Canadian HIV/AIDS Legal Network | Réseau juridique canadien VIH/sida

Criminal prosecutions for HIV non-disclosure: two cases before the Supreme Court of Canada

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On February 8, 2012, the Supreme Court of Canada will hear two appeals about when people living with HIV may be convicted of a crime for not disclosing their HIV status to sexual partners. These appeals have been brought by the Attorneys General of Manitoba and Quebec; the two cases are being heard together.

In 1998, the Supreme Court of Canada ruled that people living with HIV have a legal duty to disclose their HIV-positive status to their partners before having sex that represents a "*significant* risk" [emphasis added] of transmitting HIV. The Supreme Court said that not disclosing in such circumstances can legally amount to "fraud" that renders a partner's consent to sex legally invalid. This turns what is otherwise consensual sex into a sexual assault, even when no transmission occurs.

As of this writing, more than 130 people living with HIV have been charged in Canada for not disclosing their status and the number of charges continues to increase. People are commonly charged with *aggravated sexual assault* — one of the most serious offences in the *Criminal Code* which carries a maximum penalty of life imprisonment and registration as a sex offender.

In the last 14 years, there have been major developments in the science related to HIV. What is also becoming increasingly clear is the negative impact of overextending the criminal law on individuals living with HIV and on public health overall.

Now, with the benefit of scientific advances, we know HIV is not easy to transmit. In many cases, the risk of transmission is very dramatically reduced, to the point where it should not be considered "significant" for purposes of criminally prosecuting people — e.g., when a condom is used, when a person's viral load is low or undetectable, or in cases of oral sex.

Growing evidence also shows that an overly broad use of the criminal law in cases of HIV non-disclosure undermines the trust between people and their physicians and counsellors; reinforces stigma and misconceptions about HIV; and risks creating additional disincentives to HIV testing and disclosing HIV to others. In sum, it undermines public health efforts to prevent new infections as well as access to treatment, care and support for those living with HIV.

The facts of the cases before the Supreme Court of Canada

R. v. Mabior

The accused had engaged in vaginal intercourse with multiple women without disclosing his status. None of them became HIV-positive. At trial, he was convicted on six counts of aggravated sexual assault for not disclosing his status. On October 13, 2010, the Manitoba Court of Appeal overturned convictions on four of these counts for sexual encounters in which either a condom was carefully used or the encounter took place when his viral load was undetectable. (Convictions on the other two counts were upheld; these involved unprotected vaginal sex during a period where his viral load was higher.)

R. v. D.C.

On December 13, 2010, the Quebec Court of Appeal reversed a trial judgment that had convicted D.C., a woman living with HIV, of sexual assault and aggravated assault on the basis that she did not disclose her status before having a single instance of unprotected sex with her former abusive partner. Based on the scientific evidence, the Court of Appeal concluded that the sexual encounter in question did not expose the complainant to a significant risk of HIV transmission, because D.C.'s viral load was undetectable at the time. The complainant was not infected with HIV.

What's at stake?

These appeals raise the question of whether people living with HIV should be convicted of aggravated sexual assault for not disclosing their status in circumstances where there is no significant risk of HIV transmission and, more specifically, when a condom is used or a person's viral load is low or undetectable.

In *R. v. Mabior*, the Attorney General of Manitoba argues that any risk of HIV transmission, however miniscule — e.g., even when a condom is used or a person's viral load is low or undetectable — must be disclosed, and that not doing so is a "fraud" that turns the sexual encounter into an aggravated sexual assault. According to the prosecution, withholding that information denies a sexual partner's right to control the conditions under which he or she is willing to engage in sexual activity. In this view, people living with HIV should have a legal duty to disclose their status *regardless of the level of risk of HIV transmission.*

In *R. v. D.C.*, the position of the Attorney General of Quebec is similar in principle, although it focuses more specifically on the obligation of a person with HIV to disclose his or her status *regardless of his or her viral load.* The Quebec Attorney General does not explicitly address the issue of whether there is a duty to disclose when sex is protected by a condom (although it did earlier accept, in front of the Quebec Court of Appeal, that there is not a legal duty to disclose HIV-positive status in cases where a condom is used).

If these prosecution arguments are accepted by the Supreme Court of Canada, it would be a radical further expansion of the criminal law — based on the false assumption that every person who has sex is a vulnerable, passive individual who is unaware of the risks associated with sex. This does not correspond to the reality and contradicts the public health message of shared responsibility for

protected sex. It also trivializes the offence of sexual assault and diverts the law from its original purposes.

Moreover, the position being advanced by the Attorneys General of Manitoba and Quebec is contrary to the science and harmful to health and human rights. In practice, it means that every person living with HIV in Canada would be at risk of prosecution for aggravated sexual assault, which carries a maximum penalty of life imprisonment if he or she does not disclose his or her status to a partner, even when the risk of transmission is extremely low and no transmission occurs. By this logic, even people who don't disclose their status before kissing could also be criminals — and indeed, we have seen cases where courts have convicted people living with HIV in the absence of any evidence that there was a significant risk of transmission (including one that is currently under appeal in Ontario).

This would expose a community, already the target of prejudice, fear and stigmatization, to prosecution based on their health condition, not based on a significant risk of harm to others. Finally, it would reinforce misconceptions and stigma regarding HIV and further undermine HIV prevention efforts and access to testing, treatment and care.

Numerous concerned parties have obtained intervener status before the Supreme Court of Canada. All of them, except the Attorney General of Alberta, strongly oppose the radical position being put forward by the Attorneys General of Manitoba and Quebec, and, jointly with the defence, argue for a strictly limited use of the criminal law in cases of HIV non-disclosure. It is important to note that the Attorney General of Ontario, which originally supported the radical prosecution position, finally decided to withdraw its intervention and that the Women's Legal Education and Action Fund (LEAF), which is actively engaged before the courts in defending women's right to freedom from sexual assault, has decided not to intervene in these cases.

The coalition's position

Given the important impact of the Supreme Court's decision on every person living with HIV and Canadian public health, police practice and the justice system, the following organizations decided to intervene jointly in the two cases: the Canadian HIV/AIDS Legal Network, the HIV/AIDS Legal Clinic of Ontario (HALCO), the Coalition des organismes communautaires québécois de lutte contre le sida (COCQ-SIDA), Positive Living Society of British Columbia (Positive Living BC), the Canadian Aids Society (CAS), Toronto People with AIDS Foundation (PWA), the Black Coalition for Aids Prevention (Black Cap) and the Canadian Aboriginal Aids Network (CAAN).

The interveners argue that while prosecution for alleged non-disclosure of HIV may be warranted in some limited circumstances, the criminal law should only be used at last resort and in the most blameworthy cases.

The significant risk test established in 1998 by the Supreme Court is a rational and necessary limit to the criminal law that, *at the bare minimum*, must be maintained. However, its inconsistent application and interpretation across Canada has led to uncertainty in the law and unfairness. Based on the evidence put forward in these two cases, it is time for the Supreme Court of Canada to clarify the notion of a "significant risk" in accordance with the development in science on HIV

transmission, treatment and public policy considerations, in order that people living with HIV not be prosecuted for not disclosing their status in circumstances such as the following:

- when a condom is used for vaginal or anal sex;
- when their viral load is low or undetectable; or
- when they engage in activities where the risk is similarly reduced (e.g., unprotected oral sex).

Finally, when people have access to effective antiretroviral (ARV) treatment, HIV becomes a chronic and manageable condition. The interveners argue that HIV does not necessarily equate to an "endangerment of life" and therefore the application of the offence of "aggravated" (sexual) assault to HIV non-disclosure is disproportionate and unjustified given the actual nature of the harm or the risk of harm.

When and where will the cases be heard?
The two cases will be heard on February 8, 2012 at the Supreme Court of Canada in Ottawa.

When can we expect a decision to be published?
On average, it takes about six months for the Supreme Court of Canada to issue a decision. Any decision in these cases likely will not be released before the fall of 2012.

Who are the organizations in the intervening coalition?
The coalition of interveners includes the Canadian HIV/AIDS Legal Network, the HIV/AIDS Legal Clinic of Ontario (HALCO), the Coalition des organismes communautaires québécois de lutte contre le sida (COCQ-SIDA), Positive Living Society of British Columbia (Positive Living BC), the Canadian Aids Society (CAS), Toronto People with AIDS Foundation (PWA), the Black Coalition for Aids Prevention (Black Cap) and the Canadian Aboriginal Aids Network (CAAN).

Who else is intervening?
Other interveners include the British Columbia Civil Liberties Association (BCCLA), the Criminal Lawyers' Association in Ontario (CLA), the Institut national de la santé publique du Québec [National Public Health Institute of Quebec], and the Association des avocats de la défense de Montréal [Association of Montréal Defence Lawyers]. These interveners are arguing for a limited use of the criminal law. The Attorney General of Alberta is intervening in support of the Attorneys General of Manitoba and Quebec, arguing for a radically expanded application of criminal charges. The Ministry of Attorney General of Ontario withdrew its intervention in December 2011.

FOR MORE INFORMATION AND TO ACCESS KEY RESOURCES:
www.aidslaw.ca/stopcriminalization.