The Complex Legacy of *R. V. Cuerrier*: HIV Nondisclosure Prosecutions and Their Impact on Sexual Assault Law

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THE COMPLEX LEGACY OF R. V. CUERRIER: HIV NONDISCLOSURE PROSECUTIONS AND THEIR IMPACT ON SEXUAL ASSAULT LAW

ISABEL GRANT*

This article examines the impact of the Supreme Court of Canada decision in R. v. Cuerrier from two vantage points. First, the article examines the impact of the decision on HIV nondisclosure prosecutions. Second, it examines the damage done by Cuerrier to sexual assault law outside of the HIV context. The article argues that Cuerrier has both overcriminalized people living with HIV and distorted the law of sexual assault. Through Cuerrier, and subsequent cases, the Supreme Court of Canada has unduly limited the concept of consent and its voluntariness requirement, and distorted the concept of fraud such that deceptions around sex are only criminalized where they cause a significant risk of serious bodily harm. It is argued that legislatively removing HIV nondisclosure prosecutions from the scope of sexual assault offences, and making corresponding changes to the definition of consent, is the only way to remedy the harm done to people with HIV and to sexual assault law more generally.

TABLE OF CONTENTS

I. INTRODUCTION .............................................. 45
II. CUERRIER’S LEGACY FOR PEOPLE LIVING WITH HIV ................. 47
   A. THE TRAJECTORY OF HIV NONDISCLOSURE PROSECUTIONS IN CANADA ................................ 47
   B. HOW WE GOT HERE ..................................... 48
   C. THE DECISION IN CUERRIER ................................ 50
   D. THE FALLOUT FROM CUERRIER ............................. 51
   E. DOUBLING DOWN IN MABIOR AND DC ..................... 53
   F. THE FALLOUT FROM MABIOR .............................. 57
III. CUERRIER’S LEGACY FOR SEXUAL ASSAULT ....................... 63
   A. THE DECISION IN HUTCHINSON .............................. 63
   B. THE IMPLICATIONS OF HUTCHINSON FOR FRAUD .......... 67
   C. THE IMPLICATIONS OF HUTCHINSON FOR CONSENT ...... 69
IV. MOVING FORWARD .......................................... 76
   A. LIMITING HIV NONDISCLOSURE PROSECUTIONS ............. 76
   B. REPAIRING THE DAMAGE DONE TO SEXUAL ASSAULT LAW ...... 79

I. INTRODUCTION

HIV nondisclosure prosecutions began in the late 1980s in Canada at a time when fear, misinformation, and discrimination against people living with HIV were rampant and when treatment options for HIV were extremely limited. At the same time that HIV/AIDS was emerging into public consciousness, the 1980s also saw significant feminist-inspired law

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reform in the area of sexual assault generally. These two trends intersected in 1998 when the Supreme Court of Canada decided in *R. v. Cuerrier*¹ that HIV nondisclosure could be prosecuted as a form of assault or sexual assault. As a result, *Cuerrier* has left a complex legacy. On the one hand, the law provides a conviction for aggravated sexual assault for someone who fails to disclose their HIV status to a sexual partner, unless the accused both used a condom and had a low viral load. On the other hand, the law of sexual assault outside of the HIV context has also been impacted by *Cuerrier* with the doctrine of fraud now being conceptualized almost entirely through a lens of the risk of disease transmission and unwanted pregnancy. This focus ignores the more common and sometimes intricate deceptions that mostly men engage in to deceive their sexual partners. Further, the scope of consent—that is, the voluntary agreement to engage in the sexual activity in question—has been limited as a result of the Supreme Court’s apparent concern about extending HIV nondisclosure prosecutions even further than it had already done. In this article, I argue that the only way to right the ship is to remove HIV nondisclosure prosecutions from sexual assault and to refocus the law of sexual assault on protecting the autonomy and equality of complainants who, overwhelmingly, are women and girls.²

This article presents the legacy of *Cuerrier* from two very different vantage points. In the first part, I retrace the history of HIV nondisclosure prosecutions in Canada to demonstrate how we got to this point. The 1998 decision in *Cuerrier* marked the turning point in HIV nondisclosure cases, as lower courts had until then resisted the attempt to squeeze these prosecutions into the sexual assault category. In 2012, the Supreme Court of Canada in *R. v. Mabior*³ had an opportunity to change directions but instead doubled down and expanded the scope of criminalization of people living with HIV. Following *Mabior*, some courts have attempted, with varying success, to limit the impact of that decision to avoid prosecuting persons who create little or no risk of harm. In the second part of the article, I switch gears to look at *Cuerrier*’s legacy from a different vantage point by examining how this case has impeded the effective prosecution of sexual assault cases outside of the HIV context. I demonstrate that the decision in *Cuerrier* has in fact narrowed the definition of consent in sexual assault cases and left us with an inadequate concept of fraud which puts too much weight on the risk of serious bodily harm. I conclude by arguing that the prosecution of HIV nondisclosure as sexual assault benefits no one; it does not prevent the spread of HIV in any meaningful way, it forces people with HIV to live with the threat of criminalization hanging over their lives, and it has left Canadians with a weaker version of consent in the context of sexual assault more generally.

¹ [1998] 2 SCR 371 [*Cuerrier*].
³ 2012 SCC 47 [*Mabior SCC*].
II. CUERRIER’S LEGACY FOR PEOPLE LIVING WITH HIV

A. THE TRAJECTORY OF HIV NONDISCLOSURE PROSECUTIONS IN CANADA

After two decades of experience with highly active antiretroviral treatment (HAART), HIV is now a treatable chronic illness which is not necessarily a life-threatening condition. This was not the case in 1989 when prosecutions of HIV nondisclosure began. Acquiring HIV at that time almost inevitably led to death. The fact that HIV was associated with already marginalized communities, such as gay men and injection drug users, compounded the stigma surrounding HIV and hindered the government response. Our understanding of HIV transmission was also in its infancy and there was considerable misinformation suggesting that the virus was more easily transmitted than was in fact true.

Just four years before HIV nondisclosure prosecutions began in Canada, Parliament had amended the *Criminal Code*, removing the provision which had until that point criminalized the negligent transmission of sexually transmitted infections (STIs) as a summary conviction offence. The repeal of this provision left the regulation of STIs to the public health system rather than to criminal law. As a result, prosecutors who wanted to charge individuals for HIV nondisclosure were required to make this behaviour fit into other existing crime categories which were not drafted with HIV nondisclosure in mind.

The first prosecution for HIV nondisclosure took place in 1989 in *R. v. Summer*, where the accused was convicted of common nuisance and sentenced to one year of incarceration for failing to disclose his status to a number of female partners. Fast forward thirty years, to a time where we have made tremendous gains in treating and preventing the spread of HIV but where people can still be convicted of Canada’s most serious sexual crime, aggravated sexual assault, punishable by a maximum sentence of life imprisonment, for failing to disclose their HIV positive status. It is almost impossible to explain this trajectory in light of the developments in the science of HIV. According to the 2018 “Expert Consensus Statement on the Science of HIV in the Context of Criminal Law,” it is not possible for HIV to be transmitted in a single sex act including anal or vaginal intercourse if a condom (male or female) is used correctly. The United States Centers for Disease Control has established

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7 *Criminal Code*, RSC 1906, c 146, s 316A, as repealed by the *Criminal Law Amendment Act*, SC 1985, c 19, s 42.
8 *R v Summer* (1990), 98 AR 191 (Prov Ct) [*Summer*]. HIV nondisclosure was also an issue in an earlier decision involving a man convicted of common nuisance for donating blood when he knew he was HIV-positive but did not disclose this fact. See *R v Thornton*, [1989] OJ No 1814 (QL) (Dist Ct); *R v Thornton* (1991), 1 OR (3d) 480 (CA); *R v Thornton*, [1993] 2 SCR 445.
the risk of transmission for someone with an undetectable viral load as “effectively no risk,” yet our law continues to lag behind the scientific reality.

The federal government has steadfastly declined to amend the Criminal Code to preclude or limit these prosecutions. In December 2018, the federal government did issue a directive to limit HIV nondisclosure prosecutions, but the use of the directive meant that its applicability was limited to the territories where federal prosecutors are responsible for Criminal Code prosecutions and where relatively few HIV nondisclosure prosecutions have taken place. The directive indicates that federal prosecutions will not be initiated where the person living with HIV has maintained a suppressed viral load, and that prosecutors will “generally not prosecute” where a person used a condom, engaged only in oral sex, or was taking treatment as prescribed, unless other risk factors were present. In addition, at least one feminist group has now officially urged that these prosecutions be taken out of Canada’s sexual assault law, a position that HIV advocates have urged for years. A consensus is emerging that Canada’s criminal law is too harsh, potentially punishing those who present no real risk of HIV transmission, and targeting highly marginalized and disproportionately racialized persons. Yet, aside from the above mentioned directive, our government has been unwilling to respond.

B. HOW WE GOT HERE

After Summer’s conviction in 1989, considerable uncertainty existed in Canada as to what crime was the appropriate vehicle for such prosecutions. It was as if prosecutors across the country decided that HIV nondisclosure needed to be criminalized, but no one was exactly sure how. In the early cases, judges resisted extending the doctrine of fraud vitiating consent to sex to cover HIV nondisclosure, thus ruling out sexual assault-based offences. In a prominent Ontario case, Ssenyonga, the judge declined to extend fraud vitiating consent to include HIV nondisclosure. In response to the Crown’s argument that consent should be vitirated on public policy grounds, Justice McDermid expressed concern that this argument

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11 RSC 1985, c C-46.
13 See e.g. R v Kaotalok, 2013 NWTSC 36 [Kaotalok]; R v Ngeruka, 2015 YKTC 10 [Ngeruka].
18 See e.g. R v Cuerrier (1996), 141 DLR (4th) 503 (BCCA); R v Ssenyonga, 1993 CanLII 14680 (Ont Sup Ct) [Ssenyonga].
19 Ibid.
did “violence”\textsuperscript{20} to the meaning of assault which was meant to control the non-consensual application of force: “[w]hat the Crown is asking this court to control is the transmission of HIV and the spread of AIDS rather than the application of force. In my opinion, the law of assault is too blunt an instrument to be used to excise AIDS from the body politic.”\textsuperscript{21}

There were a number of guilty pleas to criminal negligence causing bodily harm in the early HIV nondisclosure cases,\textsuperscript{22} but criminal negligence-based offences could only be used where the Crown could prove the accused transmitted the virus to the complainant. This is because criminal negligence is only criminalized in Canada where actual bodily harm or death is caused.\textsuperscript{23} There was immense pressure on the accused in these early cases, all of whom were facing a highly stigmatizing, potentially fatal, disease. Such pressure, exacerbated by sensationalist media coverage, may explain the high rate of guilty pleas.\textsuperscript{24}

After almost a decade of uncertainty, in 1998 the Supreme Court of Canada in \textit{Cuerrier} decided that the nondisclosure of one’s HIV-positive status to a sexual partner could constitute aggravated assault or aggravated sexual assault and these charges quickly became the norm.\textsuperscript{25} Prior to \textit{Cuerrier}, fraud vitiating consent had been limited to only two contexts: deceptions related to the identity of the sexual partner (for example, someone who thought she was having sex with her partner when really it was his identical twin)\textsuperscript{26} and those relating to the nature and quality of the act (for example, someone who thought she was undergoing a medical procedure when, in fact, it was sexual activity).\textsuperscript{27} It had long been established that lying about an STI did not come within this understanding of fraud.\textsuperscript{28}

\begin{thebibliography}{9}
\bibitem{cite_note-20} Ibid at 266.
\bibitem{cite_note-21} Ibid at 265–66.
\bibitem{cite_note-22} See e.g. \textit{R v Wentzell}, [1989] NSJ No 510 (QL) (Co Ct) \textit{Wentzell}; \textit{R v Mercer} (1993), 110 Nfld & PEIR 41 (CA) \textit{Mercer}. Mercer pleaded guilty to two counts of criminal negligence causing bodily harm after failing to disclose his HIV-positive status to two sexual partners, a 16-year-old girl with whom he was in an ongoing relationship and a young mother who was visiting Newfoundland. Both women tested positive for HIV and the 16-year-old girl became pregnant and had an abortion. The accused was sentenced to 30 months’ imprisonment, but the Court of Appeal raised the sentence to 11 years, describing the crimes as “of monumental proportions”: \textit{Mercer}, ibid at para 85.
\bibitem{cite_note-23} See \textit{Criminal Code}, supra note 11, ss 220–21.
\bibitem{cite_note-25} \textit{Supra} note 1. The charge in \textit{Cuerrier} was aggravated assault perhaps because those charges were laid at a time when sexual assault charges had been largely rejected by courts. However, the reasoning in the \textit{Cuerrier} majority made it clear that aggravated sexual assault charges could also be substantiated. The Supreme Court did not address the difference between these two crimes in this context and subsequent cases relied primarily on the more serious aggravated sexual assault charge.
\bibitem{cite_note-26} See \textit{R v GC}, 2010 ONCA 451.
\bibitem{cite_note-27} The pre-1983 \textit{Criminal Code} provided that consent, for the purposes of rape, could not be obtained by “personating [the complainant’s] husband” or by “false and fraudulent representations as to the nature and quality of the act”: \textit{Criminal Code}, RSC 1970, c C-34, s 143(b) (ii)–(iii). See also \textit{Bolduc and Bird v The Queen}, [1967] SCR 677, where the Supreme Court held that, where a doctor falsely passed off his friend, who was observing the medical exam, as a medical intern, this was not fraud going to the nature and quality of the act performed by the doctor; the majority explicitly differentiated the situation where someone passes himself off as a doctor and engages in a fraudulent medical exam. For a more detailed description of this development of fraud, see Martha Shaffer, “Sex, Lies, and HIV: \textit{Mabior} and the Concept of Sexual Fraud” (2013) 63:3 UTLJ 466 at 467.
\bibitem{cite_note-28} See \textit{The Queen v Clarence} (1888), 22 QBD 23.
\end{thebibliography}
sexual assault,29 eliminating the marital exemption which had existed for rape,30 removing the corroboration requirement,31 and including protections regarding the introduction of complainant sexual history evidence.32 Along with these amendments, the fraud provision was modified such that the Criminal Code now simply stated that consent would be negated by fraud, without any explicit limits thereon.33 The Supreme Court in Cuerrier thus had its first opportunity to consider fraud in light of these reforms. However, undertaking this task in the context of HIV nondisclosure shaped the contours of fraud in ways that would have long-lasting implications.

C. THE DECISION IN Cuerrier

In Cuerrier, the Supreme Court Justices were divided on the proper scope of fraud vitiating consent. The majority, per Justice Cory, used the understanding of commercial fraud to inform fraud in sexual assault cases; there had to be a deception and a corresponding deprivation.34 The deception, failing to disclose one’s HIV status, could be satisfied by lying about one’s HIV status or even by saying nothing.35 With respect to the deprivation, the majority held that the Crown must prove beyond a reasonable doubt that the failure to disclose one’s HIV status created a significant risk of serious bodily harm. Because the risk in this case was the possible transmission of HIV, and that risk “endangered” the life of the complainant, aggravated assault or aggravated sexual assault, both very serious crimes, could be established.36 The majority took a broad approach to endangerment as an element of aggravated (sexual) assault. While most people would agree that acquiring HIV met the criterion of endangerment of life, the majority held that even the risk of acquiring HIV was sufficient to endanger life regardless of whether that risk materialized.37 The majority also required a causal connection between the deception and the deprivation; the Crown must prove beyond a reasonable doubt that the complainant would not have consented had the accused properly disclosed his HIV-positive status.38

Justice L’Heureux-Dubé would have gone further in extending fraud to any deception that was intended to, and did in fact, induce the complainant to consent.39 The Crown would be required to prove that the complainant would not otherwise have agreed to the sexual activity without the deceit and that the accused knew that fact. For example, if a man lied about his marital status or his wealth to induce agreement to participate in sex, the Crown would have to prove that the complainant would not have consented had she known the correct information, and that the accused knew this fact, in order to establish fraud vitiating consent.

29 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, c 125, s 246.1 [1982 Code Amendment].
30 Ibid, s 246.8.
31 Ibid, s 246.1(2).
33 See 1982 Code Amendment, supra note 29, s 244(3). See also R v Hutchinson, 2014 SCC 19 at para 31 [Hutchinson].
34 Cuerrier, supra note 1 at para 116.
36 See Criminal Code, supra note 11, ss 268(1), 273(1).
37 Cuerrier, supra note 1 at para 137.
38 Ibid at para 130.
39 Ibid at para 16.
Justice L’Heureux-Dubé understood that the decision was going to have broad implications for sexual assault beyond the context of HIV nondisclosure and that basing fraud on the risk of bodily harm would be unnecessarily limiting:

[F]raud is simply about whether the dishonest act in question induced another to consent to the ensuing physical act, whether or not that act was particularly risky and dangerous. The focus of the inquiry into whether fraud vitiated consent so as to make certain physical contact non-consensual should be on whether the nature and execution of the deceit deprived the complainant of the ability to exercise his or her will in relation to his or her physical integrity with respect to the activity in question.40

Admittedly, the test put forward by Justice L’Heureux-Dubé is a broad one. Various forms of deceptions, half-truths, and omissions are probably common in negotiating consent. But she focused on whether the deception was intentional and whether the complainant was denied the ability to exercise her autonomy. Justice McLachlin, as she was then, by contrast, would have taken the narrowest approach, criminalizing only cases where there was a serious risk of infecting the complainant, a position from which she would retreat in Mabior.

Some issues were left open in Cuerrier, such as whether using a condom would negate a significant risk of bodily harm and how serious the risk had to be in order to be deemed significant. Most of the justices in Cuerrier indicated that using a condom might be enough to negate the significant risk but the issue was not resolved and the decision in Mabior would later reject this position.41

D. THE Fallout FROM CUERRIER

The case law after Cuerrier demonstrated that courts were struggling with how to operationalize this new legal test. Cuerrier focused the issue on whether a risk was significant, which in turn required identifying what that risk was in each case. Quantifying the risk necessitated extensive expert testimony about the accused’s viral load, whether condoms were consistently used, the particular sex act at issue, and other factors that contributed to that risk. Experts could estimate the level of risk presented to the complainant, but it was left to the trier of fact to determine whether a particular risk was significant enough to warrant criminal liability. Cuerrier provided no guidelines for making this assessment. The Crown would also have to prove that the complainant would not have had sex with the accused had he or she known that the accused was HIV-positive. This opened up difficult questions around the admissibility of evidence about the complainant’s sexual history, for example, to demonstrate a pattern of engaging in unprotected sex42 or, where the complainant

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40 Ibid.
41 See Mabior SCC, supra note 3 at para 99. The Court of Appeal of Manitoba in R v Mabior, 2010 MBCA 93 [Mabior MBCA] at para 87 held that careful use of a condom would suffice to negate a significant risk of transmission.
42 See e.g. R v Boone, 2016 ONCA 227 at para 45 [Boone], where the Court of Appeal reviewed the conflicting Ontario case law on both sides of the issue and concluded that evidence that a complainant engaged in “risky” sex in the past should not have been admitted: “[a]llowing the defence to probe the complainants’ prior sexual behaviour would discourage the reporting of sexual assaults and would ‘potential[ly] cause prejudice to the complainant’s personal dignity and right of privacy’: ss. 276(3)(b) and (f).” In R v Clarke, 2013 ONSC 3232 [Clarke], the complainant’s prior sexual history with the accused was admitted to show a willingness to continue to have sex with the accused after he disclosed his HIV-positive status. See also R v Wilcox, 2014 SCC 75, aff’g 2014 QCCA 321 [Wilcox] where the Supreme Court held that the fact that the complainant continued to have sex with the accused after disclosure did not undermine the finding that the complainant would not have consented had he known the accused was HIV positive.
tested HIV-positive, to show that the complainant might have acquired the virus from someone else.\textsuperscript{43}

After the justices in Cuerrier hinted that condom use might reduce the risk below the level of significance,\textsuperscript{44} some courts held that protected sex could not rise to the threshold of a significant risk,\textsuperscript{45} while others found that a condom alone was insufficient to negate a significant risk, thus creating inconsistent results on the condom issue as well.\textsuperscript{46} Not surprisingly, reasonable judges and juries differed as to how much risk was necessary to cross the threshold of significance, thus resulting in inconsistent decisions across the country and a lack of certainty for people living with HIV. This uncertainty can be illustrated through a British Columbia case decided in 2010.\textsuperscript{47} The accused, J.A.T., was HIV-positive and in an intimate relationship with the complainant for ten months. The two men almost always used condoms, but the trial judge found that there were three instances of unprotected anal sex.\textsuperscript{48} At trial, expert testimony quantified the risk of transmission to the complainant at 4 in 10,000 for each instance of unprotected anal intercourse with J.A.T.\textsuperscript{49} Justice Fenlon (as she then was) found that there were three occasions of unprotected sex, making the total risk to the complainant 12 in 10,000.\textsuperscript{50} The justice appears to have assumed in this case that the incidents of protected sex did not constitute a significant enough risk to be added to the calculation. The challenging question was whether that risk met the bar of “significance.” Justice Fenlon concluded both that the risk was not significant and that the complainant’s life
was not endangered: “a risk of transmission of HIV of 0.12% is not material enough to establish deprivation invalidating the consent of the complainant.” Thus, the accused was acquitted. This is in contrast with R. c. D.C., where the trial judge convicted the accused despite finding that the accused had an undetectable viral load and the risk of transmission during the one instance of unprotected sex created a risk of transmission of 1 in 10,000, a risk considerably lower than the risk at issue in JAT. While the Court of Appeal of Quebec went on to overturn this finding, it nonetheless demonstrates the lack of certainty around the term “significant risk.” It should also be noted that had JAT been decided after Mabior, Justice Fenlon might well have been required to convict because no condom was used despite her finding that the risk was not significant.

There were many other problems with the post-Cuerrier approach. For example, an expert witness would not know how a condom was used by the parties nor whether the condom was past its expiry date. Where the accused’s viral load was being monitored, expert witnesses had to extrapolate from the most recent test. This was even more difficult for cases based on multiple instances of sexual activity over an extended period of time where the expert had to extrapolate about the risk of transmission at multiple different points in time. These prosecutions became complex, expensive, and rife with potential for inconsistency. It is therefore understandable why the Supreme Court granted leave in Mabior and R. v. D.C. with a view to clarifying some of the issues left uncertain in Cuerrier.

E. Doubling Down in Mabior and DC

Mabior and DC presented two very different pictures of HIV nondisclosure: on the one hand, an HIV-positive man who was sexually exploiting teenage girls, several of whom were Indigenous girls grappling with substance abuse and, on the other, a woman whose abusive partner, four years after the fact, raised one incident of nondisclosure that had taken place at the beginning of their long-term relationship. In Mabior, the accused had sex with nine female complainants in exchange for drugs or for a place to stay. Three of the complainants testified that they did not consent to sex. The evidence indicated that the accused used condoms on some of these occasions but not on others, and that some of the condoms had not been used properly because he had twice been infected with gonorrhea and was listed as a contact for chlamydia. He also went on antiretrovirals months after learning of his diagnosis. None of the complainants tested positive for HIV. The accused was convicted of six counts of aggravated sexual assault at trial, sentenced to 14 years of incarceration, and later deported. The trial judge held that, even where Mabior used a condom, the risk of transmission was nonetheless significant. Only if the accused used a condom and had an

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51 Ibid at para 88.
52 2008 QCCQ 629.
53 We now know that this risk of 1 in 10,000 is an overstatement of the risk of transmission for someone who has an undetectable viral load. See Barré-Sinoussi et al, supra note 9.
54 DC c R, 2010 QCCA 2289.
55 The Court of Appeal of Manitoba in Mabior MBCA, supra note 41 at para 91, set out ten factors that contribute to effective use of a condom albeit recognizing that rarely would all ten factors be satisfied.
56 2012 SCC 48 [DC].
57 Mabior MBQB, supra note 46 at para 10.
undetectable viral load would the threshold of significance not have been met. The Court of
Appeal of Manitoba overturned this decision and held that either the careful use of a condom
or an undetectable viral load could negate the significance of the risk.60

In DC, the accused met the complainant at their respective children’s soccer game and
eventually entered into a four-year relationship with him. The relationship ended violently
with the complainant seriously assaulting D.C. It was only after his conviction for that
assault that he went to the police to complain about one incident of apparently unprotected
sex prior to D.C. having disclosed her status to him. The virus was not transmitted to the
complainant. While D.C. claimed that a condom was used on that one occasion, the
complainant denied that assertion. D.C.’s doctor testified that D.C. had told her they used a
condom but that it had broken during intercourse, a fact which the trial judge used to infer
that D.C. must have been lying to her doctor and to the Court. The evidence at trial was that
the risk of D.C. transmitting the virus to the complainant on that occasion, even without a
condom, was 1 in 10,000 because she had an undetectable viral load at the time of the
incident of sexual intercourse. The trial judge nonetheless found D.C. guilty of aggravated
assault and sexual assault.61 This decision was overturned by the Court of Appeal, following
the Court of Appeal of Manitoba decision in Mabior, on the basis that an undetectable viral
load made the risk of bodily harm not significant.

Both the Court of Appeal of Manitoba in Mabior62 and the Court of Appeal of Quebec in
D.C. c. R.63 had urged the Supreme Court of Canada to clarify its position around significant
risk, specifically as it related to condom use and viral load.64 Perhaps most importantly, our
understanding of HIV and our ability to treat it had grown exponentially between the time
Cuerrier entered the legal system and the time when Mabior and DC were decided.65 Being
HIV-positive was no longer considered a death sentence and persons with HIV who were
receiving treatment were living much longer and healthier lives. In addition to extending the
lives of people with HIV, HAART had been shown to significantly decrease the risk of
transmission. In other words, treatment and prevention had merged.66

It is clear from the Mabior judgment that the Supreme Court recognized the mess Cuerrier
had left in its wake. The Supreme Court in Mabior described what would happen if it were
to accept a case-by-case application of Cuerrier moving forward:

In every case, medical experts would have to be called. Lengthy examination and cross-examination would
have to take place. Trial judges would have to spend long hours assessing the evidence to determine if it

60 See Mabior MBCA, supra note 41.
61 It is not entirely clear why D.C. was charged with sexual assault and aggravated assault rather than
simply aggravated sexual assault.
62 Mabior MBCA, supra note 41 at para 152.
63 Supra note 54 at para 121.
64 Because Cuerrier overlapped in time with the introduction of HAART, the Supreme Court in Cuerrier
did not consider viral load.
65 A coalition of HIV-AIDS groups intervened in these two cases to explain the evolution in our
understanding of HIV, taking a moderate position and asserting that a low or undetectable viral load,
or condom use, should negate significant risk, and that oral sex should never be the basis of criminal
prosecution. See Mabior SCC, supra note 3 (Factum of the Interveners – Canadian HIV/AIDS Legal
Network et al. at para 2, online: <www.aidslaw.ca/site/factum-of-the-interveners-at-the-supreme-court-
of-canada-r-v-mabior-and-r-v-d-c/?lang=en>).
66 See Myron S Cohen et al, “Prevention of HIV-1 Infection with Early Antiretroviral Therapy” (2011)
establishes a “significant risk of serious bodily harm” at the time of the alleged offence. Finally, the risk of conflicting judgments could render the process unfair from a systemic standpoint. The court of appeal, while accepting the trial judge’s conclusions on the evidence, might take a different view on the mixed question of fact and law of whether the risk was “significant”. Years may pass in legal no-man’s-land with no one knowing whether the accused is guilty or not guilty. Enormous costs, both for the prosecution and the defence, would be run up.67

As I have observed elsewhere, the language of the Supreme Court reveals that the justices believed they were taking a balanced approach that recognized the need for restraint when it came to prosecuting these cases.68 The Supreme Court stressed that its decision was meant to “[strike] an appropriate balance between the complainant’s interest in autonomy and equality and the need to prevent over-extension of criminal sanctions.”69

It was clear that the Supreme Court wanted to establish some ground rules around the standard of significant risk in order to put an end to the “legal no-man’s-land”70 that it had created just over a decade earlier. Yet, instead of following the Court of Appeal of Manitoba, the coalition of HIV/AIDS groups that intervened, and the medical evidence at trial, the Supreme Court doubled down in its support for Cuerrier and added that, in the context of HIV nondisclosure, a significant risk of transmission would be established if there was a realistic possibility of transmission.71 The language of “possibility,” for some, suggested an even harsher test than the significant risk test from Cuerrier.72 However, the more problematic aspect of Mabior was its operationalization of the realistic possibility of transmission. In order to negate a realistic possibility of transmission, an accused would have to have used a condom and had a low viral load at the time of the sexual activity in question. One of these factors alone would not suffice. The Supreme Court rejected the position of the Court of Appeal because, even with a condom, “the risk might still fall above the ‘negligible’ threshold.”73 With respect to viral load, the evidence in Mabior was that the risk of transmission “is reduced by 89 to 96% when the HIV-positive partner is treated with antiretrovirals, irrespective of whether the viral load is low or undetectable.”74 The expert at trial testified that there was “a very high probability that the accused was not infectious, i.e. could not have transmitted HIV”75 when his viral load was undetectable. Nonetheless, Chief Justice McLachlin held that antiretroviral therapy alone “still exposes a sexual partner to a realistic possibility of transmission.”76 The Supreme Court believed that focusing on a low viral load, rather than an undetectable one, would reduce problems around proof given the fluctuating nature of viral load.77 However, while some guidance was provided on what a low viral load was, nothing was mentioned about how proximate to the time of the sexual activity

67 Mabior SCC, supra note 3 at para 69.
69 Mabior SCC, supra note 3 at para 89.
70 Ibid at para 69.
71 Ibid at para 84.
72 See Grant, supra note 68.
73 See Mabior SCC, supra note 3 at para 99.
74 Ibid at para 101. We now know that this overstates the risk where the viral load is undetectable.
75 Mabior MBQB, supra note 46 at para 72.
76 Mabior SCC, supra note 3 at para 101.
77 See ibid at para 102. The Supreme Court adopted the statement on viral load from the Court of Appeal, noting that “[w]hen a patient undergoes antiretroviral treatment, 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)”: ibid at para 100.
the assessed viral load had to be measured. The Supreme Court went on to hold that the combined effect of condom use and low viral load would reduce the risk to a “speculative possibility rather than a realistic possibility.”

So, what can we conclude from this decision? A realistic possibility appears to mean a risk that is not negligible and not speculative. But any risk greater than negligible appears to be sufficient for criminal liability. The Chief Justice ended her analysis with this important caution:

However, the general proposition that a low viral load combined with condom use negates a realistic possibility of transmission of HIV does not preclude the common law from adapting to future advances in treatment and to circumstances where risk factors other than those considered in the present case are at play.

This passage is important but ambiguous and leads to two different possible interpretations of Mabior. The first interpretation of Mabior and DC is that the Supreme Court is setting down a rigid rule that the only way to negate a realistic possibility of transmission of HIV is to demonstrate both a low viral load and the use of a condom. This flows from the Supreme Court’s explicit concern that it was trying to set down clear rules that would remove the necessity of a trier of fact assessing the significance of the accused’s risk in every case. A second, more flexible, interpretation based on this passage is that the Supreme Court was open to the evolving science of HIV and was not setting a requirement that both a condom be used and low viral load be established. Rather, that standard could evolve as treatment options and our understanding of risk developed.

There is considerable support in the judgment for the first interpretation. The Supreme Court had the necessary science before it to conclude that an undetectable viral load or the use of a condom could negate significant risk. A risk of 1 in 10,000, as was found at trial in DC, even though an overstatement of D.C.’s risk, is a negligible risk. Instead, however, the Supreme Court developed a test that requires virtually no risk of transmission. The Supreme Court spoke about the law evolving in cases where “other risk factors” were at play, presumably meaning factors other than condom use and viral load. The Supreme Court put a tactical burden on future accused “to raise a reasonable doubt, by calling evidence that [they] had a low viral load at the time and that condom protection was used.” The Supreme Court’s decision in the companion case in DC also supports this interpretation. Instead of concluding that a 1 in 10,000 risk was simply too speculative a basis for criminal liability, the Supreme Court held that “[o]n the facts of this case, condom use was required to preclude a realistic possibility of HIV transmission.” The Supreme Court then went out of its way to overturn findings of fact by the trial judge in order to reach the conclusion that the absence of condom use had not been clearly established. Otherwise, the Supreme Court’s own reasoning in Mabior would have required a conviction for D.C.

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78 See Shaffer, supra note 27 at 473. Shaffer also points out that the Supreme Court was vague about how this new test applies to oral sex, where the risk of HIV transmission is much lower than for vaginal or anal intercourse.
79 Mabior SCC, supra note 3 at para 101.
80 Ibid at para 104.
81 See Grant, supra note 68.
82 Mabior SCC, supra note 3 at para 105. This tactical burden is not insignificant.
83 DC, supra note 56 at para 2.
Nonetheless, as will be discussed below, the second interpretation has re-emerged in some later cases as a plausible way to limit the vast scope of criminalization created by the Supreme Court of Canada in *Mabior*. While the science was adequate to reach this conclusion in *Mabior*, there is now more certainty that someone with an undetectable viral load cannot transmit the virus. The *Mabior* approach thus makes even less sense now than it did at the time the case was decided.

**F. THE FALLOUT FROM MABIOR**

Soon after *Mabior*, in *R. v. Felix*, the accused did try to argue precisely that *Mabior* was limited to the evidence about risk in the case before it and that it was not meant to set down a rigid rule requiring condom use and a low viral load, independent of risk. The Court of Appeal for Ontario rejected this argument, indicating that the Crown was not required to prove the accused’s viral load in a case where no condom had been used. Because the sex was unprotected, the accused’s viral load at the time was described by the Court of Appeal as “simply irrelevant,” reinforcing that *Mabior* was setting down a rule that persons with HIV could be convicted of aggravated sexual assault for HIV nondisclosure for unprotected intercourse regardless of viral load. The fact that the risk of transmission was virtually non-existent did not matter:

*Mabior* does not suggest that expert evidence of the basic risk of HIV transmission for intercourse will be required in every case to ground a conviction for aggravated sexual assault arising from unprotected acts of intercourse — anal or vaginal — with an HIV-positive partner. Rather, *Mabior* holds that a realistic possibility of transmission of HIV is negated by evidence that condom protection was used and the accused’s viral load was low at the time of intercourse.

According to this interpretation, the Crown can prove a realistic possibility of transmission simply by proving unprotected intercourse.

Similarly, we saw accused persons convicted despite the fact that they had an undetectable viral load at the time of the sexual activity. In *R. v. Murphy*, the female accused had an

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85 2013 ONCA 415 [*Felix*].
87 *Ibid* at para 53.
88 In the companion case to *Felix*, Mekonnen, *supra* note 46, discussed above, the accused was convicted prior to *Mabior* despite the fact that he used a condom. After *Mabior*, with the agreement of the Crown, the Court of Appeal for Ontario overturned the conviction because the conviction was based in part on defence counsel’s concession that nondisclosure was sufficient to ground liability, clearly an error. Although the Court is not explicit on this point, the trial judge did not address viral load and that is presumably why the Court of Appeal quashed the conviction. In the second trial against the same accused, the trial judge failed to resolve conflicting evidence on whether the accused wore a condom and, without such a finding, a realistic possibility of transmission could not be established. The Court acknowledged that the accused could be convicted on a retrial but stayed the proceedings because the accused had fully served his sentences and because the appeal had been delayed significantly pending the outcome in *Mabior* and *DC*. The Court of Appeal had an opportunity to retreat from this position in the appeal of *NG* 2017, *supra* note 46, but instead supported the first interpretation of *Mabior* requiring both a low viral load and condom use to negate a realistic possibility of transmission. See *NG* ONCA, *supra* note 46 at para 3.
89 [2013] OJ No 3903 (QL) (Sup Ct) [*Murphy*].
undetectable viral load. One of the counts related to a male complainant with whom she had engaged in cunnilingus. The sexual activity was limited to oral sex apparently because the complainant believed that it was “highly unlikely that he could get sexually transmitted diseases (STDs) from this activity.” In other words, the complainant had calculated the risks involved and limited his sexual activity accordingly. At trial, the expert testified that the risk of transmitting HIV from oral sex could not be defined in the expert studies but that it would appear to be “much less likely than 1 chance in 25,000” and later at somewhere between 1 in 50,000 and 1 in 100,000. When asked what was the risk of transmission from intercourse from a female to male when the female in question had an undetectable viral load, the expert testified that the risk was somewhere between 1 in 10,000 and 1 in 25,000, but that some studies indicated the risk was zero.

The trial judge acquitted on the count of aggravated sexual assault related to cunnilingus holding that the Crown had failed to prove a realistic possibility of transmission, but convicted the accused of aggravated sexual assault for the one sexual encounter with another complainant where the evidence showed that no condom was used during vaginal intercourse: “I am satisfied that although her viral count was low, indeed undetectable under the current science testing regime, there existed a realistic possibility of transmission of HIV when sexual intercourse occurs.” These cases represent the high point of overcriminalization of persons with HIV and show the dangers of the first, more rigid, interpretation of Mabior described above.

Some judges have resisted the expansive approach to criminalization from Mabior. Perhaps most notable were two decisions out of the Youth Court in Nova Scotia. These prosecutions involved the same person, a male who was 16 at the time of the conduct leading to charges of aggravated sexual assault. What was unusual about these cases was that the HIV-positive accused appeared to be what is known as an “elite controller,” described as “one of a small number of people whose immune systems control the virus, seemingly indefinitely.” The virus had not been detectable in his system since he was five years old, although he was also intermittently on antiretrovirals. After his mother died of AIDS, J.T.C. ended up in the child welfare system being shuffled between various family members, foster parents, and group homes. The expert testimony at both of his trials suggested that the accused had an undetectable viral load and “had no realistic possibility of transmitting the virus to anyone.” J.T.C.’s first trial involved a charge of aggravated sexual assault for one episode of sexual intercourse with an underage girl, who Judge Derrick described as being at best “pretty sure” a condom was not used. The accused was acquitted on the basis that

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90 Murphy had previously been convicted of aggravated assault in 2005 for failing to disclose her HIV status and this fact was admitted at trial. In this case, she was charged with three counts of aggravated sexual assault.
91 Murphy, supra note 89 at para 14.
92 Ibid at para 38.
93 Ibid.
94 Ibid at para 109.
95 R v JTC, 2013 NSPC 88 at para 62 [JTC (Derrick)].
96 Ibid at para 60.
97 See ibid. See also R v JTC, 2013 NSSC 318 at para 53 [JTC NSSC]. The accused was detained in custody throughout his trial and this decision was upheld by the Nova Scotia Supreme Court.
98 JTC (Derrick), supra note 95 at para 60.
99 Ibid.
100 Ibid at para 32.
the judge had a reasonable doubt on the condom issue but she nonetheless went on to discuss her “discomfort” with the *Mabior* decision.\(^\text{101}\) She began with some thinly veiled criticism of the finding that an undetectable viral load could create a realistic possibility of transmission:

It is difficult to understand how the Supreme Court of Canada determined that a non-detectable viral load could constitute “a realistic possibility of transmission”. If the use of a condom in the case of a low viral load reduces the risk of transmission to a “speculative possibility rather than a realistic possibility”, it is unclear to me at least how a viral load that is undetectable rates a risk assessment greater than speculation.\(^\text{102}\)

She then observed that, while the *Mabior* decision explicitly rejected an absolute disclosure standard, the Court’s finding on viral load was in direct conflict with that rejection.\(^\text{103}\) She also called out the Supreme Court for purporting to show restraint while, in fact, expanding criminalization.\(^\text{104}\) Judge Derrick did convict the accused of sexual interference because the complainant was under the age of consent and the accused had failed to take all reasonable steps to ascertain her age.

The second trial for J.T.C., before Judge Campbell, involved a charge of aggravated sexual assault in relation to a 17-year-old complainant whom he had met in the child welfare system.\(^\text{105}\) He used a condom in all three of their sexual encounters but, on the final occasion, they took a break from sexual activity and when they resumed no condom was used because it had broken.\(^\text{106}\) The same expert testified that there was *no possibility* of this accused transmitting HIV to the complainant.\(^\text{107}\) He testified that public health officials consistently recommend condoms, but that in a case where the risk is so close to zero, a condom provides little additional protection against transmission. This case was unusual in that the complainant testified that while she would not have consented to unprotected sex had she known J.T.C. was HIV-positive, she would have consented had she known how small the risk was at that time. It was on this basis that Judge Campbell acquitted the accused. To convict him in light of this testimony “would amount to a strange privileging of half-truth, deception and misconception over truth.”\(^\text{108}\)

Judge Campbell could have stopped there, but instead he went on agree with Judge Derrick and her concerns about overcriminalization. Where the risk of transmission is effectively zero, a person with HIV is no different than anyone else in the population:

He or she becomes subject to the sanctions of the criminal law for engaging in a deception that is in reality no more dangerous than the kinds of deceptions that the law has not criminalized. A segment of the population that has been marginalized and discriminated against since the early 1980’s would be treated more harshly by operation of law and not based on scientific evidence about the risk posed by the individual.\(^\text{109}\)

\(^{101}\) *Ibid* at para 73.
\(^{102}\) *Ibid* at para 14.
\(^{103}\) *Ibid* at para 15 (citing *Mabior SCC*, *supra* note 3 at para 85).
\(^{104}\) See *JTC* (Derrick), *ibid* at para 16.
\(^{105}\) See *R v JTC*, 2013 NSPC 105 [*JTC* (Campbell)].
\(^{106}\) *Ibid* at para 24.
\(^{107}\) *Ibid* at para 51.
\(^{108}\) *Ibid* at para 76.
\(^{109}\) *Ibid* at para 88.
Judge Campbell took the alternate interpretation of *Mabior* and *DC* presented above: that these cases were only decided on the evidence before them and were not meant to set down rules about what would constitute a realistic possibility of transmission. While *Mabior* had found that a condom and a low viral load would negate a realistic possibility, the Supreme Court had not explicitly stated that that was the only way the risk could be negated:

[The Court] does not state that an expert opinion which establishes that the risk of transmission in a particular case is effectively zero is irrelevant. That would be tantamount to saying that the facts just don’t matter and that a person with HIV is presumed to be infectious despite the facts.\(^\text{110}\)

Judge Campbell went on to conclude that the Supreme Court of Canada did not make factual findings that were binding on trial courts which would contradict “clear, compelling and precise evidence from an expert.”\(^\text{111}\) As he noted, “[i]f a zero risk, or an infinitesimally small risk doesn’t qualify as speculative, it’s hard to imagine what would.”\(^\text{112}\) It is difficult to understand why the Nova Scotia Crown felt incarceration was appropriate for this young person, who was detained in custody throughout his trial.\(^\text{113}\)

A third Nova Scotia decision in *R. v. Thompson* also made findings of fact directly contrary to the apparent rule in *Mabior* in order to acquit an accused with a low viral load of aggravated sexual assault.\(^\text{114}\) Relying on expert testimony from, among others, the same physician whose evidence formed the basis of the decision in *Mabior*,\(^\text{115}\) the justice held that “[i]f viral load is less than 1500, the risk of transmission is ‘negligible’ …, ‘extremely unlikely’” and thus there was no realistic possibility of transmission.\(^\text{116}\) She went on to hold that, had the accused used a condom\(^\text{117}\) or if he did not ejaculate, there would be no realistic possibility of transmission.\(^\text{118}\) In a somewhat surprising twist, however, Justice Hood went on to find the accused guilty of sexual assault causing bodily harm on the basis that he lied about his HIV status (deception) and it caused bodily harm because the complainants suffered significant psychological stress over whether they had acquired the virus (deprivation). Thus, while limiting the decision in *Mabior* through her findings on viral load and condom use, Justice Hood expanded the scope of criminalization considerably by allowing the “significant risk of serious bodily harm” to be satisfied by the stress and psychological harm caused to the complainants by the contemplation that they may have acquired HIV. Through this logic, failure to disclose would always constitute sexual assault causing bodily harm (unless the complainant was already HIV-positive), creating an absolute requirement to disclose in every case, a result even *Mabior* had cautioned against. The Nova Scotia Court of Appeal overturned this finding, concluding that “[t]he sole test to establish deprivation is actual transmission of HIV or ‘a realistic possibility of HIV transmission.’”\(^\text{119}\)

\(^{110}\) Ibid at para 85.

\(^{111}\) Ibid at para 89.

\(^{112}\) Ibid at para 99.

\(^{113}\) See JTC NSSC, supra note 97.

\(^{114}\) 2016 NSSC 134 [*Thompson* NSSC].

\(^{115}\) See *ibid* (the expert stated that when he testified in *Mabior* in 2008 “doctors were very cautious about what he referred to as the ‘Swiss Statement’ that if the viral load was undetectable, the risk of transmission was negligible. He said it is now accepted” at para 119).

\(^{116}\) Ibid at para 132.

\(^{117}\) Ibid.

\(^{118}\) Ibid at para 135.

\(^{119}\) *R v Thompson*, 2018 NSCA 13 at para 30 [*Thompson* NSCA].
The Court held that the *Mabior* decision had clearly attempted to avoid the overbreadth and stigmatization resulting from the use of criminal law against persons with HIV. The Crown did not appeal the acquittals on the aggravated sexual assault charges and thus the Court of Appeal did not discuss the trial judge’s findings regarding the risk of transmission.

The tactical evidentiary burden placed on the accused in *Mabior* has led some courts to conclude that once the Crown has proven nondisclosure and that the complainant would not have agreed to sexual activity had they known the accused’s status, it is then up to the accused to raise a reasonable doubt about the level of risk the complainant faced, meaning that the Crown need not prove that a condom was not used nor that an accused did not have an undetectable viral load unless the accused has raised evidence to put those questions into issue. In *Schenkels*, the accused, an Indigenous woman, failed to disclose her HIV-positive status to the complainant, after which he tested positive for HIV. There was no evidence regarding how the complainant contracted HIV. The Court of Appeal, relying on the evidentiary burden placed on the accused in *Mabior*, did not require the Crown to prove beyond a reasonable doubt that the complainant acquired the virus from the accused. *Mabior* may not have removed the need for expert testimony, but it shifted the tactical evidentiary burden of providing such testimony from the Crown to the accused.

As demonstrated by these cases, Ontario and Nova Scotia prosecutors in particular have taken a very harsh approach to laying charges after *Mabior*, including where the accused had an undetectable viral load and where the accused used a condom. In *W.H.*, not only did the accused have an undetectable viral load at the time of the one incident of alleged nondisclosure, but the trial judge also made a finding of fact that the accused always used condoms.

However, we are also seeing some Ontario courts begin to resist Crown charges in cases where the accused had a low viral load by taking the second, more flexible, interpretation of *Mabior* that the case did not set down a rigid rule requiring both condom use and a low viral load. In *R. v. C.B.*, the Ontario Crown charged the accused with three counts of aggravated sexual assault relating to three women, none of whom acquired the virus. The judge, in acquitting the accused, held that the accused’s viral load was undetectable and the risk of

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121 *Supra* note 43.
122 *See ibid* at para 116:

The weakness of the defence theory is that there was no evidence as to other possible ways in which the complainant could have contracted HIV. Without such evidence, the accused was asking the jury, and now this Court, to speculate. She is asking this Court to focus on hypothetical alternative theories that have no basis in the evidence. There was no evidence with respect to ways in which the complainant may have contracted HIV, other than from her sexual activity with the accused, such as through any other sexual partners, blood transfusions or intravenous drug use.... Simply put, there was no foundation in the evidence for these theories. As such, they are hypothetical.

123 *See e.g. R v WH, 2015 ONSC 6121 [WH]; JTC (Derrick), *supra* note 95; JTC (Campbell), *supra* note 105.
124 *In NG 2017, supra* note 46 at para 15, one complainant testified that a condom was used in all cases of vaginal intercourse, but the accused was convicted nonetheless. The Court of Appeal confirmed that consistent condom use was not enough to negate the realistic possibility of transmission. See *NGONCA, supra* note 46. In *Thompson NSSC*, *supra* note 114, the first complainant testified that the accused had used a condom. In the latter decision, *Thompson NSSCA*, *supra* note 119, the accused was acquitted. *Supra* note 123 at para 43. The accused had been diagnosed with schizophrenia and stressed that he believed he needed to use a condom for his own protection as well as that of his sexual partners.
125 2017 ONCJ 545 [*CB*].
transmission “was as close to zero as can be measured.” Most recently, the Court of Appeal for Ontario has signalled its willingness to reconsider the Mabior finding that a low viral load is insufficient to negate a realistic possibility of transmission. In NG, the Court acknowledged that the evolving science on viral load, in an appropriate case, could justify reconsideration of the Supreme Court of Canada’s holding in Mabior.\textsuperscript{128}

Ontario courts have been less willing to depart from Mabior in the context of condoms. In NG, the trial judge refused to hold that condom use could negate liability. While the science with respect to viral load may have evolved since the decision in Mabior, the same was not true for condom use.\textsuperscript{129} The Court of Appeal for Ontario also declined to reconsider the Mabior conclusion that using a condom is not sufficient to negate a realistic possibility of transmission.\textsuperscript{130} The Court indicated that it would be appropriate to reconsider Mabior if the factual underpinnings of that decision had changed. Unlike with our understanding of viral load, which has evolved since Mabior, the Court held that the factual underpinnings of the Mabior decision on condoms have not changed since Mabior. While a properly functioning latex condom may reduce the risk of transmission by almost 100 percent, this statistic does not acknowledge the possibility of human error and condom error.\textsuperscript{131} Thus, the Court of Appeal for Ontario explicitly rejected the possibility that careful condom use was sufficient to negate a realistic possibility of transmission. Recent cases in other provinces tend to be limited to cases where the accused did transmit the virus to at least one complainant.\textsuperscript{132}

I am not suggesting that the criminalization of HIV nondisclosure is never appropriate. Where a person who is HIV-positive with an uncontrolled viral load fails to use a condom, the law has a place in prosecuting these cases, particularly where the virus has been transmitted to the complainant. While proving the accused was the person who actually transmitted the virus to the complainant can raise its own evidentiary concerns, limiting prosecutions in this way would greatly reduce the number of cases moving forward. In reviewing 72 reported cases of HIV nondisclosure, I found that only approximately one-quarter of all complainants actually tested positive for HIV by the time of trial.\textsuperscript{133} This rate

\textsuperscript{127} Ibid at para 91. Justice Gee went on to acquit the accused of sexual assault causing bodily harm with respect to the one complainant who acquired the herpes complex virus at some point after having sex with the accused. While he found the circumstances to be “suspicious and troubling,” he was not satisfied beyond a reasonable doubt that the accused was the source of the complainant’s infection. Nor was he convinced that the complainant would have withheld consent to sex on this basis. See ibid at paras 99–100.

\textsuperscript{128} See NG ONCA, supra note 46 at paras 78–81.

\textsuperscript{129} See NG ONCA, supra note 46 at para 88.

\textsuperscript{130} See NG ONCA, supra note 46.

\textsuperscript{131} See ibid at paras 99–100. It is true that one of the complainants in NG tested positive for HIV, but it is important to note that the Crown did not allege that the complainant acquired the virus from the accused nor did the trial judge make such a finding. See NG 2017, supra note 46 at para 98.

\textsuperscript{132} See R v Nyoni, 2017 BCCA 360 [Nyoni]; R v KG, 2016 ABCA 205 [KG]; R v Gauthier, 2020 BCSC 146 [Gauthier]; Schenkels, supra note 43. See also R c Tshibamba Muntu, 2017 QCCQ 4299 [Tshibamba Muntu] (where the accused was charged with failure to disclose with respect to nine victims, three of whom acquired HIV). In contrast, R c FC, 2017 QCCQ 4348 (where neither complainant acquired the virus). The cases reviewed include: Cuerrier, supra note 1; Mabior SCC, supra note 3; Summer, supra note 8; Ngeruka, supra note 13; Kaatalok, supra note 13; Ssenyonga, supra note 18; Wentzell, supra note 22; Mercer, supra note 22; Boone, supra note 42; Clarke, supra note 42; Wilcox, supra note 42; Williams, supra note 43; Schenkels, supra note 43; Thomas, supra note 43; Agnatuk-Mercier, supra note 45; Ndowayo, supra note 45; Mekonnen, supra note 46; JT, supra note 47; DC, supra note 56; Felix, supra note 85; Murphy, supra note 89; JTC (Derrick), supra note 95; JTC (Campbell), supra note 105; Thompson NSCA, supra note 119; WH, supra note 123; CB, supra note 126; Nyoni, ibid; Gauthier, ibid;
went up to 44 percent when looked at from the perspective of each individual accused. In other words, fewer than half of all accused transmitted the virus to any complainant. These numbers would be even lower if one removed the pre-Cuerrier case law where rates of transmission were higher because of the unavailability of treatment options. Thus, even this change to the law would reduce the number of prosecutions considerably. As will be discussed below, there are other crimes in the Criminal Code, such as criminal negligence causing bodily harm, that could be used where necessary.

Cuerrier and its progeny have a left a legacy beyond criminalization for people with HIV. These cases have also had a considerable impact on the law of sexual assault generally. It is to this part of Cuerrier’s legacy that I now turn.

III. Cuerrier’s Legacy for Sexual Assault

A. The Decision in Hutchinson

We have seen in the previous section how some courts have started to resist the Supreme Court of Canada’s overcriminalization of HIV nondisclosure by limiting prosecutions beyond the Supreme Court’s direction in Mabior. The HIV nondisclosure cases have had implications for the law of sexual assault in two ways. First, the contours of sexual fraud have evolved almost exclusively in the context of the risk of disease transmission. Second, because of concerns about the possibility of prosecuting HIV nondisclosure without resorting to fraud, the interpretation of consent in the Criminal Code has been limited in incoherent ways. In order to understand these two aspects of Cuerrier’s legacy, it is necessary to examine in some detail the decision of the Supreme Court of Canada in Hutchinson.134

Hutchinson is an interesting case because, while it has nothing to do with HIV/AIDS, the decision was driven by concerns around not expanding the scope of prosecution for HIV nondisclosure. It is notable that no feminist groups intervened in Hutchinson, while the Canadian HIV/AIDS Legal Network (now HIV Legal Network) and the HIV and AIDS Legal Clinic Ontario intervened in coalition. As a result, the Supreme Court heard about the implications of the decision for HIV nondisclosure but did not hear about the implications of its decision for sexual assault more generally.

134 Supra note 33.

Tshibamba Muntu, ibid; KG, ibid; R v Lee, (1991) 3 OR (3d) 726 (Gen Div); R v Kreider (RJ) (1993), 140 AR 81 (Prov Ct); R v Napora, 1995 CarswellAlta 785 (QB); R v Michel, 1996 CarswellBC 2120 (CA); R v Hollihan (1998), 171 Nfld & PEIR 133 (Nfld Prov Ct); R v Miron (RP) (2000), 174 Man R (2d) 52 (Prov Ct); R v Williams (2001), 203 Nfld & PEIR 173 (Nfld Sup Ct); The Queen v James Robert Edwards, 2001 NSSC 80; R v Smith, 2004 BCPC 384; R v DeBlois, [2005] OJ No 2267 (QL) (Sup Ct); R v Booth, 2005 ABPC 137; R v Quashie, [2005] OJ No 2694 (QL) (CA); R v Murphy, 2005 CarswellOnt 8297 (Sup Ct); ND c R, 2006 QCCA 15; R v Lamirande (D), 2006 MBCA 71; R c ML, 2006 QCCQ 11242; R v Williams, 2006 ONCJ 484; R v Aziga, 2007 CarswellOnt 21 (Sup Ct); R v Walkem, [2007] OJ No 186 (QL) (Sup Ct); R v Mackay, 2007 CarswellOnt 2532 (Sup Ct); R v L(1JM), 2007 BCPC 341; R v Smith, 2008 SKCA 61; R v McGregor, 2008 ONCA 831; R v Iamkhong, 2009 ONCA 478; R v Kaonga, 2009 MBCA 64; R v Wright, 2009 BCCA 514; R c Parenteau, 2010 CSON 1500; R v Pottelberg, 2010 ONSC 5756; R c Mercier, 2011 QCCQ 198; R v Tippenseskum, 2011 ONCJ 219 [Tippenseskum]; R v Mtie, 2011 BCCA 267; R v JU, 2011 ONCJ 457; R v ATR, 2011 BCPC 283; R c Thery, 2012 CarswellQue 9375 (CP); R v Ralph, 2014 ONSC 2800; R c Biron, 2014 QCQ 8115; R v GT, 2015 ONCA 221; Leone v Canada (Attorney General), 2016 FC 980; R v Krouglov, 2017 ONCA 197; R c C(F), 2017 QCQ 4348; R v McNamara, 2017 ABQB 676; R v NG, 2018 ONSC 6654 [NG 2018].
The accused in *Hutchinson* was in an intimate relationship with the complainant which lasted for about nine months. They used condoms for birth control and only had sex without a condom when the complainant was menstruating. When the complainant began to express concerns about the future of their relationship, the accused decided that impregnating the complainant, contrary to her wishes, would be the best way to ensure the couple stayed together. He thus cut holes in the condoms that the couple used to prevent conception. The complainant became pregnant and, while they initially stayed together, her concerns about the relationship led her to leave the accused and to have an abortion. After the abortion, she developed an infection which included extreme bleeding and severe pain for about two weeks. After the breakup, Hutchinson told her that he had sabotaged the condoms. When the complainant inspected the remaining condoms, she discovered that each one had a hole pierced through it. She contacted the police and Hutchinson was charged with aggravated sexual assault.

What does a case about an abusive partner who sabotages condoms have to do with prosecuting HIV nondisclosure? To answer this question, it is necessary to examine the legislative definition of consent in the *Criminal Code*. Section 273.1(1) of the *Criminal Code* defines consent as "the voluntary agreement of the complainant to engage in the sexual activity in question."135 Some examples are listed of ways consent is not given but non-consent is not explicitly defined in the *Criminal Code*. In *Hutchinson*, the complainant clearly agreed to some form of sexual intercourse with Hutchinson. Did she, however, consent to sexual intercourse with a sabotaged condom or, effectively, no condom? The answer to this question boils down to the meaning of "the sexual activity in question" in the definition of consent. Does it mean simply consenting to vaginal intercourse? Or does it mean consenting to vaginal intercourse only where a condom is used?

There were two possible routes to liability for Hutchinson. First, if the damage to the condoms changed the nature of "the sexual activity in question" in the definition of consent, then Hutchinson could be convicted of some form of sexual assault because the complainant did not consent to sex without a condom. The second route to conviction would be to argue, analogous to the HIV nondisclosure context, that any consent to engage in sexual activity on the part of the complainant was vitiated by fraud along the lines we have seen in *Cuerrier* and *Mabior*. In this latter scenario, Hutchinson’s deception about the condoms would vitiate consent to sexual activity only if there was a significant risk of serious bodily harm to the complainant.

For many, sex with a condom is a very different activity than sex without such protection. The obvious reasons relate to transmission of STI’s and risk of pregnancy but there may also be a level of intimacy involved in sex without a condom that some may choose not to experience. Including condom use within the scope of consent would give the complainant the ability to determine not only the nature of the sexual activity but also how that activity is carried out. The fraud option, by contrast, has a significant limitation. Fraud only negates consent where there is a significant risk of bodily harm. The Supreme Court of Canada imposed this requirement to limit the scope of HIV nondisclosure prosecutions. The complainant in *Hutchinson* did experience bodily harm. As a result of the accused’s actions,

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135 Supra note 11, s 273.1(1) [emphasis added].
she became pregnant, had an abortion, and experienced complications.136 If we change the facts and imagine a hypothetical complainant who has no risk of unwanted pregnancy, perhaps because of age, infertility, or because she was already pregnant, reliance on the fraud option would lead to the conclusion that sabotaging a condom would not constitute sexual assault unless the accused had an STI because there would be no significant risk of serious bodily harm. The doctrine of fraud vitiating consent does not acknowledge a woman’s right to choose what STI risk and what level of intimacy around sexual intercourse she is willing to experience. Similarly, for gay men, criminal law would only protect the right to insist on a condom where one partner has an STI. A man would have no right to decide not to expose himself to that possibility. So those concerned about the law providing broad autonomy to complainants about when and how to engage in sexual activity would probably prefer the first option — that sexual intercourse with a condom is a different “sexual activity in question” than sexual activity without a condom and requires agreement to participate in that specific sexual activity.

That being said, there was also a concern about the scope of the first route to liability. If “the sexual activity in question” includes factors other than simply agreeing to engage in a particular sex act, HIV nondisclosure could potentially be prosecuted as sexual assault without any requirement of proving deception or the required risk of bodily harm which limits fraud. Instead, this argument goes, consent could be negated simply by showing that a complainant did not consent to sex with someone who was HIV-positive (just like she did not consent to sex without a condom), without requiring the Crown to prove the significant risk of bodily harm. Hypothetically, then, HIV nondisclosure cases could be prosecuted even where the accused used a condom and had a low viral load, circumventing the Supreme Court’s jurisprudence on HIV nondisclosure as fraud. This is precisely why the HIV/AIDS coalition intervened in Hutchinson at the Supreme Court and argued that incorporating dishonesty into the “sexual activity in question” would render the doctrine of fraud meaningless and risk the overcriminalization of persons with HIV. Thus, the Supreme Court was faced with a choice: risk expanding the scope of criminalization of HIV nondisclosure prosecutions even further or take a narrow approach to consent to avoid this possibility.

The Supreme Court of Canada was unanimous that Hutchinson was guilty of sexual assault but it was divided as to the means of arriving at that conclusion.137 A four-justice

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136 Because the complainant’s life was not endangered, the aggravated sexual assault charge was not substantiated. See Hutchinson, supra note 33 at para 74.

137 See Hutchinson, supra note 33. If these facts were to arise again, it appears that the appropriate charge would be sexual assault causing bodily harm assuming the accused is not HIV-positive. The uncertainty surrounding this case was demonstrated by the difficulty lower court judges had in deciding how to deal with Hutchinson’s conduct. At his first trial, in R v Hutchinson, 2009 NSSC 51, the justice directed a verdict of acquittal before Hutchinson even presented a defence because all the parties agreed that the complainant had consented to engage in sexual intercourse with him and therefore there was no sexual assault. In R v Hutchinson, 2010 NSCA 3, the Nova Scotia Court of Appeal was divided both on the outcome and on how to get there, but a two to one majority agreed that the case should go back for a new trial. On the retrial, in R v Hutchinson, 2011 NSSC 361, Justice Coughlan convicted Hutchinson of sexual assault, holding that there was no voluntary agreement to engage in sexual intercourse without contraception. While he found that the complainant’s life was not endangered, sexual assault causing bodily harm was not considered. He sentenced the accused to 18 months’ imprisonment and to registration as a sex offender for 20 years. The accused again appealed to the Nova Scotia Court of Appeal, which took the unusual step of sitting five judges on the appeal, demonstrating the importance of the case: R v Hutchinson, 2013 NSCA 1. There, the majority held that the use of a condom is an essential feature of the sex act and that there could be no consent to “the sexual activity in question” if the complainant did not agree to unprotected sex. The use of a condom was an “inseparable component”
majority, per Chief Justice McLachlin and Justice Cromwell,\(^{138}\) held that Hutchinson’s deception would only be criminal if the Crown could prove fraud vitiating consent. In other words, whether a condom was used was not part of the sexual activity in question. The three-justice minority would have convicted Hutchinson on the basis that there was no voluntary agreement to engage in the sexual activity in question (that is, sex without a condom) and therefore there was no need to undertake an analysis of fraud.

The majority’s judgment appears to be motivated in large part by the need to carve out distinct roles for the consent inquiry and for the fraud inquiry, ensuring that most of the work around deceptions would be done under the concept of fraud, thus limiting the scope of consent. The majority could see no reason why the facts in Hutchinson warranted a different approach than the facts in Cuerrier: “[c]onsistency and certainty in the law require that both situations be treated the same.”\(^{139}\) If deceptions could be addressed under “the sexual activity in question,” the fraud inquiry would be redundant and there would be no need for a separate fraud provision in the Criminal Code. Therefore, the majority decided that a narrow definition of “voluntary agreement to the sexual activity in question” was required and that the condom deception involved in this case had to be prosecuted through fraud, which would involve a two-step test inquiry.

The first step is to determine whether consent to the sexual activity in question has been given. This is a very limited inquiry; it “requires proof that the complainant did not voluntarily agree to the touching, its sexual nature, or the identity of the partner.”\(^{140}\) But how the sexual act is performed or the circumstances around performing it, are not part of the consent inquiry. Thus, whether or not birth control is being used or whether the accused has an STI, are not relevant considerations at this stage. If the Crown is able to prove beyond a reasonable doubt that one of these three components is not met, a finding of nonconsent will be made and the accused will be convicted without the need to go on and consider fraud. If the three components of consent are present, the analysis moves to the second step to consider whether there are circumstances, such as fraud, which vitiate what would otherwise have been a valid consent.

By treating Hutchinson’s deception as fraud, it was necessary for the Crown to prove beyond a reasonable doubt that there was a significant risk of serious bodily harm to the complainant. The majority did this by expanding the notion of risk to include the risk of unwanted pregnancy as a risk of bodily harm:

The concept of “harm” does not encompass only bodily harm in the traditional sense of that term; it includes at least the sorts of profound changes in a woman’s body — changes that may be welcomed or changes that a woman may choose not to accept — resulting from pregnancy. Depriving a woman of the choice whether to become pregnant or increasing the risk of pregnancy is equally serious as a “significant risk of serious

of the complainant’s consent. As a result, the majority upheld the conviction. The dissenting judgment would have sent the case back for new trial to determine whether the consent of the complainant was vitiated by fraud.

\(^{138}\) Justices Rothstein and Wagner concurring.

\(^{139}\) Hutchinson, supra note 33 at para 38. In fact, there is a significant difference between these cases. In Hutchinson, the complainant believed she was agreeing to intercourse with a condom that had not been sabotaged; in Cuerrier, the complainant agreed to intercourse without a condom.

\(^{140}\) Ibid at para 5.
bodily harm” within the meaning of Cuerrier, and therefore suffices to establish fraud vitiating consent under s. 265(3)(c).  

Justices Abella and Moldaver penned the minority reasons with Justice Karakatsanis concurring. The Supreme Court of Canada’s landmark decision in R. v. Ewanchuk had established that whether consent exists is determined from the perspective of the complainant. It is the complainant’s subjective state of mind that governs whether consent was present at the time of the sexual activity. Consenting to protected sex is consenting to a different sexual activity than consenting to unprotected sex, and consent in one context cannot be transferred to the other. Whatever her reasons for wanting to use a condom, the complainant did not agree to have sex with Hutchinson without a condom. That was her decision to make. Therefore, there was no need to even consider whether Hutchinson’s actions constituted fraud and no need to examine the risk of bodily harm:

A person consents to how she will be touched, and she is entitled to decide what sexual activity she agrees to engage in for whatever reasons she wishes. The fact that some of the consequences of her motives are more serious than others, such as pregnancy, does not in the slightest undermine her right to decide the manner of the sexual activity she wants to engage in. It is neither her partner’s business nor the state’s.  

The minority was careful to limit its judgment to the way in which a particular sexual touching takes place and did not extend its reasoning to other contextual factors about a sexual encounter that might influence a decision about whether to say yes or no to sex. A man lying about his wealth, his marital status, or whether he has an STI would not negate agreement to engage in the sexual act in question because such factors do not relate to that physical act. These kinds of deceptions are not part of the how the physical touching is carried out and, as a result, such deceptions would have to be dealt with under fraud and the limit imposed by the requirement of a significant risk of serious bodily harm.

B. THE IMPLICATIONS OF HUTCHINSON FOR FRAUD

Hutchinson narrows the concept of consent and correspondingly expands the range of factors to be considered as part of the fraud inquiry. Cuerrier limits fraudulently induced consent to circumstances where there is a significant risk of serious bodily harm. Deceptions that do not risk serious bodily harm, however deliberate or calculated, are therefore now entirely beyond the scope of criminal law. Thus, for example, men who have engaged in elaborate schemes to trick multiple women into thinking they are auditioning for a modelling or film contract cannot be convicted of sexual assault unless there was a risk of unwanted pregnancy. Presumably, no amount of deception will constitute fraud where the sexual

\[141\] \textit{Ibid} at para 70. 
\[142\] [1999] 1 SCR 330 [Ewanchuk]. 
\[143\] \textit{Hutchinson, supra} note 33 at para 88 [emphasis in original]. 
\[144\] See \textit{R v Dadmand, 2016 BCSC 1565 [Dadmand]}. Dadmand posed as a modelling agent working for a prominent Italian modelling agency trying to persuade women to engage in auditions that would begin with modelling clothes and develop into nude modelling and beyond. Dadmand presented the complainants with a contract and took them to a home he said falsely was the home of another model but was in fact his own home. The trial judge found that many of the complainants did not consent to the actual sexual touching that took place and therefore found the accused guilty of sexual assault, regardless of the deception. However, for one complainant, a young single mother living on social assistance, the justice had a reasonable doubt that the complainant agreed to the sexual activity as part of an audition. The trial judge acknowledged that the accused had deceived her into believing he was
contact does not include vaginal intercourse unless there is a significant risk of STI transmission. Fraud has been reduced to a risk of unwanted pregnancy or a risk of disease transmission. By focusing fraud exclusively on the risk of physical harm, attention to the harm of denying someone the autonomy to make their own choices about sex has been lost.

The majority’s concern about expanding HIV nondisclosure in Hutchinson was unwarranted. The majority criticized the minority on the basis that HIV nondisclosure could come within the minority’s definition of how the sexual activity takes place (that is, through “the exchange of diseased fluids”). But the minority judgment was careful about distinguishing between the manner in which the sexual activity was carried out and the surrounding circumstances that might have influenced whether the complainant consented. The former went to the definition of consent and the latter would go to fraud. Under the minority, HIV nondisclosure prosecutions would have continued to be dealt with by fraud because they did not relate to the manner in which the sexual activity was carried out but rather to circumstances that might have influenced the complainant’s consent. Nor would the minority include within the scope of nonconsent a woman who lies about whether she is on the pill or using other birth control, something about which the majority had expressed concern. In the minority’s view, whether a woman is on the pill does not go to the manner in which the sexual activity is carried out. A lie about being on the pill can only be dealt with through the doctrine of fraud and, because there is no significant risk of serious bodily harm to a male partner, such a deception would not constitute fraud. Both judgments would criminalize a man who deceived his sexual partner about whether he had had a vasectomy, or other infertility, but only through the doctrine of fraud. Because the absence of a vasectomy increases the risk of unwanted pregnancy, such an accused could be convicted of sexual assault through fraud vitiating consent but presumably only if his sexual partner was capable of becoming pregnant from the specific incident of sexual activity. Both the minority and the majority judgments therefore raise the possibility that, in dealing with fraud relating to male fertility, we will now require the Crown in such a scenario to prove that the complainant was capable of becoming pregnant which has serious privacy implications for complainants. While the Hutchinson minority is more coherent on consent, neither judgment advances the law relating to fraud.

One area where the different sets of reasons would lead to different outcomes is with the practice of one male partner surreptitiously deciding to remove a condom during sexual

an agent and induced her to have sex with him and to video record the sexual activity. In other words, the complainant was tricked into having sex with the accused. But the Crown could not argue fraud vitiating consent because there was no evidence of a significant risk of serious bodily harm to the complainant. Mr. Dadmand was subsequently designated a dangerous offender: see R v Dadmand, 2018 BCSC 729. See also R v Dugas, 2018 ONCI 120, where the accused perpetrated a similar ruse. See also R v Lupi, 2019 ONSC 3713 [Lupi]; R v Rivera, 2019 ONSC 3918 [Rivera]; R v Kirkpatrick, 2020 BCCA 136 [Kirkpatrick] for cases which grapple with fraud and consent in the context of condom use post-Hutchinson.

somewhat surprisingly, the majority has removed the two components of what was considered fraud at common law and in the pre-1983 Criminal Code — the sexual nature of the touching and the identity of the person involved — and moved them into the definition of voluntary agreement to the sexual activity in question. See ibid at paras 57–58.
activity — a practice which has been dubbed “stealthing.” 147 There is a whole online subcommunity dedicated to stealthing, both for men who have sex with women and for men who have sex with men. 148 Certainly someone who has been subjected to this practice may face extreme anxiety around possible pregnancy or possible transmission of an STI. But is stealthing sexual assault? The majority and minority in Hutchinson would give a somewhat different answer to this question. The majority judgment would say that stealthing could only be sexual assault through the doctrine of fraud. Because fraud requires a significant risk of bodily harm, it would only constitute sexual assault where the accused has an STI or where the complainant faces a risk of unwanted pregnancy. Stealthing, according to the majority, would not be criminalized for a man having sex with another man unless the person removing the condom had an STI. The minority judgment, by contrast, would argue that consent to engage in sex with a condom does not include within it consent to engage in sex without a condom, regardless of the complainant’s reasons for wanting a condom. In other words, stealthing would always constitute sexual assault regardless of the potential for pregnancy or the possibility of acquiring an STI. The minority judgment would have given all complainants the same right to insist on condom use, not just those who risk unwanted pregnancy or STIs.

The only harm of deceptive sexual practices that the law will recognize, therefore, is the risk of serious physical harm. As Lise Gotell has cogently argued, this is a significant constriction on our understanding of affirmative consent and the notion that the complainant gets to choose with whom she wants to engage in sexual activity and in what circumstances. 149

C. THE IMPLICATIONS OF HUTCHINSON FOR CONSENT

The majority judgment in Hutchinson represents a clear retreat from the landmark decision in Ewanchuk, which entrenched the affirmative consent standard in Canadian sexual assault law and determined that consent needed to be assessed from the subjective perspective of the complainant. 150 In Hutchinson, the majority judgment begins by stating a principle from Ewanchuk: “Control over the sexual activity one engages in lies at the core of human dignity and autonomy,” thus apparently endorsing that decision. 151 However, this misstates what the Supreme Court in Ewanchuk actually said. In Ewanchuk, Justice Major in fact stated “[h]aving control over who touches one’s body, and how, lies at the core of human dignity and autonomy.” 152 Through this sleight of hand, the “how” of sexual activity was removed from our understanding of consent.

Furthermore, the two-step approach to consent in Hutchinson is an awkward fit with the structure of the Criminal Code. The majority in Hutchinson was concerned that, if a broad

148 See Brodsky, ibid at 185.
149 See Gotell, supra note 147.
150 Hutchinson, supra note 33 at para 1, citing Ewanchuk, ibid at para 28.
151 Ewanchuk, ibid [emphasis added].
approach were taken to voluntary agreement to “the sexual activity in question,” too much of the conceptual work would be done by the consent inquiry in section 273.1(1), thus leaving the fraud provisions of the *Criminal Code* redundant. However, the majority judgment misconstrues the construction of the sexual assault provisions in the *Criminal Code* by identifying the factors listed in section 273.1(2) as exceptions which vitiate an otherwise valid consent, rather than as examples of situations where *no voluntary agreement to the sexual activity in question* has been given. Section 273.1(1) of the *Criminal Code* defines consent and 273.1(2) limits when consent is obtained in a number of ways. This latter provision was designed to clarify circumstances in which no consent would be found:

(2) For the purpose of subsection (1), no consent is obtained if

(a) the agreement is expressed by the words or conduct of a person other than the complainant;

(a.1) the complainant is unconscious;

(b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1);

(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.153

Section 265(3), sets out further limits which apply to all assaults, sexual and otherwise:

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

(a) the application of force to the complainant or to a person other than the complainant;

(b) threats or fear of the application of force to the complainant or to a person other than the complainant;

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153 *Criminal Code, supra* note 11, s 273.1(2).
Recall what the majority in *Hutchinson* said about how these provisions operate:

The *Criminal Code* sets out a two-step process for analyzing consent to sexual activity. The first step is to determine whether the evidence establishes that there was no “voluntary agreement of the complainant to engage in the sexual activity in question” under s. 273.1(1). If the complainant consented, or her conduct raises a reasonable doubt about the lack of consent, the second step is to consider whether there are any circumstances that may vitiate her apparent consent.155

I would argue that, with the possible exception of the revocation of consent that has already been given, the factors listed in section 273.1(2) and section 265(3) are prerequisites to consent, not ways to vitiate it once it has already been established as is suggested by the *Hutchinson* majority. This is consistent with how then Justice Minister Kim Campbell explained the provision to Parliament when it was introduced in 1992. Section 273.1(2) “set[s] out circumstances where no consent is obtained.”156 This approach is consistent with Justice L’Heureux-Dubé’s interpretation of section 265(3) in *Cuerrier*:

But s. 265(3) does not state simply that actions are unlawful if consent was obtained under vitiating circumstances. Instead, s. 265(3) says that “no consent is obtained where the complainant submits or does not resist” because of the presence of one of the enumerated factors.157

The *Hutchinson* majority’s construction has problematic implications outside of the fraud context. Consider the very common scenario where a complainant is intoxicated, short of unconsciousness, and the question is whether she had the capacity to consent. We have always thought of capacity as a prerequisite to consent: no capacity, no consent. Do we now first have to decide whether she voluntarily agreed to engage in sex, and only then consider whether she is in fact incapable of consenting? Under this analysis, all the work would be done at the second stage of the analysis after a finding of voluntary agreement has been made. But can someone who is incapable of consenting give voluntary agreement to engage in sexual activity? If the answer is yes, then the word “voluntary” means nothing.158 Similarly, where capacity is at issue because of a mental disability, under this two-step approach, there will be no consideration of the impact of mental disability until the determination has been made about voluntary agreement even though that disability may be deeply relevant to whether the complainant’s agreement was truly voluntary.159 One can see how unworkable this is when one looks at unconsciousness as one of the recently added factors under section 273.1(2). We do not ask whether the unconscious person voluntarily

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154 *Ibid*, s 265(3).
155 *Hutchinson*, supra note 33 at para 4.
157 *Cuerrier*, supra note 1 at para 8 [emphasis in original].
158 In *R v S (DG)* (2004), 72 OR (3d) 223 (CA), aff’d 2005 SCC 36 [*S (DG)*], the complainant only agreed to engage in sexual intercourse with the accused because he threatened that he would otherwise disseminate nude photographs of the complainant. The Court of Appeal for Ontario held that these threats did not vitiate her apparent consent but rather negated her voluntary agreement to the sexual activity in question and the Supreme Court of Canada adopted these reasons.
159 See e.g. *R c Owolabi Adejojo*, 2019 QCCQ 570.
agreed to the sexual activity in question and only then look at her unconsciousness to decide whether that agreement was vitiated. An unconscious person cannot voluntarily agree. I would argue that there can also be no voluntary agreement in the context of threats of violence to the complainant or another person, or where there is an abuse of trust, power, or authority. Agreement to participate in sex under threat of force or under an abuse of trust is not a voluntary agreement. All of these factors must be considered when one is deciding whether the agreement to the sexual activity in question was voluntary; these factors are not afterthoughts which vitiate an otherwise valid consent.

We have already begun to see the implications of Hutchinson in the context of capacity to consent. Recent scholarship has been critical of the minimalist approach to capacity to consent in the context of sexual assault. Courts have required only a bare cognitive capacity to understand that you are engaging in sexual activity and the ability to understand that you have a choice. The result is that even extremely intoxicated women are often found to be sufficiently capable of consenting. The law is clear that an unconscious woman is incapable of consenting, but it is less clear where we draw the line of capacity for someone whose cognitive capacity is severely impaired short of unconsciousness. In R. v. Al-Rawi, a Halifax taxi driver was charged with sexually assaulting his very intoxicated female passenger. The police found the accused taxi driver in the backseat of his cab, between the complainant’s legs, with his pants open. The complainant was unconscious and naked from the breasts down, her urine soaked underwear in the accused’s hands, roughly 11 minutes after she had entered the taxi. The difficulty in this case was that the complainant was unable to remember the events and the Crown could not prove when she lost consciousness. The accused was acquitted by the trial judge stating the now infamous, but legally correct, statement that “clearly, a drunk can consent.” The acquittal in Al-Rawi was overturned by the Nova Scotia Court of Appeal. The feminist organization, the Women’s Legal Education and Action Fund (LEAF), had intervened on appeal to argue for a more rigorous test for capacity that would include whether the woman was capable of understanding the risks and benefits of sexual activity and whether she was capable of communicating consent. The Court of Appeal rejected this argument relying on the HIV cases and the decision in Hutchinson:

The proposed requirement that a complainant have the cognitive ability to appreciate and assess the risks and consequences of the sexual act in question is contrary to the Supreme Court’s rejection in R. v. Cuerrier, R.
v. Mabior and R. v. Hutchinson that knowledge of the risks and consequences of the act are necessary components of a valid consent.\(^\text{167}\)

In other words, Hutchinson and the HIV cases limited what can be included within the scope of a valid consent and, if knowledge of the risks and consequences are not part of consent, the ability to weigh those risks need not be a requirement of capacity. This finding may have been based on a misunderstanding of LEAF’s position; it was not arguing that in every case the complainant must weigh the consequences of sex or there will not be a valid consent. The additional component of capacity does not require that the complainant actually weigh the risks and benefits of sexual activity. It would only have required that she have the basic cognitive capacity to do so if she so chooses. If she is not cognitively capable of weighing the risks, then we rob her of the ability to make a decision as to whether to weigh them. The point is that it should be up to the complainant to decide whether to weigh those risks. How can we claim that the law respects the complainant’s autonomy and dignity if we can make a finding of consent where she was not capable of weighing the risks and benefits?

After Al-Rawi, in 2018, the federal government introduced legislation to amend section 273.1(2) of the Criminal Code which, as indicated above, now provides that no consent is obtained where the complainant is unconscious or where she is incapable of consenting for any other reason.\(^\text{168}\) Feminist groups lobbied the government not to pass this law because it creates a risk that a court might assume that if an intoxicated woman is anything short of unconscious, she must be capable of consenting.\(^\text{169}\) Senator Kim Pate introduced amendments to the Bill that would have incorporated a definition of capacity consistent with that sought by LEAF in Al-Rawi and that would have included the ability to weigh the risks and benefits of engaging in sex as well as the ability to communicate consent.\(^\text{170}\) Then Minister of Justice Jody Wilson-Raybould rejected these amendments and the law passed as described above. Feminists continued their lobbying efforts, pressuring the new Minister of Justice, David Lametti, to reconsider the amendments passed by the Senate. Two round tables were held on the capacity issue, and HIV advocacy groups, whose expertise on sexual assault law is derived from the context of HIV nondisclosure prosecutions, opposed expanding the factors going to capacity for reasons similar to Hutchinson — a fear that any strengthening of the protections around capacity would impact the definition of consent in ways that could

\(^\text{167}\) Al-Rawi, supra note 162 at para 38.

\(^\text{168}\) See An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act, SC 2018, c 29, s 19.

\(^\text{169}\) See Isabel Grant & Elizabeth Sheehy, “Submission to the Senate Committee Studying Bill C-51,” online: <sencanada.ca/content/sen/committee/421/LCJC/Briefs/GrantandSheehy.Submissions_e.pdf>; Women’s Legal Education and Action Fund, “Submission to the House of Commons Standing Committee on Justice and Human Rights, Bill C-51: An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act,” online: <www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR9225134/br-external/WomensLegalEducationAndActionFund-e.pdf>.

\(^\text{170}\) The Senate amendments, which were ultimately rejected, would have amended section 273.1(2)(b). See Debates of the Senate, 42-1, Vol 150, No 241 (30 October 2018) at 6635, online: <sencanada.ca/Content/SEN/Chamber/421/Debates/pdf/241db_2018-10-30-e.pdf> as follows:

(b) the complainant is incapable of consenting to the activity in question for any reason, including, but not limited to, the fact that they are

(i) unable to understand the nature, circumstances, risks and consequences of the sexual activity in question,
(ii) unable to understand that they have the choice to engage in the sexual activity in question or not, or
(iii) unable to affirmatively express agreement to the sexual activity in question by words or by active conduct.
facilitate prosecution of HIV nondisclosure without the doctrine of fraud. If capacity required an ability to weigh the risks and consequences, this argument goes, it would only be a small jump to argue that consent itself must include an actual weighing of the risks and consequences which could include the risk of HIV transmission. This is the same logical leap the Nova Scotia Court of Appeal made in Al-Rawi, assuming that a finding that capacity includes the ability to weigh risks and benefits necessarily means that a person must have actually done so before her consent will be valid.

Perhaps the most troublesome application of Hutchinson we have seen to date in the context of consent was in an argument at the Supreme Court of Canada in Barton. The Criminal Lawyers’ Association of Ontario intervened to argue, relying entirely on Hutchinson, that the “sexual activity in question” does not include the complainant having to agree to the amount of force being used to carry out the particular activity. The Association argued that Hutchinson holds that “[c]onsent to the ‘sexual activity in question’ under s. 273.1 only requires agreement to the basic physical act, not the precise manner in which the act is carried out.”172 Barton involved the death of a young Indigenous woman after the accused thrust his entire fist into her vagina causing a grave injury from which she bled to death. The Supreme Court of Canada avoided the issue, but the potential for this argument after Hutchinson is deeply troubling. A woman who consents to intercourse, for example, is not consenting to any amount of force that her partner unilaterally decides to use. This reasoning is particularly dangerous in the context of coercively controlling relationships where sexual violence often plays a significant role.173 Consent must require consent to the force used. Where the amount of force used changes over the course of sexual activity, that consent must be ongoing. The interveners were correct that the Hutchinson majority did not address the degree of force used as part of the sexual activity in question, but the decision should not be taken as authority for that point since it was not at issue in Hutchinson. If, in fact, the majority did intend to make the degree of force irrelevant to consent, it must be urgently overturned legislatively.

Lower courts have struggled to make sense of Hutchinson in cases involving nonconsensual condom removal or refusal to wear a condom.175 Most notably, the Court of

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171 Supra note 166.
172 Ibid (Factum of Intervener – Criminal Lawyers’ Association of Ontario at para 13, online: <www.scc-csc.ca/WebDocuments-DocumentsWeb/37769/fm170_CLAO_Intervener.pdf>[emphasis in original]).
173 Birth control sabotage, such as that seen in Hutchinson, supra note 33, is prevalent in abusive relationships. See e.g. Shane M Trawick, “Birth Control Sabotage as Domestic Violence: A Legal Response” (2012) 100:3 Cal L Rev 721.
174 The question of whether a complainant should be able to consent to force that causes bodily harm is highly contested. See R v Zhao, 2013 ONCA 293, where the Court held that consent would be negated where the accused intended to and did cause bodily harm. In R v DK, 2020 ONCA 79 at para 23, the Court of Appeal for Ontario made a distinction between cases where bodily harm is caused during nonconsensual sex and cases where consent is vitiates through the intentional infliction of bodily harm, holding that it is only in the latter cases where the Crown must prove that the bodily harm was intentional. Recently, a movement in England, by a group entitled “We Can’t Consent to This,” successfully advocated for the inclusion of a clause in the Domestic Abuse Bill [HL] (UK), 2019–2021 Sess, Bill 124 (1st reading 7 July 2020) that will amend the law such that it is not a defence that a victim of serious harm consented to the infliction of said harm for the purposes of sexual gratification. The Domestic Abuse Bill has now passed the lower house of Parliament and is currently before the House of Lords.
175 See e.g. the text accompanying note 143 for a more detailed discussion of these cases (Dadmand, Lupi, and Rivera). See Lise Gotell & Isabel Grant, “Does ‘No, Not without a Condom’ Mean ‘Yes, Even Without a Condom’?: The Fallout from R v Hutchinson” (2020) 43:2 Dal LJ 747, online: <digitalcommons.schulichlaw.dal.ca/dlj/vol43/iss2/1/>.
Appeal for British Columbia has recently distinguished *Hutchinson* in order to conclude that whether a condom was used does in fact constitute part of the “sexual activity in question.” In *Kirkpatrick*, the accused and the complainant initially met online.\(^{176}\) When they met in person, the complainant told the accused she would only consent to intercourse with a condom.\(^{177}\) A few days later, they had consensual sexual intercourse and, at her insistence, used a condom. Later that evening, the complainant awoke from sleep to find the accused sexually aroused. He reached over to a drawer from which he had retrieved a condom earlier that night and then proceeded to have sexual intercourse with her. It was only after he ejaculated that the complainant realized he had not worn a condom.\(^{178}\) The complainant went to the hospital and undertook a month of HIV prophylactics from which she suffered serious side effects.\(^{179}\) The trial judge directed a verdict of acquittal on the basis that *Hutchinson* provides that condom use does not go to the voluntary agreement to the sexual activity in question and that there was no evidence of an actual deception which could constitute fraud vitiating consent. Rather, there had been a misunderstanding about whether *Kirkpatrick* was using a condom.\(^{180}\)

A majority of the Court of Appeal held that the complainant did not consent to the sexual activity in question because she only agreed to participate in sexual intercourse with a condom, a conclusion that the minority judgment of Justice Bennett stressed was in direct conflict with *Hutchinson*.\(^{181}\) Justice Groberman, for the majority, distinguished *Hutchinson* on the basis that where an accused surreptitiously sabotages a condom (*Hutchinson*), the case should be dealt with by fraud whereas if an accused refuses to wear a condom where the complainant has insisted on it (*Kirkpatrick*), there is no agreement to the sexual activity in question. According to the majority, a reading of *Hutchinson* which excludes condom use from “the sexual activity in question” “would leave the law of Canada seriously out of touch with reality, and dysfunctional in terms of its protection of sexual autonomy.”\(^{182}\)

I have argued elsewhere that the distinction between condom refusal and condom sabotage is tenuous and that either condom use is relevant to the sexual activity in question or it is not.\(^{183}\) Justice Bennett is correct that the Supreme Court of Canada unambiguously held that condom use does not go to the sexual activity in question. In fact, the majority in *Hutchinson* stated this explicitly: “[e]ffective condom use is a method of contraception and protection against sexually transmitted disease; it is not a sex act.”\(^{184}\) Justice Groberman, however, is correct in stating that this conclusion leaves our law dysfunctional in terms of its protection of sexual autonomy. The defence in *Kirkpatrick* has sought leave to appeal to the Supreme Court of Canada which provides the Supreme Court with an opportunity to retreat from an

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\(^{176}\) *Supra* note 144.

\(^{177}\) *Ibid* at para 11.

\(^{178}\) *Ibid* at para 9.

\(^{179}\) *Ibid* at para 64.

\(^{180}\) *Ibid* at para 13, quoting *R v Kirkpatrick* (6 November 2018), Surrey 223696-1 (BC Prov Ct) at paras 31–33.

\(^{181}\) *Kirkpatrick*, *ibid* at paras 46–51. Justice Bennett agreed that a new trial was warranted but on the basis of fraud vitiating consent.

\(^{182}\) *Ibid* at para 3.

\(^{183}\) See Gotell & Grant, *supra* note 175.

\(^{184}\) *Hutchinson*, *supra* note 33 at para 64.
approach that was correctly described as “out of touch with reality”\(^{185}\) and even “perverse”\(^{186}\) by the Court of Appeal in *Kirkpatrick*.

### IV. Moving Forward

*Cuerrier* has left us with two distinct problems to solve: the overcriminalization of people with HIV and the damage done to the law of sexual assault and to our understanding of consent. On the HIV front, Parliament has thus far abdicated its responsibility for legislating crimes in this area to the courts and, as documented above, the Supreme Court of Canada has not exactly risen to the occasion. *Cuerrier* created a “legal no-man’s-land”\(^{187}\) and *Mabior* has only made things worse by expanding the scope of criminalization to situations where there is no real risk of transmission, let alone transmission itself. On the sexual assault front, *Hutchinson* has left us with a weak definition of consent that does not allow people to determine the circumstances in which they are willing to engage in sexual activity.

#### A. Limiting HIV Nondisclosure Prosecutions

There are sound policy reasons for limiting the scope of HIV nondisclosure prosecutions to those where transmission takes place. These prosecutions target only members of a highly marginalized group — people with HIV — for criminalization. Very often, these accused persons have intersecting inequalities that have shaped their lives in profound ways.\(^ {188}\) They are disproportionately Black\(^ {189}\) or Indigenous.\(^ {190}\) Indigenous women, in particular, are disproportionately impacted by HIV.\(^ {191}\) The line between perpetrator and victim is not nearly as clear as media coverage might suggest. Some of these accused persons themselves acquired HIV from the nondisclosure of partners\(^ {192}\) or through sexual violence.\(^ {193}\) The threat of criminalization hangs over the lives of people with HIV who are already dealing with

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\(^{185}\) *Kirkpatrick*, supra note 144 at para 3.

\(^{186}\) Ibid at para 28.

\(^{187}\) *Mabior SCC*, supra note 3 at para 69.


\(^{189}\) Since the *Mabior* SCC decision in 2012, almost half (48 percent [10/21]) of all people charged (for HIV nondisclosure) for whom race is known are Black men. See Hastings, Kazatchkine & Mykhalovskiy, supra note 17 at 4. See also Mykhalovskiy & Betteridge, supra note 17.

\(^{190}\) See *Schenkels*, supra note 43; *Tippeneskum*, supra note 133; *Kaotalok*, supra note 13; *NG 2017*, supra note 46.

\(^{191}\) See “Indigenous Women, HIV and Gender-Based Violence” at 4, online (pdf): *HIV Legal Network* <aidslaw.ca/site/indigenous-women-hiv-and-gender-based-violence/?lang=en> [citations omitted]. Indigenous people—and Indigenous women in particular—are disproportionately affected by HIV. While Indigenous people made up only 4.3% of the Canadian population in 2011, they accounted for an estimated 12.2% of new infections and 8.9% of all prevalent (or existing) infections at the end of that year. In 2011, the estimated infection rate among Indigenous people was about 3.5 times higher than among non-Indigenous people. Between 1998 and 2012, nearly half (47.3%) of all positive HIV test reports among Indigenous people were women, as compared with 20.1% of reports for non-Indigenous people. See also J Kevin Barlow, “Residential Schools, Prisons, and HIV/AIDS Among Aboriginal People in Canada: Exploring the Connections,” online: *Aboriginal Healing Foundation* <ahf.ca/downloads/hivaid.pdf>; Brittany Bingham et al, “Generational Sex and HIV Risk Among Indigenous Women in a Street-Based Urban Canadian Setting” (2014) 16:4 Culture, Health & Sexuality 440.

\(^{192}\) See *Murphy*, supra note 89.

\(^{193}\) See *JTC (Campbell)*, supra note 105 at para 4.
significant challenges around disclosure. We know that disclosure can trigger violence, particularly against women with HIV. Women with HIV may well not be in a position to safely insist on condom use particularly in the context of violent relationships or those in the sex trade. We have already seen a woman prosecuted in Canada because her violent ex-partner wanted retribution for her reporting his violence to police. Women with HIV may also fear the risk of being charged for not disclosing to men who are sexually assaulting them.

Canada has the dubious distinction of being a world leader in the prosecution of HIV nondisclosure. In a study of cases in 49 countries between October 2015 and December 2018, Canada ranked fifth in terms of the absolute number of prosecutions, behind mostly countries with much larger populations. According to a 2015 study, Canada then ranked second only to the United States. The stigma historically associated with HIV/AIDS and the groups at highest risk continues to influence prosecutorial decision-making. Aggravated sexual assault is rarely charged outside of the HIV context. The fact that we still prosecute this crime where an HIV-positive person consistently uses a condom for intercourse and where the risk of transmission is virtually none, demonstrates the degree to which the criminalization of HIV nondisclosure is really about the criminalization of being HIV-positive. Despite the fact that HIV is much more difficult to transmit than most viruses, and that most transmission takes place before the individual knows he or she is HIV-positive, there is no other disease in Canada that has been exceptionalized through criminal prosecution in this way.

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197 See DC, supra note 56.
198 See House of Commons, The Criminalization of HIV Non-Disclosure in Canada: Report of the Standing Committee on Justice and Human Rights: Report of the Standing Committee on Justice and Human Rights, (June 2019) (Chair: Anthony Housefather) at 9–10, online: <ourcommons.ca/Content/Committee/421/JUST/Reports/RP10568820/justrp28/justrp28-e.pdf> [Report of the Standing Committee]. “I was raped by three [people] in [Canadian city]. They broke into my home and they held me prisoner for 24 hours and beat me and raped me. And if I had told him I was HIV positive, I would have been dead. I know it. So where does that fit in the picture? (Julie, British Columbia)” Greene et al, supra note 194 at 1097.
199 Canada ranked behind the Russian Federation, Belarus, the United States, and Ukraine. Belarus is the only one of these jurisdictions with a smaller population than Canada. Sally Cameron, Advancing HIV Justice 3 at 9, online: HIV Justice Network <hivjustice.net/wp-content/uploads/2019/05/AHJ3-Full-Report-English-Final.pdf>.
201 See e.g. NG 2018, supra note 133.
202 See e.g. JTC (Derrick), supra note 95; DC, supra note 56.
204 See Report of the Standing Committee, supra note 198 at 10. There are a handful of cases involving nondisclosure in the context of herpes: see R v Tysick, 2017 ONCJ 255; R v H (J), 2012 ONCJ 753; R v JYT, 2017 ONCJ 255. See also R v Jones, 2002 NBQB 340 (hepatitis C).
These compelling reasons to limit the scope of prosecutions for HIV nondisclosure do not apply to sexual assault more generally. Sexual assault is a profoundly under-reported and under-prosecuted crime. Conviction rates outside of the HIV context are low compared to other violent crimes. Already marginalized populations tend to be targeted for sexual assault such as, for example, Indigenous women and girls and those with disabilities.

I recognize that my position could be criticized for being inconsistent if considered from a doctrinal perspective. On the one hand, I support excluding cases of HIV nondisclosure from the doctrine of fraud vitiating consent and prosecuting HIV nondisclosure under other crimes, such as criminal negligence causing bodily harm, but only where the virus is transmitted. On the other hand, I am urging that we take an approach to fraud that shifts the focus to the nature of the deception and its role in inducing consent rather than its physical consequences. Why would HIV nondisclosure not then always be fraud if the accused is tricking the complainant into consenting by lying about something she would consider highly relevant to her decision? It is important to acknowledge that my recommendations about HIV nondisclosure are not based primarily on doctrinal concerns but rather on the damage nondisclosure criminalization has caused both to a highly marginalized group of people and to the law of sexual assault. Our most serious sexual offence is simply not the way to manage a serious public health issue except in the most extraordinary circumstances. Quite simply, prosecuting HIV nondisclosure in this way has done more harm than good. Where the virus is not transmitted, prosecutions need to stop.

There are several ways to reduce HIV nondisclosure prosecutions. Robust prosecutorial guidelines in every province could limit prosecution to cases where the virus has been transmitted. This is already the approach we take to crimes based on criminal negligence in Canada. Criminal negligence, or conduct that “shows wanton or reckless disregard for the lives or safety of other persons,” is only criminalized where it leads to bodily harm or death. In most nondisclosure cases, the accused is not setting out to injure their partner, but
rather showing what could be described as a wanton or reckless disregard for the safety of that partner if no condom is used by an accused who does not have a low viral load. In the rare case where someone actually sets out to transmit the virus, and in fact does so, there are more serious charges that can, and are, being utilized.  

I recognize that transmission might be said to be a matter of luck and is not necessarily reflective of the accused’s moral blameworthiness. This is often true for consequence crimes where the harm to the victim is based on factors outside of the accused’s control such as access to prompt medical care. However, there is a connection between transmission and moral blameworthiness. Where the accused has taken steps to protect his or her partner, such as through careful use of a condom or a reduced viral load through treatment, transmission almost certainly will not take place. In this respect, transmission is a proxy for condom use and viral load. A person who does not disclose will then bear the risk of transmission taking place. Alternatively, Parliament could enact something similar to its pre-1985 law that criminalized only the transmission of an STI. This provision was entirely independent of sexual assault, was a summary conviction offence punishable by up to six months of incarceration and only criminalized actual transmission. HIV nondisclosure should be explicitly removed from fraud through legislative reform.

While these recommendations might improve the state of HIV nondisclosure prosecutions, they do not undo the damage that has been done to sexual assault law. The more difficult question is whether we can make these changes without causing irrevocable damage to the law of sexual assault.

B. REPAIRING THE DAMAGE DONE TO SEXUAL ASSAULT LAW

The retreat from Ewanchuk that has resulted from concerns around HIV nondisclosure prosecutions should also be dealt with legislatively. In Barton, the Supreme Court of Canada had an opportunity to depart from, or at least limit, Hutchinson but declined to do so. The Criminal Code should therefore be amended so that “voluntary agreement to the sexual activity in question” explicitly includes how the sexual activity is undertaken as well as the degree and type of force involved. It should also be made clear that voluntary agreement must be ongoing and must apply to each sexual activity in question. This change would make it unnecessary to have a specific provision dealing with revocation of consent once we

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212 See e.g. R v Boone, 2016 ONSC 1626. The accused was convicted of, among other things, three counts of attempted murder. The trial judge’s description of the accused, at para 2, demonstrates how rare this case is likely to be:

This is … more than an HIV non-disclosure case. It is about someone who first deliberately set out to contract HIV and upon learning of his HIV positive status, refused to take antiretroviral medication, notwithstanding his elevated viral load scores. Mr. Boone then preyed upon young men, whom he believed to be HIV negative, with the intent of infecting them with HIV.

In allowing the attempted murder charges to go forward, the Court of Appeal in R v Boone, 2019 ONCA 539 at para 36, stated:

If the appellant believed that by infecting his sexual partners his conduct would, in the absence of intervening circumstances that might cause their death, inevitably kill them, in my view, it would be open to a trier of fact to find that he possessed a specific intent to kill. In such circumstances, the fact that death might not ensue for many years would be irrelevant.

However, in R v Boone, 2019 ONCA 652 at para 60, the Court of Appeal ultimately allowed a new trial on the charges of attempted murder because the trial judge had failed to make clear that the accused had to both intend to transmit HIV and believe that death was a virtually certain consequence of transmitting the virus in order to satisfy the mens rea of attempted murder.
recognize the ongoing nature of consent and the requirement for consent to each act. A further amendment should clarify that the factors in section 273.1(2) (excluding the revocation provision which could be repealed) go to the definition of voluntary agreement to the sexual activity in question and are not factors that vitiate an otherwise valid consent. A person cannot voluntarily agree to the sexual activity in question where that agreement is induced by an abuse of trust, power, or authority nor if she lacks the capacity to give consent. None of these suggestions are radical and most of them were thought to be the law prior to the decision in Hutchinson.213

Undoing the harm done to the concept of fraud is the most difficult task in light of Cuerrier and Hutchinson. Strengthening the definition of consent, as suggested above, would reduce the scope of fraud because more work could be done at the stage of consent. A robust definition of consent both in terms of the content of voluntariness and the content of “the sexual activity in question” reduces the importance of factors that vitiate that consent. The condom cases, for example, could be dealt with exclusively under the definition of consent. Someone like Hutchinson, or someone who surreptitiously removes a condom, would be convicted because the complainant did not consent to the sexual activity in question, not through the doctrine of fraud. Troublesome distinctions about whether the victim was capable of becoming pregnant would be unnecessary.

The precise scope of fraud has been the subject of considerable scholarly debate and is a complex subject that warrants its own article.214 My own view is that we need to work out a test for fraud that fully acknowledges the nature of the deception and its role in inducing consent. Fraud should include someone who develops an elaborate ruse for the sole purpose of tricking women into thinking they are auditioning for a film215 or who tricks a woman into agreeing to sex through a false promise of payment.216 It is the centrality of these deceptions to the consent decision that warrants bringing them within the scope of fraud.217

213 See S (DG), supra note 158.

214 See Dougherty, “Sex,” supra note 214 at 718–19. Dougherty, a philosopher, describes the deception as being about the sex itself and as being a “dealbreaker.”
While it is important to develop a test that does not criminalize trivial deceptions, this danger should not be overstated. Justice McLachlin, as she was then, in *Cuerrier* cautioned against a broad definition of fraud that might include a woman wearing “alluring make-up” or a man’s “false moustache.”218 These examples are insulting to those who are concerned about sexual violence and are part of an exaggeration tactic sometimes used to create unnecessary concern about the potential for overcriminalization through sexual assault.219 Yet the approach to fraud taken by Justice L’Heureux-Dubé in *Cuerrier* may need further limits. For example, under the L’Heureux-Dubé test, a woman who lies about being on the pill or having an intrauterine device could be convicted of sexual assault through fraud, if the Crown could prove beyond a reasonable doubt that the complainant would not otherwise have consented.

We could consider a requirement that the deception be explicit before it can be vitiated,220 a position rejected by the courts in the HIV context where lies about STIs have been equated with saying nothing.221 The causal connection requirement is also likely to be more meaningful outside of the context of disease transmission. In other words, the Crown burden to prove beyond a reasonable doubt that the complainant would not have consented otherwise, and that the accused knew that, will be more difficult when the potentially serious consequence of acquiring HIV is off the table. While some limits may be necessary, the test from Justice L’Heureux-Dubé is at least a starting point for thinking about an approach to fraud that recognizes more than the physical harm from deceptive sex.

In 1998, *Cuerrier* inexorably linked the development of HIV nondisclosure prosecutions with the crime of sexual assault. The result has been the overcriminalization of people with HIV and the distortion of the law of sexual assault in ways that limit sexual autonomy for complainants. In order to right the ship, it is time to sever the link between these two distinct social problems.

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218 *Cuerrier*, *supra* note 1 at para 52.
219 Perhaps the most notable example of this fear tactic is in the dissenting judgment in *R v JA*, 2011 SCC 28 at para 74, where the concern was raised that prohibiting advanced consent to sexual activity would result in criminalizing someone who gives their sleeping partner a kiss. Needless to say, we have not seen cases where sexual assault has been charged as a result of a kiss to a sleeping spouse.
220 See Joseph J Fischel, *Screw Consent: A Better Politics of Sexual Justice* (Oakland: University of California Press, 2019) at 111–12. In Chapter 3 “The Trouble with Transgender ‘Rapists,’” Fischel argues that there is a distinction between conditions that are made explicit and those that are not.
221 See *Cuerrier*, *supra* note 1 at para 126.