

# HIV and the duty to disclose in Canada



Charlie Sheen's revelation that he is HIV positive has highlighted some legal issues that are rarely discussed, including when, and under what circumstances Canadians are required to disclose they have the virus that causes AIDS, says Toronto civil litigator [Sarah O'Connor](#).

"Under current Canadian criminal law, people living with HIV can be charged and/or prosecuted if they don't tell their sexual partners about their HIV-positive status before having sex," she tells [AdvocateDaily.com](#). "But it depends on the circumstances."

The former *Two and a Half Men* star said in an interview this week that he was diagnosed with HIV four years ago, but doesn't know how he contracted it, he told the [Today Show](#).

He has insisted that it was "impossible" that he knowingly transmitted the virus to other people, says the article on the [Today Show](#) website. He has admitted to having unprotected sex with two people since his diagnosis, both were informed ahead of time and have been under the care of Sheen's physician, it says.

Sheen says he appeared on the [Today Show](#) to end a smear campaign against him and extortion. He says he has paid out about \$10 million to keep his illness a secret after he told people he trusted about his diagnosis, says the article.

O'Connor, the principal of [O'Connor Richardson Professional Corporation](#), says in many states across the U.S. it is a criminal offence not to inform a partner of an HIV-status prior to having sex.

It's the same in Canada but it depends on which sexual activity the parties are engaging in and the level of risk each activity presents for contracting HIV.

"There has to be a realistic possibility of HIV transmission so even a very small risk of HIV transmission is a realistic possibility," she says. "The courts have broken it down into different sexual acts. There are different requirements for disclosure depending on the viral load, the type of sexual activity and whether the individuals use protection or not."

O'Connor says a failure to disclose an HIV-status could result in charges under the Criminal Code of Canada, including aggravated sexual assault and/or fraud negating consent.

She says there are two Canadian court cases from 2012 that clarified when one needs to disclose HIV status. [R. v. Mabior](#), [2012] 2 SCR 584, and [R. v. D.C.](#), [2012] 2 SCR 626, both Supreme Court of Canada matters that involved individuals who are HIV-positive and didn't divulge their condition to a sexual partner.

"Those cases break down the duties to disclose for the various sexual activities," O'Connor says. "These cases have really established the law here in Canada. Essentially, they say that either low viral load at the time of sexual relations or condom use could negate significant risk."

O'Connor says disclosure beforehand may be the safest way to avoid prosecution.

In [Mabior](#), the court says. "To summarize, to obtain a conviction under ss. 265(3)(c) and 273, the Crown must show that the complainant's consent to sexual intercourse was vitiated by the accused's fraud as to his HIV status. Failure to disclose (the dishonest act) amounts to fraud where the complainant would not have consented had he or she known the accused was HIV-positive, and where sexual contact poses a significant risk of or causes actual serious bodily harm (deprivation). A significant risk of serious bodily harm is established by a realistic possibility of transmission of HIV."

Further, the court says that on the evidence in this matter, "a realistic possibility of transmission is negated by evidence that the accused's viral load was low at the time of intercourse and that condom protection was used."

O'Connor says one could also be charged criminally for failing to disclose other sexually transmitted diseases.

In 2010, Master Cpl. Mathew Wilson was charged with six counts of aggravated sexual assault and six counts of criminal negligence causing bodily harm. He had unprotected sex with women without telling them he had herpes. He eventually pleaded guilty to criminal negligence causing bodily harm and received a conditional discharge. [Read more](#)

"With other sexually transmitted diseases, there is no duty to disclose if your partner doesn't ask but one cannot lie about having an STD," she says. "If they are asked, they have to be truthful. If not, it could be considered fraudulent misrepresentation."

O'Connor notes that even in matters where no criminal charge are laid, civil proceedings may be launched.

"But there are fewer of these cases here in Canada compared to the United States and the damages here aren't as high as in the U.S.," she says.