

Summary

R. v. Thompson, 2018 NSCA 13

Psychological harm alone cannot vitiate consent to sex: How the courts of Nova Scotia continue to shape HIV non-disclosure jurisprudence in Canada

In *R. v. Mabior*, the Supreme Court of Canada left open the possibility of prosecuting people living with HIV even if they used a condom *or* had a low or undetectable viral load. In the aftermath of that decision, the courts of Nova Scotia have been providing important positive developments regarding the criminalization of HIV non-disclosure in Canada. In November 2013, a young man with an undetectable viral load who had not disclosed his HIV-positive status before engaging in condomless sex was acquitted. More recently, in April 2016, a trial judge ruled that non-disclosure before vaginal sex with a condom *or* a low viral load did not amount to aggravated sexual assault because there was no realistic possibility of transmission.

While this 2016 decision was remarkable in its acknowledgement of scientific evidence, it unfortunately remained problematic on another front. Despite the absence of any realistic possibility of HIV transmission, the accused was nevertheless convicted of sexual assault causing bodily harm—based on the psychological harm allegedly suffered by the two complainants as they waited for their test results to confirm that they had not contracted HIV. The trial judge found that the complainants' worry and uncertainty amounted to harm which, coupled with non-disclosure, had invalidated their consent to sex, thereby transforming consensual sex into a sexual assault.

Within days of sentence, the conviction was appealed. The Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic Ontario (HALCO), who had provided support throughout the trial, and the provincial coalition of HIV organizations in Quebec, COCQ-SIDA, intervened to prevent this dangerous expansion of the criminal law. Indeed, the Crown conceded that the trial judge had erred and the appellant was finally acquitted.

The Court's reasons for judgment were issued on February 15, 2018. In its decision, the Nova Scotia Court of Appeal clarifies that in the absence of a "realistic possibility" of HIV transmission there can be no conviction for HIV non-disclosure. Psychological harm alone, even when it amounts to bodily harm for the purpose of the criminal law (which was questionable in this instance), cannot invalidate consent.

This decision should help put an end to troubling attempts to expand the scope of the criminal law beyond cases including a realistic possibility of HIV transmission. It refuses to consider fear of HIV, often rooted in stigma and misinformation, as valid grounds for prosecution. This decision is important because it is binding on lower courts in Nova Scotia, and will likely influence other courts across the country.

While Canada's approach towards criminalization remains unsatisfying and irrational, decisions such as that of the Nova Scotia Court of Appeal—which put science and sensible public policy considerations before prejudice—are encouraging steps in the right direction.