Focus: R v Mabior and R v D C

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INTRODUCTION

In this focus feature, we offer three perspectives on the recent Supreme Court of Canada judgments in R v Mabior and R v D C, which attempted to clarify when a person living with HIV will be subject to criminal liability for failing to disclose this condition prior to engaging in sexual intercourse. Martha Shaffer argues that the Court missed an opportunity to reconsider the test for sexual fraud it had laid out in its 1998 decision in R v Cuerrier, a test that, since its inception, has proven difficult to apply. Isabel Grant argues that the Court has over-criminalized HIV non-disclosure through treating all cases where there is a realistic possibility of transmission as aggravated sexual assault regardless of whether transmission of the virus takes place. Alison Symington notes that the Court’s punitive approach is out of step with recent scientific and medical advancements with respect to HIV transmission and treatment and that, while the Court set out a risk-based test, it did not appropriately weigh the evidence regarding the risk of HIV transmission. These three perspectives demonstrate that the criminalization of HIV non-disclosure in Canada remains deeply problematic.

Keywords: R v Mabior, R v D C, aggravated sexual assault, consent, HIV, non-disclosure

In 1998 in R v Cuerrier,1 the Supreme Court of Canada held that non-disclosure of one’s HIV-positive status to a sexual partner will constitute fraud negating consent to sexual activity where there is a ‘significant risk’ of transmission. In R v Mabior2 and R v D C,3 the Court revisited this issue and held unanimously that a person who is HIV-positive can be convicted of aggravated sexual assault for engaging in sexual intercourse without prior disclosure of this status where there is a ‘realistic possibility’ of HIV transmission. Such a possibility will exist unless two conditions are met: the accused must have a low viral load4 at the time of the

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2 R v Mabior, 2012 SCC 47.
3 R v D C, 2012 SCC 48. We use ‘DC’ when referring to the case and ‘DC’ when referring to the accused.
4 Viral load is the term used to describe the amount of HIV circulating in the body, usually measured in the blood (as the number of copies per millilitre). The tests currently
encounter and condoms must be used during intercourse. Thus, to avoid criminal liability, people living with HIV must disclose their status before engaging in sexual intercourse unless they meet these conditions.

The decisions raise important questions for legal, social, and health policy and so have been met with a mixed response. For example, is it fair to convict a person of aggravated sexual assault for failing to disclose an HIV infection, especially if there is little risk of transmission? Does the prosecution of non-disclosure help or hinder HIV prevention? Does it protect the public from being exposed to HIV during sexual encounters? Does criminalization of non-disclosure contribute to the stigmatization of people living with HIV? Is criminalization enforced disproportionately against certain groups? And will it affect certain populations more negatively than others?

There have been significant changes with respect to our knowledge about HIV prevention and transmission since Cuerrier, as well as ongoing development of effective treatments, which have transformed HIV from a fatal diagnosis into a chronic, manageable condition for most people with access to treatment. Yet much of the public still believes that HIV is highly infectious, is inevitably fatal, and is associated with immoral activities. As a result, not revealing HIV status to sexual partners is a charged issue.

To be clear, HIV infection remains a serious medical condition, with the potential to cause life-threatening complications and death if not successfully treated. But we now know that the average risk of HIV transmission per act of unprotected vaginal intercourse is only 0.08 per

used in Canada can measure viral load levels as low as 20 to 50 copies/ml. Below this level, viral load is said to be ‘undetectable.’ The goal of HIV treatment is to render viral load undetectable, thereby allowing the immune system to maintain or recover its strength and keep people healthy. There is also a strong correlation between a person’s viral load and the risk of transmission to another person – a lower viral load means there is less possibility of transmission. If the viral load is undetectable, the possibility of transmission is almost eliminated.

5 Contrast, for example, the press release issued by the coalition of HIV organizations who intervened in the decision: Canadian HIV/AIDS Legal Network et al, News Release, ‘Unjust Supreme Court Ruling on Criminalization of HIV Major Step Backwards for Public Health and Human Rights’ (5 October 2012), online: Aidslaw.ca <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=2055>, with this blog posting by a University of Ottawa law professor: Carissima Mathen, ‘R v Mabior; R v DC’ (5 October 2012) (weblog), online: Slaw <http://www.slaw.ca/2012/10/05/r-v-mabior-r-v-dc/>.

6 Some two dozen effective antiretroviral medications (ARVs) have been approved for treating people with HIV. ‘Highly active antiretroviral therapy’ (HAART), usually involving the combination of at least three different medications, practically stops HIV from replicating, lowering the person’s viral load dramatically.
If condoms are used, that risk is reduced by at least 80 per cent. If the HIV infected partner is on antiretroviral treatment (ARVs), that risk is reduced by 96 per cent. The Supreme Court was therefore called upon to reconsider the *Cuerrier* test, taking into consideration the new science of HIV, contemporary realities of living with HIV, and the protection of sexual autonomy and dignity.

*Mabior* and *DC* presented two very different factual contexts in which to confront these realities. In *Mabior*, the accused failed to disclose his HIV-positive status to nine complainants, several of whom were teenagers. During the period of time in question, Mabior sometimes had an undetectable viral load and at other times had a low viral load. Condoms were used inconsistently. None of the complainants tested positive for HIV. At trial, Mabior was convicted of six counts of aggravated sexual assault but acquitted on the counts where he had an undetectable viral load and used a condom. The Manitoba Court of Appeal quashed all but two of the aggravated sexual assault convictions, holding that either an undetectable viral load or reasonably careful use of condoms reduces the risk of HIV transmission so that there is no longer a ‘significant risk.’

*DC* was a single mother who met the complainant at their sons’ soccer game. Although there was conflicting testimony, the trial judge found that there was one incident of unprotected sex prior to *DC’s* disclosing


8 See David McLay, ‘Scientific research on the risk of sexual transmission of HIV infection on HIV and on HIV as a chronic and manageable infection.’ Report prepared for the Canadian HIV/AIDS Legal Network (December 2011), online: Canadian HIV/AIDS Legal Network <http://www.aidslaw.ca/EN/lawyers-kit/documents/2a.McLay2010s.3update-Dec2011.pdf>. Note this report is an update of section 3 of a report funded by the Ontario HIV Treatment Network: Eric Mykhalovskiy, Glenn Betteridge, & David McLay, HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario (August 2010), online: <http://www.catie.ca/pdf/Brochures/HIV-non-disclosure-criminal-law.pdf> [McLay]. Note that some studies have found the risk of transmission from an HIV-positive man to a woman is about twice that of an HIV-positive woman to a man. Unprotected anal intercourse is considered more risky, with estimates of per-act risk of HIV transmission ranging from 0.01% to over 3%. Unprotected oral sex carries the lowest risk of sexual transmission.

9 *R v Mabior*, 2008 MBQB 201. He was also convicted of sexual interference and invitation to sexual touching with respect to an under-age girl. (These convictions were not appealed.) He was sentenced to fourteen years and has since been deported: ‘HIV Sex Offender Deported from Winnipeg.’ *CBC News* (20 February 2012), online: CBC News <http://www.cbc.ca/news/canada/manitoba/story/2012/02/20/mb-mabior-hiv-assault-sudan-deport-winnipeg.html>.

10 *R v Mabior*, 2010 MBCA 93 at para 92.
her HIV-positive status to the complainant. After a brief separation following her disclosure, the couple reconciled and cohabited for four years. The relationship came to a violent end; the complainant was convicted of assaulting DC and her son. After charges were laid against him for assault, DC was charged for not disclosing her HIV status four-and-a-half years earlier. The complainant did not contract HIV. DC was convicted of aggravated assault and sexual assault. The Quebec Court of Appeal quashed the convictions on the basis that her undetectable viral load reduced the risk of transmission below the level of ‘significance.’

In this focus feature, we assess the Mabior and DC decisions from three perspectives. Martha Shaffer focuses on the implications of Mabior for the doctrine of fraud as it relates to sexual assault law. She examines whether Mabior leaves us with a coherent test for determining what kinds of deceptions will negate consent to sexual activity. Isabel Grant questions the Court’s application of aggravated sexual assault in cases where no transmission of HIV has occurred. She argues that this tendency toward over-criminalization is part of a pattern of exceptionalism in which persons with HIV are singled out for disadvantageous treatment. Alison Symington criticizes the Court’s failure to appreciate the significance of HIV-related scientific developments and predicts that the decision will have a disproportionate impact on particularly marginalized groups with HIV.

All three pieces address a fundamental question from different angles: when, if ever, should failure to disclose one’s HIV status constitute sexual assault? We all write from the position that people living with HIV generally should disclose their status to their sexual partners. We also agree that there is some role for criminal law with respect to HIV exposure. Finally, we approach these questions as feminists, concerned with retaining the gains women have achieved through the development of a robust definition of consent in the law of sexual assault.

11 As of 12 November 2012, conditional sentences will no longer be available where sexual assault is prosecuted by indictment (Safe Streets and Communities Act, SC 2012, c 1, s 34). For more details about this case, see Isabel Grant & Jonathan Glenn Betteridge ‘A Tale of Two Cases: Urging Caution in the Prosecution of HIV Non-disclosure’ (2011) 15 HIV/AIDS Policy & Law Review 15.

12 R v DC, 2010 QCCA 2289.