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INTERVENERS WELCOME SUPREME COURT DECISION IN *R. v. HUTCHINSON*

Court rejects arguments that would have expanded law and led to even more unjust convictions of people living with HIV

March 7, 2014 — This morning, the Supreme Court of Canada released its decision in the case of *R. v. Hutchinson*. This case was about fine distinctions in the law of sexual assault that could have had very broad and negative implications for people living with HIV. That is why the Canadian HIV/AIDS Legal Network and the HIV/AIDS Legal Clinic of Ontario (HALCO) intervened in this case. We are pleased that the majority of the Supreme Court agreed with the approach that we presented.

This case did not involve any allegation of HIV non-disclosure. The case involved a man who poked holes in condoms before having sex with his partner, knowing that she wanted to use condoms to reduce the chance of getting pregnant. He was charged with sexual assault, on the basis that her consent to sex was not legally valid as a result of his actions.

Given how the Crown chose to prosecute the case, the case raised important questions about how the law of sexual assault should be interpreted and applied – and this is why it carried potentially serious implications for people living with HIV. That is where our interest lay. The approach taken by the Crown in this case would have made the application of the criminal law even wider than it already is, including in cases where a person is accused of not disclosing his or her HIV status. Specifically, the prosecution’s interpretation of the law would have removed any consideration of the risk of transmission in cases of alleged HIV non-disclosure. This would have worsened the already over-broad state of the criminal law, led to further unjust prosecutions of people living with HIV and undermined the public health response to HIV in Canada.

In our intervention, the Legal Network and HALCO urged the Supreme Court to reject the broad, sweeping approach advanced by the Crown. Instead, we urged the Court to confirm that the legal framework for dealing with cases involving alleged non-disclosure of sexually transmitted infections is to determine, on the facts of a given case, whether there has been a fraud that renders consent invalid (under section 265 of the Criminal Code). In this way, the requirement of establishing that there was a “significant risk of serious bodily harm” would remain a fundamental requirement for any prosecution in relation to HIV non-disclosure. The Supreme Court agreed with our position.

The majority decision states: “As the most serious interference by the state with peoples’ lives and liberties, the criminal law should be used with *appropriate restraint*, to avoid over-criminalization. It draws a line between conduct deserving the harsh sanction of the criminal law, and that is undesirable or unethical but ‘lacks the reprehensible character of criminal acts’.” (para 18)

We welcome this decision. Prosecutors and judges must take seriously the Supreme Court’s directive to limit the overly-broad application of the criminal law and, as the Court indicated in an earlier decision, must have regard for the evolving scientific evidence about HIV transmission and treatment in not over-extending the criminal law.

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