

Aggravated assault/ sexual assault/ non-disclosure/ unprotected oral sex/ anal sex/  
condom use

**“The standard to be applied in the gay community is the obligation of one who is infected to practice safe sex or make clear disclosure so that there can be informed consent if unprotected sex is to be pursued (...) If the failure to disclose a contagious disease before engaging in “protected” sex is to be a criminal offence, it is for the Legislature to so define such activity.”<sup>2</sup>**

**Applicable law:**

Section 265 of the Criminal Code

(1) A person commits an assault when:

(a) Without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

[...]

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of:

(c) Fraud

Section 268 of the Criminal Code

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

(2) Every one who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Section 271 of the Criminal Code

(1) Every one who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or

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<sup>1</sup> *R. v. Edwards*, 2001NSSC 80.

<sup>2</sup> *Ibid.* at para. 19, 25.

## Facts

Edwards was charged with aggravated assault and sexual assault for not disclosing his HIV-positive status to his male sexual partner before having sex. Edwards met the complainant at a bar and they went to the complainant's residence where they performed oral sex on each other. They later engaged in anal sex and Edwards was the penetrative partner. The complainant testified that they did not use a condom, while Edwards testified that the anal sex was protected. The complainant did not test positive for HIV.

## Decision — key points

### *On the issue of unprotected oral sex*

- Edwards was not prosecuted for not disclosing his HIV-positive status before having unprotected oral sex.
- “The Crown acknowledges that unprotected oral sex is a conduct at a low risk that would not bring it within s. 268(1) of the Criminal code and had only unprotected sex taken place, no charge would have been laid.”<sup>3</sup>
- According to the Crown’s expert, the per-act risk of transmission through unprotected oral sex was 1 in 10,000 (0,01%).

### *On the issue of anal sex*

- In this case, the trial judge made it clear that when a condom is used there is no duty to disclose. The judge looked at the evidence before him that indicated that the proper use of condom reduces or renders the risk low. As a result, a person living with HIV cannot be convicted of assault for not disclosing his/her status before engaging in protected sex.<sup>4</sup>
- According to the trial judge, “what this case is about is whether or not the Crown has established beyond a reasonable doubt that “unprotected” anal intercourse took place between the two men” (...)<sup>5</sup>
- “The standard to be applied in the gay community is the obligation of one who is infected to practice safe sex or make clear disclosure so that there can be informed consent if unprotected sex is to be pursued.”<sup>6</sup>(Emphasis added).
- The judge indicated that “it is not for a trial judge to expand what constitutes a criminal act. Such a determination is for the Legislature or the Supreme Court in Canada in its interpretation of Legislation. The gay community and its leaders vigorously urge the practice of safe sex, not abstinence. If the

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<sup>3</sup> *Ibid.* at para. 4.

<sup>4</sup> Note that a Manitoba decision, *R. v. Mabior*, criminalized non-disclosure even when condoms were used. The judge ruled that both an undetectable viral load and the use of a condom would reduce the risk of transmission below the threshold of “significant risk” (*R. v. Mabior*, 2008 MBQB 201). The decision is contested in appeal.

Also, the BC Court of Appeal refused to accept that condom-use would automatically remove requirement to disclose (*R. v. Wright* 2009 BCCA 514). In April 2010, the Supreme Court of Canada denied leave to appeal this decision.

<sup>5</sup> *Ibid.* at para. 17.

<sup>6</sup> *Ibid.* at para. 19.

failure to disclose a contagious disease before engaging in “protected” sex is to be a criminal offence, it is for the Legislature to so define such activity.”

- The Court found that the evidence of both Edwards and the complainant was convincing and decided that the Crown had failed to establish beyond a reasonable doubt that the men had engaged in unprotected anal sex.
- The Crown had therefore failed to establish that the anal sexual intercourse was not consensual.
- As a result, Edwards was acquitted.