



Update on two Ontario appeals regarding criminalization of HIV non-disclosure

June 26, 2012

Dear Legal Network members and supporters:

On June 25, the Ontario Court of Appeal decided to postpone hearing appeals in two prosecutions for HIV non-disclosure, *R v. M* and *R v. F*, until after the Supreme Court of Canada delivers its decisions in two other cases, *R v. Mabior* and *R v. DC*, anticipated later this year.

The original trial decisions reached in *R v. M* and *R v. F* are of particular concern because they represent an unjustifiable expansion of the criminal law in cases of HIV non-disclosure. In both cases being appealed, the trial judges made serious errors by ignoring the “significant risk” test established by the Supreme Court of Canada in *R v. Cuerrier* as the legal standard for HIV non-disclosure cases. As a result, in both cases, the trial judges ruled that even if a condom is used, a person can still be convicted for sexual assault for not disclosing his or her HIV-positive status. The Attorney General of Ontario is arguing before the Court of Appeal that this is the correct approach, that the “significant risk” test should be abandoned, and that people living with HIV should be subject to criminal prosecution for not disclosing their HIV-positive status regardless of how miniscule the risk of transmission is. On this view, people with HIV who use condoms or who have an undetectable viral load would still be criminally responsible for sexual assault if they do not disclose their status.

The Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic Ontario (HALCO) were granted intervener status in these appeals a few months ago and have argued that the “significant risk test” established by Supreme Court of Canada is a necessary limit to the criminal law that cannot be ignored and must be interpreted based on available medical and scientific evidence. We also call for evidence-based consideration of the complex legal and social issues presented by HIV non-disclosure. Currently, people in Ontario are being charged and convicted in the absence of a significant risk of HIV transmission. This overly broad interpretation and application of the criminal law in Ontario fuels stigma and discrimination and only makes HIV disclosure more difficult.

We understand the Ontario Court of Appeal’s reasoning to postpone hearing the cases until the Supreme Court of Canada clarifies the law later this year. But in the meantime, we are concerned that the Crown will continue to use these two trial convictions as a bad precedent (even though they are under appeal), and that people living with HIV in Ontario will continue to be prosecuted even in the absence of a significant risk of transmission. We expressed to the Court our view that the Crown should also stop

pursuing HIV non-disclosure prosecutions where there no significant risk until the Supreme Court of Canada further clarifies the law. No court order has been issued to that effect, but we are calling on Attorney General of Ontario to also postpone any prosecutions

AIDS ACTION NOW! has published an excellent blog post on the implications of these two cases on HIV non-disclosure in Ontario: <http://bit.ly/Od5Wkl>. We also invite you to visit the website of the Ontario Working Group on Criminal Law and HIV Exposure, which has been calling on Ontario's Attorney General to work with community groups and experts to adopt guidelines for prosecutors that would help prevent the misuse of criminal charges, and the injustice to individuals and harm to public health that result.

More information and resources on the criminalization of HIV non-disclosure can be found on our website at www.aidslaw.ca/stopcriminalization. We have also recently produced a **video workshop series to help service providers and people living with HIV understand the law and tackle the criminalization of HIV-non disclosure in their community.** As noted in the videos, and as explained here, the law is still not fully settled on some issues — including the question of whether using condoms means there is no (legal) obligation to disclose. To watch the workshops, please visit <https://vimeo.com/album/1963055>. If you have any questions please do not hesitate to contact us at info@aidslaw.ca or 416-595-1666.

In solidarity,

Richard Elliott
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