in a sexual manner without consent. The term “consent” is defined by s. 273(1) of the *Code* as “the voluntary agreement of

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<sup>6</sup> Prosecutorial Directive, *supra* note 1.

<sup>7</sup> *R v Cuerrier*, [1998] 2 SCR 371 [*Cuerrier*].

<sup>8</sup> Alison Symington, “HIV Exposure as Sexual Assault” in E Sheehy, ed *Sexual Assault Law in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) at p 661 [Symington].

<sup>9</sup> *Criminal Code*, RSC 1985, c C-46, s 162(1) [*Criminal Code*].

the complainant to engage in the sexual activity in question.”<sup>10</sup> The *Code* also provides a list of circumstances in which no consent is given, even if the complainant appeared to agree to participate at the time of the activity. Section 265(3) states that “no consent is obtained where the complainant submits or does not resist by reason of ... (c) fraud”.<sup>11</sup> The courts have said that if there is a realistic possibility of transmission of HIV, and the accused fails to disclose their HIV status, this constitutes fraud negating consent. The Crown must prove that the complainant would not have consented had he or she known about the accused’s HIV status.

In Canadian criminal law, fraud vitiating sexual consent requires proof of both dishonesty and deprivation.<sup>12</sup> The Supreme Court of Canada first held in *Cuerrier* that deprivation can mean a significant risk of serious bodily harm<sup>13</sup> and that HIV infection constitutes serious bodily harm.<sup>14</sup> In the subsequent *Mabior* decision, the Court held that a realistic possibility of transmission was sufficient to constitute a significant risk of bodily harm (and therefore, a deprivation) and that, unless the accused had a low viral load **and** used a condom, a realistic risk of transmission would be found.<sup>15</sup> HIV experts disagree, and have argued that either a low viral load or condom usage is sufficient to prevent transmission.<sup>16</sup>

The decision in *Mabior* thus maintained Canada’s harshly punitive approach to HIV non-disclosure, arguably creating an even more expansive approach to criminalization than *Cuerrier* by requiring both condom use and a low viral load in order to escape criminalization when there is a failure to disclose. This standard is also gendered, because women do not control the condom

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<sup>10</sup> *Ibid*, at s 273(1).

<sup>11</sup> *Ibid*, at s 265(3).

<sup>12</sup> In *Cuerrier*, *supra* note 7, the SCC defined “deprivation” as serious bodily harm or a significant risk of serious bodily harm (para 28). In *R v Mabior*, 2012 SCC 47, [*Mabior*] the SCC affirmed this definition (para 12) and went on to state that a “realistic possibility of transmission of HIV” would constitute a significant risk of serious bodily harm, and therefore a deprivation (para 91). In *R v Hutchinson*, 2014 SCC 19 [*Hutchinson*], the SCC confirmed that, in the context of sexual assault, the only deprivation that would render a dishonest act fraudulent in the meaning of the *Code* is a significant risk of serious bodily harm: “With only two narrow exceptions that we will discuss shortly, consent will be vitiated by fraud *only* when consent is obtained by lies or deliberate failure to disclose *coupled with* a significant risk of serious bodily harm as a result of the sexual touching” (para 34).

<sup>13</sup> *Cuerrier*, *supra* note 7 at paras 126-128.

<sup>14</sup> *Ibid* at para 128.

<sup>15</sup> *R v Mabior*, *supra* note 12 at paras 81-103.

<sup>16</sup> Mona Loutfy, Mark Tyndall, et al, “Canadian consensus statement on HIV and its transmission in the context of criminal law” (2014) Can J Infect Dis Med Microbiol 3; See also Department of Justice, *Criminal Justice System’s Response to Non-Disclosure of HIV*, (Canada: Department of Justice, 2017), online: <http://www.justice.gc.ca/eng/rp-pr/other-autre/hivnd-vihnd/index.html> [DOJ Report].

use of male partners and because women may find it more difficult to disclose their HIV status in abusive relationships and when they themselves are victims of sexual assault.

On December 1, 2018, the federal government announced a new prosecutorial directive for HIV non-disclosure cases, recommending a less punitive approach.<sup>17</sup> Pursuant to this directive, the Attorney General of Canada will not prosecute charges of HIV non-disclosure where the person living with HIV has maintained a suppressed viral load, or used condoms, or engaged only in oral sex, because there is likely no realistic possibility of transmission in such cases. Federal prosecutors must also consider the blameworthiness of the individual and whether or not he or she received services from public health authorities, in order to determine whether it is in the public interest to pursue criminal charges. At the time of this paper, the provinces have not provided similar instructions to their Attorneys General. Nonetheless, this directive is an important step towards reducing the harm that *Mabior* has caused to those living with HIV/AIDS.

### **3. LEAF's Feminist Approach to HIV Non-disclosure**

Prior to the federal prosecutorial directive,<sup>18</sup> the federal government had published a report identifying concerns about over-criminalization.<sup>19</sup> Advocates in the HIV/AIDS legal community have criticized the criminalization of HIV non-disclosure, particularly its prosecution as aggravated sexual assault. They assert that this punitive approach increases the stigma of those living with HIV, punishes people for a disability, and interferes with public health initiatives to prevent the spread of the virus.<sup>20</sup>

LEAF shares many of these concerns. However, LEAF's primary law reform goal is the protection of women's equality rights. LEAF, in consultation with feminist legal scholars and practitioners nationwide, has developed a position on HIV non-disclosure that addresses the complex issues at

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<sup>17</sup> Prosecutorial Directive, *supra* note 1.

<sup>18</sup> *Ibid.*

<sup>19</sup> DOJ Report, *supra* note 16.

<sup>20</sup> See for example Canadian Coalition to Reform HIV Criminalization, *Developing a Community Consensus Statement on Ending Unjust Prosecutions for HIV Non-Disclosure: Background and Draft Consensus Statement for Discussion*, online: [http://www.aidslaw.ca/site/wp-content/uploads/2017/07/CCRHC\\_Backgrounder-and-Draft-Community-Consensus-Statement\\_final\\_EN\\_25July2017.pdf](http://www.aidslaw.ca/site/wp-content/uploads/2017/07/CCRHC_Backgrounder-and-Draft-Community-Consensus-Statement_final_EN_25July2017.pdf). This statement has now been officially released as Canadian Coalition to Reform HIV Criminalization, *End Unjust HIV Criminalization: Community Consensus Statement*, (CCHRC, 2017) online: <http://www.hivcriminalization.ca/community-consensus-statement/>.

stake in a manner that protects women's equality. LEAF seeks to ensure that gender equality rights are considered and protected in future law reform initiatives.

LEAF has played a pivotal role in establishing women's equality rights as a central tenet of sexual assault law and asserting the importance of women's right to determine the parameters of the sexual activity in which they wish to engage. LEAF has intervened to provide its expertise in almost every post-*Charter* Supreme Court of Canada case that has set precedent in sexual assault law.<sup>21</sup> In *R. v. Ewanchuk*,<sup>22</sup> LEAF argued against the existence of a defense of implied consent, emphasizing that the values of sexual autonomy and equality demand that consent be communicated. That decision established affirmative consent as the legal standard in Canadian law. In *R. v. J. A.*,<sup>23</sup> LEAF argued successfully that one cannot consent in advance to unconscious sex because consent must always be active, voluntary and contemporaneous with the sexual act. In *R. v. Darrach*,<sup>24</sup> LEAF emphasized that restrictions on sexual history evidence were embedded in s. 276 of the *Code* to enhance equality rights and reduce the sway of discriminatory myths in sexual assault trials.

In short, LEAF can claim significant credit for having shaped the law of sexual assault to protect the substantive equality of women and to improve the treatment of complainants in trials. A primary driving force in LEAF's interest in the legal framework of HIV non-disclosure is to preserve the legal gains made to women's sexual autonomy and equality rights.

#### **4. Why LEAF is Concerned about the Current Law of HIV Non-disclosure**

With these feminist equality-rights principles in mind, there are three central reasons why LEAF is concerned about the law of HIV non-disclosure. First, a significant percentage of complainants in reported cases are women. Second, women are also found among the accused in reported cases - particularly women who experience intersecting disadvantages on the basis of, for example,

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<sup>21</sup>*R v Seaboyer* [1991] 2 SCR 577; *Canadian Newspapers Co v Canada* [1988] 2 SCR 122; *R v Whitley and Mowers*, [1994] 3 SCR 830; *R v Ewanchuk*, [1999] 1 SCR 330 [*Ewanchuk*]; *R v Mills*, [1999] 3 SCR 668 [*Mills*]; *R v Darrach*, 2000 SCC 46 [*Darrach*]; *R v JA*, 2011 SCC 28 [*JA*].

<sup>22</sup>*Ewanchuk*, *supra* note 21.

<sup>23</sup>*JA*, *supra* note 21.

<sup>24</sup>*Darrach*, *supra* note 21.

disability, race, poverty, and/or Indigeneity. Third, the use of sexual assault law to prosecute cases of HIV non-disclosure has had a negative impact on the law of sexual assault generally.

#### ***a. Criminalization of Marginalized Women***

A significant concern for LEAF is that marginalized women who are HIV positive, and who may themselves be survivors of gendered violence, are being prosecuted for aggravated sexual assault under the law of HIV non-disclosure. As with many areas of criminal law, studies have shown that prosecutions have disproportionately involved members of marginalized groups such as men of colour and Indigenous women (e.g. *R. v. Schenkels*<sup>25</sup>). The fear of criminalization serves to further isolate and stigmatize women who are HIV-positive.

LEAF is also concerned that the over-criminalization of HIV non-disclosure incorporates gender dynamics harmful to women. Women in abusive relationships, for example, face increased danger when they disclose their HIV-positive status to their partners. The fears women have around HIV disclosure are not unfounded – the tragic death of Texas woman Cicely Bolden, who was murdered by her boyfriend after he found out she was HIV-positive, is a concrete reminder of the violent reaction an HIV diagnosis might attract.<sup>26</sup>

In the case of *R. v. D.C.*,<sup>27</sup> the accused was a woman and a survivor of domestic violence at the hands her accuser. He only reported his allegation of HIV non-disclosure after D.C. brought a complaint of domestic violence against him. Similarly, in *R. v. Schenkels*,<sup>28</sup> the accused was an Indigenous survivor of intimate partner violence and sexual assault<sup>29</sup> who was convicted of aggravated sexual assault for not disclosing her status to a casual sexual partner.

These cases demonstrate that any policy approach to HIV non-disclosure must take into account the risks that disclosure may pose to HIV positive women, and the potential for prosecutions to be tools for abusers to continue their abuse. These cases also signal the need for a cautious feminist

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<sup>25</sup> *R v Schenkels*, 2016 MBQB 44, *aff'd* 2017 MBQA 62 [*Schenkels*], *Symington*, *supra* note 8 at 645, 660.

<sup>26</sup> J Emily, “Man who admitted killing HIV-positive girlfriend: “I wanted to make her pay”” *Dallas News* (October 2013) online: Dallas News <<http://www.dallasnews.com/news/crime/2013/10/29/man-who-admitted-killing-hiv-positive-girlfriend-i-wanted-to-make-her-pay>>.

<sup>27</sup> *R v DC*, 2012 SCC 48.

<sup>28</sup> *Schenkels*, *supra* note 25.

<sup>29</sup> *Schenkels*, *supra* note 25 at 7-8, 25.



response to HIV non-disclosure, to avoid further marginalizing already disadvantaged groups of women.

***b. Risk to Sexual Assault Law***

LEAF is also concerned that treating HIV non-disclosure as aggravated sexual assault has the potential to erode the gains made in establishing an affirmative standard for consent, which protects the right to determine “who touches one’s body and how.”<sup>30</sup> It also risks reintroducing discriminatory concepts around implied consent and the so-called twin myths about sexual assault complainants – that women who have had sex in the past are more likely to be the “kind of person” who would consent to sex, or are more likely to lie about sexual assault<sup>31</sup> - into determinations about the admissibility of sexual history evidence.

i. Affirmative Consent

The existing legal approach to HIV non-disclosure relies on a distinction between sexual contact to which the complainant did not consent, and sexual contact to which the complainant did consent, but where consent was vitiated by the accused’s fraudulent conduct.

Concern over broadening the potential for HIV non-disclosure prosecutions has led the Supreme Court of Canada to narrow the legal scope of voluntary consent, to the detriment of women. The majority judgment in *R. v. Hutchinson*<sup>32</sup> illustrates this problem. In that case, the defendant sabotaged the condoms he used during sexual intercourse with his girlfriend, with the result that she became pregnant. The Court was tasked with deciding whether or not the accused’s conduct constituted sexual assault. In an attempt to resolve this question in a manner consistent with HIV non-disclosure jurisprudence, the majority adopted a narrow definition of the scope of consent to sexual activity.

While both the majority and the concurring judgments found that the accused committed sexual assault, the majority reached this conclusion by finding that the complainant’s consent had been vitiated by fraud pursuant to s. 265(3)(c). The concurring decision of Abella, Moldaver, and Karakastanis JJ. found that the complainant had not consented to the sexual contact at all, because

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<sup>30</sup> *Ewanchuk*, *supra* note 21 at 28.

<sup>31</sup> *Criminal Code*, RSC 1985, c C-46, s 276(1).

<sup>32</sup> *Hutchinson*, *supra* note 12.

sex without a condom is a different sexual act than sex with a condom and the complainant had only consented to the latter.

The difference in these conclusions relates to the scope of the complainant’s consent. The majority read “consent to the sexual activity in question” under s. 273.1 narrowly, by defining consent as consent to physical sexual touching only, or “the basic physical act agreed to at the time, its sexual nature, and the identity of the partner.”<sup>33</sup> According to the majority, consent to the “sexual activity in question” can exist in law even where the complainant has not consented to the “conditions and qualities of the act or risks and consequences flowing from it.”<sup>34</sup> The concurring judgment, by contrast, utilized a more expansive interpretation of consent under s. 273.1, defining “sexual activity in question” in a way that includes other elements related to the physical sexual touching itself. It held that the way the sexual activity takes place is a crucial component of voluntary agreement to participate in sexual activity.<sup>35</sup>

Even though *Hutchinson* was not an HIV case, the majority judgement adopted a narrow interpretation of “sexual activity in question” with the express purpose of limiting HIV non-disclosure prosecutions to the context of fraud. The majority was concerned that treating deceptions such as condom sabotage as a violation of the complainant’s consent per se would criminalize HIV non-disclosure even if the sex posed no risk of bodily harm to the complainant:

From a legal perspective, what is the difference between, on one hand, deceiving the complainant about the condition of the condom and creating a risk of pregnancy, and on the other hand, deceiving the complainant about HIV status so that she will agree to unprotected sex? Since *Cuerrier*, it is clear that the latter situation must be analyzed under the fraud provision in [s. 265\(3\) \(c\)](#) of the [Criminal Code](#). Why then not the former? Consistency and certainty in the law require that both situations be treated the same.

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These inconsistencies are not merely semantic — they may affect outcomes under the “essential features”/“how the act was carried out” approach. HIV status may well be an “essential feature” of the sexual activity under the Court of Appeal majority’s approach. It

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<sup>33</sup> *Ibid* at para 22.

<sup>34</sup> *Ibid* at para 21-28.

<sup>35</sup> *Ibid* at para 83.

could also be characterized as part of the “how” under Abella and Moldaver JJ.’s approach. If the use of an intact condom goes to the manner in which the sexual activity occurred, why not the exchange of diseased fluids? Thus, under these approaches, deceptions about HIV status could result in a finding of no consent under [s. 273.1\(1\)](#), even where the accused had a low viral load at the relevant time and condom protection was used. That conclusion, however, would be in direct conflict with *Cuerrier* and *Mabior*.<sup>36</sup>

While the majority approach may have the desirable outcome of limiting HIV prosecutions, LEAF considers it highly problematic for women’s equality for two reasons.

First, it undermines women’s sexual autonomy by narrowing the definition of “sexual activity in question.” In *Ewanchuk*, the foundational Supreme Court of Canada decision establishing an affirmative standard of consent, the Court stated that “having control over who touches one’s body, and how, lies at the core of human dignity and autonomy”.<sup>37</sup> In LEAF’s view, and as affirmed in the concurring decision in *Hutchinson*, use of a condom is a fundamental part of “how” the sexual touching takes place, and without voluntary agreement to sexual activity without a condom, there is no consent under section 273.1. As the concurring judgement emphasized, “When a woman agrees to have sexual intercourse with a condom, she is consenting to a particular sexual activity. It is a different sexual activity than sexual intercourse *without* a condom.”<sup>38</sup> The narrow definition of “sexual activity in question” adopted by the majority denies women the legal right to choose whether or not to use a condom. In addition, it has the potential to undermine women’s sexual autonomy in future cases, since other elements of the “how” of sexual activity may be excised from the definition of consent. The majority decision therefore risks undermining women’s sexual autonomy by narrowing the scope of women’s consent over how the sexual activity is carried out.

The second problem with the majority’s decision is that the test for fraud requires both a dishonest act *and* a deprivation. Accordingly, to the extent that the accused deceived the complainant as to “how” the sex occurred, this is only criminal if that deception posed a significant risk of serious bodily harm to the complainant.<sup>39</sup> In *Hutchinson*, the majority found that the complainant’s

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<sup>36</sup> *Ibid* at paras 38-40.

<sup>37</sup> *Ewanchuk*, *supra* note 21 at para 28 [emphasis added].

<sup>38</sup> *Hutchinson*, *supra* note 21 at para 76.

<sup>39</sup> *Ibid* at para 42.

unwanted pregnancy constituted deprivation.<sup>40</sup> However, when condom sabotage or “stealthing” occurs without pregnancy, or other bodily harm, the majority’s reasons suggest that this would not meet the test for fraud vitiating consent. In such a case, the complainant’s consent would be treated as legally valid, notwithstanding the fact that she did not agree to unprotected sex.

In *Ewanchuk* and subsequent cases, LEAF has argued for a clear analytical framework for understanding sexual assault, focusing on sexual autonomy and the requirement for affirmative and voluntary consent. *Hutchinson* demonstrates how the attempt to fit HIV non-disclosure prosecutions into the framework of sexual assault law pulls the focus of sexual assault jurisprudence away from these foundational concepts. This poses a significant risk to women’s equality because women’s right to control over their sexual lives is fundamental to women’s equality and human dignity. LEAF’s position is that law reform efforts in this area must consistently reaffirm the equality dimension of sexual assault jurisprudence and the values articulated in *Ewanchuk*<sup>41</sup> and *J.A.*<sup>42</sup>.

ii. Discriminatory Myths and Stereotypes

In addition, the current law of HIV non-disclosure has led defence counsel to seek to rely on discriminatory arguments about both the prior sexual history of the complainant and implied consent, two lines of argument that feminists have fought to eradicate from sexual assault law.

In regard to prior sexual history, a central element of an HIV non-disclosure prosecution is a finding that the complainant would not have consented had she known about the accused’s HIV status. Defence lawyers have brought applications to cross-examine complainants on a pattern of engaging in unprotected sex in an attempt to raise a reasonable doubt that they would have refused consent to the specific sex at issue had they known about the risk.<sup>43</sup> In *R. v. Wilcox*, some HIV advocates also argued that this kind of evidence should be admissible.

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<sup>40</sup> *Ibid* at paras 70-71.

<sup>41</sup> *Ewanchuk*, *supra* note 21. In *Ewanchuk* the SCC wrote: “Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one’s body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the *Code* expresses society’s determination to protect the security of the person from any non-consensual contact or threats of force” (para. 28).

<sup>42</sup> *JA*, *supra* note 21. In *JA* the SCC wrote, “consent of the complainant must be specifically directed to each and every sexual act” (para 34).

<sup>43</sup> See for example, *R v Wilcox*, 2011 QCCQ 11007, *aff’d R v Wilcox*, 2014 SCC 75 at para 17, 45, 131, 204 [*Wilcox*].

This line of argument relies on the same discriminatory myths and stereotypes that are at play in other sexual history applications: that if the complainant had previously consented to a type of sex in the past, it is more likely that she consented to that type of sex on the occasion in question or that she is the kind of person who would consent to unprotected sex. Feminists have long opposed this kind of argument. As the Supreme Court of Canada determined in *Ewanchuk*, consent is “subjective and determined by reference to the complainant’s subjective internal state of mind towards the touching, at the time it occurred.”<sup>44</sup>

However, the requirement that the Crown prove what the complainant would or would not have done had the circumstances been different makes this analysis vulnerable to this line of reasoning. This risks undermining the rape shield provisions and inviting discriminatory myths into sexual assault trials.

In addition, in *Wilcox* the defence argued that the complainant’s consent to the risk of contracting HIV could be implied from the circumstances in which the sex occurred. The defence called an expert witness to testify that the nature of the gay bathhouse was such that the risk of HIV transmission was implicit, and therefore by agreeing to have sex in this context the complainant consented to this risk.<sup>45</sup> As feminists have insisted, and as the Supreme Court has affirmed, belief in consent must rest upon the affirmative communication of willingness, either by the complainant’s words or conduct, to engage in sexual activity.<sup>46</sup> While the Court rejected the implied consent argument in *Wilcox*, this is another way in which the law of HIV non-disclosure may erode the hard-won protections for women’s equality and sexual autonomy in sexual assault law.

## **5. LEAF’s Position on HIV Non-Disclosure**

Policy approaches to HIV non-disclosure must be alert to women’s equality rights. An equality-enhancing law reform would ensure that sexual assault law focuses on protecting sexual autonomy and integrity and promoting gender equality. To that end, LEAF has developed a coherent position

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<sup>44</sup> *Ewanchuk*, *supra* note 21 at para 26.

<sup>45</sup> *Ibid* at paras 4, 70-76.

<sup>46</sup> *Ewanchuk*, *supra* note 21 at para 49.

that endeavours to protect the equality rights of the diverse women affected by this area of law and, in particular, that:

1. Ensures women's equality and sexual autonomy is protected in the law of sexual assault;
2. Provides recourse for female complainants who have contracted HIV from irresponsible, non-disclosing partners;
3. Reduces the criminalization of marginalized women; and
4. Reduces the criminalization and stigmatization of those living with HIV.

To that end, LEAF recommends the following:

- 1. HIV non-disclosure should no longer be addressed as a question of fraud negating consent within the framework of criminal sexual offences.**

This will eliminate the Court's perceived need to define consent narrowly in order to avoid the over-criminalization of people living with HIV. This should also limit the excessive reliance on fraud in sexual assault law, which is vulnerable to discriminatory arguments about sexual history and implied consent, and has limited value in cases in which the accused has interfered with a woman's sexual autonomy in a way that does not cause bodily harm.

- 2. The definition of "sexual activity in question" found in the concurring decision in *Hutchinson* (as opposed to the majority decision) should be affirmed, as should the fundamental principle established in *Ewanchuk* that women have the right to determine who touches their body and how.**
- 3. The current scope of fraud should be protected<sup>47</sup> and fraud generally should not require a risk of bodily harm to the complainant.**

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<sup>47</sup> Including, among other categories, the established law that deception as to the sexual nature of the act or the perpetrator's identity constitutes fraud that would vitiate consent: see *Cuerrier, supra* note 7 at para 30.

**4. Those who intentionally or recklessly<sup>48</sup> transmit HIV to their sexual partner without disclosing their HIV status should be prosecuted under provisions of the *Criminal Code* that do not deal with sexual offences.**

This would provide legal recourse for women who contract HIV from sexual partners who did not take care to prevent HIV transmission, and thereby violated their partner's bodily integrity. However, limiting prosecution to cases in which HIV was actually transmitted will limit the scope of criminalization significantly, consistent with the principle that where the state is criminalizing members of a systemically marginalized population such as persons with HIV, it should limit the scope of criminal law to cases involving the most serious harm. The use of condoms and the development of antiretroviral drugs are both very effective means of preventing transmission. There are no Canadian cases where an accused responsibly used a condom or had an undetectable viral load and the virus was nonetheless transmitted. The requirement of transmission thus rules out prosecution for cases where the accused has taken care to protect the physical safety of his or her sexual partner.

5. **Prosecutorial guidelines** should make it clear that even where there is transmission of HIV, such transmission is not an offence where the accused:
- a. Feared violence would result from disclosing their HIV status;
  - b. Feared violence if they insisted on condom use; or
  - c. Engaged in sex under duress, was coerced into sex or engaged in sex without consent.

The purpose of such guidelines is to protect, to the extent possible, marginalized women from prosecution under this new approach. While it may not be possible or appropriate to prevent marginalized women from being prosecuted altogether, the above factors represent circumstances in which women's equality is particularly engaged.

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<sup>48</sup> In Canadian criminal law, recklessness refers to someone who is aware that a significant risk exists but takes that risk anyway. In the context of HIV non-disclosure, this would mean that an accused is aware that his or her behaviour creates a significant risk of transmitting HIV to the sexual partner in question, but withholds information about their HIV status and engages in the sexual activity anyway.

## **7. Conclusion**

To conclude, LEAF commends the federal government's recent prosecutorial directive, and recommends further reform to the law of HIV non-disclosure that is attentive to women's equality. While acknowledging the important concerns raised by HIV/AIDS legal advocates and other community organizations regarding the criminalization of individuals living with HIV, this area of law must also take account of the gender equality issues at stake. This goal is best accomplished by removing HIV non-disclosure from sexual assault law, in order to protect the gains made in this area of law for women's sexual autonomy and equality. In addition, limiting the application of other provisions of the criminal law to cases of actual transmission provides protection for women who have contracted HIV because their partners failed to have due regard for their bodily integrity, while at the same time limiting the punitive over-criminalization of individuals living with HIV, including marginalized women.