

Criminal law and HIV non-disclosure



Understanding the criminal law in Canada

Sources of the criminal law

- In Canada, crimes are established for the most part under the *Criminal Code of Canada* and, to a lesser extent, under other related laws. The federal Parliament is responsible for enacting the *Criminal Code*, and as such, the criminal law applies the same way across the country.
- However, the administration of justice is within provincial jurisdiction, which means that, in practice, how people are charged and prosecuted can vary from one province to another.
- In addition, the courts also examine previous court decisions that applied and interpreted the *Criminal Code* in cases with similar facts and issues as the case at hand. This is called “**case law**” or “**precedent.**” Judgments from the Supreme Court of Canada are the most authoritative source of case law. They are binding in every other court in Canada (meaning, subsequent judgments must follow the same rules). Decisions from the provincial/territorial courts of appeal are binding within the lower courts of the same province/territory. But a court of appeal judgment can also have significant influence on other provincial/territorial courts of appeal, even though it is not technically binding.

Sections 7 to 14 of the Canadian *Charter of Rights and Freedoms* protects legal rights of a person, including the right not to be arbitrarily arrested (s. 9), right to be presumed innocent until proven guilty, the right to be tried within a reasonable time and the right not to be denied reasonable bail without just cause (s. 11), and the right not to be subject to cruel and unusual punishment or treatment (s. 12).

How do courts interpret the *Criminal Code*? *R. v. Cuerrier*: application of the law of assault to HIV non-disclosure

In *Cuerrier*, the Supreme Court of Canada had to decide whether non-disclosure of HIV status to a sexual partner could constitute a criminal offence. Because there was no specific provision in the *Criminal Code* about non-disclosure, the Court had to look at and interpret general provisions of the *Criminal Code* and determine how these applied (or did not apply) to HIV non-disclosure. The Supreme Court decided that the law of assault could apply in HIV non-disclosure, ruling that in certain circumstances, non-

disclosure transformed consensual sex into an aggravated (sexual) assault. To come to this conclusion, the Court had to consult the definitions of assault, consent, and aggravated assault in the *Criminal Code*.

What is an aggravated (sexual) assault?

- **Assault**
“A person commits an **assault** when ... without the **consent** of another person, he applies force intentionally to that other person, directly or indirectly.” (*Criminal Code* section 265(1))
- **Consent**
“For the purposes of this section, no consent [to physical contact] is obtained where the complainant submits or does not resist by reason of ... **fraud.**” (*Criminal Code* section 265(3) (c))
- **Aggravated assault**
An aggravated assault is an assault that “wounds, maims, disfigures *or endangers the life* of the complainant.” (*Criminal Code* section 268) [emphasis added]
- **Aggravated sexual assault**
An aggravated sexual assault is when an accused “... in committing a sexual assault, wounds, maims, disfigures *or endangers the life of the complainant.*” (*Criminal Code* section 273) [emphasis added]

How did the Supreme Court apply the law of assault to HIV non-disclosure?

The majority of the Supreme Court ruled that non-disclosure of HIV-positive status could transform otherwise consensual sex into (sexual) assault when non-disclosure amounts to **fraud vitiating consent to sex**.

But the Supreme Court was clear that **non-disclosure** would not automatically amount to **fraud** vitiating consent. It decided that non-disclosure would only amount to fraud when it could be proved that:

- the partner was exposed to a “significant risk of serious bodily harm” (i.e., a significant risk of HIV transmission); *and*
- the partner would not have consented to sex had s/he known of the accused person’s HIV-positive status.

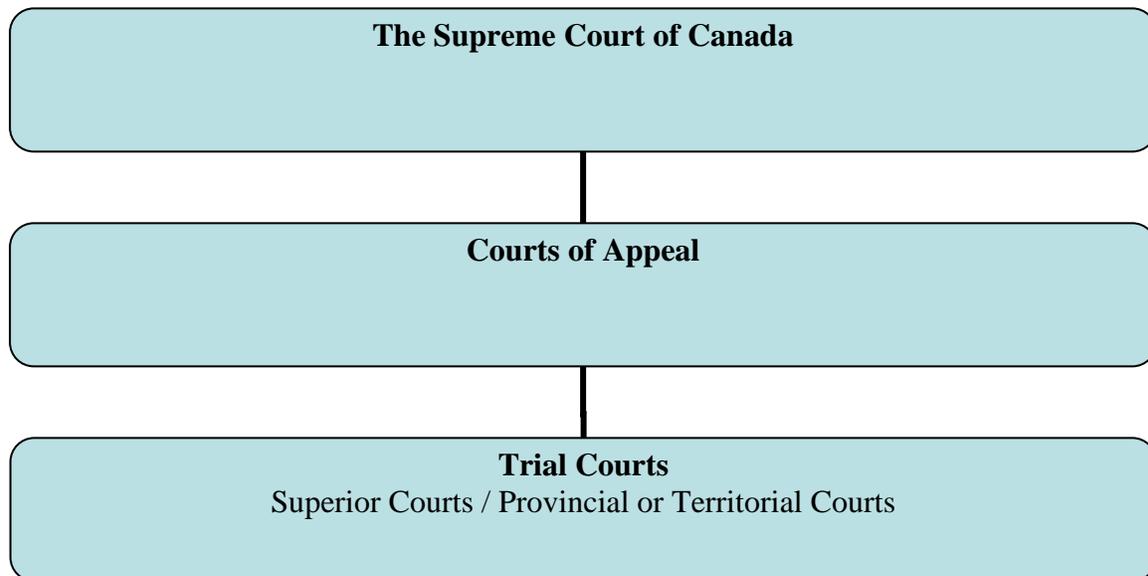
In such circumstances, consent to sex would be considered invalidated by fraud.

The Supreme Court also ruled the assault would be considered an *aggravated* assault because HIV exposure was considered to endanger the person’s life

For more information about the current criminal law on HIV non-disclosure, see “HIV non-disclosure: what’s the law in Canada?” also in this section of this resource kit.

Understanding the criminal justice system

The hierarchy of the courts



- In Canada, there are three main levels of courts in criminal cases: the trial courts, the courts of appeal and the Supreme Court of Canada. Each province/territory has its own judicial system, which includes a court of appeal, and trial courts.
- **When a person is prosecuted, his or her case is heard by a trial court** (which name may differ from one province to another and depending on the nature of the offence). Trial courts decide whether a person is guilty of an offence or not and, when the person is found guilty, pronounce a sentence.
- **The court of appeal** hears appeals from trial courts decisions. As the highest court in the province/territory, it has an important role to establish case law in the province/territory as its decisions are binding in trial courts in the province/territory. A court of appeal decision can also influence other courts outside the province/territory, although it is not technically binding.
- **The Supreme Court of Canada** is the highest level of court in Canada. Before a case can reach the Supreme Court of Canada, it must have used up all available appeals at other levels of court. Once the Supreme Court has spoken on an issue, all Canadian appellate and trial courts must follow the rules set out by it.

Actors of the justice system

- ***The police***
Generally, the police can investigate and lay charges if they believe an offence was committed. Police usually exercise discretion in determining which charges

are laid. Police can also lay multiple charges against the same person. However, in B.C. and Quebec, only the Crown (and not the police) can lay charges. In New Brunswick, the police can only lay charges after receiving advice from the Crown.

- ***The Crown prosecutor***
A Crown prosecutor is a lawyer acting on behalf of the government, which prosecutes crimes in the name of the Queen (sometimes referred to simply as “the Crown” or “Crown counsel”).
- ***The judge***
The judge is an official responsible for running court hearings, deciding the outcome of court cases (unless it is a jury trial — see below) and, in criminal cases, pronouncing sentences.
- ***A jury***
In jury trials, a jury is a group of 12 citizens who listen to the evidence, follow the judge’s instructions about the law, and decide whether the accused is guilty or not guilty. They decide verdicts, but not sentences. The right to a trial by jury for serious offences is constitutionally entrenched in the *Canadian Charter of Rights and Freedoms*, which states that “any person charged with an offence has the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment” (s. 11(f)).
- ***The defense lawyer***
A defense lawyer is a lawyer acting on behalf of the accused.
- ***Duty counsel***
Provinces and territories in Canada usually provide for duty counsel. A duty counsel is a lawyer who can, for instance, help people who have not hired a lawyer on their first appearance date before the court by providing free legal advice and representation.
- ***The accused***
The accused is a person who is charged by the police or the Crown with violating the *Criminal Code* (also referred to as the “defendant”).
- ***The complainant***
In the context of a criminal case, the complainant is a person who has been directly or indirectly affected by an alleged crime.
- ***A witness***
A witness is someone who provides evidence in a trial.

- **An expert witness**
An expert witness is a witness that the court considers to have sufficient expertise in a particular field. Expert testimony usually helps the court understand some of the other evidence being presented.

For a complete glossary of legal terms, check out your provincial justice website. See, for example, in Ontario, <http://www.attorneygeneral.jus.gov.on.ca/english/glossary/>, or in B.C., <http://www.justicebc.ca/en/cjis/meta/glossary.html>.

Key basic principles in the criminal law

- A person charged with a crime in Canada is **presumed innocent until proven guilty**.
- In order to prove that someone is guilty of a criminal offence and secure a conviction, the Crown prosecutor must **prove**:
 - that the accused committed the **prohibited act** (*actus reus*); and
 - that he/she had the required **mental element of fault** (*mens rea*) specific to a particular offence.
- The Crown prosecutor must prove both these elements of a crime **beyond a reasonable doubt**. Each crime has its own specific prohibited act, related to a specific mental element of fault. The mental element of fault does not necessarily equate to the intent to bring about the consequences of the prohibited act. For some crimes, negligence is sufficient to meet the required mental element of fault.
- The *Criminal Code* clearly states that **ignorance of the law by a person who commits an offence is not an excuse for committing that offence** (section 19). This means that a person can be charged with and convicted of a criminal offence, even if he or she did not know that what he or she was doing was illegal.
- When criminal cases are reported or written about, they often appear in the form **R v. Smith**. The “R” means “Regina,” which is the Latin word for Queen. In this example, the person named “Smith” is the person accused of the crime, also known as the defendant.

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