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## INTRODUCTION

*In this focus feature, we offer three perspectives on the recent Supreme Court of Canada judgments in R v Mabior and R v DC, which attempted to clarify when a person living with HIV will be subject to criminal liability for failing to disclose this condition prior to engaging in sexual intercourse. Martha Shaffer argues that the Court missed an opportunity to reconsider the test for sexual fraud it had laid out in its 1998 decision in R v Cuerrier, a test that, since its inception, has proven difficult to apply. Isabel Grant argues that the Court has over-criminalized HIV non-disclosure through treating all cases where there is a realistic possibility of transmission as aggravated sexual assault regardless of whether transmission of the virus takes place. Alison Symington notes that the Court's punitive approach is out of step with recent scientific and medical advancements with respect to HIV transmission and treatment and that, while the Court set out a risk-based test, it did not appropriately weigh the evidence regarding the risk of HIV transmission. These three perspectives demonstrate that the criminalization of HIV non-disclosure in Canada remains deeply problematic.*

**Keywords:** *R v Mabior*, *R v DC*, aggravated sexual assault, consent, HIV, non-disclosure

In 1998 in *R v Cuerrier*,<sup>1</sup> the Supreme Court of Canada held that non-disclosure of one's HIV-positive status to a sexual partner will constitute fraud negating consent to sexual activity where there is a 'significant risk' of transmission. In *R v Mabior*<sup>2</sup> and *R v DC*,<sup>3</sup> the Court revisited this issue and held unanimously that a person who is HIV-positive can be convicted of aggravated sexual assault for engaging in sexual intercourse without prior disclosure of this status where there is a 'realistic possibility' of HIV transmission. Such a possibility will exist unless two conditions are met: the accused must have a low viral load<sup>4</sup> at the time of the

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1 *R v Cuerrier*, [1998] 2 SCR 371.

2 *R v Mabior*, 2012 SCC 47.

3 *R v DC*, 2012 SCC 48. We use 'DC' when referring to the case and 'DC' when referring to the accused.

4 Viral load is the term used to describe the amount of HIV circulating in the body, usually measured in the blood (as the number of copies per millilitre). The tests currently

encounter *and* condoms must be used during intercourse. Thus, to avoid criminal liability, people living with HIV must disclose their status before engaging in sexual intercourse *unless* they meet these conditions.

The decisions raise important questions for legal, social, and health policy and so have been met with a mixed response.<sup>5</sup> For example, is it fair to convict a person of aggravated sexual assault for failing to disclose an HIV infection, especially if there is little risk of transmission? Does the prosecution of non-disclosure help or hinder HIV prevention? Does it protect the public from being exposed to HIV during sexual encounters? Does criminalization of non-disclosure contribute to the stigmatization of people living with HIV? Is criminalization enforced disproportionately against certain groups? And will it affect certain populations more negatively than others?

There have been significant changes with respect to our knowledge about HIV prevention and transmission since *Cuerrier*, as well as ongoing development of effective treatments, which have transformed HIV from a fatal diagnosis into a chronic, manageable condition for most people with access to treatment.<sup>6</sup> Yet much of the public still believes that HIV is highly infectious, is inevitably fatal, and is associated with immoral activities. As a result, not revealing HIV status to sexual partners is a charged issue.

To be clear, HIV infection remains a serious medical condition, with the potential to cause life-threatening complications and death if not successfully treated. But we now know that the average risk of HIV transmission per act of unprotected vaginal intercourse is only 0.08 per

used in Canada can measure viral load levels as low as 20 to 50 copies/ml. Below this level, viral load is said to be 'undetectable.' The goal of HIV treatment is to render viral load undetectable, thereby allowing the immune system to maintain or recover its strength and keep people healthy. There is also a strong correlation between a person's viral load and the risk of transmission to another person – a lower viral load means there is less possibility of transmission. If the viral load is undetectable, the possibility of transmission is almost eliminated.

5 Contrast, for example, the press release issued by the coalition of HIV organizations who intervened in the decision: Canadian HIV/AIDS Legal Network et al, News Release, 'Unjust Supreme Court Ruling on Criminalization of HIV Major Step Backwards for Public Health and Human Rights' (5 October 2012), online: Aidslaw.ca <<http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=2055>>, with this blog posting by a University of Ottawa law professor: Carissima Mathen, '*R v Mabior*, *R v DC*' (5 October 2012) (weblog), online: Slaw <<http://www.slaw.ca/2012/10/05/r-v-mabior-r-v-dc/>>.

6 Some two dozen effective antiretroviral medications (ARVs) have been approved for treating people with HIV. 'Highly active antiretroviral therapy' (HAART), usually involving the combination of at least three different medications, practically stops HIV from replicating, lowering the person's viral load dramatically.

cent.<sup>7</sup> If condoms are used, that risk is reduced by at least 80 per cent. If the HIV infected partner is on antiretroviral treatment (ARVs), that risk is reduced by 96 per cent.<sup>8</sup> The Supreme Court was therefore called upon to reconsider the *Cuerrier* test, taking into consideration the new science of HIV, contemporary realities of living with HIV, and the protection of sexual autonomy and dignity.

*Mabior* and *DC* presented two very different factual contexts in which to confront these realities. In *Mabior*, the accused failed to disclose his HIV-positive status to nine complainants, several of whom were teenagers. During the period of time in question, Mabior sometimes had an undetectable viral load and at other times had a low viral load. Condoms were used inconsistently. None of the complainants tested positive for HIV. At trial, Mabior was convicted of six counts of aggravated sexual assault but acquitted on the counts where he had an undetectable viral load *and* used a condom.<sup>9</sup> The Manitoba Court of Appeal quashed all but two of the aggravated sexual assault convictions, holding that either an undetectable viral load *or* reasonably careful use of condoms reduces the risk of HIV transmission so that there is no longer a 'significant risk'.<sup>10</sup>

DC was a single mother who met the complainant at their sons' soccer game. Although there was conflicting testimony, the trial judge found that there was one incident of unprotected sex prior to DC's disclosing

7 Marie-Claude Boily et al, 'Heterosexual Risk of HIV-1 Infection Per Sexual Act: Systematic Review and Meta-analysis of Observational Studies' (2009) 9 *Lancet Infectious Diseases* 118.

8 See David McLay, 'Scientific research on the risk of sexual transmission of HIV infection on HIV and on HIV as a chronic and manageable infection.' Report prepared for the Canadian HIV/AIDS Legal Network (December 2011), online: Canadian HIV/AIDS Legal Network <[http://www.aidslaw.ca/EN/lawyers-kit/documents/2a\\_McLay2010\\_s.3update-Dec2011.pdf](http://www.aidslaw.ca/EN/lawyers-kit/documents/2a_McLay2010_s.3update-Dec2011.pdf)>. Note this report is an update of section 3 of a report funded by the Ontario HIV Treatment Network: Eric Mykhalovskiy, Glenn Beteridge, & David McLay, *HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario* (August 2010), online: <<http://www.catie.ca/pdf/Brochures/HIV-non-disclosure-criminal-law.pdf>> [McLay]. Note that some studies have found the risk of transmission from an HIV-positive man to a woman is about twice that of an HIV-positive woman to a man. Unprotected anal intercourse is considered more risky, with estimates of per-act risk of HIV transmission ranging from 0.01% to over 3%. Unprotected oral sex carries the lowest risk of sexual transmission.

9 *R v Mabior*, 2008 MBQB 201. He was also convicted of sexual interference and invitation to sexual touching with respect to an under-age girl. (These convictions were not appealed.) He was sentenced to fourteen years and has since been deported: 'HIV Sex Offender Deported from Winnipeg,' *CBC News* (20 February 2012), online: CBC News <<http://www.cbc.ca/news/canada/manitoba/story/2012/02/20/mb-mabior-hiv-assault-sudan-deport-winnipeg.html>>.

10 *R v Mabior*, 2010 MBCA 93 at para 92.

her HIV-positive status to the complainant. After a brief separation following her disclosure, the couple reconciled and cohabited for four years. The relationship came to a violent end; the complainant was convicted of assaulting DC and her son. After charges were laid against him for assault, DC was charged for not disclosing her HIV status four-and-a-half years earlier. The complainant did not contract HIV. DC was convicted of aggravated assault and sexual assault.<sup>11</sup> The Quebec Court of Appeal quashed the convictions on the basis that her undetectable viral load reduced the risk of transmission below the level of 'significance.'<sup>12</sup>

In this focus feature, we assess the *Mabior* and *DC* decisions from three perspectives. Martha Shaffer focuses on the implications of *Mabior* for the doctrine of fraud as it relates to sexual assault law. She examines whether *Mabior* leaves us with a coherent test for determining what kinds of deceptions will negate consent to sexual activity. Isabel Grant questions the Court's application of aggravated sexual assault in cases where no transmission of HIV has occurred. She argues that this tendency toward over-criminalization is part of a pattern of exceptionalism in which persons with HIV are singled out for disadvantageous treatment. Alison Symington criticizes the Court's failure to appreciate the significance of HIV-related scientific developments and predicts that the decision will have a disproportionate impact on particularly marginalized groups with HIV.

All three pieces address a fundamental question from different angles: when, if ever, should failure to disclose one's HIV status constitute sexual assault? We all write from the position that people living with HIV generally should disclose their status to their sexual partners. We also agree that there is some role for criminal law with respect to HIV exposure. Finally, we approach these questions as feminists, concerned with retaining the gains women have achieved through the development of a robust definition of consent in the law of sexual assault.

11 As of 12 November 2012, conditional sentences will no longer be available where sexual assault is prosecuted by indictment (*Safe Streets and Communities Act*, SC 2012, c 1, s 34). For more details about this case, see Isabel Grant & Jonathan Glenn Betteridge 'A Tale of Two Cases: Urging Caution in the Prosecution of HIV Non-disclosure' (2011) 15 HIV/AIDS Policy & Law Review 15.

12 *R v DC*, 2010 QCCA 2289.

Martha Shaffer\*

SEX, LIES, AND HIV: MABIOR AND THE  
CONCEPT OF SEXUAL FRAUD

*This article argues that the Court missed an opportunity to reconsider the test for sexual fraud it had laid out in its 1998 decision in R v Cuerrier, a test that since its inception has proven difficult to apply. It argues that the standard in Mabior is unlikely to provide people living with HIV and other sexually transmitted infections the certainty lacking under Cuerrier and that the judgment fails to advance the development of the concept of consent in the law of sexual assault.*

**Keywords:** sexual assault, consent, fraud, HIV, sexually transmitted infections (STIs).

From almost any perspective, *Mabior* and *DC* are profoundly disappointing judgments. They fail to provide clear guidance to those living with HIV as to when disclosure is necessary, and they fail to give guidance on disclosure to those living with other sexually communicable diseases. Perhaps most fundamentally, they fail to address whether the 'significant risk of serious bodily harm' test for fraud in the sexual context, set out in the *Cuerrier* decision, provides a workable definition of fraud. To explain these criticisms, I return to the Court's judgment in *Cuerrier*, where the issues that gave rise to these problems are addressed more clearly.

*Cuerrier* forced the courts to confront an extraordinarily difficult issue – how to interpret the concept of fraud in the context of sexual consent. Fraud is relevant to the offences of assault and sexual assault because of the way those offences are defined in Canadian law. Section 265 of the *Criminal Code*, which forms the basis of the *actus reus* of assault and sexual assault, provides that a person commits an assault when he or she applies force to another person without consent.<sup>1</sup> Section 265 goes on to provide that no consent will be obtained where the complainant submits or does not resist by reason of four factors: (1) the application of force; (2) threats or fear of the application of force; (3) the exercise of authority; or (4) fraud. These provisions have been interpreted to mean that touching will be assaultive (regardless of the degree of force applied) unless the person who is touched has given consent. Even if that person has 'consented,' the consent he or she has given will not be

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1 These provisions are supplemented for sexual assault by the provisions found in *Criminal Code*, RSC 1985, c C-46, ss 271–273.3.

valid if it was obtained through the use of – or threats of – violence, the exercise of authority, or (most relevant here) fraud. The question that arises, here, is what types of fraud will invalidate consent to sexual touching. Will any deception that leads to consent be enough? Or will only certain types of misrepresentations vitiate consent to a sexual encounter?

Before *Cuerrier*, the answer to this question was clear. In the context of sexual consent, the law limited fraud to two types of misrepresentation: deceptions going to identity and deceptions going to the nature and quality of the act. Both of these types of fraud were interpreted narrowly. Misrepresentations as to identity were limited to situations where the accused impersonated another person, as when the accused impersonated a woman's husband. They did not include false claims about status (e.g. I'm a doctor), accomplishments (I was a member of the Olympic boxing team), or personal attributes (I'm a good listener) that a person might make as a way of attempting to convince another to engage in a sexual encounter. Misrepresentations as to the nature and quality of the act were limited to claims that a sexual act was actually something else and non-sexual, such as a claim that sexual intercourse was really a medical treatment.<sup>2</sup> Since the 1888 English decision in *R v Clarence*<sup>3</sup> it had been clear that lying about having a sexually transmitted disease did not constitute fraud. According to the *Clarence* court, so long as the complainant understood that she was consenting to a sexual act, the accused's failure to disclose a sexually transmitted disease did not affect the validity of the complainant's consent.<sup>4</sup> This was the state of the law at the time the Crown decided to charge *Cuerrier* with aggravated assault for failing to disclose to two women that he was HIV-positive.

The central issue at the Supreme Court of Canada was whether 'fraud' in the sexual context should continue to be limited to misrepresentations going to identity and to the nature and quality of the act, or whether fraud should be given a broader definition. This issue is much more difficult than it first appears. The difficulty arises from the challenge of finding a principled yet workable definition of fraud in the sexual context, one that captures the kinds of deceptions that should give rise to liability for sexual assault without making everyone who lies in the prelude to a sexual encounter into a sex offender.

<sup>2</sup> See e.g. *Bolduc v The Queen*, [1967] SCR 677.

<sup>3</sup> (1888), 22 QBD 23.

<sup>4</sup> These limitations on the types of fraud that invalidated sexual consent developed under the offences of rape and indecent assault, which no longer exist within Canadian law.

Limiting fraud to the two highly circumscribed types of deceit recognized at common law provides a workable definition but one that seems unduly narrow. Arguably, deceptions beyond these categories are sufficiently fundamental to the nature of consent to vitiate consent to sexual activity. Deceptions about sexually transmitted infections (STIs) are a case in point. Lying about, or even failing to disclose, a sexually transmitted infection is a good candidate for the type of deception that should amount to fraud in the sexual context, since sexual infections are factors that might reasonably lead people to refuse consent. Deceptions about sexually transmitted infections do not affect the sexual nature of the act, but they do seem to go to the very heart of the conduct to which people consent when they engage in sexual activity.

But if fraud were to be expanded to allow a broader range of deceitful practices to vitiate consent, what other sorts of lies should count? Should all lies made in the hope of securing consent be treated as significant enough to invalidate consent? If, for example, the accused falsely represents himself as being a CEO of a major corporation or as a doctor, and the complainant consents in part as a result of that (mis)information, should the complainant's consent be seen as legally invalid? What if the accused tells the complainant, falsely, that he has had a vasectomy and she consents to unprotected intercourse as a result? Has she given legally valid consent?

While these examples may seem fanciful, similar questions have arisen in litigated cases. For example, in *R v Petrozzi*,<sup>5</sup> the British Columbia Court of Appeal was asked to determine whether a man who had promised to pay a sex worker for the performance of a sexual act, never intending to pay her, had obtained her consent by fraud. The Nova Scotia case of *R v Hutchinson*<sup>6</sup> raised the issue of the validity of a woman's consent to sexual intercourse in circumstances where her partner had, unbeknownst to her, pierced holes into the condoms they used for contraception. And in an Israeli case, an Arab man was convicted of the offence of 'rape by deception' for allegedly misrepresenting himself as being Jewish.<sup>7</sup> The complainant in the case, a Jewish woman, testified that she would never have had intercourse with the accused had she known he was Arab. Are these the sorts of misrepresentations that should make an otherwise consensual act nonconsensual?

5 (1987), 35 CCC (3d) 528 (BC CA).

6 *R v Hutchinson*, 2009 NSSC 51, rev'd 2010 NSCA 3, new trial, 2011 NSSC 361, aff'd 2013 NSCA 1, leave to appeal filed to Supreme Court of Canada on 10 January 2013.

7 See "Israeli Arab who 'raped' a woman says verdict 'racist.'" *BBC News* (21 July 2010) online: BBC News <<http://www.bbc.co.uk/news/world-middle-east-10717186>>. Sabbar Kashur had originally been charged with rape and indecent assault.

If, instead, only certain lies should be recognized as amounting to consent-vitiating fraud, which lies should count? Is there a principled way of distinguishing between the types of misrepresentations that should invalidate consent and those that should not? How do we maximize protection of the complainant's sexual autonomy without turning all lies into sexual assaults?

While these concerns are important for the principled development of the law generally, they have particular resonance for feminists. For decades, feminist scholars and activists have pushed for reforms to the procedural, evidentiary, and substantive laws on sexual assault to remove stereotypes that treated sexual assault complainants with suspicion and to create new laws that took women's sexual autonomy seriously.<sup>8</sup> A considerable amount of this advocacy has centred on reformulating the concept of sexual consent. Feminists have fought for a concept of consent that maximizes women's ability to decide when, with whom, and under what conditions they will agree to sexual activity. These efforts are now reflected in s 273.1 of the *Criminal Code*, which defines consent as the voluntary agreement of the complainant to engage in the sexual activity in question, and by the Supreme Court of Canada decision in *R v Ewan-chuk*,<sup>9</sup> which held that consent is determined based on the *complainant's* perspective.

The question of how fraud should be defined is inextricably linked to the definition of sexual consent and it is for this reason that the issue is so challenging for feminists. On the one hand, a broad definition of fraud appears most consistent with the enterprise of taking women's consent seriously because it recognizes that many factors can undermine a person's ability to give meaningful consent. But on the other hand, not all deceptions are so morally objectionable that they should brand the person who makes them with a sexual assault conviction. This is true even for deceptions about sexually transmitted infections. For example, lying about a yeast infection, while not laudable, does not evoke the moral opprobrium we associate with a sexual assault. Even deceptions about HIV provoke different moral responses, a point *Mabior* and *DC* illustrate well. There is a vast difference in the blameworthiness of someone like *Mabior*, who routinely had unprotected intercourse with teenage girls, and someone like *DC*, who may have performed one act of unprotected sex with a man with whom she was hoping to form a relationship and who, she likely was hoping, would not reject her once she

8 For a discussion of some of these laws, see Martha Shaffer, 'The Impact of the Charter on the Law of Sexual Assault: Plus ça change, plus c'est la même chose' (2012) 57 Supreme Court LR (2d) 337.

9 [1999] 1 SCR 330.



disclosed. Treating them both as sex offenders does not take into account the significant moral difference in their actions. This suggests that sexual assault may be too blunt an instrument to deal with deceptions about HIV. Instead of treating these deceptions as a type of sexual fraud, a more nuanced approach may be needed.

Faced with these difficult questions, the Supreme Court of Canada in *Cuerrier* split three ways on the definition of sexual fraud. Justice L'Heureux-Dubé articulated the broadest approach, holding that fraud should include *any* deceit intended to secure consent that does, in fact, secure consent. This approach maximizes a person's ability to make accurate and informed choices about the conditions under which he or she will agree to sexual touching and seems the most consistent with the objectives underlying the offences of assault and sexual assault – protecting physical autonomy and integrity. But it also vastly expands the scope of sexual assault because any deception, no matter how trivial, will vitiate consent if the complainant would not otherwise have consented.<sup>10</sup> For precisely this reason, Justice Cory, for the majority, proposed a definition of fraud deliberately designed to narrow the scope of criminalization for sexual deception. For Justice Cory, sexual deception would amount to fraud only where it exposed the complainant to a 'significant risk of serious bodily harm.'<sup>11</sup> This limitation would permit the concept of fraud to be expanded while at the same time preventing lies that 'lack the reprehensible character of criminal acts'<sup>12</sup> from being swept within the sexual assault provision. Justice McLachlin (as she then was) proposed the narrowest approach. She held that, in addition to the two traditional categories, fraud should be expanded to include 'deception as to the presence of a sexually transmitted disease giving rise to serious risk or probability of infecting the complainant.'<sup>13</sup> Thus, in addressing the question of which kinds of lies should amount to fraud in the context of sexual behaviour, the Court proposed three different answers: all deceptions (Justice L'Heureux-Dubé), only deceptions about sexually

10 The effect of Justice L'Heureux-Dubé's broad definition of fraud in the HIV context is that disclosure would generally be required to avoid a sexual assault conviction, with the exception of cases where it would be possible to show that the complainant would have consented even if the accused had disclosed – i.e., non-disclosure played no causal role in the complainant's decision to consent. Failure to disclose an HIV infection before engaging in sexual activity would amount to fraud.

11 *R v Cuerrier*, [1998] 2 SCR 371 at para 128.

12 *Ibid* at para 133.

13 *Ibid* at para 70. Justice McLachlin made no effort to expand her test for fraud to lies falling outside of the context of sexually transmitted infections, holding explicitly that the question of whether other deceptions should be included within the definition of fraud was 'better left for another day'; *ibid* at para 73.

transmitted diseases where there is a high risk of transmission (Justice McLachlin), or only those deceptions which expose the complainant to a 'significant risk of serious bodily harm.'

Although Justice Cory's test might appear to set out a solid middle ground between Justice L'Heureux-Dubé's broad approach and Justice McLachlin's narrow one, problems of application began to surface almost immediately after its inception. Most of these focused on the requirement that there be a 'significant risk' of harm and more specifically on the question of how to determine whether a risk is 'significant.' Even in the HIV context, the very context in which the 'significant risk' test was born, these issues proved problematic. In *Cuerrier* itself, Justice Cory assumed that unprotected vaginal intercourse always posed a 'significant risk,' an assumption that makes the 'significant risk' test easy to apply. But since *Cuerrier*, research has established that the risk of transmission from unprotected intercourse is much lower than commonly thought and can be so low that it cannot be said to be 'significant' on any meaningful understanding of that word. For example, a person with an undetectable viral load has less than a 1 in 10 000 chance of infecting his or her partner through unprotected intercourse. Is this a 'significant risk' in any meaningful sense of that term?

Increased scientific knowledge of HIV transmission rates and of the factors that affect these rates raises uncomfortable questions for the 'significant risk' test. Research has shown that the risk of HIV infection is mediated by many factors, including stage of the infection, type of sexual activity, whether the person living with HIV/AIDS (PHA) is the insertive or receptive partner, condom use, viral load, anti-retroviral treatment, circumcision, and whether either partner has an STI.<sup>14</sup> Should the 'significance' of a risk be determined based on the likelihood of transmission? If so, how high must the transmission risk be to be considered significant? Since multiple factors affect the likelihood of transmission, how should a PHA – or a court – go about quantifying the risk? An accurate assessment would require that all of the relevant risk factors be considered, but if all of the factors have to be considered each time a PHA has sex, how workable is the 'significant risk' test? Does a test that

14 See David McLay, 'Scientific research on the risk of sexual transmission of HIV infection on HIV and on HIV as a chronic and manageable infection.' Report prepared for the Canadian HIV/AIDS Legal Network (December 2011), online: Canadian HIV/AIDS Legal Network at 9–12, 14–5 <[http://www.aidslaw.ca/EN/lawyers-kit/documents/2a.McLay2010\\_s.3update-Dec2011.pdf](http://www.aidslaw.ca/EN/lawyers-kit/documents/2a.McLay2010_s.3update-Dec2011.pdf)>. Note this report is an update of section 3 of a report funded by the Ontario HIV Treatment Network: Eric Mykhalovskiy, Glenn Betteridge, & David McLay, HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario (August 2010), online: <<http://www.catie.ca/pdf/Brochures/HIV-non-disclosure-criminal-law.pdf>> [McLay].

requires this level of quantification provide enough certainty for a PHA to know in advance of engaging in sexual activity whether disclosure is required, especially in light of rapidly changing scientific knowledge about HIV transmission? Would a court also have to engage in this same type of analysis, looking back at each sexual encounter in order to determine whether the accused should have disclosed an HIV infection at that time?

These difficulties of application point to an even more fundamental question – whether the ‘significant risk of serious bodily harm’ test succeeds in distinguishing deceptions that should be treated as sexual fraud from those that should not. If the test is so difficult to apply in the very context that created it, how useful is it in delineating the kinds of deceptions that should be criminalized from those that should not?

In *Mabior*, the Supreme Court had the opportunity to revisit Justice Cory’s ‘significant risk of serious bodily harm’ test and, in fact, it had been specifically asked to do so by the Manitoba Court of Appeal and by the Quebec Court of Appeal in *DC*. The Supreme Court ducked the issue. Instead, it reiterated the utility of the ‘significant risk’ test, asserting that the test ‘carved out the appropriate area for the criminal law’ by recognizing that ‘not every deception that leads to sexual intercourse should be criminalized, while still according consent meaningful scope.’<sup>15</sup> The Court acknowledged that the application of the ‘significant risk’ test had generated considerable uncertainty as to when a person was required to disclose an HIV infection but held that the answer to this problem was to clarify how the test applies in the context of HIV. According to the Court, in the HIV context, a ‘significant risk of serious bodily harm’ will exist so long as there is a ‘realistic possibility’ of transmission.<sup>16</sup> There will be a ‘realistic possibility’ of transmission during (vaginal) sexual intercourse unless the accused has a low viral load at the time of the activity *and* condoms were used during the encounter.<sup>17</sup>

What are the implications of this ‘realistic possibility’ standard? Does it succeed in providing certainty to people living with HIV as to when they need to disclose their illness? Does it give any guidance at all to people living with other sexually transmitted infections?

The first point to make about the standard is that it is clearly a *legal* standard, not a medical one. As Alison Symington explains in more detail, from a medical perspective, the use of condoms *alone* would be sufficient to negate a ‘realistic possibility’ of transmission, and

15 *R v Mabior*, 2012 SCC 47 at para 58 [*Mabior*].

16 *Ibid* at para 84.

17 *Ibid* at para 94.

transmission is considered very unlikely where a person has a low viral load.<sup>18</sup> The Court, however, insisted on *both* of these factors. In reality, the Court's 'realistic possibility' standard is far more stringent than its nomenclature suggests and more akin to holding that disclosure is required if there is more than a negligible risk of transmission.

Second, the need for the accused to have a low viral load raises problems of certainty and proof. Low viral load is central to establishing or negating liability and yet the Court spends virtually no time discussing what level counts as 'low.' The only indication the Court gives is in a single sentence where, based on the evidence led at trial, it discusses the impact of treatment on viral load: '[w]hen a patient undergoes antiretroviral therapy, the viral load shrinks rapidly to less than 1,500 copies per millilitre (low viral load), and can even be brought down to less than 50 copies per millilitre (undetectable viral load).'<sup>19</sup> If this number, 1,500 copies per millilitre, is to be the benchmark, more sustained discussion of this standard, beyond a passing reference, would be helpful. But, more importantly, how will a person know whether his or her viral load falls under this level? Viral loads are not tested on a daily basis and the frequency of testing will vary from patient to patient. If a PHA's last test was a month before a sexual encounter, can she rely on that result as a measure of her viral load? What if the last test was three months, or even six months before a sexual encounter? Since viral load can change over time and can be subject to 'spikes' due to other infections, how stable must a person's viral load readings be before he or she is entitled to rely upon them? Must a person with a low viral load give evidence that he or she did not have any condition that could have caused a 'spike'? Over time, courts can answer these questions, but until they do, people living with HIV are left with considerable uncertainty. Until this uncertainty is resolved, the safest course for avoiding liability is to disclose before any sexual encounter.

Third, it is not clear how this 'realistic possibility' test applies to sexual activities other than vaginal intercourse. For oral sex, the risk of transmission is so low that studies have not been able to obtain an accurate measure.<sup>20</sup> Must a person with HIV have a low viral load and use condoms during oral sex to avoid liability on the basis of non-disclosure? On the flip side, anal intercourse has a higher rate of transmission than vaginal intercourse, particularly where the insertive partner is HIV-positive.<sup>21</sup> Will low viral load and condom use negate the existence of 'realistic possibility' of transmission in these circumstances?

18 Alison Symington, 'Injustice Amplified' 63 UTLJ 485 at 488–490 [present issue].

19 *Mabior*, supra note 15 at para 100.

20 McLay, supra note 14 at 8.

21 McLay, *ibid* at 9.

Finally, because it was devised specifically to address the application of the 'significant risk' test to HIV, the 'realistic possibility' test offers no guidance on the application of that test to people living with other sexually transmitted conditions. Though most sexually transmitted infections are treatable and not life threatening, many pose a risk of serious bodily harm. This is certainly true of gonorrhea, especially in light of the recent emergence of severe antibiotic resistant strains.<sup>22</sup> Even genital herpes, for which there is no cure, may be seen to pose a risk of serious bodily harm because of the possibility of recurrent outbreaks of painful sores. Does the Court's insistence that the 'realistic possibility' standard only applies to HIV mean that a different standard of disclosure applies to these conditions? Is disclosure warranted only where the transmission risk is *higher* than a 'realistic possibility'? What is the disclosure standard here?

In the end, the *Mabior* decision seems to fail on its own terms. By including low viral load within the 'realistic possibility' assessment it fails to provide the certainty that was missing from the 'significant risk' test. It fails to help us identify whether deceptions about other sexually transmitted illnesses amount to fraud that vitiates consent. And it fails to help us consider whether *Cuerrier's* 'significant risk' test sets out a notion of sexual fraud that promotes a full conception of sexual autonomy and sexual consent.

22 See e.g. Centers for Disease Control and Prevention, 'Antibiotic Resistant Gonorrhea,' online: Centers for Disease Control and Prevention <<http://www.cdc.gov/std/gonorrhea/arg/>>; Robert D Kirkcaldy, Gail A Bolan, & Judith N Wasserheit, 'Cephalosporin-Resistant Gonorrhea in North America' (2013) 309 *Journal of the American Medical Association* 185.

Isabel Grant\*

THE OVER-CRIMINALIZATION  
OF PERSONS WITH HIV

*This article argues that the Court has over criminalized HIV nondisclosure through treating all cases where there is a realistic possibility of transmission as aggravated sexual assault regardless of whether transmission of the virus takes place. It argues that there is no other context in which a remote possibility of a harm, where that harm is not realized, constitutes our most serious form of sexual assault and suggests that this over-criminalization of HIV is a result of a pattern of exceptionalism in which persons with HIV are singled out for disadvantageous treatment because of the stigma that has built up around the condition. Finally, the article notes the lengths the Court went to acquit DC in *R v DC* and suggests this reflects the Court's own discomfort with the Mabior test.*

1 Introduction

The Supreme Court of Canada judgment in *R v Mabior*<sup>1</sup> has enormous implications for persons with HIV, for their sexual partners, and for sexual assault generally. In this brief comment, I would like to focus on several points not made explicit in *Mabior*. I will begin, in Part II, by discussing briefly the failure of the decision to address the context of living with HIV in Canadian society.<sup>2</sup> In the Part III, I will discuss three interrelated issues, all of which address what form criminalization should take. First, I begin with a consideration of the fact, omitted by the Court, that the transmission of a sexually transmitted infection was, in fact, already criminalized when the amendments were made to the definition of fraud in the sexual assault provisions in 1983. Second, I examine why the Court did not consider other crimes in its analysis, either less serious forms of sexual assault or crimes that focus more directly on the risk-taking component of nondisclosure rather than on lack of consent. Finally, I close with a few comments about the new test for aggravated sexual assault and its effect of increasing the criminalization of HIV non-

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1 *R v Mabior*, 2012 SCC 47 [*Mabior*].

2 This lack of context has been particularly evident in a number of recent SCC decisions involving gendered violence including *R v Ryan*, 2013 SCC 3; *R v O'Brien*, 2013 SCC 2; and *R v JA*, 2011 SCC 28.

disclosure. I suggest that the Court's reaction to the facts in *DC*<sup>3</sup> illustrates its own discomfort with the implications of the *Mabior* decision.

## II *The absence of context*

Most notable among the things not discussed by the Court in *Mabior* is the context of HIV for those who live with it. There was one reference to persons with HIV as a vulnerable group but with no elaboration.<sup>4</sup> There was no discussion of the difficulty of disclosing HIV in a society where people who are HIV-positive have been discriminated against in numerous ways<sup>5</sup> and where disclosure can trigger a domino effect of negative repercussions. Nor is there mention of the difficulty of insisting on condom use, particularly for women in relationships characterized by an imbalance of power.<sup>6</sup> Further, it is assumed that everyone has equal access to antiretroviral medication and to the regular viral load testing which will now be necessary to establish the new defence to liability. At the same time that HIV is decontextualized, it is also exceptionalized. There is a new variant of aggravated sexual assault that can only be committed by someone with HIV. Variations on the test may apply to other sexually transmitted infections, but the 'realistic possibility of infection' test is limited to people with HIV.<sup>7</sup> While it is not unusual for the Court to limit itself to the issue before it, it is unusual to isolate one form of systemic disadvantage and to use that as the basis of criminal liability. There might be legitimate reasons to distinguish HIV from other sexually transmitted infections. For example, we have developed effective ways to prevent transmission of HIV, making it less easily transmissible than most STIs. But because there are so many illegitimate reasons for singling out HIV – such as stigma and discrimination, which have

3 *R v DC*, 2012 SCC 48 [*DC*].

4 *Mabior*, supra note 1 at para 67.

5 See e.g. Valerie A Earnshaw et al, 'Stereotypes about People Living with HIV: Implications for Perceptions of HIV Risk and Testing Frequency among At-Risk Populations' (2012) 24 *AIDS Education and Prevention* 574; Saara Greene et al, "Under My Umbrella": The Housing Experiences of HIV Positive Parents Who Live with and Care for Their Children in Ontario' (2010) 13 *Archives of Women's Mental Health* 223; Michael J Kaplan, 'HIV Stigma: Standing in the Way of an AIDS-Free Generation,' *The Huffington Post* (30 November 2012) online: *Huffington Post* <[http://www.huffingtonpost.com/michael-j-kaplan/hiv-stigma-aids-generation\\_b\\_2218559.html](http://www.huffingtonpost.com/michael-j-kaplan/hiv-stigma-aids-generation_b_2218559.html)>.

6 Alison Symington, 'HIV Exposure as Assault: Progressive Development or Misplaced Focus?' in Elizabeth Sheehy, ed, *Sexual Assault Law, Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 635.

7 *Mabior*, supra note 1 at para 92.

historically driven non-disclosure prosecutions – it was incumbent on the Court to make these reasons explicit.

### III *How to criminalize non-disclosure*

#### A LEGISLATIVE INTENT

Much of the Court's judgment is an attempt to determine whether Parliament intended non-disclosure of a sexually transmitted infection to constitute fraud negating consent to sexual activity. The key change to the definition of fraud took place in 1983 when the reference to fraud as to 'the nature and quality of the act' was amended to refer simply to 'fraud.'<sup>8</sup> Given the Court's over-arching concern with legislative intent, it is puzzling that it did not mention that, in 1983 when the definition of fraud was amended, the *Criminal Code* already contained an explicit provision criminalizing the transmission of certain serious sexually transmitted infections.<sup>9</sup> A specific provision had been enacted in 1919,<sup>10</sup> making it an offence punishable on summary conviction to communicate a venereal disease, knowingly or by culpable negligence, to another person. This provision was repealed in 1985, just a few years before the first HIV non-disclosure prosecution in Canada.<sup>11</sup> According to Richard Elliott, it was repealed because the transmission of a venereal disease was considered better addressed by public health rather than by criminal law and because no one had been prosecuted under the provision for over fifty years.<sup>12</sup>

It is possible that the repealed section was intended to deal only with cases of actual transmission of an STI, regardless of whether disclosure was made. But it seems unlikely that the transmission of our then most

8 *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, SC 1980–81–82–83, c 125, s 19.

9 *Criminal Code*, SC 1919, c 46, s 316A, as repealed by *Criminal Law Amendment Act*, SC 1985, c 19, s 42.

10 The text of the provision reads as follows: '(1) Any person who is suffering from venereal disease in a communicable form, who knowingly or by culpable negligence communicates such venereal disease to any other person shall be guilty of an offence, and shall be liable upon summary conviction to a fine not exceeding five hundred dollars or to imprisonment for any term not exceeding six months, or to both fine and imprisonment.' The section applied to syphilis, gonorrhoea, and soft chancre and there was a much outdated corroboration requirement in subsection (2).

11 *R v Summer* (1989), 98 AR 191, AJ no 784 (QL) (Alta Prov Ct).

12 Richard Elliott, *Criminal Law and HIV/AIDS: Final Report* (1996), online: Canadian HIV/AIDS Legal Network <<http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=30>>.



serious STIs would be punishable on summary conviction, whereas non-disclosure (with or without transmission) was intended by Parliament to be charged as aggravated sexual assault. The enactment and particularly the repeal of this section should have formed part of the analysis of legislative intent. This is not to suggest that this section is determinative of the outcome on the legislative intent behind fraud. Rather, it should inform us about how transmission of serious sexually transmitted infections was viewed before the AIDS pandemic became part of our public consciousness and should lead us to question why HIV has triggered such a uniquely punitive approach.

#### B PROBLEMS WITH CHARGING HIV NON-DISCLOSURE AS AGGRAVATED SEXUAL ASSAULT

In *Mabior*, the Court phrased the issue as being whether a person who engages in sexual relations without disclosing his or her condition commits aggravated sexual assault.<sup>13</sup> No distinction was made between cases where the virus is transmitted and those where it is not. The Court did not consider any options for criminalization short of our most serious sexual offence of aggravated sexual assault, a crime which is punishable by a maximum sentence of life in prison.<sup>14</sup>

The scheme of sexual assault offences in the *Criminal Code* is tiered from 'simple' sexual assault through to aggravated sexual assault, based on the consequences or additional harm to the complainant beyond the harm of sexual assault. A sexual assault is a sexual touching without consent. An aggravated sexual assault is one in which the accused 'wounds, maims, disfigures or endangers the life of the complainant' in the course of that sexual assault. The potential life sentence for aggravated sexual assault is justified by the harmful consequences that ensue from the sexual assault, along with a heightened level of moral culpability.<sup>15</sup> This distinction is lost in HIV non-disclosure prosecutions. There are several problems with the Court's reliance on aggravated sexual assault, three of which I will discuss here.

First, the Court assumed, without analysis, that *any possibility* of transmitting HIV endangers life. It is true that HIV is a serious condition that

13 *Mabior*, supra note 1 at para 1.

14 Ibid at paras 1-4. See *Criminal Code*, RSC 1985, c C-46, s 273 (2)(b).

15 See e.g. *R v Henry*, 2002 BCCA 575, in which the accused's sentence of fifteen years for beating the victim with a hammer and repeatedly choking her into unconsciousness during a brutal sexual assault was upheld; *R v H(PA)* (1998) 227 AR 211 (Alta Prov Ct), aff'd (1999), 232 AR 150 (Alta CA), where the accused was sentenced to nineteen years for attacking the victim viciously and leaving her with permanent brain damage.

can be life endangering if left untreated. But does proving a very small possibility of transmitting the virus constitute proof of actual endangerment of life beyond a reasonable doubt? Consider the facts in *DC*. Unprotected sex with DC was found to involve a risk of HIV transmission of one in 10 000, an estimate we now know was probably on the high side. Is a one in 10 000 chance that you will acquire a condition that may endanger your life the same as proof beyond a reasonable doubt of actual endangerment?

To use an imperfect analogy, we punish someone for impaired driving if we catch him or her driving while impaired. We punish the individual for impaired driving causing bodily harm or causing death only where those harmful consequences ensue. The accused bears the risk of these consequences ensuing and the penalty escalates accordingly. Because the concept of endangerment is more amorphous and involves a potential rather than an actual harm, the Court held that a 'realistic possibility' of transmitting the virus will suffice. In my view, there needs to be a stronger nexus between the non-disclosure and the endangerment to justify invoking our most serious sexual offence. That nexus should be transmission. Culpability in criminal law should depend on a combination of the mental state of the accused and the harm caused.<sup>16</sup> HIV may actually endanger life but, where there is no transmission, a remote possibility of acquiring it does not.

While sexual assault is not a crime that is measured by the degree of harm caused to the complainant, aggravated sexual assault is. Sexual assault is about the denial of the complainant's autonomy to choose the circumstances in which he or she will participate in sexual activity. But aggravated sexual assault applies to situations where that autonomy is negated *and* further serious harm is caused. The judgment in *Mabior* trivializes the significance of such harm when it does occur.<sup>17</sup>

Why is it only in the HIV context that even the slightest possibility of endangerment is sufficient to trigger our most serious sexual offence?<sup>18</sup> It is as if the idea of HIV is enough to endanger life. The Court acknowledged that other jurisdictions have taken a more nuanced approach,

16 *R v DeSousa*, [1992] 2 SCR 944, 95 DLR (4th) 595.

17 Under the *Mabior* test, in the unlikely event that transmission takes place even where the accused uses a condom and has a low viral load, the test would result in acquittal.

18 In *R v Hutchinson*, 2009 NSSC 51, rev'd 2010 NSCA 3, new trial, 2011 NSSC 361, aff'd 2013 NSCA 1, the Nova Scotia Court of Appeal suggested, without deciding, that a deception leading to pregnancy *could* constitute aggravated sexual assault because pregnancy can cause bodily harm and even endanger life. The Court did not suggest that every deception *where there is a realistic possibility of pregnancy* but no actual pregnancy would constitute aggravated sexual assault.

either by prosecuting only cases where transmission takes place<sup>19</sup> or by prosecuting cases where no transmission takes place as a less serious offence,<sup>20</sup> but it dismissed these options without explanation.

Second, the Court relieved the Crown of having to prove endangerment in individual cases by presuming that endangerment was present unless a condom was used *and* the accused's viral load was low. An accused with an undetectable viral load who did not use a condom, for example, would not be able to present scientific evidence that transmission was not a realistic possibility.' As Shaffer notes, the legal test does not correspond with the scientific evidence.<sup>21</sup>

Finally, the Court conflated the *mens rea* for sexual assault with the *mens rea* for aggravated sexual assault. In order to prove sexual assault, the only fault requirement appears to be knowledge that one is HIV-positive.<sup>22</sup> While the Court noted that the potential life sentence required a high level of moral blameworthiness, it did not mention an additional *mens rea* requirement to elevate the assault to aggravated sexual assault.<sup>23</sup> For example, aggravated sexual assault usually requires objective foreseeability of bodily harm.<sup>24</sup> The *Mabior* Court did not discuss whether endangerment must be reasonably foreseeable by the accused in the HIV non-disclosure context. In overlooking this element, the Court failed to recognize the impact of the accused's knowledge on his or her culpability: for instance, might an accused who has an undetectable viral load argue that he or she reasonably believed the complainant was not endangered? There would be significant scientific evidence to support such a belief.

There is a more basic question that Symington<sup>25</sup> also addresses: whether sexual assault is the most appropriate crime in this context. What is the harm from failure to disclose that is being addressed by criminalization? There are two possibilities. The harm could be conceptualized as the denial of the autonomy to choose whether to engage in sexual activity with someone who is HIV-positive. Alternatively, the harm could be seen as exposing the complainant to the risk that he or she will

19 *Offences against the Person Act, 1931* (UK), 24 & 25 Geo V, c 100, ss 18, 20.

20 *Crimes Act* (NZ), 1961/43 (reprint as of June 2010) ss 145, 188, 201, online: NZLII <[http://www.nzlii.org/nz/legis/consol\\_act/ca196182/](http://www.nzlii.org/nz/legis/consol_act/ca196182/)>.

21 Martha Shaffer, 'Sex, Lies and HIV: *Mabior* and the Concept of Sexual Fraud' 63 UTLJ 466 at 472 [present issue].

22 It is not clear whether the accused must know that the complainant is not HIV-positive.

23 *Mabior*, supra note 1 at para 24.

24 *R v Ford*, 2006 NLCA 70, 262 Nfld & PEIR 165 at para 16; *R v Godin*, [1994] 2 SCR 484, 31 CR (4th) 33 at para 2.

25 Alison Symington, 'Injustice Amplified' 63 UTLJ 485 at 494–95 [present issue].

acquire HIV. Most of the Court's attention was focused on the latter concern: taking unjustifiable risks with the health of one's sexual partner. I have argued elsewhere that it might be more appropriate to charge those accused in HIV non-disclosure cases with crimes other than aggravated sexual assault that reflect the risk-taking nature of the conduct.<sup>26</sup> Where the virus is transmitted, for example, criminal negligence causing bodily harm reflects the lack of regard the accused had for the physical integrity of his or her partner through the test of 'wanton and reckless disregard for the lives or safety of others.' This seems to get at the heart of the wrong done in non-disclosure. When the virus is not transmitted, lesser offences such as common nuisance more realistically reflect the level of culpability involved.

Whether non-disclosure constitutes sexual assault is the question with which I struggle most deeply. Determining whether sexual assault is the appropriate offence is a very complex question, as it is important to protect the rights of persons with HIV but also important not to dilute the protections that sexual assault law provides more generally through a robust definition of consent. The HIV cases highlight the dilemma for women in particular because, as a result of their relative lack of power in sexual relationships, women have unique difficulties with disclosure and with insisting on condom use, making them vulnerable both to sexual exploitation and to prosecution when they fail to meet the *Mabior* criteria. Sexual assault, at its core, is about power and control and that power and control is often obscured in the HIV context.<sup>27</sup> The problem with using sexual assault to cover all non-disclosures is that it casts the net too widely. There may be cases where non-disclosure involves the objectification of one's sexual partner or the disregard of his or her sexual integrity in a manner deserving of such a label. But there will also be cases where the non-disclosure occurs in a context that is far removed from what we usually think of as the power imbalance at the root of sexual assault.<sup>28</sup> One might hope to rely on prosecutorial discretion in these cases, but the fact that DC was prosecuted suggests that such discretion is not always exercised cautiously. We have to question whether the dangers of casting the sexual assault net too wide outweigh the benefits, particularly when there are other crimes that can capture the most blameworthy conduct.

26 Isabel Grant, 'The Prosecution of Non-disclosure of HIV in Canada: Time to Rethink *Cuerrier*' (2011) 5 McGill JL & Health 7.

27 See Emily MacKinnon & Constance Crompton, 'The Gender of Lying: Feminist Perspectives on the Nondisclosure of HIV Status' (2012) 45 UBC L Rev 407 at 423–7.

28 DC's explanation for her non-disclosure, for example, was her fear that her son would be excluded from the soccer team if she disclosed her status: DC, supra note 3 (Factum of the Respondent at para 32).

## C THE PROPER SCOPE OF CRIMINAL LIABILITY

One puzzling dimension of *Mabior* is that it reads as if the Court, conscious of the dangers of over-criminalization, was trying to limit the scope of *Cuerrier*.<sup>29</sup> This view would be consistent with how the media reported the case, as though *Mabior* gives people with HIV new freedom not to disclose their HIV status.<sup>30</sup> For example, the Court pointed out that criminalization should be limited to 'conduct that is highly culpable – conduct that is viewed as harmful to society, reprehensible and unacceptable.'<sup>31</sup> The Court reasserted the legitimacy of *Cuerrier*, holding that it carved out 'an appropriate area for the criminal law – one restricted to significant risk of serious bodily harm.'<sup>32</sup> The Court purported to put forward a compromise suggesting that *Cuerrier* connotes a position 'between the extremes of no risk (the trial judge's test) and "high risk" (the Court of Appeal's test).'<sup>33</sup> It stated that the 'realistic possibility of transmission' standard 'avoids setting the bar for criminal conviction too high or too low.'<sup>34</sup> But the *Mabior* 'realistic possibility of transmission' test is essentially a no-risk test, once the Court's requirement of condoms and low viral load is factored in. The only difference from the trial judge's decision is that the trial judge required an undetectable viral load while the Court required only a low viral load. Nonetheless, only those who 'pose no risk of harm' are excluded from the net of liability.<sup>35</sup> The word 'significant,' from *Cuerrier*, has been lost or denuded of any content.

It is beyond dispute that *Mabior* expands the scope of criminal liability beyond *Cuerrier*. Strangely absent from *Mabior* are the passages from the majority and minority opinions in *Cuerrier* which strongly suggested that condom use would negate a 'significant risk.'<sup>36</sup> On this basis, many courts have held that the use of a condom alone precludes criminal liability,<sup>37</sup> a

29 *R v Cuerrier*, [1998] 2 SCR 371 [*Cuerrier*].

30 Kirk Makin, 'Where the Supreme Court Went Wrong on HIV Disclosure,' *The Globe and Mail* (12 Oct 2012) online: *Globe and Mail* <<http://www.theglobeandmail.com/news/national/where-the-supreme-court-went-wrong-on-hiv-disclosure/article4610682/>>; Jordan Press, 'Change to HIV Disclosure Rules Raise Alarm,' *Vancouver Sun* (6 October 2012) B1; Michelle Mandel, 'Gambling with Lives: Supreme Court's HIV Ruling a Blow to Informed Consent,' *Toronto Sun* (6 October 2012) 6.

31 *Mabior*, supra note 1 at para 19.

32 *Ibid* at para 58.

33 *Ibid* at para 84.

34 *Ibid* at para 87.

35 *Ibid* at para 67.

36 *Cuerrier*, supra note 29 at para 73, McLachlin J, Gonthier J concurring, and para 129, Cory J, Major, Bastarache, & Binnie JJ, concurring.

37 See e.g. *R v Mabior*, 2010 MBCA 93 [*Mabior* CA]; *R v Agnatuk-Mercier* [2001] OJ no 4729 (Ont Sup Ct J) (QL); *R v Edwards*, 2001 NSSC 80; *R v Smith*, [2007] SJ No 116 (SKQB) at para 59, aff'd on other grounds, 2008 SKCA 61, 310 Sask R 230; see *contra R v JT*, 2008 BCCA 463 and *R v Wright*, 2009 BCCA 514 [*Wright*]. In *Wright*, for

position which promotes responsible behaviour and is most consistent with public health efforts. Some courts have also commented that an undetectable viral load may preclude criminal liability.<sup>38</sup> *Mabior* requires both condom use and a low viral load before criminal liability can be avoided.

That the Court had some discomfort with its own test is evident from the efforts it went to to bring about an acquittal for DC. On the findings of fact made by the trial judge in *DC* – that there was one episode of unprotected sex in the context of an undetectable viral load – she was rightly convicted because no condom was used. To avoid convicting DC, the Supreme Court had to reverse the finding of fact that no condom had been used, concluding that this finding was too speculative.<sup>39</sup> Perhaps the Court had concerns that the charges were in response to her allegations of domestic violence or perhaps DC did not fit the Court's picture of someone who should be labelled a sex offender. But what about the next DC who has one episode of unprotected sex (with an undetectable viral load) as she struggles to negotiate disclosure and then, after disclosure, enters a long-term relationship with her partner during which HIV is not transmitted? Such an accused will be properly convicted of aggravated sexual assault under the *Mabior* standard, even when, as in this case, the charges are clearly a vengeful response to being held accountable for domestic violence. Beyond justice in the individual case, we should get little comfort from DC's acquittal, as it simply distracts attention from the expansion of the test from *Cuerrier*.<sup>40</sup> One can only hope that other courts will have similar discomfort with the scope of the test and look for ways to avoid applying its full force in cases where there was no 'significant risk' of HIV transmission.

I began this piece by arguing that the judgments in *Mabior* and *DC* ignore the context of living with HIV in significant ways. It is the

example, the Court of Appeal held at para 39 that 'it is a question of fact in each case for the trier of fact to determine whether the use of a condom has reduced the risk of HIV transmission to a level that does not represent a significant risk of serious bodily harm.'

38 See *Wright*, *ibid*, where the Court acknowledged the relevance of viral load to the 'significant risk' determination even though *Wright* was convicted; *ibid* at paras 32–3; *Mabior* CA, *ibid* at paras 102–5; *R v DC*, 2010 QCCA 2289 at paras 98–100.

39 *DC*, *supra* note 3 at paras 25–8, 30.

40 Another puzzling component of *DC* is the Court's reference to the couple's having both protected and unprotected sex during their four-year relationship. I have been unable to find any indication on the record that they had unprotected sex after disclosure was made. If they did, then surely the Crown had failed to prove its case because the complainant, knowing the accused was HIV-positive, nonetheless consented to unprotected sex. This would suggest that the non-disclosure was not causally related to the complainant's consent.

marginalization of persons with HIV that makes disclosure so difficult. Widespread criminalization increases the stigma associated with HIV and makes disclosure *more* difficult, not easier. We have made tremendous gains in treating and preventing the spread of HIV; yet, ironically, in the face of these gains we see a more punitive approach to non-disclosure which will inevitably enhance the marginalization of people living with HIV in Canada.

Non-disclosure prosecutions are an inefficient way of trying to prevent transmission, as up to 60% of transmissions take place in the early stages of the illness before the person knows that she or he has HIV.<sup>41</sup> Telling those who do not have access to antiretroviral medications that using a condom will make no difference in their criminal liability or telling those who do not have the power to insist on condom use that an undetectable viral load is irrelevant will not encourage responsible behaviour for those who do not feel safe in disclosing to sexual partners. The coalition of HIV groups that intervened in *Mabior* did not argue that there is no role for criminal law in HIV non-disclosure. Rather, they argued for a cautious approach, informed by science and not prejudice, that criminalizes only those who are the most culpable and only to the degree that fairly reflects their culpability. On this mandate, the Court has fallen short.

41 Bluma G Brenner et al, 'High Rates of Forward Transmission Events after Acute/Early HIV-1 Infection' (2007) 195 *Journal of Infectious Diseases* 951; Gary Marks, Nicole Crepaz, & Robert S Janssen, 'Estimating Sexual Transmission of HIV from Persons Aware and Unaware That They Are Infected with the Virus in the USA' (2006) 20 *AIDS* 1447.

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INJUSTICE AMPLIFIED BY HIV  
NON-DISCLOSURE RULING

*This article notes that the Supreme Court's punitive approach in Mabior and DC is out of step with recent scientific and medical advancements with respect to HIV transmission and treatment. It argues that while the Court set out a risk-based test to determine when HIV disclosure is legally required, it did not appropriately weigh the evidence regarding the risk of HIV transmission. It predicts that the judgment will have an unfair and disproportionate impact on already marginalized people, including newcomers, those in violent relationships, and those without access to treatment. Finally, it questions whether the new legal test for HIV non-disclosure cases reflects Charter values.*

**Keywords:** HIV, non-disclosure, consent, aggravated sexual assault, fraud, injustice

1 Introduction

In the fifteen years since the Supreme Court issued its decision in *Cuerrier*,<sup>1</sup> the many injustices emanating from the scope of the HIV disclosure obligation have become increasingly evident. In addition to the shocking situation of DC,<sup>2</sup> we have seen persons living with HIV (PHAs) sentenced harshly for non-disclosure in circumstances where there was clearly no intention to harm or exploit and where transmission risks were minimal. Individuals have also pleaded guilty where it is not certain that disclosure would have legally been required.<sup>3</sup>

Beyond the impact of prosecutions on individuals, an overly broad criminalization of HIV non-disclosure has had sweeping impacts on the HIV community and responses to the epidemic. Criminalization causes anxiety, confusion, and fear for PHAs.<sup>4</sup> For example, there have been false threats against PHAs who did disclose and also a great deal of

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1 *R v Cuerrier*, [1998] 2 SCR 371 [*Cuerrier*].

2 See Martha Shaffer, Isabel Grant, & Alison Symington, 'R v Mabior and R v DC: Introduction' (2013) 63 UTJ 462 [present issue] [Shaffer, Grant, & Symington], for a description of the facts and ruling in *R v DC*.

3 For summaries of many HIV non-disclosure cases, see HIV/AIDS Policy and Law Review, online: Canadian HIV/AIDS Legal Network <[www.aidslaw.ca/review](http://www.aidslaw.ca/review)>.

4 See e.g. Barry D Adam, *How Criminalization Is Affecting People Living with HIV in Ontario* (2012) online: Ontario HIV Treatment Network <<http://www.ohtn.on.ca>>.



uncertainty regarding when disclosure is legally required and how to prove that disclosure took place. Some women living with HIV who have been sexually assaulted (or have faced an attempted assault) have been 'reminded' by police of their obligation to disclose. Despite the fact that the disclosure obligation in Canada is already broader than that recommended by international agencies such as the UNAIDS,<sup>5</sup> some prosecutors have been pushing to expand the scope of the obligation and the severity of charges PHAs may face. The negative public health implications of overly broad criminalization have been discussed extensively and the chilling effect on communication with healthcare and other service providers has also been demonstrated.<sup>6</sup>

This unjust law is increasingly out of synch with the 'good news' stories of the HIV epidemic. In 1996, the benefits of 'highly active antiretroviral therapy' (HAART) were announced to great excitement at the 11th International AIDS Conference, held in Vancouver. Researchers had discovered that combining different ARVs (antiretroviral medications), thereby disrupting HIV's viral cycle at different points simultaneously, practically stops HIV from replicating.<sup>7</sup>

HIV infection remains a serious illness, but with access to quality healthcare, including ARVs, the lifespan of those newly diagnosed now approximates that of people who are HIV-negative.<sup>8</sup> Researchers have also confirmed that successful treatment with ARVs prevents onward

5 See e.g. UNAIDS, *Criminalization of HIV Transmission Policy Brief* (August 2008) online: UNAIDS <[http://aidslex.org/site\\_documents/CR-0017E.pdf](http://aidslex.org/site_documents/CR-0017E.pdf)>; Global Commission on HIV and the Law, *Risks, Rights and Health* (July 2012), online: Global Commission on HIV and the Law <<http://www.hivlawcommission.org/index.php/report>>.

6 See e.g. Carol L. Galletly & Steven D. Pinkerton, 'Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV' (2006) 10 AIDS and Behaviour 451; Patrick O'Byrne, 'Criminal Law and Public Health Practice: Are the Canadian HIV Disclosure Laws an Effective HIV Prevention Strategy?' (2011) 9 Sexuality Research and Social Policy 70, online: <<http://dx.doi.org/10.1007/s13178-011-0053-2>>; Hon Justice Edwin Cameron, 'Criminalization of HIV Transmission: Poor Public Health Policy' (2009) 14:2 HIV/AIDS Policy and Law Review 1; and Eric Mykhalovskiy, 'The Problem of "Significant Risk": Exploring the Public Health Impact of Criminalizing HIV Non-disclosure' (2011) 73 Social Science and Medicine 668.

7 AVERT, *History of HIV & AIDS*, online: AVERT <<http://www.avert.org/hiv-aids-history.htm>>.

8 See David McLay, 'Scientific research on the risk of sexual transmission of HIV infection on HIV and on HIV as a chronic and manageable infection.' Report prepared for the Canadian HIV/AIDS Legal Network (December 2011), online: Canadian HIV/AIDS Legal Network at 15-6 <[http://www.aidslaw.ca/EN/lawyers-kit/documents/2a.McLay2010\\_s.3update-Dec2011.pdf](http://www.aidslaw.ca/EN/lawyers-kit/documents/2a.McLay2010_s.3update-Dec2011.pdf)>. Note this report is an update of section 3 of a report funded by the Ontario HIV Treatment Network: Eric Mykhalovskiy, Glenn Betteridge, & David McLay, *HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario* (August 2010), online: <<http://www.catie.ca/pdf/Brochures/HIV-non-disclosure-criminal-law.pdf>> [McLay].

transmission of HIV by dramatically reducing the viral load present in a person's bodily fluids.<sup>9</sup> There is a certain irony that precisely when PHAs can celebrate this remarkable progress and get on with their lives – including safe, fulfilling sexual lives – that the law would become even more punitive toward them.

Given the benefit of years of experience with these laws, new scientific and medical evidence, and an understanding of the realities of living with HIV in our society today, the Supreme Court's revisiting the *Cuerrier* standard in *R v Mabior* and *R v DC* held promise that the injustices of these prosecutions would be addressed and the disclosure obligations in Canadian law would be modernized.<sup>10</sup> Writing for a unanimous court, Chief Justice McLachlin identified two primary problems with the *Cuerrier* test: its uncertainty and its breadth.<sup>11</sup> Once these flaws had been pinpointed, one would expect that the decision would provide at least some substantive redress to the injustices they produce. Unfortunately, the Court did not deliver.

## II *Appropriately weighing the science of HIV transmission risk*<sup>12</sup>

In most sexual assault prosecutions, the statistical risk of physical harms resulting from the assault is not part of the equation. But HIV non-disclosure cases are not typical cases. As Martha Shaffer explains, these prosecutions are brought under section 265 (3)(c) of the Criminal Code.<sup>13</sup> The complainant did willingly consent to sex, based on the knowledge he or she had at that time. But he or she is asking the law to vitiate that consent retroactively on the ground of fraud – he or she would not have consented had he or she known the partner's HIV-positive status.

Parliament offered little guidance as to what in practice constitutes fraud vitiating consent and the jurisprudence on this provision is limited. Surely, not every lie or omission transforms a consensual sexual encounter into an assault. As Justice McLachlin (as she then was) noted in her minority judgment in *Cuerrier*, '[d]eceptions, small and sometimes large,

9 Ibid at 10–12.

10 See Shaffer, Grant, & Symington, *supra* note 2 for a description of *Mabior* and *DC*.

11 *R v Mabior*, 2012 SCC 47 at para 13 [*Mabior*].

12 Note that this discussion is limited to *Mabior* because the Court did not provide any analysis of the science in the other case at issue in this focus discussion, *R v DC*, 2012 SCC 48.

13 Martha Shaffer, 'Sex, Lies, and HIV: *Mabior* and the Concept of Sexual Fraud' (2013) 63 UTLJ 466 at 466 [present issue] [Shaffer], citing *Criminal Code*, RSC 1985, c C-46, s 265.

have from time immemorial been the by-product of romance and sexual encounters.<sup>14</sup>

What type of lies and omissions can reverse consent? The possibility of physical harm – specifically a ‘significant risk’ of ‘serious bodily harm’ – was identified in *Cuerrier* as a factor which makes certain information essential to consent. On their face, the terms suggest that the standard should be high – an important, substantial, notable risk and a dangerous, severe bodily harm.<sup>15</sup> In this way, the *Cuerrier* test made scientific and medical evidence pivotal to subsequent prosecutions.

In *Mabior*, the Court evaluated the scientific evidence to determine whether Mabior’s non-disclosure vitiated the complainants’ consent to have sex with him. The Court’s lack of detailed analysis makes it unclear whether it did not give sufficient weight to the science or whether it understood a ‘realistic possibility’ as an *extremely small* possibility. On the one hand, it stated that “significant risk of serious bodily harm” cannot mean any risk, however small.<sup>16</sup> On the other hand, it suggested that anything ‘non-negligible’ is realistic.<sup>17</sup> It is difficult to understand the Court’s reasoning, given such vague and almost contradictory statements. The *Mabior* test ultimately over-criminalized non-disclosure, even while the Court itself cautioned against this:

The danger of an overbroad interpretation is the criminalization of conduct that does not present the level of moral culpability and potential harm to others appropriate to the ultimate sanction of the law. A criminal conviction and imprisonment, with the attendant stigma that attaches, is the most serious sanction the law can impose on a person, and is generally reserved for conduct that is highly culpable – conduct that is viewed as harmful to society, reprehensible and unacceptable. It requires both a culpable act – *actus reus* – and a guilty mind – *mens rea* – the parameters of which should be clearly delineated by the law.<sup>18</sup>

Condoms are a key safer sex measure recommended the world over because they are highly effective. The Court nonetheless ruled that there is a ‘realistic possibility’ of transmitting HIV when condoms are used for vaginal intercourse,<sup>19</sup> despite recognizing that ‘[i]t is undisputed that HIV does not pass through good quality male or female latex

14 *Cuerrier*, supra note 1 at para 47.

15 For example, Steel JA for the Manitoba Court of Appeal stated that “[s]ignificant” means something other than an ordinary risk. It means an important, serious, substantial risk; *R v Mabior*, 2010 MBCA 93 at para 127 [*Mabior* CA].

16 *Mabior*, supra note 11 at para 85.

17 *Ibid* at para 99.

18 *Ibid* at para 19.

19 *Ibid* at para 99.

condoms'<sup>20</sup> and that condom use reduces the probability of HIV transmission by at least 80 per cent.<sup>21</sup>

What does an 80 per cent reduction mean? A 2009 analysis of existing studies found a transmission risk of 0.08 per cent per act for unprotected vaginal sex.<sup>22</sup> An 80 per cent reduction in risk puts the chance of HIV transmission at 0.016 per cent; that is, one transmission if 6 250 couples have unprotected intercourse. If the woman is the HIV-positive partner, the rate falls to 1 in 12 500 encounters. If condoms are used consistently, carefully, and correctly, even fewer transmissions are expected because incorrect condom use is accounted for in the 80 per cent figure.<sup>23</sup>

The Court devotes a mere two paragraphs to the complex issues of viral load and treatment. It is now widely accepted that a lower viral load reduces infectivity. The risk of sexual transmission from a person on effective treatment has been described by experts as 'approaching zero.'<sup>24</sup>

Viral load varies naturally over the course of disease progression in an untreated PHA and it is dramatically reduced, often to the point of undetectability, through successful ARV treatment. In *Mabior*, the Court noted that the most recent wide-scale study concluded that the risk of HIV transmission is reduced by 89 to 96 per cent when the partner is treated with ARVs.<sup>25</sup> In practice, this means that, with treatment, if

20 Ibid at para 98.

21 Ibid.

22 Marie-Claude Boily et al, 'Heterosexual Risk of HIV-1 Infection Perper Sexual Act: Systematic Review and Meta-analysis of Observational Studies' (2009) 9 *Lancet Infectious Diseases* 118.

23 Canadian HIV/AIDS Legal Network, *HIV Non-disclosure and Canadian Criminal Law: Condom Use* (November 2011) online: Canadian HIV/AIDS Legal Network <www.aids-law.ca>; McLay, supra note 8 at 10.

24 Notably, the strongest evidence on this issue was published after *Mabior*'s trial and therefore the evidence presented by the medical expert at trial did not fully reflect the 'treatment as prevention' phenomenon.

25 *Mabior*, supra note 11 at para 101, referring to Myron S Cohen et al, 'Prevention of HIV-1 Infection with Early Antiretroviral Therapy' (2001) 365 *New Eng J Med* 493. It should be noted that the results of this study are more commonly cited as a 96 per cent reduction as opposed to the range noted by the Court. Furthermore, it should be noted that this study reported data on HIV transmission rates and ARV treatment but did not report on the viral load of the HIV-positive partner. A study presented at the Third International Workshop on Women and HIV, January 2013, looking at HIV transmission rates, ARV treatment and viral load concluded that the transmission rate is essentially zero if the HIV-positive heterosexual partner has an undetectable viral load as a result of treatment; see Mark Mascolini, 'HIV Transmission Risk Essentially 0 if Heterosexual Partner Has Undetectable Viral Load' (Conference report of paper delivered at the Third International Workshop on Women and HIV, January 2013) online: National AIDS Treatment Advocacy Project <[http://natap.org/2013/HIV-women/HIVwomen\\_01.htm](http://natap.org/2013/HIV-women/HIVwomen_01.htm)>. The transmissions that took place in prior studies,

10,000 couples had unprotected vaginal intercourse, we would expect no HIV transmissions.<sup>26</sup> These significant findings would seem to suggest that the Court created unnecessary evidence requirements and uncertainty by requiring evidence that the person's viral load was low or undetectable *at the time of the sexual encounter*, as suggested by Martha Shaffer.<sup>27</sup> Minor fluctuations in viral load (sometimes referred to as 'blips' or 'spikes') would presumably have been occurring in the study populations. For PHAs on stable ARV treatment, a rebuttable presumption of a lowered viral load, reducing infectiousness, could have sufficed.

Beyond the onerous evidentiary burden on a defendant – to prove that condoms were used and that viral load was low at a particular point in time – does the Court really feel that protected sex or sex with a partner on ARVs truly poses a 'realistic possibility' of transmission, considering the above mentioned probabilities? In this case, the Court ruled that it is 'realistic' enough to justify an aggravated sexual assault conviction, with the serious penal consequences that follow. But this area of science is developing rapidly, with successive studies reporting ever more impressive results. The Court's failure to provide a detailed and nuanced analysis of the scientific evidence presented by the parties and the interveners makes it difficult to understand how this information informed the Justices' decision regarding where to draw the line for legal liability. Unfortunately, the line they did draw is, in my view, out of step with the science and the approaches to HIV prevention, care, treatment, and support that are critical to controlling this epidemic.

### III *Disproportionate impact*

Some believe the obligation to disclose is fair and appropriate, requiring only that PHAs provide sufficient information for their partners to make a so-called 'informed choice.' They may say it is just and fair because the obligation applies equally to all PHAs, is reasonable, and there is a defence available if the transmission risk is negligible. To my mind, however, people make choices about the risks they run in having sex, particularly unprotected sex, all the time. While a person might like to know whether his or her partner has an STI (sexually transmitted infection), that does not necessarily mean it should be a crime not to disclose nor that it is impossible to take precautions to protect oneself without

including that of Cohen, may have occurred before the HIV-positive partner had achieved an undetectable viral load.

26 McLay, *supra* note 8 at 11.

27 *Mabior*, *supra* note 11 at paras 104–5. Shaffer, *supra* note 13 at 472–473 [present issue].

disclosure. Moreover, to be just, a law cannot have a disproportionate impact on vulnerable or marginalized populations, nor can it require people to do something unreasonable or that may put them at personal risk.

As Isabel Grant points out,<sup>28</sup> PHAs are marginalized within our society, subject to significant stigma and discrimination. To declare that you are a member of this group is understandably difficult. Moreover, once information has been shared with another person, control is lost over how and with whom it is further shared.

Experiences of disclosure are affected by many aspects of social location, such as race and ethnicity, sexual orientation, nationality, age, and gender.<sup>29</sup> Personal experiences also have a significant impact on a person's willingness and ability to disclose. For example, one study found that victims of sexual abuse are six times less likely to disclose.<sup>30</sup> And, of course, the fear of rejection and violence upon disclosure is not unfounded. The deaths of Cicely Bolden, who was allegedly stabbed to death after revealing her HIV status to a man she had sex with, and Stuart Mark, who was bludgeoned to death allegedly after his boyfriend found out he was HIV-positive, are poignant reminders that the risk is real.<sup>31</sup> Disclosure is complicated, and it is seldom completely safe.

While only time will tell how the 'realistic possibility' test will be applied, the history of non-disclosure prosecutions gives reason to believe that certain segments of the population of PHAs will bear a disproportionate and unfair burden of threatened charges, investigations, prosecutions, and convictions, as well as related anxiety and stigma.<sup>32</sup> Consider, for example, newcomers to Canada – in particular, those from racialized communities. Newcomers confront many practical challenges, from finding a home and a school for their children to accessing medical and social services. If they are living with HIV, they also need to

28 Isabel Grant, 'The Over-Criminalization of Persons with HIV' 63 UTLJ 475 at 476 [present issue].

29 Ontario HIV Treatment Network, *Rapid Review no 9: HIV Disclosure* (September 2009), online: Ontario HIV Treatment Network <[http://www.ohtn.on.ca/Documents/Knowledge-Exchange/Rapid-Responses/Rapid-Response-09\\_Disclosure\\_2009.pdf](http://www.ohtn.on.ca/Documents/Knowledge-Exchange/Rapid-Responses/Rapid-Response-09_Disclosure_2009.pdf)>.

30 Anita Raj et al, 'Sex Trade, Sexual Risk, and Nondisclosure of HIV Serostatus: Findings from HIV-Infected Persons with a History of Alcohol Problems' (2006) 10 AIDS and Behaviour 149.

31 Teresa Woodard, 'HIV Revelation leads to Dallas woman's murder' WFAA.com (7 September 2012), online: WFAA TV <<http://www.wfaa.com>>; Mike McIntyre, '7-year sentence for Winnipeg man who killed HIV-positive boyfriend' *Winnipeg Free Press* (5 September 2012), online: Winnipeg Free Press <<http://www.winnipegfreepress.com>>.

32 Eric Mykhalovskiy & Glenn Betteridge, 'Who? What? When? Where? And With What consequences? An Analysis of Criminal Cases of HIV Non-disclosure in Canada' (2012) 27 CJS 31.

determine their legal rights and responsibilities. Add to this, the racial discrimination that persists in our criminal justice system and the high level of stigma related to HIV and sexuality within many racialized communities. For many, openly discussing sex is taboo, let alone disclosing an STI or negotiating condom use. Disclosure is particularly challenging in close-knit communities where disclosure may affect one's family and community, in contrast to disclosure that has only personal ramifications.<sup>33</sup>

Taken together, these factors suggest that we can expect a disproportionate impact on black and newcomer PHAs under the *Mabior* test. Criminal charges will do nothing to address the reasons why disclosure is so difficult or to encourage HIV testing, condom use, or equality in these communities. The sensational media coverage accompanying the charges can only add to HIV-related stigma, misinformation about the law and HIV, and fear of one's status becoming known.

Consider also those who are vulnerable to violence or in coercive relationships. DC is a perfect example. Charges were brought against her by a man who had engaged in a sexual relationship with her – aware of her status for the entire period of their relationship apart from their first sexual encounter – but then used the law as a weapon of further abuse against her when she sought redress for the violence he had perpetrated against her and her son. (He was given a discharge because of the case against her.) How many women will remain in abusive relationships because their partners threaten to go to the police with non-disclosure allegations if they leave, whether the allegations are true or not? How many will face counter-charges for non-disclosure if they report their abusive partners to the police? How many women will be beaten, abandoned, threatened, or degraded for disclosing their status, as is required of them by the law? These situations are all realistic examples of how criminalizing HIV non-disclosure has affected women to date, unjust results which I expect will be multiplied by the stringency of the *Mabior* test.

The condom requirement is particularly problematic when considered from a gendered perspective. While female condoms exist, they are not as common as male condoms and not so discreet that a woman can

33 Erica Lawson et al, *HIV/AIDS Stigma, Denial, Fear and Discrimination: Experiences and Responses of People from African and Caribbean Communities in Toronto* (2006), online: The African and Caribbean Council on HIV/AIDS in Ontario and the HIV Social, Behavioural and Epidemiological Studies Unit, University of Toronto <[http://www.accho.ca/pdf/hiv\\_stigma\\_report.pdf](http://www.accho.ca/pdf/hiv_stigma_report.pdf)>; Akim Adé Larcher & Alison Symington, *Criminals and Victims? The Impact of the Criminalization of HIV Non-disclosure on African, Caribbean and Black Communities in Ontario* (2010), online: The African and Caribbean Council on HIV/AIDS in Ontario <[http://www.accho.ca/pdf/ACCHO\\_Criminals\\_and\\_Victims\\_Nov2010.pdf](http://www.accho.ca/pdf/ACCHO_Criminals_and_Victims_Nov2010.pdf)>.

use them without her partner knowing. The male partner in a heterosexual encounter has significant power not only in relation to a key HIV prevention measure but also in relation to a critical component of the defence a PHA has to this serious criminal charge. Faced with possible violence, rejection, and loss of privacy, some women living with HIV may reasonably fear disclosure, but if the men refuse to wear condoms, the women have no options that will not expose them to the possibility of prosecution.

Access to HAART, HIV care, and viral load testing is a challenge for many PHAs. This is an important health and equality issue. Now it is also a legal issue because not accessing and adhering to treatment may result in legal jeopardy. Little research exists on access barriers in Canada, but some studies suggest that marginalized PHAs face significant challenges accessing health and social services.<sup>34</sup> Many Aboriginal people, newcomers, and those living in remote locations, for example, face particular impediments. For example, a study of PHAs who inject drugs found that marginalization from health care is a barrier to HAART access and adherence. Because women who use drugs are more likely to be street involved and to engage in sex work, they are more likely than male drug users to face barriers in accessing HAART.<sup>35</sup> Another study of women sex workers found that only 15 per cent of those who were diagnosed as HIV-positive had ever initiated HAART; only 9 per cent continued on HAART.<sup>36</sup> Similarly, a recent study shows that women reporting recent trauma had over four times the chances of antiretroviral failure as compared to those who did not report trauma.<sup>37</sup> Furthermore, many PHAs do not undergo viral load and other testing according to medical guidelines. Most of those who have difficulty accessing continuous care belong to marginalized populations.<sup>38</sup>

34 Ontario HIV Treatment Network, *Rapid Review no 62: Demographic Characteristics Associated with Access to HAART, HIV Care and HIV Viral Load Testing* (November 2012), online: Ontario HIV Treatment Network <<http://www.ohtn.on.ca/Documents/Knowledge-Exchange/Rapid-Responses/Rapid-Response-62-access-to-HAART.pdf>> [*Rapid Review no 62*].

35 Christine Tapp et al, 'Female Gender Predicts Lower Access and Adherence to Antiretroviral Therapy in a Setting of Free Healthcare' (2011) 11 *BMC Infectious Diseases* 86, cited in *ibid*.

36 Kate Shannon et al, 'Access and Utilization of HIV Treatment and Services among Women Sex Workers in Vancouver's Downtown Eastside' (2005) 82 *Journal of Urban Health* 488, cited in *Rapid Review no 62*, *supra* note 34.

37 Edward L Machtinger, 'Recent Trauma Is Associated with Antiretroviral Failure and HIV Transmission Risk Behaviour among HIV-Positive Women and Female-Identified Transgenders' (2012) 16 *AIDS and Behaviour* 2160.

38 *Rapid Review no 62*, *supra* note 34.



Under the *Mabior* test, those who do not have a low viral load must disclose or risk conviction for aggravated sexual assault. Is this a fair outcome? Whether or not to take potent medication should be a personal health decision, taken in consultation with one's doctor, not one's lawyer. Moreover, if access to treatment or testing is impeded by poverty, mental health or addiction issues, unstable housing, physical or psychological abuse, where one lives, or any number of other factors, individuals are deprived of the evidence to defend themselves in a prosecution.

#### IV *Consent in a world with STIs*

This brings us back to where this focus section began with Shaffer's question: what is fraud in the context of sexual assault?<sup>39</sup> The Court has suggested that the 'realistic possibility' test is consistent with the broad, purposive definition of consent required by *Charter* principles. It hasn't, however, explained how.

The Court cited some STI cases from the 1880s as evincing 'a generous approach to the issue of consent and when deceit might vitiate it, an approach that respected the right of the woman involved to choose whether to have intercourse or not.'<sup>40</sup> This era is not generally viewed as an exemplary time for women's rights, gender equality, or sexual autonomy. The facts of these cases suggest that factors other than a generous approach to consent may have been at play. The complainants were twelve and thirteen years old. According to the short reported decisions, one complainant was given liquor by her uncle and then slept unaware that he had sex with her. The other resisted the man's sexual advances but did not 'scream or cry.' It would seem that a rape conviction could not be made out in either case under the law of the time and therefore a conviction for transmitting an STI was as close to justice as could be obtained.

Oddly, while the Court relied on these 1880s cases, it did not address recent cases on consent, sexual assault, or equality, nor did it engage with the most recent jurisprudence on HIV non-disclosure. It was silent about how the *Mabior* reasoning is to be reconciled with these other cases. It is not clear to me that vitiating consent to sex because of HIV non-disclosure is consistent with sexual autonomy, dignity, and substantive equality in all cases. People have sex in many different ways, for many different reasons, under many different conditions. The Court has

39 Shaffer, *supra* note 13 at 467.

40 *Mabior*, *supra* note 11 at para 32, commenting on *R v Bennet* (1866), 4 F & F 1105, 176 ER 925 and *R v Sinclair* (1867), 13 Cox CC 28.

provided hollow guidance for the continuing development of sexual assault law in a way that is protective of both equality and sexual rights.

Generally, sexual assault is about power. It is one individual disregarding the desires and choices of another, using or objectifying another person. HIV non-disclosure cases do not all fit within this framework. The Court has devised a test which treats all PHAs in the same manner, irrespective of their circumstances or their reason not to disclose. Mabior's actions cannot be differentiated from DC's on this legal test. Yet there is no logical basis on which to assert that DC was objectifying her partner, using him for her own sexual pleasures without any respect for his choices, or assaulting him.

Disclosure is not necessary for HIV prevention, nor is it always necessary in order to engage in respectful, responsible sex. Disclosure is also not always possible. Treating non-disclosure as aggravated sexual assault does little to empower those who are unable to decide the terms on which they have sex and little to promote greater equality in sexual relationships. Certainly, there are some cases where exposing a partner to HIV may merit criminal sanction, but the 'realistic possibility' test does not provide us with the tools to identify those cases or deal with them appropriately. In my years of working on this issue, I have seen some grave injustices. I expect that, as a result of *Mabior*, I will witness many more.