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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.

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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*].

² Of all reported sexual assaults in Canada, 87 percent of victims are female. See Statistics Canada, *Police-Reported Sexual Assaults in Canada, 2009 to 2014: A Statistical Profile*, by Cristine Rotenberg, Catalogue No 85-002-X (Ottawa: Statistics Canada, 3 October 2017) at 3, online: <www150.statcan.gc.ca/n1/en/pub/85-002-x/2017001/article/54866-eng.pdf?st=kE1XsIEm>.

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.⁴ This was not the case in 1989 when prosecutions of HIV nondisclosure began. Acquiring HIV at that time almost inevitably led to death.⁵ 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.⁶

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.⁷ 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.⁸ 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.⁹ The United States Centers for Disease Control has established

⁴ See Steven G Deeks, Sharon R Lewin & Diane V Havlir, "The End of AIDS: HIV Infection as a Chronic Disease" (2013) 382:9903 *Lancet* 1525.

⁵ See Paroma Basu, "Forgotten Lessons" (2010) 466:7304 *Nature* S14.

⁶ See e.g. William H Masters, Virginia E Johnson & Robert C Kolodny, *Crisis: Heterosexual Behaviour in the Age of AIDS* (New York: Grove Press, 1988).

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.

⁹ See Françoise Barré-Sinoussi et al, "Expert Consensus Statement on the Science of HIV in the Context of Criminal Law" (2018) 21:7 *J Intl AIDS Society* 1 at 3–4. See also Mona Loutfy et al, "Canadian Consensus Statement on HIV and its Transmission in the Context of Criminal Law" (2014) 25:3 *Can J Infectious Diseases & Medical Microbiology* 135.

the risk of transmission for someone with an undetectable viral load as “effectively no risk,”¹⁰ 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.¹¹ In December 2018, the federal government did issue a directive to limit HIV nondisclosure prosecutions,¹² 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.¹³ 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.¹⁴ In addition, at least one feminist group has now officially urged that these prosecutions be taken out of Canada’s sexual assault law,¹⁵ a position that HIV advocates have urged for years.¹⁶ 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.¹⁷ 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.¹⁸ In a prominent Ontario case, *Ssenyonga*, the judge declined to extend fraud vitiating consent to include HIV nondisclosure.¹⁹ In response to the Crown’s argument that consent should be vitiated on public policy grounds, Justice McDermid expressed concern that this argument

¹⁰ “Evidence of HIV Treatment and Viral Suppression in Preventing the Sexual Transmission of HIV” (December 2018), online: *Centers for Disease Control and Prevention* <cdc.gov/hiv/pdf/risk/art/cdc-hiv-art-viral-suppression.pdf>.

¹¹ RSC 1985, c C-46.

¹² See Public Prosecution Service of Canada, *Public Prosecution Service of Canada Deskbook* (Ottawa: Attorney General of Canada, 2018), part V, s 5.12 [“Prosecutions Involving Non-Disclosure of HIV Status”]. See also Davinder Singh & Karen Busby, “Criminalizing HIV Non-Disclosure: Using Public Health to Inform Criminal Law” (2019) 42:3 *Man LJ* 89.

¹³ See e.g. *R v Kaotalok*, 2013 NWTSC 36 [*Kaotalok*]; *R v Ngeruka*, 2015 YKTC 10 [*Ngeruka*].

¹⁴ “Prosecutions Involving Non-Disclosure of HIV Status,” *supra* note 12 at 2–3.

¹⁵ See Women’s Legal Education and Action Fund, “A Feminist Approach to Law Reform on HIV Non-Disclosure,” online: <www.leaf.ca/wp-content/uploads/2019/01/2019-01-08-LEAF-HIV-ND-Position-Paper-FINAL.pdf>.

¹⁶ See “The Criminalization of HIV Non-Disclosure in Canada: Current Status and the Need for Change” at 8, online (pdf): *Canadian HIV/AIDS Legal Network* <aidslaw.ca/site/the-criminalization-of-hiv-non-disclosure-in-canada-report/?lang=en>.

¹⁷ See Colin Hastings, Cécile Kazatchkine & Eric Mykhalovskiy, “HIV Criminalization in Canada: Key Trends and Patterns,” online (pdf): *Canadian HIV/AIDS Legal Network* <aidslaw.ca/site/hiv-criminalization-in-canada-key-trends-and-patterns/?lang=en>. See also Eric Mykhalovskiy & Glenn Betteridge, “Who? What? Where? When? And with What Consequences? An Analysis of Criminal Cases of HIV Non-Disclosure in Canada” (2012) 27:1 *CJLS* 31.

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”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.”²¹

There were a number of guilty pleas to criminal negligence causing bodily harm in the early HIV nondisclosure cases,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.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.²⁴

After almost a decade of uncertainty, in 1998 the Supreme Court of Canada in *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.²⁵ Prior to *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)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).²⁷ It had long been established that lying about an STI did not come within this understanding of fraud.²⁸ In 1983, Parliament enacted major reforms to sexual assault law, inspired by feminist activists, making a number of important changes to the law such as replacing the crime of rape with three levels of

²⁰ *Ibid* at 266.

²¹ *Ibid* at 265–66.

²² See e.g. *R v Wentzell*, [1989] NSJ No 510 (QL) (Co Ct) [*Wentzell*]; *R v Mercer* (1993), 110 Nfld & PEIR 41 (CA) [*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”: *Mercer*, *ibid* at para 85.

²³ See *Criminal Code*, *supra* note 11, ss 220–21.

²⁴ See e.g. “AIDS Man Held,” *The Province* (11 April 1989) 8. See also “AIDS Man Loses Jail Appeal” *The Province* (14 September 1989) 33; “AIDS Man Sought Many Sex Partners Bail Hearing Told,” *The Toronto Star* (11 April 1989) F7; “AIDS Man’ is Denied Bail,” *The Windsor Star* (13 April 1989) 11; Dave Haynes, “AIDS Story Sparks Panic, Concern, Hatred,” *Calgary Herald* (13 April 1989) B1; “Pregnant Woman Has AIDS, Bisexual Man Jailed 3 Years,” *The Windsor Star* (9 December 1989) A1; “Bisexual Admits Spreading AIDS,” *The Windsor Star* (9 September 1989) A19; “‘Damn You!’ Woman Cries ‘Trusting’ Man Accused of Infecting 3,” *The Hamilton Spectator* (7 April 1993) A3.

²⁵ *Supra* note 1. The charge in *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 *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.

²⁶ See *R v GC*, 2010 ONCA 451.

²⁷ The pre-1983 *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”: *Criminal Code*, RSC 1970, c C-34, s 143(b) (ii)–(iii). See also *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 themselves 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: *Mabior* and the Concept of Sexual Fraud” (2013) 63:3 UTLJ 466 at 467.

²⁸ See *The Queen v Clarence* (1888), 22 QBD 23.

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).

³² *Ibid*, s 246.6. See also Margaret A Somerville & Gerald L Gall, "Sexual Assault" in *The Canadian Encyclopedia* (Toronto: Historica Canada, 2020), online: <www.thecanadianencyclopedia.ca/en/article/sexual-assault>.

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.

³⁵ *Ibid* at para 126.

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

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.⁴³

After the justices in *Cuerrier* hinted that condom use *might* reduce the risk below the level of significance,⁴⁴ some courts held that protected sex could not rise to the threshold of a significant risk,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.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 2010.⁴⁷ 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.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.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 10,000.⁵⁰ 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

⁴³ In cases where the complainant tests positive for HIV and it cannot be proven that the accused was the one who transmitted HIV, or in cases where it cannot be proven that the complainant acquired the virus from the accused after the accused discovered their HIV-positive status, the appropriate verdict is attempted aggravated sexual assault, a less serious crime than where the virus is not transmitted. See *R v Williams*, 2003 SCC 41 [*Williams*]. See also *R v Thomas*, 2011 ONSC 7136 [*Thomas*]. However, see *R v Schenkels*, 2017 MBCA 62 [*Schenkels*], where the Crown had not proven that it was the accused who transmitted the virus to the complainant, but the Court nonetheless upheld the verdict of aggravated sexual assault because any suggestion that the complainant acquired the virus elsewhere was purely speculative.

⁴⁴ See *Cuerrier*, *supra* note 1. Justice Cory is explicit in addressing condom use, stating at para 129: “[t]o have intercourse with a person who is HIV-positive will always present risks. Absolutely safe sex may be impossible. Yet the careful use of condoms might be found to so reduce the risk of harm that it could no longer be considered significant so that there might not be either deprivation or risk of deprivation.” Justice McLachlin, in her judgment at paras 73–74, stated that protected sex would not be caught by her test.

⁴⁵ See e.g. *R v Agnatuk-Mercier*, [2001] OJ No 4729 (QL) (Sup Ct) [*Agnatuk-Mercier*]; *R v Nduwayo*, 2012 BCCA 281 [*Nduwayo*].

⁴⁶ See *R v Mabior*, 2008 MBQB 201 [*Mabior* MBQB]; *R v NG*, 2020 ONCA 494 [*NG* ONCA]; *R v NG*, 2017 ONSC 6739 [*NG* 2017]. In *R v Mekonnen*, 2009 ONCJ 643, for example, the accused was convicted of aggravated sexual assault for having sex four times with the complainant. While he denied the sexual activity, she reported it as involving the use of a condom on each occasion but could not remember if a condom was used during one episode of fellatio. The trial judge convicted the accused nonetheless. Years later, however, after the decision in *Mabior*, the convictions were overturned because defence counsel had wrongly conceded that nondisclosure alone could substantiate aggravated sexual assault: see *R v Mekonnen*, 2013 ONCA 414 at para 48 [*Mekonnen*].

⁴⁷ See *R v JAT*, 2010 BCSC 766 at para 29 [*JAT*]. After the preliminary hearing, the accused had (unsuccessfully) sought to quash the committal to stand trial on the basis that the Crown had failed to present evidence of a significant risk of serious bodily harm to substantiate the aggravated sexual assault charge. In dismissing the appeal from the trial judge’s refusal to quash the charges, the Court of Appeal clarified that *Cuerrier* had not set any guidelines for determining what risk was significant. See *R v JT*, 2008 BCCA 463 [*JT*]. See also *Mabior* MBCA, *supra* note 41 at para 67.

⁴⁸ See *JAT*, *ibid* at para 53.

⁴⁹ This risk was based on a number of factors including the accused’s viral load, the fact that the complainant was uncircumcised, and the fact that the accused was the receptive partner in their sexual interactions and not the insertive partner, which would have increased the risk (*ibid* at para 29).

⁵⁰ *Ibid* at para 56. This additive approach actually overstates the risk to the complainant; one cannot simply add the risk from each sexual encounter together to get the combined risk of three independent acts of unprotected sex.

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.”⁵¹ Thus, the accused was acquitted. This is in contrast with *R. c. D.C.*,⁵² 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*.⁵³ 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.”⁵⁴ 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.⁵⁵ 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.*⁵⁶ 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.⁵⁷ 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.⁵⁸ 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.⁵⁹ 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

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. 2012 SCC 48 [*DC*].

⁵⁶ *Mabior* MBQB, *supra* note 46 at para 10.

⁵⁷ See Isabel Grant & Jonathan Glenn Betteridge, “A Tale of Two Cases: Urging Caution in the Prosecution of HIV Non-Disclosure” (2011) 15:3 HIV/AIDS Policy & L Rev 15.

⁵⁸ See “Sex Offender Set for Deportation from Winnipeg,” *CBC News* (3 February 2012), online: <www.cbc.ca/news/canada/manitoba/sex-offender-set-for-deportation-from-winnipeg-1.1160826>.

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 *Mabior*⁶² 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) 365:6 *New Eng J Med* 493.

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.

⁶⁸ See Isabel Grant, “The Over-Criminalization of Persons with HIV” (2013) 63:3 UTLJ 475 at 475.

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 *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.⁷⁸ 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.”⁷⁹

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.⁸⁰

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.⁸¹ 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.”⁸² 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.”⁸³ 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.

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.⁸⁴ 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.⁸⁵ 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,"⁸⁶ 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.⁸⁷

According to this interpretation, the Crown can prove a realistic possibility of transmission simply by proving unprotected intercourse.⁸⁸

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*,⁸⁹ the female accused had an

⁸⁴ See Barré-Sinoussi et al, *supra* note 9.

⁸⁵ 2013 ONCA 415 [*Felix*].

⁸⁶ *Ibid* at para 48.

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.⁹⁰ 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.”⁹¹ 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 100,000.⁹² 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.⁹³

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.”⁹⁴ 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.”⁹⁵ The virus had not been detectable in his system since he was five years old,⁹⁶ 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.⁹⁷ 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.”⁹⁸ J.T.C.’s first trial⁹⁹ 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.¹⁰⁰ The accused was acquitted on the basis that

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.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.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.¹⁰³ She also called out the Supreme Court for purporting to show restraint while, in fact, expanding criminalization.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.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.¹⁰⁶ The same expert testified that there was *no possibility* of this accused transmitting HIV to the complainant.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.”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.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.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.”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.”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.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.¹¹⁴ Relying on expert testimony from, among others, the same physician whose evidence formed the basis of the decision in *Mabior*,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.¹¹⁶ She went on to hold that, had the accused used a condom¹¹⁷ or if he did not ejaculate, there would be no realistic possibility of transmission.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.’”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.¹²⁰ 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.¹²¹ 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.¹²² *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 load¹²³ and where the accused used a condom.¹²⁴ 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.¹²⁵

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.¹²⁶ The judge, in acquitting the accused, held that the accused's viral load was undetectable and the risk of

¹²⁰ *Ibid* at para 31.

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 his 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 *NG ONCA*, *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 NSCA*, *supra* note 119, the accused was acquitted.

¹²⁵ *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.

¹²⁶ 2017 ONCJ 545 [*CB*].

transmission “was as close to zero as can be measured.”¹²⁷ 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*.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.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.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.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.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.¹³³ This rate

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.

¹²⁸ *NG ONCA*, *supra* note 46 at paras 78–81.

¹²⁹ See *NG 2017*, *supra* note 46 at para 88.

¹³⁰ See *NG ONCA*, *supra* note 46.

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.

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).

¹³³ The cases reviewed include: *Cuerrier*, *supra* note 1; *Mabior SCC*, *supra* note 3; *Summer*, *supra* note 8; *Ngeruka*, *supra* note 13; *Kaotalok*, *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; *Nduwayo*, *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 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.

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 LJM*, 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 Tippeneskum*, 2011 ONCJ 219 [Tippeneskum]; *R v Mzite*, 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 QCCQ 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 QCCQ 4348; *R v McNamara*, 2017 ABQB 676; *R v NG*, 2018 ONSC 6654 [NG 2018].

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Supra note 33.

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,

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

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).¹⁴¹

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.¹⁴² 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.¹⁴³

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.¹⁴⁴ Presumably, no amount of deception will constitute fraud where the sexual

¹⁴¹ *Ibid* at para 70.

¹⁴² [1999] 1 SCR 330 [*Ewanchuk*].

¹⁴³ *Hutchinson*, *supra* note 33 at para 88 [emphasis in original].

¹⁴⁴ See *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").¹⁴⁵ 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.¹⁴⁶

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 ONCJ 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*.

¹⁴⁵ *Hutchinson*, *supra* note 33 at para 40.

¹⁴⁶ 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

¹⁴⁷ See e.g. Alexandra Brodsky, “‘Rape-Adjacent’: Imagining Legal Responses to Nonconsensual Condom Removal” (2017) 32:2 Columbia J Gender & L 183; Lise Gotell, “Thinly Construing the Nature of the Act Legally Consented To: The Corrosive Impact of *R v Hutchinson* on the Law of Consent” (2020) 53:1 UBC L Rev 53.

¹⁴⁸ See Brodsky, *ibid* at 185.

¹⁴⁹ See Gotell, *supra* note 147.

¹⁵⁰ *Supra* note 142.

¹⁵¹ *Hutchinson*, *supra* note 33 at para 1, citing *Ewanchuk*, *ibid* at para 28.

¹⁵² *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;

¹⁵³ *Criminal Code*, *supra* note 11, s 273.1(2).

(c) fraud; or

(d) the exercise of authority.¹⁵⁴

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

¹⁵⁴ *Ibid*, s 265(3).

¹⁵⁵ *Hutchinson*, *supra* note 33 at para 4.

¹⁵⁶ *House of Commons Debates*, 34-3, Vol 9 (15 June 1992) at 12027 (Hon Kim Campbell).

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.¹⁶⁰ 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.¹⁶¹ 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.¹⁶² 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.¹⁶³ 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 "[c]learly, a drunk can consent."¹⁶⁴ The acquittal in *Al-Rawi* was overturned by the Nova Scotia Court of Appeal.¹⁶⁵ 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.¹⁶⁶ 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.*

¹⁶⁰ See *R v Snelgrove*, 2018 NLCA 59, aff'd 2019 SCC 16, where one of the majority justices in the Court of Appeal uses the language of vitiation of consent to describe the impact of section 273.1(2)(c), whereas the other concurring minority, per Hoegg JA at para 52, was explicit that "it is not a question of vitiating or nullifying consent, because there was no consent at law in the first place." The very brief reasons of the Supreme Court of Canada did not elaborate on this issue. See also *R v Alsadi*, 2012 BCCA 183.

¹⁶¹ See Isabel Grant & Janine Benedet, "Capacity to Consent and Intoxicated Complainants in Sexual Assault Prosecutions" (2017) 37 CR (7th) 375; Janine Benedet, "The Sexual Assault of Intoxicated Women" (2010) 22:2 CJWL 435. See also Elaine Craig, "Judging Sexual Assault Trials: Systemic Failure in the Case of *Regina v Bassam Al-Rawi*" (2017) 95:1 Can Bar Rev 179.

¹⁶² 2018 NSCA 10 [*Al-Rawi*].

¹⁶³ See Grant & Benedet, *supra* note 161.

¹⁶⁴ *Al-Rawi*, *supra* note 162 at para 109 (citing the trial judge) [emphasis omitted].

¹⁶⁵ *Ibid* at para 123.

¹⁶⁶ *Al-Rawi*, *supra* note 162 (Factum of the Intervenor – Women's Legal Education and Action Fund Inc and Avalon Sexual Assault Centre Society, online: <www.leaf.ca/wp-content/uploads/2017/11/LEAF-Al-Rawi-20171002-factum-of-the-intervenor.pdf>). In *R v Barton*, 2019 SCC 33 at para 118 [*Barton*], the Supreme Court of Canada made clear that affirmative consent applies to communicated consent.

v. Mabior and *R. v. Hutchinson* that knowledge of the risks and consequences of the act are necessary components of a valid consent.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.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.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.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

¹⁶⁷ *Al-Rawi*, *supra* note 162 at para 38.

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.

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>.

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*.¹⁷¹ 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.¹⁷⁴ 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

¹⁷¹ *Supra* note 166.

¹⁷² *Ibid* (Factum of Intervener – Criminal Lawyers' Association of Ontario at para 13, online: <www.sec-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 vitiated 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

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 Black¹⁸⁹ 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 partners¹⁹² or through sexual violence.¹⁹³ The threat of criminalization hangs over the lives of people with HIV who are already dealing with

¹⁸⁵ *Kirkpatrick*, *supra* note 144 at para 3.

¹⁸⁶ *Ibid* at para 28.

¹⁸⁷ *Mabior* SCC, *supra* note 3 at para 69.

¹⁸⁸ See Eric Mykhalovskiy, Glenn Betteridge & David Mclay, “HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario,” at 12, online: <www.catie.ca/pdf/Brochures/HIV-nondisclosure-criminal-law.pdf>.

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/hiv_aids.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.¹⁹⁴ We know that disclosure can trigger violence, particularly against women with HIV.¹⁹⁵ 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.¹⁹⁶ We have already seen a woman prosecuted in Canada because her violent ex-partner wanted retribution for her reporting his violence to police.¹⁹⁷ Women with HIV may also fear the risk of being charged for not disclosing to men who are sexually assaulting them.¹⁹⁸

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.¹⁹⁹ According to a 2015 study, Canada then ranked second only to the United States.²⁰⁰ 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 intercourse²⁰¹ and where the risk of transmission is virtually none,²⁰² 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,²⁰³ there is no other disease in Canada that has been exceptionalized through criminal prosecution in this way.²⁰⁴

¹⁹⁴ See Saara Greene et al, “How Women Living with HIV React and Respond to Learning About Canadian Law That Criminalises HIV Non-Disclosure: ‘How Do You Prove That You Told?’” (2019) 21:10 *Culture, Health & Sexuality* 1087.

¹⁹⁵ See Kevin Ritchie, “Laws Criminalizing HIV are Putting Vulnerable Women at Greater Risk,” *Now Toronto* (11 January 2017), online: <nowtoronto.com/news/laws-criminalizing-hiv-are-putting-vulnerable-women-at-great>; Alison Symington, “HIV Exposure as Assault: Progressive Development or Misplaced Focus?” in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 635 at 635.

¹⁹⁶ See Symington, *ibid.*; “Women and the Criminalization of HIV Non-Disclosure,” online: *HIV Legal Network*, online: <aidslaw.ca/site/wp-content/uploads/2013/04/Women_crim-ENG.pdf>.

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>.

²⁰⁰ See Sophie E Patterson et al, “The Impact of Criminalization of HIV Non-Disclosure on the Healthcare Engagement of Women Living with HIV in Canada: A Comprehensive Review of the Evidence” (2015) 18:1 *J Intl AIDS Society* 1 at 2.

²⁰¹ See e.g. *NG* 2018, *supra* note 133.

²⁰² See e.g. *JTC* (Derrick), *supra* note 95; *DC*, *supra* note 56.

²⁰³ See William C Miller et al, “The Role of Acute and Early HIV Infection in the Sexual Transmission of HIV” (2010) 5:4 *Current Opinion in HIV & AIDS* 277; Bluma G Brenner et al, “High Rates of Forward Transmission Events After Acute/Early HIV-1 Infection” (2007) 195:7 *J Infectious Diseases* 951; Gary Marks, Nicole Crepez & Robert S Janssen, “Estimating Sexual Transmission of HIV from Persons Aware and Unaware That They are Infected with the Virus in the USA” (2006) 20:10 *AIDS* 1447.

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 J.T.*, 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.²⁰⁵ Conviction rates outside of the HIV context are low compared to other violent crimes.²⁰⁶ Already marginalized populations tend to be targeted for sexual assault such as, for example, Indigenous women and girls²⁰⁷ and those with disabilities.²⁰⁸

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.²⁰⁹ 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,”²¹⁰ is only criminalized where it leads to bodily harm or death.²¹¹ In most nondisclosure cases, the accused is not setting out to injure their partner, but

²⁰⁵ See Statistics Canada, *Self-Reported Sexual Assault in Canada, 2014*, by Shana Conroy & Adam Cotter, Catalogue No 85-002-X (Ottawa: Statistics Canada, 11 July 2017); Holly Johnson, “Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault” in Sheehy, *supra* note 195, 613.

²⁰⁶ See “The Criminal Justice System: Statistics,” online: <rainn.org/statistics/criminal-justice-system>.

²⁰⁷ See “Too Many Victims: Sexualized Violence in the Lives of Children and Youth in Care: An Aggregate Review,” online: <cwrp.ca/sites/default/files/publications/en/tr_for_c_and_y_toomanyvictims_2016.pdf>; Margo E Pearce et al, “The Cedar Project: Historical Trauma and Vulnerability to Sexual Assault among Young Aboriginal Women Who Use Illicit Drugs in Two Canadian Cities” (2015) 21:3 *Violence Against Women* 313.

²⁰⁸ See Janine Benedet & Isabel Grant, “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief” (2007) 52:2 *McGill LJ* 243.

²⁰⁹ Prosecutorial guidelines in Ontario and British Columbia reflect the emerging science on viral load but do not show much progress on the condom issue. The Ontario guidelines state that there is no realistic possibility of transmission if (1) a condom is used and there is a low viral load [essentially the *Mabior* test], or (2) the individual has maintained a suppressed viral load for six months and is on antiretroviral therapy. See Ontario, Ministry of the Attorney General, D33 “Sexually Transmitted Infections and HIV Exposure Cases” in *Crown Prosecution Manual* (1 December 2017). The British Columbia guidelines are similar but require that the condom be *correctly* used and, for the second branch, require a suppressed viral load when measured every four to six months. The British Columbia guidelines do go on to say that the public interest *may weigh against prosecution* where “the person living with HIV correctly used a condom during a single act of vaginal or anal sex and HIV was not transmitted”: British Columbia Prosecution Service, “Sexual Transmission, or Realistic Possibility of Transmission, of HIV” in *Crown Counsel Policy Manual* (16 April 2019) at 4, online: <gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/sex-2.pdf>.

²¹⁰ *Criminal Code*, *supra* note 11, s 219.

²¹¹ *Ibid.*, ss 220–21.

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.²¹²

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

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*, 2012 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 For a small sample see Kyle McCleery, “‘Alluring Make-up or a False Moustache’: *Cuerrier* and Sexual Fraud Outside of HIV Non-Disclosure” (2019) 42:3 *Man LJ* 189; Ben A McJunkin, “Deconstructing Rape by Fraud” (2014) 28:1 *Colum J Gender & L* 1; Deborah Tuerkheimer, “Sex Without Consent” (2013) 123 *Yale LJ Forum* 335, online: <www.yalelawjournal.org/forum/sex-without-consent>; Amanda Clough, “Conditional Consent and Purposeful Deception” (2018) 82:2 *J Crim L* 178; Tom Dougherty, “No Way Around Consent: A Reply to Rubenfeld on Rape-by-Deception” (2013) 123 *Yale LJ Forum* 321, online: <www.yalelawjournal.org/forum/no-way-around-consent-a-reply-to-rubenfeld-on-rape-by-deception>; Patricia J Falk, “Rape by Fraud and Rape by Coercion” (1998) 64:1 *Brook L Rev* 39; Jonathan Herring, “Mistaken Sex” (2005) *Crim L Rev* 511; Carissima Mathen & Michael Plaxton, “HIV, Consent and Criminal Wrongs” (2011) 57:4 *Law Q Rev* 464; Michael Mullen, “Rape by Fraud: Eluding Washington Rape Statutes” (2018) 41:3 *Seattle UL Rev* 1035; Jed Rubenfeld, “The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy” (2013) 122:6 *Yale LJ* 1372; Tom Dougherty, “Sex, Lies, and Consent” (2013) 123:4 *Ethics* 717 [Dougherty, “Sex”]; Leah A Plunkett, “Contraceptive Sabotage” (2014) 28:1 *Colum J Gender & L* 97.

²¹⁵ See *Dadmand*, *supra* note 144.

²¹⁶ In *R v Petrozzi* (1987), 13 BCLR (2d) 273 (CA), a pre-*Cuerrier* decision, the Court of Appeal of British Columbia held that failure to pay did not constitute fraud. The fact that this case even got to a fraud analysis is deeply problematic given that the accused “violently assaulted [the complainant], choking her and forcing her out of the car. He made her remove all her clothing and forced her to have sexual intercourse with him. Following this, he made her perform an act of oral sex”: *ibid* at para 2. In *R v Gartner*, 2003 SKPC 178, at para 30, Justice Turpel-Lafond rejected the argument that *Cuerrier* required her to hold that failure to pay as promised is not sexual assault because “the Court would then have to endorse the view that women working in the sex trade are not harmed when they do not consent because they are engaged in sex for money anyway and hence sexually available on different terms than other women.” See also *R v Linekar*, [1994] EWCA Crim 2.

²¹⁷ 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.

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.

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