

# Discussion Guide



# POSITIVE WOMEN: EXPOSING INJUSTICE

What if you knew you could  
go to prison for something you  
couldn't change?

[WWW.POSITIVEWOMENTHEMOVIE.ORG](http://WWW.POSITIVEWOMENTHEMOVIE.ORG)

Canadian  
HIV/AIDS  
Legal  
Network

Réseau  
juridique  
canadien  
VIH/sida

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A Goldelox Production

goldelox  
PRODUCTIONS

***Positive Women: Exposing Injustice***  
**A film by the Canadian HIV/AIDS Legal Network  
and Alison Duke (Goldelox Productions)**

[www.positivewomenthemovie.org](http://www.positivewomenthemovie.org)



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## Positive Women: Exposing Injustice — Credits

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Special thanks to all of the women who appeared in the film and to all the experts, advisors, crew and others behind the scenes who contributed to its production.

Special thanks also to Jalana Lewis for her work in shaping this Discussion Guide.

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## Canadian HIV/AIDS Legal Network

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This Discussion Guide contains information about the law, but it should not be treated as legal advice. Only a lawyer can provide legal advice.

## Statement from the Canadian HIV/AIDS Legal Network

In the early-1990s, the first criminal prosecutions related to HIV non-disclosure emerged in Canada. This launched us into a new era of using the criminal law to reinforce an obligation on people living with HIV to prevent transmission of the virus to others. The Legal Network quickly recognized that criminalizing HIV exposure could at best be ineffective and at worst counterproductive in the public health response to HIV. Moreover, criminalization could further stigmatize people living with or vulnerable to HIV and result in injustice.

The Supreme Court of Canada weighed in on criminalizing HIV non-disclosure in 1998 in *R. v. Cuerrier*.<sup>1</sup> The Supreme Court found that a person living with HIV can be convicted of the crime of aggravated (sexual) assault if he or she does not disclose his or her HIV-positive status before engaging in sexual activity that poses a “significant risk of serious bodily harm” (i.e., a significant risk of HIV transmission). The Court ruled that without disclosing in such circumstances, consent to sex would be invalidated because the sexual partner was not aware of “significant relevant factors.”

As anticipated, the Supreme Court’s ruling has resulted in a great amount of confusion, anxiety and controversy in the years since. In its decision, the Supreme Court did not specify what sexual activities might pose a legally “significant risk” of HIV transmission, nor did it foresee the range of personal and public health ramifications the legal test would have. Trial-level courts have been inconsistent in their application of the “significant risk” threshold and risk assessments have not kept pace with medical and scientific advancements in the understanding and treatment of HIV.

Since about 2004, we have witnessed a significant escalation in the criminalization of HIV non-disclosure in Canada, both in terms of the numbers of cases, the severity of the charges, and the legal arguments being advanced by prosecutors set on “pushing the envelope” of the legal obligation to disclose. More than 130 people living with HIV have been charged in less than 15 years, including numerous cases in which the sexual activity has posed a minimal risk of HIV transmission and, not surprisingly, the sexual partner was not infected.

The Legal Network’s engagement on this issue has been multifaceted. We have intervened in key cases, developed strategic resources for people living with HIV, service providers and legal professionals, acted as co-investigators in various research projects, and spoken out in the media regarding the negative public health impacts and the injustices resulting from many HIV-related prosecutions.

One thing that was becoming increasingly apparent was that the voices of women were largely missing on this issue. Yet, given the persistence of gender-based discrimination and violence against women in our society, we knew that

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<sup>1</sup> 2 S.C.R. 371.

criminalization had specific implications for women. Moreover, in a number of those cases where women faced charges, issues of domestic violence, unstable immigration status, and coercion were clearly at play. This was particularly evident in the shocking facts of the case known as “D.C.,” then moving through the courts in Quebec.

And so we set out to bring women’s voices to the fore on this issue. There were many questions to address. What happens when a woman discloses her HIV-positive status to a sexual partner? How does criminalization affect HIV-positive women in Canada? Does the law actually protect women’s health or their sexual autonomy? How do women feel about their experience with the criminal law with respect to HIV non-disclosure? How is the development of the criminal law of sexual assault affected by its application to cases of non-disclosure?

In the spring of 2011, we were fortunate enough to cross paths with the talented and perceptive Alison Duke of Goldelox Productions. Alison expertly guided us through the process of developing our seed of an idea into a viable production plan, and the Legal Network launched into its first film project. A call for participants was issued and numerous brave and articulate women living with HIV from across the country came forward to share their experiences and opinions with respect to criminalization of HIV non-disclosure.

The final cut of *Positive Women: Exposing Injustice* arrived in February 2012, the same time the Supreme Court of Canada was preparing to hear the appeal in the cases of *D.C.* and *Mabior*. Fundamental issues of sexuality, intimacy, safety and dignity permeate both the film and the documents that we and our partners submitted to the court. While we work towards legal change, we cannot make real progress without truly hearing the voices of Positive Women. It is our hope that this film leaves audiences with an understanding that criminalizing HIV non-disclosure is far more complex than it may appear on the surface, and that injustice demands a remedy.

Janet Butler-McPhee, Cécile Kazatchkine & Alison Symington  
Co-producers

June 2012

## Introduction

*Positive Women: Exposing Injustice* is a 45-minute documentary film that tells the personal stories of four women living with HIV in Canada — a Quebecker who was charged for not telling her partner that she had HIV at the beginning of an ultimately abusive relationship; a young woman who did not pursue charges against the man who infected her; an Aboriginal woman who has personally faced stigma and violent threats; and a Latina woman who describes the challenges of disclosure and intimate relationships for women living with HIV. Their stories are real, raw and from the heart, and tell the truth about what it's like to live in a society that all-too-often criminalizes intimate behaviour between consenting adults and discriminates against those living with HIV. Legal experts, doctors, counsellors and support workers also lend their voices to challenge current Canadian laws that are failing the very women they are meant to protect. [www.positivewomenthemovie.org](http://www.positivewomenthemovie.org)

### The filmmaker

Alison Duke is an award-winning independent filmmaker, and formed Goldelox Productions — a boutique film, video and multi-media production company — in 2001. Alison has been producing and directing for over 10 years and serves as the creative director of the company. A renowned figure in her field, Alison brings an electric feel to her work, encompassing a variety of skills to each production including packaging and branding entertainment products. Her films have aired on a range of cable, private and public networks including: Superchannel, TVO, Sundance Channel, CBC Newsworld, Much Music, MuchMoreMusic, BET, Rogers Television, TVOne, Encore, Black Starz, Oxygen, LIFE Network and OMNI1. Alison has worked on many informative productions commissioned by various prominent organizations, as well as more creative mainstream productions. For more information, visit Alison's website at [www.alisonduke.com](http://www.alisonduke.com).

### The Canadian HIV/AIDS Legal Network

The Canadian HIV/AIDS Legal Network promotes the human rights of people living with and vulnerable to HIV/AIDS, in Canada and internationally, through research and analysis, advocacy and litigation, public education and community mobilization. The Legal Network is Canada's leading advocacy organization working on the legal and human rights issues raised by HIV/AIDS.

The Legal Network is opposed to criminal prosecutions for non-disclosure in cases of otherwise consensual sex, except in limited circumstances (such as when a person is aware of their status and acts with malicious intent to infect someone else). Working with numerous AIDS service organizations (ASOs), researchers, criminal defence lawyers, health care providers and others, the Legal Network is responding to the criminalization of HIV non-disclosure in a number of ways, including: tracking Canadian and international cases; supporting lawyers, ASOs and people living with HIV facing charges; developing educational resources and delivering workshops, training session and lectures;

intervening before appellate courts; mobilizing community; and advocating for policy guidance.

[www.aidslaw.ca](http://www.aidslaw.ca)

### **Using this Discussion Guide**

This Discussion Guide was created for people who want to use *Positive Women: Exposing Injustice* to engage friends, clients, students, colleagues and communities on the criminalization of HIV non-disclosure and its effects on women (and men) in Canada. The film addresses complex and emotional issues. We therefore encourage audiences to engage in dialogue and delve more deeply into the issues after watching the film.

The discussion questions in this Guide intentionally address a range of topics. Not all questions are suited to all audiences; choose those that best meet your needs and interests.

## **Definitions**

### **Antiretroviral Drugs**

Antiretroviral drugs are medications for the treatment of infection by retroviruses, primarily HIV. Standard antiretroviral therapy consists of the combination of at least three antiretroviral drugs to maximally suppress the HIV virus and stop the progression of HIV disease. In addition to protecting the immune system and health of the person living with HIV, antiretroviral drugs can also reduce the likelihood that HIV will be transmitted to others.

### **Consent**

To consent is to give approval or permission. Under Canadian law, consent to sex is required; if there is no consent, then the sexual act is considered a sexual assault. Consent in Canadian law is purely subjective; consent is the state of mind of the complainant at the time of the sexual activity. To be legally effective, consent must be freely given. The law respects and protects sexual autonomy by making the actual subjective consent of a complainant determinative.

### **Crown Prosecutor**

The legal party who represents the government in criminal matters.

### **Stigma**

HIV-related stigma refers to prejudice against, negative attitudes towards and the devaluation of people living with or associated with HIV. HIV-related discrimination follows stigma and is the unfair treatment of a person because of their real or perceived HIV status.

### **Supreme Court of Canada**

The highest court in Canada and the last court to consider a request for an appeal. The decisions made by the Supreme Court are binding on all Canadian courts.

### **Vitiated Consent**

Parliament has defined a list of circumstances where even if the complainant did genuinely consent at the time of the sexual activity, or there is some doubt as to whether or not he or she consented, consent will retroactively be considered invalid. One of the circumstances that vitiates or invalidates consent is where fraud has been committed in order to induce consent. HIV non-disclosure, when there is a legally “significant risk” of HIV transmission, is considered a fraud which vitiates consent.

## Facts & Statistics

- The estimated per-act risk of transmission **from an HIV-positive women to a male sexual partner** through vaginal sex is **1 transmission in every 2500 sexual encounters**.
- When an HIV-positive women's **viral load** (i.e., the level of active virus in the body) **is low**, the risk of HIV transmission to her male sexual partners drops to **1.3 expected transmissions in 10 000** sexual encounters.
- When a condom is used, the per-act risk of transmission from an HIV-positive woman to a male sexual partner through vaginal sex is at most **1 in 12 500** sexual encounters.
- **From 1989 to 2012, more than 130 people have been charged for HIV non-disclosure in Canada, including 14 women living with HIV.** At least 4 of these women are Aboriginal and at least 2 are newcomers to Canada from Asia and Sub-Saharan Africa.
- With the exception of a handful of prosecutions related to other sexually transmitted infections (i.e., herpes, hepatitis B and hepatitis C), **prosecutions for non-disclosure have focused on HIV only.**
- 10 of the 14 women charged for HIV non-disclosure in Canada have been charged with **aggravated sexual assault** which carries a **maximum penalty of life imprisonment and sexual offender registration.**

For further information on the criminal law as it relates to HIV non-disclosure in Canada, please consult the Canadian HIV/AIDS Legal Network's many resources available for free online, including info sheets and briefing papers, at [www.aidslaw.ca/criminallaw](http://www.aidslaw.ca/criminallaw).

## Discussion Questions

The following questions are intended to help guide your audience through a critical discussion of the film. Through discussion, audience members can develop a deeper understanding of the film, the impacts of criminalizing HIV non-disclosure and how to respond to the issue's inherent injustice. There are no "right" or "wrong" answers, and audience members may have different opinions about and reactions to the film.

You will find that some of the questions below are accompanied by a series of "Points to consider" and more detailed notes in some instances. These points and notes can be used by facilitators to help stimulate the discussion and address issues that are likely to arise.

### 1. **What key messages did you take away from the film? What did you learn from this film? What insights did it provide?**

#### **Points to consider:**

- ***HIV disclosure is complex and difficult.***

Revealing your HIV-positive status is intensely personal and at times extremely difficult. Disclosing one's HIV status to a sexual partner can mean talking openly about sex, sexual orientation, HIV risk factors, personal health and past relationships. HIV-related stigma and discrimination remain very real in our society. Many people living with HIV experience rejection and condemnation.

It can be very difficult to decide when and how to disclose to a new sexual partner. Disclosure can also be risky, requiring a person living with HIV to open up to the possibility of rejection, condemnation and sometimes even violence. Given the high level of misinformation regarding HIV in our society, disclosing one's HIV status can also lead to a longer process of education and awareness-raising in order for the partner to understand what they are being told.

Proving that you did disclose your HIV-positive status to a sexual partner who claims that you did not disclose can also be very difficult. Another concern related to disclosing one's HIV-positive status is that once that information is "out there," you lose control of it. The person you tell may in turn tell others.

- ***The overly broad use of the criminal law with respect to HIV exposure results in injustice.***
- ***Women are often affected differently than men by laws that criminalize HIV.***

- ***Legal change is needed now.***

## **2. Why is disclosing one's HIV-positive status so difficult?**

### **Points to consider:**

- ***Marginalization***  
Many already stigmatized and/or marginalized groups — such as men who have sex with men, people who inject drugs, sex workers, prisoners, Aboriginal people and migrants — are disproportionately affected by HIV. An HIV-positive status is also considered to be a marginalized status.
- ***Fear of retaliation, judgment, discrimination or rejection***
- ***Privacy Concerns***  
Once a person living with HIV has told someone else about their HIV-positive status, they cannot control what this individual will do with that information or who else they may tell.

- 3. What specific concerns or challenges with respect to HIV disclosure might arise for youth? For Aboriginal women? For newcomer women? For women in abusive or dependant relationships? For sex workers?**
- 4. What do you think happens when someone is arrested? What do you think prison is like for a person living with HIV? What do you think it is like to be a registered sex offender?**
- 5. What factors do you think police and prosecutors should take into account when deciding whether to lay charges and proceed to trial?**
- 6. How might criminalizing HIV non-disclosure impact the work of health care providers, counsellors and support workers?**

### **Points to consider:**

- ***A chilling effect***  
Fear of criminal prosecutions and/or privacy breaches can hinder people's capacity to talk openly about their disclosure or sexual practices with their health care providers, counsellors or support workers. Lack of knowledge about legal obligations and criminal processes can also impede the willingness of health care providers, counsellors and support workers from engaging in discussions about disclosure and sexual practices with their clients.
- ***Legal and ethical obligations***  
Client confidentiality is extremely important. However, if a health care provider, counsellor or support worker comes to know that a client has not

disclosed their HIV-positive status to a sexual partner, he or she may find that there is a competing obligation to inform the sexual partner of the risk. Obligations of confidentiality and the circumstances where privacy can be breached are addressed in various pieces of public health and privacy legislation, codes of professional conduct and organizational policies.

7. **Why is the risk of HIV transmission a relevant factor in a criminal prosecution for HIV non-disclosure?**
8. **Why do you think there is so much misunderstanding and controversy about the criminalization of HIV non-disclosure?**

**Points to consider:**

- ***Lack of information***  
Many Canadians have misconceptions regarding HIV and AIDS, as well as other sexually transmitted diseases. Many people hold an exaggerated sense of the risk of HIV transmission and also know little about HIV treatment or the realities of living with HIV.
- ***HIV non-disclosure is prosecuted as aggravated sexual assault***  
While HIV non-disclosure is very different from sexual assault, the criminal charges that are most commonly used in these cases are aggravated assault and aggravated sexual assault. Aggravated sexual assault charges are usually reserved for cases where there has been violence and the perpetrator has asserted power over the complainant or objectified the complainant for the perpetrator's own sexual gratification.
- ***Sensational and inaccurate media coverage***  
Many cases of individuals charged in relation to alleged HIV non-disclosure have generated a significant amount of media attention. Some of this coverage is rather sensational and/or contains misinformation about HIV, the circumstances of the case or the law.
- ***Tendency to want to blame someone when bad things happen***  
Many people see complex issues in simple terms, creating dichotomies between "good" and "bad" persons, guilty and innocent, right and wrong. Many people also look to the law to provide easy answers to what are in fact complicated social issues.

9. **What do you think is the appropriate role for law in responding to the HIV epidemic?**

## Programming Suggestions

- ***Hold a panel or roundtable discussion after viewing the film***
  - People to involve:
    - A person living with HIV who may have a personal story about how criminalization affects his or her life;
    - A health care provider or counsellor who has worked with persons living with HIV or other marginalized groups who may be vulnerable to HIV;
    - A lawyer who has a background in criminal cases, law and health or human rights;
    - A representative from a local AIDS service organization;
    - People of diverse backgrounds and experiences to speak about these issues in the context of their communities.
  
- ***Written reflections after viewing the film***
  - Ask participants to write down what they thought about the criminalization of HIV non-disclosure before watching film and how their opinion may have changed after having seen the film.
  - Ask participants to write a letter to the filmmaker or one of the women living with HIV who appeared in the film. If they could ask her one question, what would it be?
  - Ask participants to write about a scene in the film that they found especially moving or disquieting. What was it about the scene that particularly affected them?
  
- ***Media analysis exercise***
  - Analyze the media coverage surrounding a criminal trial for HIV non-disclosure.
  - Prepare a letter to the editor in response to an article appearing in a newspaper.

**How have you used *Positive Women: Exposing Injustice*?**  
We'd love to receive your feedback on the film and an update regarding your screening. Please send your feedback to [info@aidslaw.ca](mailto:info@aidslaw.ca).

## Take Action

- ***Share Positive Women: Exposing Injustice and raise awareness regarding this issue***  
Share this film with your family, friends, clients, classmates, or colleagues. Copies of the film are available in English and French and can be ordered by visiting [www.positivewomenthemovie.org](http://www.positivewomenthemovie.org).
- ***Campaign for prosecutorial guidelines in your province or territory***  
Prosecutorial guidelines instruct Crown Prosecutors. Prosecutorial guidelines on HIV non-disclosure could help ensure that complaints of HIV non-disclosure are investigated in a fair and non-discriminatory manner. They could help to ensure that any decision to prosecute such cases is informed by a complete and accurate understanding of the risks of HIV transmission. Ultimately, prosecutorial guidelines will also affect police behaviour. Police will not waste resources charging people whom they know the Crown Counsel will not prosecute.
- ***Make your voice heard on this issue***  
Write a letter to the editor or an opinion editorial piece (or “op-ed”). Participate in advocacy campaigns for legal and policy change. Support your local AIDS service organization. Make a statement!
- ***Join the National Lawyers’ Referral Database***  
If you are a lawyer with interest or experience in providing legal services to people living with HIV, add your name to our lawyers’ referral database. For more information, please visit [www.aidslaw.ca/lawyers](http://www.aidslaw.ca/lawyers).
- ***Become a member of the Canadian HIV/AIDS Legal Network***  
Membership is open to any organization or individual that supports the goals and activities of the Canadian HIV/AIDS Legal Network. Join us in defending and promoting human rights. Please visit [www.aidslaw.ca/joinus](http://www.aidslaw.ca/joinus).
- ***Make a donation to the Legal Network***  
Donations to the Canadian HIV/AIDS Legal Network allow us to continue doing work that defends the human rights and upholds the dignity of those most vulnerable to HIV, in Canada and around the world. This documentary, *Positive Women: Exposing Injustice*, is but one such example of our work. Donate today and help us change the laws that harm women and all those living with and vulnerable to HIV. Please visit [www.aidslaw.ca/donate](http://www.aidslaw.ca/donate).

## Additional Resources

- *Positive Women: Exposing Injustice* website  
[www.positivewomenthemovie.org](http://www.positivewomenthemovie.org)
- Canadian HIV/AIDS Legal Network
  - Stop Criminalization campaign: [www.aidslaw.ca/stopcriminalization](http://www.aidslaw.ca/stopcriminalization)
  - Further information on criminalization of HIV non-disclosure:  
[www.aidslaw.ca/criminallaw](http://www.aidslaw.ca/criminallaw)
  - “HIV Disclosure and the Law — A Resource Kit for Service Providers”:  
[www.aidslaw.ca/community-kit](http://www.aidslaw.ca/community-kit)
  - Video workshop series on criminalization of HIV non-disclosure:  
<https://vimeo.com/album/1963055>
- Ontario Working Group on Criminal Law and HIV Exposure  
<http://ontarioaidsnetwork.on.ca/clhe/>
- HIV Justice Network  
[www.hivjustice.net](http://www.hivjustice.net)

## **ADDENDUM: Supreme Court of Canada Rulings of October 2012**

The film *Positive Women: Exposing Injustice* and this accompanying Discussion Guide were prepared before the Supreme Court of Canada issued its decisions in two HIV non-disclosure cases on October 5, 2012: *R. v. Mabior* (2012 SCC 47) and *R. v. D.C.* (2012 SCC 48). *D.C.* is the case of Diane, who shares her personal story in this film. The two cases, *Mabior* and *D.C.*, were heard together by the Supreme Court because they both dealt with HIV non-disclosure.

In light of the Court's decisions, this addendum is now necessary.

### **The Context**

*Positive Women: Exposing Injustice* tells the personal stories of four women living with HIV in Canada. It also presents a vision for how the Supreme Court could have ruled to reduce the injustices described in the film.

Regrettably, the Supreme Court's rulings of October 5, 2012 did not bring the story to a happy ending. The Court's decision was a step backward, opening the door for further injustice. The Court ruled that people living with HIV have a legal duty, under the criminal law, to disclose their HIV-positive status to sexual partners before having sex that poses a "realistic possibility of HIV transmission." They went on to find, however, that almost any possible risk, no matter how small, could represent a "realistic possibility of transmission," for the purposes of the criminal law. Furthermore, the Court said that it is only when a condom is used *and* the person's viral load is low that there is no legal duty to disclose (at least in the context of vaginal sex). This is an expansion of the legal obligation to disclose HIV-positive status under Canadian law. It puts many more people at risk of false allegations or criminal prosecution for behaviour that poses no harm to sexual partners.

While Diane's acquittal was upheld, it was only because the Court determined that the original trial judge had made an inappropriate inference that condoms were not used. The injustice continues.

### **Implications for Film Screenings**

Facilitators should be prepared to provide up-to-date information to audiences regarding the current state of the law regarding HIV non-disclosure in Canada. Resources are available at [www.aidslaw.ca/criminallaw](http://www.aidslaw.ca/criminallaw).

Facilitators should also be aware that it may be very emotional and difficult for people to watch this film, particularly people living with HIV who may personally be at risk of criminal prosecution in light of the Supreme Court's decision. Although this film has an educational purpose, it is not an appropriate tool for informing people living with HIV of their legal obligations. Rather, it is a resource to raise awareness about the injustices that result from criminalization, with a

focus on women. Screenings of the film should be planned and facilitated accordingly.

### **Supreme Court Rulings: Further Discussion Questions**

- 1. What factors do you think may have led the Supreme Court to decide that condom use alone or having a low viral load were not a sufficient defence to an allegation of HIV non-disclosure? What factors do you think the Supreme Court might have failed to take into account?**

#### **Points to consider:**

- Misinformation about the risks of HIV transmission and how treatment has transformed living with HIV;
  - Safer sex advice and the role of condoms in HIV prevention, since the early days of the epidemic (NB: imperfections in how people use condoms can also be discussed);
  - The difficulty of determining an individual's viral load at any specific time, and also understanding the impact of viral load on risks of HIV transmission;
  - The difficulty of interpreting the available science and evaluating/understanding very small risks;
  - The crucial role of consent in Canadian sexual assault laws;
  - The challenge of protecting sexual autonomy and dignity in a society still plagued by HIV-related stigma, as well as discrimination and gender-based violence;
  - People's ability, especially women, to ensure condom use; and
  - People's ability, especially the most marginalized, to access treatment and be able to establish a low viral load.
- 2. Why do you think the criminal law treatment of HIV non-disclosure has become harsher at a time when there have been such impressive advancements in the treatment of HIV?**

Consider the following quote:

*“What a terrible irony that we have come to a place where the medications we fought for will allow us to live a relatively “normal” quality of life and now we are going to go to jail for doing so.”*

*— Louise Binder, “No test, no arrest: criminal laws to fuel another HIV epidemic,” OpenDemocracy.net, July 27, 2012*

- 3. What information and supports do people living with HIV need now?**

- 4. What role can health care providers, AIDS service organizations, researchers, prosecutors and others play in opposing/responding to the overly broad use of the criminal law with respect to HIV non-disclosure?**
- 5. What alternatives are there to criminalizing HIV non-disclosure?**
- 6. Is criminalizing HIV non-disclosure necessary in order to protect the sexual autonomy and sexual health of people who are HIV-negative or presume themselves to be HIV-negative?**
- 7. What implications might this ruling have with respect to the development of sexual assault jurisprudence and the law around consent and fraud (outside of the context of HIV non-disclosure)?**