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## **VANCOUVER HIV CASE HIGHLIGHTS AGAIN THE NEED FOR CLEAR GUIDELINES ON CRIMINAL PROSECUTIONS**

TORONTO, May 11, 2010 — In a ruling released last Friday, May 7<sup>th</sup>, a trial judge in British Columbia found that a gay man living with HIV had had unprotected anal sex with his then-partner without disclosing his HIV status on three occasions, but acquitted him on the charge of aggravated sexual assault. Based on the evidence before her, the judge concluded that the sexual encounters did not represent a “significant risk of serious bodily harm.” This is the legal threshold set out by the Supreme Court of Canada for triggering a duty to disclose known HIV-positive status.

This judgment reinforces the basic point that not every risk of transmission will be considered “significant”, and illustrates the importance of ensuring that courts consider carefully the scientific evidence before them in determining when there is a “significant risk” of harm, rather than simply criminalizing non-disclosure in all circumstances. While critical of the accused’s conduct, describing it as unethical, the judge observed: “But not every unethical or reprehensible act engages the heavy hand of the law.”

In this particular case, the accused HIV-positive partner was exclusively the receptive partner during anal sex, and the prosecution’s medical expert estimated the risk of transmission per act as 0.04 percent (for a cumulative risk of 0.12 percent over the three occasions). In addition, the judge found that HIV infection is now a chronic, manageable condition; this was relevant in her view because, as the severity of the possible harm decreases, the higher the risk of harm must be in order to warrant criminal prosecution.

The judgment is unusual; in numerous other cases, people living with HIV have previously been convicted for unprotected vaginal or anal sex without disclosing their status. It would be unwise to assume that, because of this single ruling by a B.C. trial court, there is no need to disclose known HIV status when having unprotected sex.

However, the case illustrates again the need for greater clarity in the law. Ever since the Supreme Court of Canada ruled in 1998 in the *Cuerrier* case that there is a duty to disclose HIV-positive status before engaging in activity that poses a “significant risk” of transmission, there has been uncertainty about what this includes. There has been an inconsistent, and hence unfair, application of criminal charges aimed at defining this standard. For example, in some cases, prosecutors and courts have agreed that

unprotected oral sex, or vaginal or anal sex while using a condom, does not carry a significant enough risk to trigger criminal charges for not disclosing — yet we know of other cases in which people have been charged and/or convicted for these very same activities, and now this Vancouver case is an acquittal for unprotected anal sex.

Provincial Attorneys-General should work with community AIDS organizations to develop clear guidelines for prosecutors and police that would recognize when criminal charges are not warranted. Those guidelines should be informed by the evidence about actual risks of transmission. They should also consider the damage that misusing the criminal law does to individual lives, and how it undermines public health, including HIV prevention efforts, through contributing to misinformation, fear and stigma.

The Legal Network worked closely with defence counsel in this case and provided expert testimony at trial.

More information about the court decision can be found in the following sources:

“HIV-positive gay man acquitted”, *Xtra!* (May 7, 2010)

[http://www.xtra.ca/public/Vancouver/HIVpositive\\_gay\\_man\\_acquitted-8632.aspx](http://www.xtra.ca/public/Vancouver/HIVpositive_gay_man_acquitted-8632.aspx)  
<http://www.xtra.ca/blog/national/>

“HIV-positive man acquitted for having sex with unprotected gay partner,” *The Province* (May 8, 2010)

<http://www.theprovince.com/news/positive+acquitted+having+with+unprotected+partner/2999879/story.html>

### **About the Canadian HIV/AIDS Legal Network**

The Canadian HIV/AIDS Legal Network ([www.aidslaw.ca](http://www.aidslaw.ca)) promotes the human rights of people living with and vulnerable to HIV/AIDS, in Canada and internationally, through research, legal and policy analysis, 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.

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#### **For more information:**

“Criminal Law and HIV”

A series of 5 info sheets on-line at:

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