Notice: HIV Disclosure and Criminalization

On Friday, October 5, the Supreme Court of Canada, in its decisions in R. v. Mabior and R. v. D.C. made some important judgments about the law in Canada concerning HIV disclosure.

Positive Living BC disagrees profoundly with the Court's decision. But we cannot change it. And we believe it is vital that our members know what that decision is and means.

Under Canadian law, it has always been the case – and it is still the case – that HIV-positive persons should disclose their HIV-positive status to any person with whom they are going to have sex if the sex act(s) involved pose(s) a "significant risk of HIV transmission".

If they do not do so, they can be charged with aggravated sexual assault, one of the most serious charges in the entire Criminal Code. (Criminal Code, Part VIII, section 273 – see below)

In the Cuerrier decision in 1998, the Supreme Court suggested that the careful use of condoms may reduce the risks of HIV transmission enough that there may be no duty to disclose.

What the Supreme Court said on October 5 is that a "significant risk" now means a "realistic possibility of HIV transmission". And in the Court's view, almost any risk involves a "realistic possibility of HIV transmission".

But the Supreme Court was clear that there is no duty to disclose before having heterosexual vaginal sex if (1) a condom is used and (2) the HIV-positive person has a "low" viral load.

Please note: this is not an either/or proposition. Both conditions (condom use and a "low" viral load) must be met to by-pass the duty to disclose. Further, the Court did not clearly define what constitutes a "low" viral load. And this decision addressed heterosexual vaginal sex only; the Court didn't address the questions of oral sex and anal sex, so we can't be sure how the law would apply to those activities.

It is certain that you must disclose your HIV-positive status before having anal sex if you don't have a "low" viral load and/or you will not be using a condom. It may be the case that, if you have a "low" viral load, and you use a condom, you can engage in anal sex without disclosing – but we can't be absolutely certain of that.

And there might be a duty to disclose before oral sex even though it is generally understood to be a low risk activity. (Even with no condom and a relatively high viral load, the risk of transmission has been determined to be low. As the American Centre for Disease Control puts it: "The risk of HIV transmission from an infected partner through oral sex is much less than the risk of HIV transmission from anal or vaginal sex.") Still, "low risk" is not the standard; virtually no risk (no "realistic possibility of HIV transmission") is now the standard.

Until at some future time Parliament amends the relevant sections of the Criminal Code, or until the Supreme Court reconsiders this decision, this is now the law in Canada.

For suggestions on what you can do to protect yourself under this new system of criminal law regarding HIV disclosure, contact your local HIV/AIDS organization, or contact the Canadian HIV/AIDS Legal Network at 416-595-1666, or by email to info@aidslaw.ca.

Positive Living BC has always argued that HIV-positive people are ethically required to disclose their HIV-positive status to any other person prior to engaging in any kind of "risky" activity. But Positive Living BC has always understood that individual HIV-positive people can face individual circumstances in which it is exceedingly difficult and even dangerous for them to do so. In such circumstances, the Society has argued, their ethical duty is covered if they take effective steps – like using a condom or using only clean needles – to reduce the risk of transmission to the point where it is negligible. Further, if attempting to take such preventive measures would place the HIV-positive person at serious risk of physical injury or other substantial harm at the hands of the person with whom they were about to engage in the "risky" behavior, then (Positive Living BC has contended) the ethical requirement to disclose is negated by that person to whom it is otherwise owed. But it is crucial to understand that this is Positive Living BC's position – it is not the law. To repeat, the law is condom use and a "low" viral load are required to by-pass the duty to disclose in instances of heterosexual vaginal sex.

Aggravated Sexual Assault

The relevant section of the Criminal Code says:

273. (1) Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.

(2) Every person who commits an aggravated sexual assault is guilty of an indictable offence and liable …

(b) … to imprisonment for life.

How does this apply to HIV non-disclosure?

First, it's considered "sexual assault" because not telling the person with whom you are intending to have sex that you are HIV-positive is considered to be withholding relevant information from them. Because you have not given them this information, the consent is obtained through a kind of fraud, a deception that exposed them to a risk of HIV. This may "vitiate" their consent – make it as if it had never been granted – if they would not have consented to sex had they known about your HIV-positive status. If consent has been vitiated by fraud, what would otherwise have been consensual sex is a sexual assault.

It becomes aggravated sexual assault because the possibility of transmitting HIV is deemed to "endanger the life" of the person whose consent was obtained through deception.

The maximum penalty for aggravated sexual assault is life imprisonment and can involve registration as sexual offender.