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A Tale of Two Cases: Urging Caution in the Prosecution of HIV Non-Disclosure

Isabel Grant

Allard School of Law at the University of British Columbia, grant@allard.ubc.ca

Jonathan Glenn Betteridge

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A tale of two cases: urging caution in the prosecution of HIV non-disclosure

Two provincial Courts of Appeal have recently released unanimous decisions that clarify the law regarding the obligation imposed upon people living with HIV to disclose their HIV status prior to sexual relations. The decision of the Manitoba Court of Appeal in *R v. Mabior*¹ and of the Quebec Court of Appeal in *R c. D.C.*² must be seen against a background of increasing criminal prosecutions in Canada of people with HIV who allegedly do not disclose their HIV status to sexual partners. Since the first HIV non-disclosure prosecution in 1989, there have been over 120 prosecutions. A high proportion of accused has either pleaded guilty to, or been convicted at trial, of serious criminal offences, often resulting in harsh sentences and sex offender registration.³ In the majority of convictions, there was no transmission of HIV to the complainant.⁴

Despite the significant number of prosecutions, it is arguable that people living with HIV who know of their infection, of whom there were an estimated 48 100 in Canada in 2008,⁵ cannot ascertain their criminal law disclosure obligation. The test set out by the Supreme Court of Canada in *R v. Cuerrier*,⁶ requiring significant risk of serious bodily harm, has not provided adequate guidance to people living with HIV, police, Crown counsel or lower courts. The Supreme Court will soon have an opportunity to revisit *Cuerrier*. It has granted leave to appeal in *Mabior* and *D.C.*,⁷ which will be heard together. In both cases, the Crown is arguing for a doctrine of informed consent in sexual assault such that non-disclosure accompanied by *any* risk of HIV transmission, regardless of condom use or the amount of HIV in the infected person's blood (known as viral load), would attract criminal liability.⁸ This comment begins with a review of each case, focusing on the analysis of the appellate courts, and then discusses three issues that the Supreme Court of Canada must confront when it hears the appeals.

The Mabior case

The accused was diagnosed as HIV-positive in January 2004, and placed on antiretroviral therapy in April 2004. Between February 2004 and January 2006, the accused had sexual relations with nine female complainants, several of them teenagers, sometimes with condoms and sometimes without, and often the relations involved use of alcohol and illicit drugs supplied by the accused. There was evidence that he had not been using condoms properly during this time, because he was infected twice with gonorrhoea and was listed as a contact for chlamydia. To date, none of the complainants has tested positive for HIV.

At trial, the accused was convicted of six counts of aggravated sexual assault and one count each of invitation to sexual touching and sexual interference, and was sentenced to a total of 14 years' incarceration.⁹ The trial judge found that five of these six complainants would not have had sex with Mabior if they had known of his HIV-positive status. The sixth, who was 14 years of age, learned of his status during the course of their

sexual relationship. The trial judge stated several times in her reasons that condom usage only resulted in an 80 percent reduction of the risk of transmission of HIV, but she did not clearly apply this level of risk reduction to the already low rates of sexual transmission. In essence, she found that *any* risk of transmission was sufficient to meet the *Cuerrier* test — only when use of a condom and an undetectable viral load are *both* present would the risk be reduced sufficiently to negate the significant risk of serious bodily harm.

The Manitoba Court of Appeal, in a cautious and well-reasoned judgment, attempted to put some limits on the criminalization of non-disclosure. The Court sought to achieve a balance between competing interests:

In this context, no one, including the intervener, the Canadian HIV/AIDS Legal Network, disagrees with charging individuals who intentionally or recklessly infect their partners with a serious disease. The criminal law has a role to play in protecting the public from irresponsible individuals. Nor is there any disagreement that, from an ethical and public health perspective,

disclosure is necessary. However, between those two poles, policy considerations should impact on the law so as to produce a more nuanced view of when failure to disclose warrants criminal sanctions. There are other mechanisms for the state to intervene, short of criminalizing the act. Criminal sanctions should be reserved for those deliberate, irresponsible or reckless individuals who do not respond to public health directives and who are truly blameworthy.¹⁰

The Court held that the trial judge made two errors. First, even though the test requires that there be a significant risk, the trial judge required that, to avoid conviction, there must be virtually no risk of harm, requiring both the use of condoms *and* an undetectable viral load. Instead, the Court held that, if either of these factors was present, HIV non-disclosure was not subject to criminal liability because the risk would be reduced below what is considered significant.

Second, the Court held that the trial judge had erred in her focus on the finding that condoms reduce the risk of sexual transmission by 80 percent. The Court clarified that 80 percent relates to an 80 percent reduction of an already low rate of sexual transmission. The risk of transmission the trial judge should have considered was 20 percent of “an already small baseline figure.”¹¹ The Court found that “consistent and careful use of condoms”¹² or “reasonably proper condom use”¹³ reduces the risk below significance. The Court explicitly rejected the Crown’s argument that, because the potential harm involved was so serious, virtually any possibility of that harm occurring was significant.

The Court elaborated on the careful use of condoms by listing 10 fac-

tors provided by an expert witness that would represent “an ideal situation.”¹⁴ In addition, the Court made clear that, when a condom breaks, the accused must immediately disclose his or her HIV status to a non-HIV-positive partner so that the partner may seek prophylactic measures. Non-disclosure in this context would be equated with unprotected sex.¹⁵

The Court noted the significance of the scientific developments post-*Cuerrier*, including the successful use of antiretroviral therapy, which can dramatically reduce viral load and subsequent risk of transmission. The Court held that the application of *Cuerrier* must “evolve to account appropriately for the development of the science of HIV treatment.”¹⁶

People living with HIV who know of their infection cannot ascertain with certainty their criminal law disclosure obligation.

However, the Court was not willing to make definitive statements on viral load and instead held that each case will depend on the evidence presented, while also urging the Supreme Court of Canada to provide more guidance.¹⁷ On the facts, the Court of Appeal found that the standard of “significant risk of serious bodily harm” was met with respect to only

two of the accused’s six aggravated sexual assault convictions.

The D.C. case

In the summer of 2000, D.C. met a man at a soccer pitch, where each had a son playing soccer. Thus began a four-year relationship. The trial judge found one incident of unprotected sexual intercourse prior to HIV disclosure, which took place early in the relationship. The relationship came to a tumultuous end in November 2004 when D.C. called police alleging that her partner had physically assaulted her and her son. Her partner was charged with, and convicted at trial of, assault. In February 2005, he contacted the police and complained of the one earlier incident of unprotected intercourse prior to HIV disclosure. D.C. was charged with one count each of aggravated assault and sexual assault.

At trial, expert medical testimony established that the risk of HIV transmission during unprotected sexual intercourse between an HIV-infected female and a male is 1 in 1000, irrespective of HIV viral load.¹⁸ Where the female’s HIV viral load is “undetectable” (below 50 copies of HIV per millilitre of blood), the risk of transmission is 1 in 10 000, which risk decreases to 1 in 50 000 where a condom is used. Citing *Cuerrier* and *Williams*,¹⁹ the trial judge found D.C. guilty of aggravated assault because her failure to disclose her HIV status prior to unprotected sexual intercourse exposed her partner to a significant risk of serious bodily harm. The trial judge also found D.C. guilty of sexual assault, since her partner’s consent to sex had been vitiated by the HIV non-disclosure.

D.C. appealed her convictions to the Quebec Court of Appeal. She argued that the trial judgment represented an unwarranted and overly expansive interpretation of the criminal obligations placed upon HIV-positive people, and erred in rejecting the uncontradicted expert evidence of the extremely minimal risk of HIV transmission in the circumstances of the case, thereby ignoring the significant risk standard established in *Cuerrier*. The Crown argued that the failure by an HIV-positive person to disclose his or her HIV status prior to unprotected sexual intercourse carried sufficient risk to vitiate his or her partner's consent to intercourse.

A unanimous Court of Appeal addressed the “heart of the appeal”:²⁰ the relationship between the disclosure obligation, the significance of the risk of bodily harm and the medical evidence. The Court reviewed the essential elements of fraud in sexual relations — dishonesty and the risk of deprivation — established by the Supreme Court in *Cuerrier*. Its analysis highlighted those parts of Justice Cory's judgment that tie the HIV disclosure obligation to the risk posed to the sexual partner's health: the disclosure obligation increases with the risk associated with the sexual act.²¹ The Court found that the trial judge had erred in the application of the test to the evidence. There was uncontradicted evidence that the accused had an undetectable viral load. The Court reviewed the expert testimony and found that, as a result of effective medications, D.C.'s HIV viral load became undetectable at the end of June 2000 and stayed undetectable until spring of 2001. The Court found that, in the circumstances of the case, the risk of transmission was so small as not to constitute a “sig-

nificant risk of serious bodily harm,” such that D.C.'s failure to disclose her HIV status to the complainant did not vitiate his consent to unprotected sexual intercourse as required under *Cuerrier*.²² In the Court's view, the terms used by the medical experts (“very weak,” “very minimal” and “very, very low”) were incompatible with the existence of any significant risk whatsoever.²³ Thus, the trial judge had erred in finding that the Crown had proven the offences of sexual assault and aggravated assault.

The Court quotes favourably from Justice Steel's reasons in *Mabior*, including the invitation to the Supreme Court to revisit and clarify the inherent uncertainty in the significant risk test.²⁴ In conclusion, the Court suggests that the question of the use of the criminal law to address the transmission of serious communicable infections might be one most appropriately left to Parliament, given the issue's numerous social, ethical and moral ramifications.²⁵

Analysis and comment

These cases could not be more different on their facts and demonstrate the wide range of complex and diverse circumstances that lead to HIV non-disclosure prosecutions. What these cases share, however, is that the trial judges held that *any* risk of transmission of HIV was sufficient to satisfy the “significant risk of serious bodily harm” test from *Cuerrier*. Both appeal courts disagreed, holding that the requirement from *Cuerrier* that the risk be significant must be given some meaning and that not all risks will vitiate consent to sex. These cases provide the opportunity for the Supreme Court of Canada to examine how our increased knowledge of HIV transmission risk, and our ability to

greatly reduce that already low risk through condoms and antiretroviral medication, should affect a legal test developed at a time when HIV almost always led to AIDS and death. We discuss three issues that merit consideration by the Supreme Court.

The requirement from *Cuerrier* that the risk be significant must be given some meaning — not all risks will vitiate consent to sex.

The significant risk test: an evidence-informed approach

The Supreme Court will soon have the opportunity to clarify the significant risk of serious bodily harm test. If the Supreme Court follows its *Cuerrier* analysis, the Court of Appeal's reasoning in *Mabior* is an excellent, evidence-informed starting point. The latter Court provides overall guidance as to the appropriate function of the criminal law in the context of HIV non-disclosure, fundamentally distinguishing between what the majority of people would consider moral or ethical sexual conduct, and conduct that should be subject to criminal sanction: “[e]veryone would want to be told that a potential partner was HIV-positive. Most people would agree that there was a moral and ethical obligation to disclose that information.”²⁶ Yet the Court explicitly

recognized that criminal sanctions should only be imposed where the risk of bodily harm resulting from the non-disclosure is significant.²⁷

The Court articulated the following principles for determining whether the sexual act put the complainant at a “significant risk of serious bodily harm”: (i) at present, being infected with HIV subjects an individual to serious bodily harm;²⁸ (ii) the Crown will bear the burden of proving that there was a significant risk of HIV transmission given the HIV viral load of the accused at the relevant time(s);²⁹ (iii) the determination of risk should be consistent with medical science related to HIV/AIDS, which will develop over time;³⁰ (iv) the risk of sexual transmission is cumulative, increasing with each risk-presenting act; (v) reasonably proper condom use, as opposed to perfect condom use, reduces the risk of sexual transmission to below the level of significance;³¹ and (vi) where a condom breaks, immediate disclosure by the HIV-positive partner could suffice to reduce the risk of harm.³² Non-disclosure after a condom breaks is only criminalized where there is a detectable viral load.

Significantly, the Court recognizes the significant legal relevance of condoms in determining HIV transmission risk and the criminal law duty of disclosure. The Court accepts that even reasonably proper condom use, as opposed to perfect condom use, for sexual intercourse reduces the risk of HIV transmission to below the level of significance.³³ This position is consistent with the Supreme Court of Canada’s decision in *Cuerrier* and encourages mutually responsible sexual behaviour that will ultimately reduce the risk of HIV transmission more than disclosure.

By contrast, the Court’s equivocal approach to the impact of HIV viral load on the risk of transmission represents a missed opportunity to clarify the law further:

It is true that the test for a viral load is done for “a moment in time.” ... Common infections, STDs and treatment issues can lead to fluctuations in a person’s viral load. HIV-positive people with apparently undetectable viral loads can experience occasional spikes in viral load or may develop viral resistance. *Consequently, no comprehensive statement can be made about the impact of low viral loads on the question of risk.* Each case will depend on the facts regarding the particular accused, and each case will depend on the state of the medical evidence at the time and the manner in which it is presented in that particular case.³⁴ [Emphasis added.]

This approach is unfortunate given the large body of recent scientific literature suggesting that effective antiretroviral therapy offers more significant protection against HIV transmission during sex than does condom use.³⁵ It also stands in contrast to the Court’s findings on the facts of the case. It posed the following question in relation to each complainant where it found that a condom was not properly used: “[w]as the accused’s viral load undetectable at the time of sexual intercourse?” If so, there was no significant risk of HIV transmission, no duty to disclose on the part of Mabior and no criminalization of non-disclosure.

One issue that must be addressed in the context of viral load is burden of proof. We suggest that the burden be on the Crown to prove all elements of the assault offence beyond a reasonable doubt, which includes leading evidence to establish that, *in the*

circumstances of the case, the sexual act presented a significant risk of serious bodily harm to the complainant. This approach is preferable to the one set out by the British Columbia Court of Appeal in *Wright*,³⁶ whereby the Crown can establish a significant risk based on average risk as set out in the literature. The approach from *Wright* is based on the heavily stigmatizing presumption that sexual intercourse with a person living with HIV *per se* presents a significant risk of HIV transmission, which reflects an outdated, inaccurate view of HIV. Moreover, the courts of appeal in *Mabior* and *D.C.* soundly reject this presumption in favour of a case-specific, expert-informed assessment of risk, which takes into account the factors that decrease and increase transmission risk. Such an approach avoids placing on the accused the tactical burden of proof to introduce case-specific evidence regarding HIV transmission risk in response to the general evidence of risk introduced by the Crown. It properly places the initial tactical decision on the Crown whether to introduce medical and scientific evidence of HIV transmission risk in the circumstances of the case, readily obtained by the Crown through search warrant, subpoena and expert testimony.

Is aggravated (sexual) assault the appropriate offence?

Currently, prosecutions for non-disclosure to one’s sexual partner involve almost exclusively charges of aggravated assault or aggravated sexual assault.³⁷ The latter is the most serious sexual offence in the *Criminal Code* and is punishable by a maximum life sentence. These offences are used whether or not HIV is transmitted. In fact, prosecution

will be easier where the virus is not transmitted because where the complainant is HIV-positive the Crown will need to prove that she was not infected with HIV at the time of sexual relations with the accused.³⁸ We argue that both aggravated sexual assault and aggravated assault result in over-criminalization where the virus is not transmitted to the complainant, and such serious offences should be limited to cases where HIV was transmitted with the result that the complainant's life was actually endangered as opposed to the potential risk of endangerment.³⁹

What makes an assault or sexual assault "aggravated" is the additional harm caused to the complainant through wounding, maiming, disfiguring or endangering life.⁴⁰ We would argue that, where the virus is not transmitted, life has not been endangered. As mentioned earlier, the presumption that sex with an HIV-positive person is always life-endangering is not accurate. Where the virus is not transmitted, the fact that it could have been is not sufficient to warrant the degree of criminal responsibility attached to an aggravated (sexual) assault conviction. New Zealand and several Australian jurisdictions rely on different offences based on whether the virus was transmitted.⁴¹

This raises the question of what offence is most appropriate where transmission has not taken place despite the fact that the complainant has been exposed to a significant risk of acquiring HIV. We would argue that, at most, the lesser included offences of assault or sexual assault be employed where the virus has not been transmitted. This would be most consistent with treating transmission cases as aggravated (sexual) assault

and the idea that non-disclosure, in the context of a significant risk of serious bodily harm, vitiates consent to the touching involved. However, assault-based offences leave courts in the conundrum of applying probabilities in individual cases to determine whether the risk of an event that did not happen was significant.

Where the virus is not transmitted, the fact that it could have been is not sufficient to warrant the degree of criminal responsibility attached to an aggravated (sexual) assault conviction.

We suggest that the Supreme Court has a more radical option open to it, that is, to reject the assault-based analysis of *Cuerrier* as unworkable and to shift the focus to the harm caused by transmission. The Court could re-think the question of whether failure to disclose actually vitiates consent to sexual activity. What kind of deceptions constitute fraud? On the one hand, one could take a very broad approach such as was done by Justice L'Heureux-Dubé in *Cuerrier*, whereby any deception that induces consent constitutes fraud and vitiates consent. Under such an approach, if a man told a woman he was single when in fact he was married and his assertion induced consent, his lie would constitute fraud

vitiating consent. A broad approach might be desirable in sexual assault generally to protect women from sexual violence and coercion.

On the other hand, one could apply a narrower approach that only limits consent in cases where the fraud goes to precisely what the complainant consented to. For example, in *R v. Crangle*,⁴² the accused was the identical twin brother of the complainant's boyfriend. When he started having sex with her, she thought she was having sex with her boyfriend. This deception went to the very essence of the sexual activity — she consented to have sex with A and not to have sex with B. The kind of deception involved in non-disclosure is subtly different from most of the other fraud cases that arise. In the HIV non-disclosure cases, the complainant wanted the sexual activity to take place with the accused, but not necessarily with a person who was HIV-positive. The assumption is that if the accused is HIV-positive, he or she will disclose and sex will either not take place or protective measures will be taken.

We would argue, however, that one can never presume one is having sex with a person who is HIV-negative. HIV is most transmissible when one's viral load is highest, such as during the early stages of infection, often before the person knows they are HIV-positive⁴³ — and an alarmingly high proportion of persons with HIV do not know their status.⁴⁴ Nor can one make reasonable assessments about who is likely to be HIV-positive based on assumptions about who gets HIV and who does not. Thus, while the suggestion that everyone needs to protect themselves appears trite, it remains the best way to prevent transmission of the virus.

We do recognize that some people are not in a position to insist on condom use or to understand the risks involved in sexual activity generally. In this latter category, it may be possible to argue that someone who does not understand the risks involved in sexual activity is not capable of giving meaningful consent to sex.⁴⁵ With respect to someone who cannot safely insist on condom use to protect herself, we question the voluntariness of consent in this context.⁴⁶

If the Court were to reject the fraud-based approach as unworkable, criminal negligence causing bodily harm would be a possible charge in cases of HIV transmission. The *mens rea* is well-suited to the HIV non-disclosure cases where, in the vast majority of cases, the accused does not intend to transmit the virus and rather hopes that no transmission takes place.⁴⁷ In such a case, criminal negligence, which speaks of wanton or reckless disregard for the safety of others, seems well-suited to the risk-taking nature of the activity. This offence would only apply where the virus has been transmitted because Canadian criminal law does not punish criminal negligence in and of itself without proof of bodily harm or death. This offence would take the focus off the sexual nature of the harm and shift it to the deliberate risk-taking activity on the part of the accused. The more difficult question is what offence might be appropriate where the virus is not transmitted. In our view, such cases should only be prosecuted where there is a pattern of non-disclosure in the context of unprotected sex. Common nuisance is one option that could be applied, an offence that criminalizes the endangering of “lives, safety or health of the public” through an

unlawful act or failure to discharge a duty.⁴⁸ This offence is not without its problems and courts would still have to draw limits about what level of risk is sufficient to constitute that endangerment to the public.⁴⁹

It is imperative that provincial and territorial Attorneys General seriously consider developing comprehensive prosecutorial guidelines.

We are not suggesting we can resolve this difficult issue in a case comment. Rather, we seek merely to raise the possibility that the sexual assault approach is not the only approach to this issue. What is clear from examining various *Criminal Code* provisions is that none of the offences in the current *Criminal Code* were designed to cover the non-disclosure of a sexually transmitted infection. The *Criminal Code* used to have a specific provision, enacted in 1919,⁵⁰ making it an offence, punishable on summary conviction, to communicate a venereal disease, knowingly or by culpable negligence, to another person. This provision was, somewhat ironically, repealed in 1985, just a few years before the first HIV non-disclosure prosecution in Canada. In 1984, the federal Badgely Committee had recommended, instead of the provision, strengthening provincial health regulations,

more effective diagnostic criteria, research and public education.⁵¹ In 1985, the Fraser Committee concluded again that the provision was “hopelessly outdated in the etiological assumptions it makes” and “clearly does not reflect modern knowledge on, or practice in relation to, sexually transmitted diseases.”⁵² We are concerned that HIV has been singled out for special treatment when other sexually transmitted infections may be even more easily transmissible. Why are HIV prosecutions increasing in frequency and severity at the same time that our ability to clinically manage HIV, and to prevent transmission through antiretroviral medication, has improved so dramatically?

Whatever crime(s) the Supreme Court of Canada decides should apply in this context, it is imperative that provincial and territorial Attorneys General seriously consider developing comprehensive prosecutorial guidelines, as has been done in England and Wales.⁵³ Given the dangers of over-criminalizing non-disclosure — such as discouraging HIV testing, driving people living with HIV away from health care and social services out of fears of criminal prosecution — and the dangers of further marginalizing people living with HIV, guidelines should strive to limit prosecutions to those cases where the blunt force of the criminal law is absolutely necessary to deter or incapacitate the individual.

The need for caution in the unique context of non-disclosure prosecutions

Our final point is that the political and social dynamics of HIV non-disclosure prosecutions mitigate in favour of caution. The Crown, in the documents filed with the Supreme

Court in *Mabior* and *D.C.*, argues that *R v. Ewanchuk*⁵⁴ be used to modify the rule in *Cuerrier* so as to require fully informed consent, the absence of which would render any non-disclosures an aggravated sexual assault.

The Supreme Court of Canada decision in *Ewanchuk* was an important victory for women in the context of sexual assault, reaffirming the importance of consent being assessed from the perspective of the complainant and the importance of autonomy in sexual decision-making. We are concerned that an expansion of *Ewanchuk* in the HIV context ignores the unique context of HIV non-disclosure prosecutions and the stigma and prejudice resulting from over-criminalization of persons living with HIV. The criminal law must be used with particular caution where it is being applied only against members of a marginalized group and we must ask whether other mechanisms, such as public health legislation, are better suited for dealing with this complex social problem. We urge the courts to deal with non-disclosure cases as a unique context and not as an opportunity to expand the crime of sexual assault generally.

As the Supreme Court of Canada has recognized, sexual assault generally is a highly gendered crime. Over 97 percent of those accused of sexual assault are men,⁵⁵ and roughly 85 percent of all complainants are women.⁵⁶ Certain groups of women are at a higher risk of sexual assault, such as women involved in prostitution,⁵⁷ women with disabilities⁵⁸ and Aboriginal women.⁵⁹ Conviction rates for sexual assault generally are also very low in part due to the fact that women's allegations of sexual violence are often disbelieved.⁶⁰

The gendered nature of non-disclosure prosecutions is less clear and something we are only beginning to understand. Overwhelmingly, in Canada,⁶¹ the accused in non-disclosure cases are men. A recent study found that 91 percent of those charged in Canada for failing to disclose their HIV status are men.⁶² Overall, 65 percent of all Canadians charged are men who fail to disclose their status to women, although we may be seeing an increase in the number of charges against men who have sex with men.⁶³ However, this does not appear to be an accurate reflection of non-disclosure rates in the community. There is some evidence that men withhold their HIV

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status more often than do women, but this evidence is far from unambiguous and does not explain the preponderance of female complainants:

Variations in disclosure based on race, gender and age yield controversial findings. White and Hispanic individuals have been found to be more likely to disclose to partners than

African-Americans, yet other research suggests that race and ethnicity do not play a role. Although Stein and colleagues found that women are more likely to disclose than men, most existing research suggests that gender is not associated with partner disclosure. Younger age has also been associated with higher disclosure. Other researchers, however, have documented a relationship between youth and non-disclosure.⁶⁴

We would argue that the prosecutions for non-disclosure in the HIV context are disproportionately for non-disclosure in the heterosexual context. This may say more about the value we put on potential complainants of non-disclosure than the potential accused. Police and prosecutors may be more likely to see women as victims of sexual assault (as compared to gay men). Similarly, there may be a different ethic in the gay community around laying complaints for non-disclosure because of attitudes towards police and the criminal justice system, or because there may be a higher level of acceptance of mutual responsibility for preventing HIV transmission in the gay community. Conviction rates in the non-disclosure context are much higher than in sexual assault generally,⁶⁵ perhaps because persons with HIV are even less likely to be believed than sexual assault complainants and guilty pleas are common, possibly due to the publicity and resultant stigma associated with these trials.

The impact of over criminalization of non-disclosure of HIV status has implications for women both as potential complainants and as potential accused.⁶⁶ The cases to date highlight women as HIV-negative complainants who face the potential of acquiring the virus from their

non-disclosing partners. But issues of non-disclosure also arise for HIV-positive women. *D.C.* demonstrates the complexity of this issue: charges were not laid against *D.C.* until over four years after the complainant learned of the non-disclosure and only after *D.C.* laid charges of domestic assault. Women in relationships of heightened inequality, such as women in abusive relationships or women with disabilities, may have particular barriers to disclosing their status to sexual partners or in insisting on condom use. There is also the alarming potential for charging women for passing on the virus to their children during childbirth or breastfeeding.⁶⁷

Perhaps the biggest difference between the non-disclosure context and other sexual assault offences is that *every* accused person in the non-disclosure context is grappling with HIV and thus is a member of a highly stigmatized group in Canadian society. The charges in question relate directly to their status as HIV-positive individuals. They may have acquired the virus through the non-disclosure of their partners or through some other means. Regardless, they are likely to have experienced discrimination and rejection when others have learned of their HIV status. Many will have experienced the loss of a job, the loss of friends and the loss of a partner on disclosing their HIV-positive status.⁶⁸ Over-criminalization of persons with HIV runs the risk of further marginalization and stigmatization. Marginalization contributes to non-disclosure; it does not prevent it. The more negative the social consequences of disclosure, the less likely it is to take place. Until we give people the necessary physical, economic and social supports to enable them to

disclose their status safely, non-disclosure is likely to continue at a high rate. In fact, the criminalization of non-disclosure may make non-disclosure more likely, as persons with HIV may fear the consequences of their status becoming known to previous or current partners.

Conclusion

At a minimum, with the upcoming appeals the Supreme Court should address the need for clarity among the range of people affected by the criminal law related to HIV non-disclosure: people living with HIV/AIDS, police, Crown counsel and the judiciary. These people need to know whether there is a duty to disclose prior to oral sex, prior to protected sexual intercourse, or prior to unprotected sexual intercourse where an HIV-positive person has an undetectable viral load. The appeals will also present the Supreme Court with the opportunity to further refine the criminalization of HIV non-disclosure in ways that will preserve the integrity of sexual assault law by restricting the circumstances in which HIV non-disclosure calls for criminal prosecution and identifying the *Criminal Code* offences most appropriate to those circumstances.

— Isabel Grant and Jonathan Glenn Betteridge

Isabel Grant is a Professor in the Faculty of Law at the University of British Columbia; Jonathan Glenn Betteridge, LL.B, B.C.L., is Principal of Jonathan Glenn Betteridge Legal & Policy Consulting, Toronto. The authors would like to thank Laura DeVries for her research assistance on this article.

¹ *R v. Mabior (C.L.)*, 2010 MBCA 93.

² *R c. D.C.*, 2010 QCCA 2289.

³ Eric Mykhalovskiy, Glenn Betteridge and David McLay, *HIV Non-disclosure and the Criminal Law: Establishing Policy Options for Ontario* (Toronto: Ontario HIV Treatment Network, 2010), at 12, on-line at <http://library.catie.ca/pdf/ATI-20000s/26343.pdf> [forthcoming update on file with author].

⁴ *Ibid.*, at 13.

⁵ Public Health Agency of Canada, *HIV/AIDS Epi Updates, July 2010* (Ottawa: Centre for Communicable Diseases and Infection Control, Public Health Agency of Canada, 2010) [Public Health Agency of Canada, *HIV/AIDS Epi Updates*], on-line at www.phac-aspc.gc.ca.

⁶ *R v. Cuerrier*, [1998] 2 SCR 371.

⁷ *R v. Mabior*, [2010] SCCA No 492 ; *R v. D.C.*, [2011] SCCA No. 137.

⁸ Crown Memorandum of Argument in the SCC application for leave to appeal in *Mabior*, at para. 10.

⁹ *R v. Mabior*, 2008 MBQB 201.

¹⁰ *Ibid.*, at para. 55.

¹¹ *Mabior*, *supra* note 1, at para. 88.

¹² *Ibid.*, at para. 87.

¹³ *Ibid.*, at para. 92.

¹⁴ *Ibid.*, at para. 92.

¹⁵ *Ibid.*, at para. 97.

¹⁶ *Ibid.*, at para. 104.

¹⁷ *Ibid.*, at para. 152. The Quebec Court of Appeal in *D.C.* echoed this request (*D.C.*, *supra* note 2, at para. 121).

¹⁸ *R c. D.C.*, 2008 QCCQ 629.

¹⁹ *R v. Williams*, 2003 SCC 41.

²⁰ *D.C.*, *supra* note 2, at para. 76.

²¹ *Ibid.*, at para. 78, citing *Cuerrier*, *supra* note 6 at para. 127.

²² *Ibid.*, at paras. 100, 115–117.

²³ *Ibid.*, at para. 118.

²⁴ *Ibid.*, at paras. 102–114.

²⁵ *Ibid.*, at para. 120.

²⁶ *Mabior*, *supra* note 1 at para. 156.

²⁷ *Ibid.*, at para. 154.

²⁸ *Ibid.*, at para. 64.

²⁹ *Ibid.*, at para. 151.

³⁰ *Ibid.*, at para. 59.

³¹ *Ibid.*, at para. 92.

³² *Ibid.*, at para. 97.

³³ *Ibid.*, at para. 92.

³⁴ *Ibid.*, at paras. 112–113.

³⁵ See, for example, HIV Prevention Trials Network, Press Release, "Initiation of Antiretroviral Treatment Protects Uninfected Sexual Partners from HIV Infection (HPTN Study 052)," (12 May 2011) on-line at www.hptn.org; "HIV treatment as prevention — it works," Editorial, *Lancet* (21 May 2011) 377:9779, p. 1719; J. Del Romero, et al.,

"Combined Antiretroviral Treatment and Heterosexual Transmission of HIV-1: Cross Sectional and Prospective Cohort Study," (2010) 340 *British Medical Journal* c2205; D. Donnell, et al., "Heterosexual HIV-1 Transmission After Initiation of Antiretroviral Therapy: A Prospective Cohort Analysis," (2010) 375 *Lancet* 2092.

³⁶ *R v. Wright*, 2009 BCCA 514.

³⁷ Attempted murder charges are sometimes laid but they require an intent to cause death, which may be difficult to prove in the non-disclosure context.

³⁸ *Williams*, *supra* note 19. Where the Crown is unable to prove this fact, the verdict will be attempted aggravated (sexual) assault. See also Isabel Grant, "The Prosecution of Non-Disclosure of HIV in Canada: Time to Rethink *Cuerrier*," (2011) 5:1 *McGill Journal of Law and Health* 7, at 48.

³⁹ Grant, "Time to Rethink *Cuerrier*."

⁴⁰ One of us has argued elsewhere that where there is no disclosure, the accused should bear the risk that transmission takes place: see Grant, "Time to Rethink *Cuerrier*," at 49, 58–59.

⁴¹ For instance, in New Zealand, there are three potential levels of liability: section 201 of the *Crimes Act* applies if the virus is intentionally transmitted; section 188 if the virus is recklessly transmitted; and section 145 if the virus is not transmitted (*Crimes Act* (NZ), 1961/43). Only three of the nine Australian jurisdictions criminalize exposure without transmission, and of those jurisdictions, two states apply different criminal offences for exposure and for transmission (*Crimes Act 1958* (Vic), ss 22–23; *Criminal Law Consolidation Act 1935* (SA) s 29; *Criminal Code* (NT), ss 174C, 174D). The remaining six jurisdictions do not prosecute exposure where no transmission has occurred. See Grant, "Time to Rethink *Cuerrier*," *supra* note 38, at 36–42, for details.

⁴² *R v. Crangle*, 2010 ONCA 451.

⁴³ See e.g., Maria J. Wawer, et al., "Rates of HIV-1 Transmission per Coital Act, by Stage of HIV-1 Infection, in Rakai, Uganda," (2005) 191:9 *Journal of Infectious Diseases* 1403, at 1408; Gary Marks, Nicole Crepaz and Robert S. Janssen, "Estimating Sexual Transmission of HIV from Persons Aware and Unaware That They are Infected with the Virus in the USA," (2006) 20:10 *AIDS* 1447; Bluma G. Brenner, et al., "High Rates of Forward Transmission Events After Acute/Early HIV-1 Infection," (2007) 195:7 *Journal of Infectious Diseases* 951. Marks and his colleagues found that, adjusting for population size differences in the groups, the rate of transmission of HIV was 3.5 times higher in the group that was unaware of their HIV status than in the group that knew they had HIV.

⁴⁴ At the end of 2008, an estimated 65 000 people were living with HIV (including AIDS) in Canada. Of these, approximately 16 900, or 26 percent, were not aware of their infection. See Public Health Agency of Canada, *HIVAIDS Epi Updates*, *supra* note 5.

⁴⁵ Janine Benedet and Isabel Grant, "Hearing the Sexual

Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Mistaken Belief," (2007) 52 *McGill Law Journal* 243; Janine Benedet and Isabel Grant, "Sexual Assault of Women with Mental Disabilities: A Canadian Perspective," in Claire McGlynn and Vanessa Munro, eds., *Rethinking Rape Law: International and Comparative Perspectives* (London: Routledge, 2010) 322.

⁴⁶ See e.g., *R v. Stender*, (2004) 188 CCC (3d) 514 (Ont CA), *aff'd* 2005 SCC 36.

⁴⁷ Where there is intent to transmit the virus, a more serious offence is appropriate.

⁴⁸ *Criminal Code*, RSC 1985, c C-46 s 180(1).

⁴⁹ Courts have disagreed as to whether creating a risk of HIV transmission to one person suffices to meet the requirement of endangering the public. See *R v. Ssenyonga*, (1992) 73 CCC (3d) 216, at para. 42, holding that this test is not met, and *R v. Williams*, (2000) 189 Nfld and PEIR 156 (Nfld Sup Ct); *R v. Williams*, 2001 NFCA 52, at paras. 88–89, holding that non-disclosure to an individual could be said to endanger the public. This issue was not addressed by the Supreme Court of Canada in *Williams*, *supra* note 19.

⁵⁰ *Criminal Code*, SC 1919, c 46, s 316A, as repealed by *Criminal Law Amendment Act*, SC 1985, c 19, s 42.

⁵¹ Committee on Sexual Offences against Children and Youth, *Sexual Offences against Children: Report of the Committee on Sexual Offences against Children and Youth* (Ottawa: Department of Supply and Services, 1984), at 25.

⁵² Special Committee on Pornography and Prostitution, *Pornography and Prostitution in Canada* (Ottawa: Minister of Supply and Services Canada, 1985), at 556.

⁵³ While British Columbia does have a section of its Crown Policy dedicated to sexually transmitted diseases, it focuses on information sharing and case reporting between the criminal justice and public health systems. See Criminal Justice Branch, Minister of Attorney General, *Crown Counsel Policy Manual* (2007), on-line at www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/SEX2-SexuallyTransmittedDiseases-16May2007.pdf. In contrast, the England and Wales legal guidance is wide-ranging. In addition to setting out the overall approach and policy consideration to be taken into account by Crown prosecutors, it includes specific guidance regarding the types of evidence the Crown will need to take into account at the charge screening stage, complainant and witness issues, and internal procedures for decision-making in individual cases.

⁵⁴ *R v. Ewanchuk*, [1999] 1 SCR 330.

⁵⁵ Shannon Brennan and Andrea Taylor-Butts, *Sexual Assault in Canada: 2004 and 2007* (Ottawa: Canadian Centre for Justice Statistics, 2008).

⁵⁶ *Ibid.*

⁵⁷ For recent discussions, see Janice Du Mont and Margaret J. McGregor, "Sexual Assault in the Lives of

Urban Sex Workers: A Descriptive and Comparative Analysis," (2004) 39 *Women and Health* 79; Christine M. Sloss and Gary M. Harper, "Legal Service Needs and Utilization of Women Who Trade Sex," (2010) 7 *Sexuality Research and Social Policy* 229.

⁵⁸ Benedet and Grant, "Consent, Capacity and Mistaken Belief", *supra* note 45.

⁵⁹ For example, see Diane K. Bohn, "Lifetime Physical and Sexual Abuse, Substance Abuse, Depression, and Suicide Attempts Among Native American Women," (2003) 24 *Issues in Mental Health Nursing* 333. Aboriginal women in Canada report being victims of violent crime (sexual assault, robbery, or physical assault) at a rate nearly three times that of non-Aboriginal women: Shannon Brennan, "Violent Victimization of Aboriginal Women in the Canadian Provinces, 2009," (Ottawa: Canadian Centre for Justice Statistics, 2011), on-line at www.statcan.gc.ca.

⁶⁰ Alison Symington, "HIV Exposure as Assault: Progressive development or misplaced focus?" in Elizabeth Sheehy, ed., *Sexual Assault Law, Practice and Activism in a Post-Jane Doe Era* (Ottawa: University of Ottawa Press, 2011) [forthcoming, see on-line at www.ruor.uottawa.ca/en/handle/10393/19876], at 24.

⁶¹ Grant, "Time to Rethink *Cuerrier*," *supra* note 38.

⁶² Mykhalovskiy, Betteridge and McLay, *HIV Non-disclosure and the Criminal Law*, *supra* note 3 at 10.

⁶³ *Ibid.*, at 11.

⁶⁴ E. Mayfield Arnold, et al., "HIV Disclosure Among Adults Living with HIV" (2008) 20 *AIDS Care* 80, citations omitted. This study discusses disclosure in several contexts — not just to sexual partners.

⁶⁵ Sixty-eight percent of HIV non-disclosure cases in Canada result in convictions: Mykhalovskiy, Betteridge and McLay, *HIV Non-disclosure and the Criminal Law*, *supra* note 3 at 13. This is two to three times higher than the conviction rates for sexual offences more generally: Kong, et al., *Sexual Offences in Canada* (Ottawa: Canadian Centre for Justice Statistics, 2003), on-line at www.statcan.gc.ca.

⁶⁶ See Patricia Allard, Cécile Kazatchkine and Alison Symington, "Criminal Prosecutions for HIV Non-disclosure: Protecting Women from Infection or Threatening Prevention Efforts?" in Jacqueline Gagahan, ed., *Women and HIV Prevention in Canada: The Past, The Present and the Future — Implications for Research, Policy and Practice* (Toronto: Canadian Scholars' Press, 2012) [forthcoming, copy on file with authors].

⁶⁷ See e.g., *R v. Ifejika*, 2006 ONCJ 356, a case in Hamilton in which a woman had her children permanently removed from her care and was convicted of failing to provide the necessities of life to her newborn child on the basis that, having followed medical advice during her first pregnancy, she failed to tell her doctors during her second delivery that she was HIV-positive. She was sentenced to a six-month conditional sentence and three years' probation.

⁶⁸ Arnold, et al., "HIV Disclosure," *supra* note 64.