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HIV non-disclosure and the criminal law: An analysis of two recent decisions of the Supreme Court of Canada

R. v. Mabior, 2012 SCC 47
R. v. D.C., 2012 SCC 48

On October 5, 2012, the Supreme Court of Canada released its decisions in the cases of Mabior *and* D.C. *The Court decided 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. Not disclosing in such circumstances means a person could be convicted of aggravated sexual assault.*

In defining when there is a "realistic possibility" of transmission, the Court has set the bar very low. At this time, the only sex that the Court has recognized as not posing a realistic possibility of HIV transmission is vaginal sex that takes place when (1) a condom is used, AND (2) the person living with HIV has a low or an undetectable viral load. If both of these conditions are met, then there is no obligation under the criminal law to disclose one's HIV status. However, the Court has not clarified how the requirement to disclose in the case of a "realistic possibility" of transmission applies to any sexual activity other than vaginal sex.

Are you are living with HIV? Do you counsel people living with HIV? Learn more about the concrete implications of the decisions in *HIV non-disclosure and criminal law: Implications of recent Supreme Court of Canada decisions for people living with HIV* (Questions & Answers).

The facts

R. v. Mabior

The accused had vaginal sex with several women. He did not disclose his HIV-positive 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 appeal, the Manitoba Court of Appeal overturned convictions on four of these counts because, in those four cases, either a condom was carefully used or the sex took place when his viral load was undetectable. In the appellate court's view, either of these factors alone meant there was not a (legally) "significant risk" of transmission, the threshold established in a previous decision of the Supreme Court of Canada for triggering a duty to disclose (see **The legal issues**, below). Therefore, it was not a crime that he did not disclose his status in those circumstances. The prosecution appealed this decision to the Supreme Court of Canada.

R. v. D.C.

D.C., a woman living with HIV, had sex once with her former partner before she disclosed her status to him. They stayed together for four years after she disclosed her status. Her partner eventually became abusive and violent. When he was convicted for beating D.C. and her son, he accused her of not disclosing her HIV-positive status the first time they had sex and claimed the sex was unprotected — an accusation the trial judge determined was motivated by his desire for revenge. Although she claimed that they used a condom the first time they had sex, the trial judge did not believe her and found that their first sexual encounter was unprotected. The Supreme Court of Canada later described the judge's reasoning on this point as "a series of speculative conclusions"[1] based on one item of dubious evidence (i.e., a single, "cryptic" note in a doctor's file from seven years before the trial). Based on this speculation by the trial judge, D.C. was convicted of sexual assault and aggravated assault for not disclosing her HIV status to her partner. On appeal, the Quebec Court of Appeal overturned D.C.'s convictions on the basis that, even if no condom had been used for that first sexual encounter, her viral load was undetectable at the time. Therefore, based solely on her viral load, there was no "significant risk" of transmission and so her non-disclosure was not a crime. The prosecution appealed this decision to the Supreme Court of Canada.

The legal issues

The existing legal context: the "significant risk" test

In these two appeals, the Supreme Court of Canada was called upon to determine the circumstances in which a person living with HIV can be convicted of (aggravated) sexual assault for not disclosing his or her HIV-positive status to a sexual partner.

It was not the first time the Supreme Court of Canada was asked to address this issue. In 1998, in a case called *R. v. Cuerrier*, the Court considered the case of a man living with HIV who had unprotected vaginal sex on a number of occasions with two women. The Court decided that people living with HIV had a legal duty to disclose their HIV-positive status to their partners before having sex that would result in a "significant risk" of serious bodily harm (i.e., HIV transmission). The Court said that not disclosing, or not telling the truth, in such circumstances is a "fraud" that makes the partner's consent to sex legally invalid. This turns what would otherwise be consensual sex into a sexual assault, even if there is no transmission of HIV.

In this first judgment in 1998, the Supreme Court of Canada did not impose a blanket duty to disclose on people living with HIV. It was clear that it was only where there was a "significant risk" of HIV transmission that the legal duty to disclose would engage. The Court further suggested that if a condom was used the risk may be so reduced it might no longer be "significant" for the purpose of the criminal law. In other words, if a condom is used, it might be that there is no crime if the person does not disclose his or her HIV-positive status. The Court did not definitively decide this issue because *Cuerrier* was not about protected sex, leaving the question of a "condom defence" to be resolved in other cases by other courts.

[1] *R. v. D.C.*, 2012 SCC 48, at para. 28.

The "significant risk" test adopted in *Cuerrier* by the Supreme Court of Canada resulted in a great deal of uncertainty and unfairness for people living with HIV. A majority of the subsequent decisions by lower courts — including the Court of Appeal of Manitoba in *R. v. Mabior* — ruled that condom use was enough to preclude criminal liability. Yet in other cases some people living with HIV were charged and convicted even though condoms had been used.

In addition, since the Court's decision in *Cuerrier*, an extensive body of new science has emerged, showing that treatment with highly effective antiretroviral drugs (ARVs) dramatically reduces the risks of transmission by lowering a person's viral load (i.e., the presence of the virus in one's body). But this, too, was not addressed consistently by the judiciary.

As of today, more than 140 people have been charged (usually with aggravated sexual assault) for not disclosing their HIV-positive status to their sexual partners. In too many cases, the available scientific evidence was disregarded and some people were charged even where the risk was exceedingly low (e.g., in cases of oral sex).

In October 2012 in *R. v. Mabior* and *R. v. D.C.*, the Supreme Court of Canada had an opportunity to clarify the law in accordance with the current science of HIV transmission and treatment, by confirming that the Manitoba and Quebec Courts of Appeal were right in deciding that either the use of a condom or an undetectable viral load could preclude criminal liability in cases of HIV non-disclosure. These cases also presented the Court with an opportunity to respond to important health and human rights concerns — namely, the negative impact of the overuse of the criminal law against people living with HIV and in matters of public health. Unfortunately, the Court failed to seize these critical opportunities.

The position of the prosecution

These appeals in these cases were brought by the Attorneys General of Manitoba and Quebec, who argued that the Supreme Court of Canada should abandon the rule that disclosure is required only if there is a "significant risk" of transmission. They argued that people living with HIV have a legal duty to disclose their status to their sexual partner before having sex, regardless of the level of risk of HIV transmission.[2] The Attorney General of Manitoba argued that withholding information about one's HIV-positive status denies a sexual partner's right to control the conditions under which he or she is willing to engage in sexual activity. Therefore, they argued, whatever the risk of transmission, not disclosing one's HIV status should be treated as "fraud," turning the sexual encounter in question into an aggravated sexual assault.

The position of the interveners

The Supreme Court granted the Canadian HIV/AIDS Legal Network (www.aidslaw.ca), working in coalition with seven other organizations, the chance to present the Court with its position on

[2] Note that the argument of the Quebec prosecution service before the Supreme Court of Canada focused on the issue of viral load. It did not explicitly address the issue of whether there is a duty to disclose when sex is protected by a condom — although it had previously accepted, before the Quebec Court of Appeal, that there is not a legal duty to disclose HIV-positive status in cases where a condom is used.

the law and raise important public health and human rights concerns.[3] The coalition strongly opposed the prosecution's position which, it believes, was based on false and dangerous assumptions about people's ability to consent to sex, undermines public health messages of shared responsibility for safer sex, trivializes the offence of sexual assault, and ignores the available science about HIV transmission risks and treatment.

The coalition argued before the Court that while the criminal law may be warranted in some limited circumstances, it should only be used as a last resort and in the most blameworthy cases. It argued that, at a bare minimum, the Supreme Court of Canada should:

1) reject the prosecution's absolutist position by maintaining the existing "significant risk" test; and
2) clarify that test, based on available science, such that people living with HIV would not be criminally prosecuted for not disclosing their status:

    - in cases where a condom is used for vaginal or anal sex; or
    - in circumstances where they have low or undetectable viral load; or
    - in relation to oral sex.

Other interveners, including the British Columbia Civil Liberties Association (BCCLA), the Criminal Lawyers' Association in Ontario (CLA), the Institut national de la santé publique du Québec (INSPQ) [National Public Health Institute of Quebec], and the Association des avocats de la défense de Montréal (ADDM) [Association of Montréal Defence Lawyers] also argued for a limited use of the criminal law.

The Attorney General of Alberta intervened 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 proposed intervention in December 2011.

The Supreme Court of Canada decisions

In a unanimous ruling, the Supreme Court of Canada decided that "not every deception that leads to sexual intercourse should be criminalized."[4] It rejected the prosecution's position that people living with HIV must disclose their HIV-positive status to every sexual partner in all cases, and declared the legal framework established in *Cuerrier* valid (i.e., non-disclosure would only amount to fraud vitiating consent to sex where there is a "significant risk of serious bodily harm"). However, the Court also rejected the interveners' position that there is no significant risk of HIV transmission when people use a condom or have a low or an undetectable viral load.

[3] HIV & AIDS Legal Clinic 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).
[4] *R. v. Mabior,* 2012 SCC 47 at para. 58

Taking into account both the risk of contracting HIV and the seriousness of the disease if contracted,[5] the Court decided that the "significant risk" test first established in *Cuerrier* now means a "*realistic possibility of transmitting HIV.*"[6] [emphasis added]

Based on this new interpretation of the *Cuerrier* test, the Court decided, at least in the context of heterosexual vaginal sex, that in order to avoid being convicted of aggravated sexual assault for not disclosing one's HIV-positive status, a person living with HIV would need both to ensure that a condom is used and have a low or undetectable viral load. If both of these conditions are met, then there is no obligation, under the criminal law, to disclose one's HIV status.

What did this mean for the defendants in these particular cases?

Applying this new approach, the Court reinstated Mabior's convictions in three cases where he had had sexual intercourse when his viral load was undetectable but he had not used a condom. The Court upheld his acquittal regarding a fourth complainant, because in that case he used a condom and his viral load at the time of the sexual intercourse was low.

D.C.'s acquittal was upheld, but solely on a technical legal ground related to how the trial judge dealt with the evidence on condom use in that case. Otherwise, she would have been convicted by the Court based on its new "realistic possibility" test.

Evidence cited by the Supreme Court of Canada on the risks of HIV transmission

Unprotected vaginal sex with ejaculation (HIV-positive male partner):
One of the medical experts put the risk at 0.05% (1 in 2000) to 0.26% (1 in 384).
A public health nurse testified that the risk was 0.1% (1 in 1000).
According to a systemic review and meta-analysis,[7] the risk in high-income countries is 0.08% (1 in 1250).[8]

Impact of condom-use on reducing risk of transmission:
"It is undisputed that HIV does not pass through good quality male or female latex condoms. However, condom use is not fail-safe, due to the possibility of condom failure and human error ... [c]onsistent condom protection reduces the risk of HIV transmission by 80 percent ... the reduction may be larger for consistent *and* correct condom use ...."[9]

Impact of treatment on reducing risk of transmission:

[5] Ibid. at para. 86.
[6] Ibid. at para. 84.
[7] The court referred to M. C. Boily, et al., "Heterosexual risk of HIV-1 infection per sexual act: systematic review and meta-analysis of observational studies," *The Lancet Infectious Diseases*9, 2 (2009): pp.118–129.
[8] Ibid. at para. 97.
[9] Ibid. at para 98. The Court referred to S. C. Weller and K. Davis-Beaty, "Condom effectiveness in reducing heterosexual HIV transmission (Review)," Cochrane Database of Systematic Reviews 1 (2002) No.: CD003255. DOI: 10.1002/14651858.CD003255.

"When a patient undergoes antiretroviral treatment, the viral load shrinks rapidly to less than 1,500 copies per millilitre (low viral load) and can even be brought down to less than 50 copies per millilitre (undetectable viral load) over a long period of time."[10]

"[T]he risk of transmission is reduced by 89 to 96 percent when the HIV-positive partner is treated with antiretrovirals, irrespective of whether the viral load is low or undetectable."[11]

For more information about the estimated risks of HIV transmission associated with any given sexual act, and the impact of condoms and of antiretroviral treatment on further reducing those small risks, see D. McLay et al., *"Scientific research on the risk of the sexual transmission of HIV infection and on HIV as a chronic manageable infection"* (updated December 2011) at www.aidslaw.ca/lawyers-kit, and the following Canadian HIV/AIDS Legal Network materials at www.aidslaw.ca/stopcriminalization:

- *HIV non-disclosure and the criminal law: condom use*
- *HIV non-disclosure and the criminal law: antiretroviral treatment and viral load*

Commentary

For people living with HIV and for those working in the field of HIV prevention and care, these decisions are a major step backward from the Supreme Court of Canada's previous decision in *Cuerrier*. While the Court said it was maintaining the "significant risk" test it previously established in 1998, it has deprived the word "significant" of much meaning. A "significant risk" of transmission must now be understood as a "realistic possibility" of transmission, and the Court says this includes anything higher than a "negligible threshold"[12] or anything more than a "speculative possibility."[13]

By deciding that there is a duty to disclose before vaginal sex unless both a condom is used and a person's viral load is low (i.e., where the risk is almost zero), the Court effectively decided that almost any risk, no matter how small, could trigger a duty to disclose, even as the Court also declared that it did not want to criminalize "any risk, however small."[14] This was but one of numerous contradictions in the Court's judgments in these cases. In essence, the Court purported to put some limit on the scope of the criminal law, but that limit was largely illusory.

The Supreme Court recognized that although the law must ensure that consent to sex is meaningful, "not every deception that leads to sexual intercourse should be criminalized."[15] It also stated that there must be a balance between a sexual partner's interest in autonomy and equality in consenting to sex, which values are entrenched in the *Canadian Charter of Rights and Freedoms*,[16] and "the need to confine the criminal law to conduct associated with serious wrongs

[10] Ibid. at para 100.
[11] Ibid. at para 101. The Court refers to M.S. Cohen, et al., "Prevention of HIV-1 Infection with Early Antiretroviral Therapy,"*The New England Journal of Medicine* 365(2011): pp. 493–505.
[12] Ibid. at para 99.
[13] Ibid. at para 101.
[14] Ibid. at paras. 85, 87.
[15] Ibid. at para 58.
[16] Ibid. at para 45.

and serious harms."[17] The Court further acknowledged that an overly broad use of the criminal law would be unfair and stigmatizing for people living with HIV,[18] and that the experience of other common law jurisdictions "sounds a note of caution against extending the criminal law beyond its appropriate reach in this complex and emerging area of law."[19]

Yet despite these multiple warnings, the Supreme Court of Canada chose to expand the scope of the criminal law in cases of HIV non-disclosure and to clearly indicate that its new test of disclosure being required in the case of a "realistic possibility" of transmission is "specific to HIV." Moreover, although the Court was clear that "[t]he potential consequences of a conviction for aggravated sexual assault ... underline the importance of insisting on moral blameworthiness in the interpretation of [the law],"[20] it failed to address the issue of the *mens rea* (i.e., "guilty mind") required to obtain a conviction for HIV non-disclosure, as had been suggested by the coalition of AIDS organizations.[21] As a result, based on the Court's decisions in *Mabior* and *D.C.*, a person who acts responsibly by taking highly effective precautions to protect their partner, and who has no intent to cause harm, can face charges of aggravated sexual assault.

Finally, the Court did say that the law should be open to "adapting to future advances in treatment."[22] Such advances could further affect both the risks of HIV transmission and the harm associated with HIV.[23] But very significant advances have already taken place. When treatments are available, HIV is already a chronic and manageable disease. Moreover, the impact of treatment on dramatically reducing what are already very small risks is now well established. It is therefore unfortunate that the Court refused to consider this existing evidence about the impact of low viral load sufficient to preclude criminal charges.

In addition to its contradictory approach to assessing and criminalizing the risk of HIV transmission, the Court's approach to consent was also deficient. The Court made a passing reference to an earlier, leading case (*R. v. Ewanchuk*) about when consent to sex is not valid; *Ewanchuk* concerned rape myths and situations where there was no real consent to sex because it was forced or because a person was afraid to refuse. The Court also repeatedly asserted that its approach in *Mabior* and *D.C.* was in line with the *Charter* values of equality and sexual autonomy.

But nowhere did the Court meaningfully analyze how the law protects personal autonomy and advances equality (i.e., specifically for women) by overriding the consent of an adult to engage in sex solely because of the absence of certain information they might prefer to know. The Court

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[17] Ibid. at para 89.
[18] Ibid. at para 67.
[19] Ibid. at para 55.
[20] Ibid. at paras 24.
[21] The coalition of interveners had asked the Supreme Court to clarify the means rea required for a conviction in cases of HIV non-disclosure. The interveners suggested several factors that should be taken into account to limit the use of the criminal law, including the use of appropriate safeguards; the fear of violence in case of disclosure; the timing of disclosure (e.g. shortly after a condom were to break) etc... But, the Supreme Court chose not to address this issue
[22] Ibid. at para 104.
[23] The Court suggested that the failure to disclose might no longer constitute fraud vitiating consent if researchers were to find a cure for HIV because HIV might cease to cause "serious bodily harm" for the purpose of the criminal law.

ignored the cases decided in Canada since *Cuerrier* on HIV non-disclosure and much of the analysis emerging from various other, similar jurisdictions where the trend is to limit the criminal law. Whether or not the Supreme Court wants to admit it, people do have sex without full and complete information about their sexual partners all the time — including in circumstances which can give rise to some risk of serious harm. Yet the law does not step in to all such circumstances to override consent and criminally prosecute the lack of disclosure of information.

Consenting adults are capable of deciding whether to have protected or unprotected sex without being aware of whether a particular partner does or does not have HIV or another sexually transmitted infection (STI), and do so often. Contrary to the Court's basic assumption, sexually active adults are not deprived of their autonomy, including their ability to decide whether to practise safer sex, simply because they lack information about a sexual partner's HIV or other STI status.

The Court also failed to consider the challenges associated with disclosure of a heavily stigmatized and misunderstood condition: repercussions can include loss of privacy, discrimination and rejection, and even violence. Lack of disclosure may not be about asserting force over another person in order to gain sexual gratification — which is the assumption behind equating it with aggravated sexual assault — so much as about protecting oneself from violence or other harm. By broadly asserting that this is about protecting the dignity and autonomy of the sexual partner without any examination of the range of factors at play when people have sex, the Court revealed a shallow understanding of the values that it purports to protect when criminalizing HIV non-disclosure, even in cases where the risk of transmission is miniscule. Such an approach trivializes sexual assault and diverts the law from protecting women's physical and sexual autonomy.

In addition, the Supreme Court decisions in *Mabior* and *D.C.* did not provide much certainty in the law. There are many questions that remain unanswered and that will be tested in courts on the backs of people living with HIV. Do people have a duty to disclose before they engage in oral sex? What about those who have an undetectable viral load at the time they have oral sex? How do these decisions apply to anal sex?

Finally, these decisions further undermine public health and the rights of people living with HIV. They create additional disincentives to seek HIV testing and will discourage some people from talking with their counsellors and physicians about their sexual and disclosure practices, as medical and counselling records can be subpoenaed and used in criminal investigations.

The Court's decisions will also disproportionally affect the most vulnerable. Access to treatment was once an issue of public health and social justice. Now it is also a criminal issue. People with inadequate access to care, treatment and support may not be able to establish a low viral load. If they do not or cannot disclose their status — including because of fear of violence or other negative consequences — they will be exposed to criminal conviction and imprisonment. Based on the Supreme Court of Canada's judgments, a condom alone is not sufficient to avoid conviction.

The Court has put another tool for coercion into the hands of abusive partners. This can only exacerbate the vulnerability of HIV-positive people in abusive and/or violent relationships to blackmail and threats of prosecutions, an outcome that will disproportionately affect women living with HIV.

In summary, the Court's decisions in *Mabior* and *D.C.* make already bad and unclear law, which has resulted in uneven application and injustice in numerous cases, even worse — for people living with HIV, for HIV prevention and care efforts, and hence for public health.