

## Summary: Court of Appeal of Manitoba *R. v. Mabior*, 2010 MBCA 93

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*For a person living with HIV to be convicted of (aggravated) (sexual) assault for HIV non-disclosure, the risk of HIV transmission must be “significant”.*

*Based on the facts and medical evidence presented in this case, the Court of Appeal decided that when a condom was carefully used or when the accused’s viral load was undetectable there was no significant risk of HIV transmission. Therefore there was no duty to disclose in those situations. The appellant, who was convicted at trial on six counts of aggravated sexual assault for HIV non-disclosure, was acquitted on appeal of four of these counts for sexual encounters in which a condom was carefully used or that took place when his viral load was undetectable.*

The accused was diagnosed HIV-positive on January 14, 2004. At the time of his diagnosis, and numerous times thereafter, he was advised by a public health nurse to inform his sexual partners of his HIV status and to always use condoms.

The accused began antiretroviral therapy (ART) shortly after his diagnosis. The therapy resulted in an undetectable viral load between early October 2004 and December 2005.

From January 2004 to March 2006, he engaged in sexual intercourse with multiple women without disclosing his status.

At trial, he was convicted on six counts of aggravated sexual assault for not disclosing his status to his partners. He was sentenced to fourteen years’ incarceration. The total sentence included additional convictions that were not related to HIV non-disclosure.

The decision was appealed to the Manitoba Court of Appeal. The Canadian HIV/AIDS Legal Network sought and was granted intervener status in the appeal.

The principal issue on the appeal was whether the trial judge erred in her application of the legal test of “significant risk of serious bodily harm” (i.e. significant risk of HIV transmission) in the particular circumstances of the case.

Since the Supreme Court of Canada’s 1998 decision in *R. v. Cuerrier*, a person living with HIV can be convicted of (aggravated) (sexual) assault for not disclosing his/her status to a partner before engaging in an activity that represents a “significant risk” of HIV transmission.

The trial judge considered that even when a condom is used there is a significant risk of HIV transmission for the purpose of the criminal law. She also reached the same conclusion for an undetectable viral load. According to the trial judge, the risk would only be sufficiently reduced when a person has both an undetectable viral load AND uses a condom.

The Court of Appeal disagreed and stated very clearly that the test set out in *Cuerrier* was not a “no risk” test but required the presence of a significant risk. The Court further explained that: “[s]ignificant risk means something other than an ordinary risk. It means an important, serious, substantial risk.”

The Court of Appeal also stated that “[l]egal assessments of risk in this area should be consistent with the available medical studies” and acknowledged that “[t]he application of the legal test in *Cuerrier* must evolve to account appropriately for the development in the science of HIV treatment.”

As a result, the Court decided that the careful use of a condom OR an undetectable viral load can reduce the level of risk below the threshold test of a “significant risk.”

Based on these findings, the accused was acquitted of four counts of aggravated sexual assault with respect to those sexual encounters in which he carefully used a condom (even though his viral load was detectable) OR did not use a condom but had an undetectable viral load.

This decision is heading in the right direction by recognizing that—based on science—people should not be convicted when they carefully use a condom or have an undetectable viral load. However, the Court of Appeal does not provide absolute certainty in the application of the law.

The Court refused to make a general statement that condom use or an undetectable viral load would automatically preclude criminal liability. Instead, the Court said that whether or not the accused person had a duty to disclose his or her HIV-positive status would depend on the facts and the medical evidence available in each case. For instance, it remains open to the Crown to prove that additional factors increased the risk of transmission in a particular case (e.g. a condom was not carefully used, condom use was inconsistent, or the accused had another sexually transmitted infection at the time he/she had sex which might have led to a spike in the viral load) or the Crown might otherwise put forward medical evidence showing that there was a “significant risk” of transmission.

Also, according to the Court, if a condom breaks, the person living with HIV has a duty to disclose his/her status even if the sexual intercourse is interrupted. The Court was concerned about ensuring that the partner who may have been exposed to a risk of HIV infection has access to post-exposure prophylaxis. However, following the logic of the Court’s decision, it seems reasonable to assume that there would be no duty to disclose in the case where a condom breaks if the person had an undetectable viral load and there is

no additional factor to increase the risk of transmission. But this assumption has yet to be tested or confirmed by a court.

Another interesting point in the decision is that the Court of Appeal recognized that the nature of the disease has evolved with the availability of treatments and that HIV is no longer an “inevitable death sentence”.

The Court continued to consider that HIV infection is a serious bodily harm for the purpose of the criminal law. However, the Court questioned whether exposing someone to a significant risk of HIV transmission is still considered as “endangering” one’s life. A (sexual) assault will only amount to an *aggravated* (sexual) assault, which carries a higher maximum penalty, if the conduct of the accused person endangers the life of the complainant. The Court of Appeal was not called upon to determine this issue. Therefore, this part of the decision is only a non-binding expression of the Court’s opinion. However, it shows that the Court took into account the evolution of the disease in its reflection with respect to the application of some existing offences to HIV non-disclosure.

Lower courts (trial courts) in Manitoba will be bound by the decision of the Court of Appeal, which means that, if the medical and scientific evidence brought forward in a given case shows a similar (or lower) estimate of the risk of transmission than in *Mabior*, a person living with HIV should not be convicted for (aggravated) (sexual) assault for not disclosing HIV-positive status if either

- a condom is carefully used, or
- he/she has an undetectable viral load,

unless the Crown proves beyond a reasonable doubt that, given the specific circumstances of the case, the risk of transmission is increased by additional factors.

Outside Manitoba, the decision will not be binding but is likely to influence lower courts and Courts of Appeal from other provinces in Canada.

However, as of now, we cannot exclude the possibility that the decision might be appealed to the Supreme Court of Canada.

The decision limiting the scope of the criminal law to the very circumstances where the risk of HIV transmission is real has great merit. It clearly rejects the Crown’s argument that sex can never be consensual unless there has been disclosure of HIV-positive status. The Court recognized that this is not the law in Canada and that “[c]riminal sanctions should be reserved for those deliberate, irresponsible or reckless individuals who do not respond to public health directives and who are truly blameworthy.”

Again, we welcome the decision of the Court for recognizing that either careful condom use or an undetectable viral load can be sufficient to preclude criminal liability. However, we regret that it does not provide certainty that, in all cases, the use of a

condom or an undetectable viral load will remove the requirement to disclose HIV-positive status.