Court File No. C66296

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

\- and -

N.G.

Appellant

FACTUM OF THE INTERVENERS
HIV LEGAL NETWORK, HIV & AIDS LEGAL CLINIC ONTARIO AND COALITION DES ORGANISMES COMMUNAUTAIRES QUEBECOIS DE LUTTE CONTRE LE SIDA

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PART I – OVERVIEW

1. Can and should a person who uses a condom be convicted of sexual assault for not disclosing their HIV-positive status to a sexual partner, absent a finding of incorrect condom use? The Interveners submit this would be an overly broad application of the criminal law that is unwarranted in light of scientific knowledge, contrary to law, and undesirable as a matter of public policy. The Interveners address in further detail below the following submissions:

A) **As a matter of law, condom use *per se* can negate a "realistic possibility of transmission of HIV,"** the legal threshold requiring HIV disclosure stipulated by the Supreme Court of Canada in *R v. Mabior*.[1] The law does not always require both condom use *and* a low viral load to negate a realistic possibility of transmission. The possibility of HIV transmission associated with vaginal sex with a condom "varies from none to negligible depending on the context."[2] "Correct use of a condom during sex means HIV transmission is not possible," as HIV cannot pass through intact latex or polyurethane.[3] (Correct use of a condom means "the integrity of the condom is not compromised and the condom is worn throughout the sex act in question."[4]) Based on the evidence before it in a given case, it is open to a court to find that condom use alone negates such a possibility.

B) **It is fundamentally unfair to criminalize HIV non-disclosure by someone living with HIV who uses a condom for sexual intercourse, particularly absent a finding of incorrect use.** First, an approach that categorically rejects that a condom can suffice to

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[1] *R. v. Mabior*, 2012 S CC 47 at paras. 84 and 104 (Interveners' Book of Authorities ["IntBOA"] Tab 1). Whether the facts meet the legal test for imposing a duty to disclose is a question of law: *Mabior* at para. 82.
[2] F. Barré-Sinoussi et al., "Expert consensus statement on the science of HIV in the context of criminal law," *Journal of the International AIDS Society* 2018; 21(7): e25161, p. 6. (Fresh Evidence Record, Vol. 1, Tab 1D)
[3] Ibid., p. 3.
[4] Ibid., p. 3.

preclude a realistic possibility of transmission would mean that a person could be convicted not because their own conduct actually poses a proven significant risk of serious bodily harm, but based on a *presumption* of a *possibility* of harm, even where the facts and evidence in a given case do not support such a presumption. By their very nature, estimates at the population level of condoms' effectiveness do not necessarily accurately reflect the actual risk of transmission in a given case. They are also recognized as *under*-estimates of effectiveness, thereby overstating the possibility of HIV transmission in cases of condom-protected sex. Convicting an individual accused on the basis of such a presumed (and overstated) possibility of harm offends basic principles of fairness. Second, the unfairness of such a conviction — particularly absent a finding of incorrect condom use — is compounded by the severe consequences of a conviction for aggravated sexual assault: years in prison, mandatory lifetime designation as a sex offender and, in some cases, deportation. These are grossly disproportionate penalties for a sexual encounter that is consensual (but for the non-disclosure), and in which a person has taken a highly effective precaution that means either zero risk of HIV transmission, or negligible risk at most – which responsible safe sex practice itself indicates the absence of moral blameworthiness warranting criminal sanction.

C) **Criminalizing people who use condoms is bad public policy in various respects.** It is not in the public interest to prosecute people for HIV non-disclosure in cases where the evidence establishes there is no or negligible possibility of harm and an absence of moral blameworthiness. Such over-extension of the criminal law is itself an extreme form of HIV-related stigma and discrimination. It also contributes to broader societal misinformation about HIV and the consequent stigma, which further undermine public health. Finally, it compounds disadvantage faced by particular communities and people affected by HIV.

PART II – STATEMENT OF FACTS

2. The Interveners adopt the facts as set out in the Appellant's Factum.

PART III – ISSUES AND LAW

A. Condom use per se can be found to negate a "realistic possibility of transmission"

3. In *Mabior*, the Supreme Court affirmed the rule in *R v. Cuerrier* that non-disclosure of a sexually transmitted infection (STI) amounts to fraud vitiating consent to sex only where there is a "significant risk of serious bodily harm."[5] Mindful of "the need to confine the criminal law to conduct associated with serious wrongs and serious harms,"[6] the Court declared that:

> … "significant risk of serious bodily harm" cannot mean any risk, however small. That would come down to adopting the absolute disclosure approach, with its numerous shortcomings, and would effectively read the word "significant" out of the *Cuerrier* test.[7]

As the Court observed, such an approach "casts the net of criminal culpability too widely" and is "unfair and stigmatizing to people with HIV, an already vulnerable group."[8]

4. The Court "clarified" in *Mabior* that, in the context of HIV, a significant risk of serious bodily harm exists when there is a "realistic possibility of transmission of HIV."[9] Based on the evidence before it at the time, the Court concluded:

> This leaves the question of when there is a realistic possibility of transmission of HIV. The evidence adduced here satisfies me that, as a general matter, a realistic possibility of transmission of HIV is negated if (i) the accused's viral load at the time of sexual relations was low, and (ii) condom protection was used.[10]

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[5] *Mabior*, at paras. 57, 58 and 60, citing *R. v. Cuerrier*, [1998] 2 S.C.R. 371 at para. 128 (**IntBOA Tab 2**).
[6] Ibid. at para 89.
[7] Ibid. at para 85 [emphasis added].
[8] Ibid, at para. 67.
[9] Ibid. at paras.4, 84, 91-93, 104, 108.
[10] Ibid. at paras 94 [emphasis added].

5. Nowhere did the Court say that the combination of condom use *and* a low viral load is the only way in which a realistic possibility of HIV transmission may be negated, such that both are always required to preclude criminal liability in cases of HIV non-disclosure. A careful reading of *Mabior* and other jurisprudence confirms that the law can, and must, account for the scientific evidence available in a particular case and evolve in accordance with new understandings of the science and the factors relevant to the possibility of transmission. As specifically stated in *Mabior*:

> The conclusion that low viral count coupled with condom use precludes a realistic possibility of transmission of HIV, and hence does not constitute a "significant risk of serious bodily harm" on the Cuerrier test, flows from the evidence in this case. This general proposition does not preclude the common law from adapting to future advances in treatment and to circumstances where risk factors other than those considered in this case are at play.[11]

6. At every turn where the Court articulated this "general proposition" that the combination of condom use and low viral load negated a realistic possibility of transmission, it accompanied the proposition with a clear qualifier that it was based on the evidence before it at that time.[12]

7. In each case, in applying the legal test in *Mabior*, a court must have regard to the evidence before it. As was correctly and clearly recognized in *R. v. J.T.C.*:

> The [Supreme] Court did not preclude trial judges considering expert evidence to establish whether the risk of transmission in any given case was a speculative possibility rather than a realistic possibility. Otherwise there would be no need for

[11] Ibid. at para. 95 [emphasis added].
[12] See *Mabior*, initially at para 4 introducing the proposition ("If the HIV-positive person has a low viral count as a result of treatment and there is condom protection, the threshold of a realistic possibility of transmission is not met, on the evidence before us."), and subsequently at paras. 94 ("the evidence adduced here"), 95 ("flows from the evidence in this case"), 101 ("on the evidence before us"), 103 ("on the evidence before us"), 104 ("on the evidence before us"), 108 ("in the case at hand"), and 109 ("on the evidence in this case"). This point about the Supreme Court's approach in *Mabior* was also noted explicitly in *R. v. J.T.C.*, 2013 NSPC 105 (at para. 82) (IntBOA Tab 3): "The court stated that as **a general matter**, a realistic possibility of transmission of HIV is negated if the accused's viral load was low **and** a condom protection was used. That conclusion was noted as 'flowing from the evidence' in that case." (emphasis in original)

> that principled test. The combination of low viral load and condom use would be the only test to be applied…[13]
>
> There must be a realistic possibility of transmission. It is negated by a low viral load and the use of a condom. The court does not state that that is the only way in which it can be negated. It 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…[14]
>
> The issue is whether a low viral load and condom use are **both** required to negate that risk [i.e., realistic possibility of HIV transmission] in every case. The Supreme Court of Canada did not in those cases [*Mabior* and *D.C.*] make factual findings that are binding on trial courts and that would in any event contradict clear, compelling and precise evidence from an expert.[15]
>
> In my view the Supreme Court of Canada did not intend in *R. v. Mabior* and *R. v. D.C.* to impose evidentiary findings on trial courts that are incompatible with the evidence actually before those courts.[16]

8. Indeed, it would be difficult to imagine how the law could ever adapt in light of evidence if the rule was that a *prima facie* case of aggravated sexual assault could only ever be negated by proof of *both* a low viral load *and* condom use, despite the evidence in a given case. Such a categorical approach has already proved untenable because, as additional courts have recognized since *J.T.C.*, ignoring the evidence actually before them could result in a conviction even in the absence of a significant risk of serious bodily harm.[17]

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[13] *R. v. J.T.C.*, 2013 NSPC 105 at para. 83. (IntBOA Tab 3)
[14] Ibid. at para 85.
[15] Ibid. at para. 89 [emphasis in original].
[16] Ibid. at para. 99. The trial judge in *J.T.C.* considered not only *Mabior* but also *R v. Felix*, 2013 ONCA 415 and *R. v. Mekonnen*, 2013 ONCA 414, noting that both were cases in which there was an absence of expert scientific evidence before the court. He concluded (at para. 97) that in all these cases, the courts were "acknowledging that there may be cases when the *prima facie* case can be negated with expert medical evidence establishing the level of risk… Neither the Supreme Court of Canada nor the Ontario Court of Appeal were suggesting that in the face of defence evidence establishing a risk of transmission that was so negligible as to approach zero, that a risk could be legally deemed to exist sufficient to meet the test of real possibility."
[17] *R v. Thompson*, 2016 NSSC 134 at paras. 95-96 (IntBOA Tab 4), citing with approval *R. v. J.T.C.*, 2013 NSPC 105. See also *R v. C.B.*, 2017 ONCJ 545 (IntBOA Tab 5) at paras. 80-86 and 91, where the court rejected the Crown position that *Mabior* established a fixed rule that both low viral load and condom use are always required to raise a reasonable doubt about the existence of a realistic possibility of transmission. There, the court found that "all this

Suppressed viral load recognized as precluding a realistic possibility of transmission

9. Since *Mabior*, further data have been released confirming that an HIV-positive person with a suppressed (or undetectable) viral load cannot transmit HIV through sex.[18] As a result, applying the legal test from *Mabior*, several people accused of non-disclosure and sex without a condom were acquitted because the evidence indicated their viral load precluded a realistic possibility of transmitting HIV,[19] including in Ontario.[20] As a matter of established scientific fact, and increasingly as a matter of recognized law, there is no basis for criminalizing HIV non-disclosure by a person with a suppressed viral load.[21]

Condom use and the negation of a realistic possibility of transmission

10. In *Mabior*, the Supreme Court of Canada declined to "take judicial notice that condom use always negates a significant risk of serious bodily harm" (i.e., a realistic possibility of HIV

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case [*Felix*] did was reiterate the findings in *Mabior* that once the Crown establishes a prima facie case, a tactical burden falls to the defence. What this case did establish is that the Crown can make out a prima facie case without calling expert evidence. For practical purposes, once the Crown has established a prima facie case, the necessity to call expert evidence will now fall on the defence in order to meet their tactical burden to raise a reasonable doubt.

[18] F. Barré-Sinoussi et al at p. 4. (Fresh Evidence Record, Vol. 1, Tab 1D). This consensus of expert opinion, of which the lead author is the Nobel Prize-winning co-discoverer of HIV, was endorsed by several dozen additional scientists from across the globe, as well as the International AIDS Society, the International Association of Providers of AIDS Care and the Joint United Nations Programme on HIV/AIDS: ibid. at p. 2. See also: M. Loutfy et al., "Canadian Consensus Statement on HIV and its transmission in the context of the criminal law," *Canadian Journal of Infectious Diseases & Medical Microbiology* 2014; 25(3): 135–140 at p. 137 (Appeal Book, Tab 17). In addition to nearly 80 scientific experts across the country, this consensus statement is also endorsed by the Association of Medical Microbiology and Infectious Disease Canada.

[19] E.g., *J.T.C.*, at paras. 55-56, 63, 99 (IntBOA Tab 3); *Thompson*, at paras. 97, 132 (IntBOA Tab 4).

[20] E.g., *R. v. C.B.*, 2017 ONCJ 545 (IntBOA Tab 5). See also *R v. Felix* (October 19, 2016), Court File No. No. 13-02532 (Newmarket, Chisvin J.) (O.C.J.), Transcript of Proceedings (Evidence of Dr. El-Helou and Crown's Submission on Acquittal), 19 October 2015 (IntBOA Tab 6).

[21] More recently, an Ontario trial court acquitted a man who had condomless sex, but did not have a fully suppressed viral load, on the basis that his "low" viral load (under 1500 copies/ml) gave rise to a reasonable doubt as to the existence of a realistic possibility of transmission: *R. v. Vatcher* (22 November 2019), Ottawa, Court File No. 0411-998-17-51-27 (O.C.J., Boxall J.) (IntBOA Tab 7). The expert evidence was that: 1500 copies/ml is considered the "threshold for transmissible"; sexual transmission from a person with a viral load that is not suppressed but is below 1500 would be an "extremely rare event"; and the risk of transmission is "negligible to none": ibid. at p. 10. Based on the evidence before it, the court concluded that it was "clearly a very low risk", perhaps even "exceedingly low" and possibly "negligible": ibid. at pp. 27-28.

transmission).[22] However, this does not mean – and cannot be correctly interpreted as meaning – that condom use alone could never negate a realistic possibility of transmission.

11. The Supreme Court itself recognized from the outset in *Cuerrier* that condoms *might* suffice to preclude criminal liability, and that this would be a live issue for proof and adjudication in a given case:

> 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. To repeat, in circumstances such as those presented in this case, there must be a significant risk of serious bodily harm before the section can be satisfied. In the absence of those criteria, the duty to disclose will not arise.[23]

12. Applying *Cuerrier*, Canadian courts on numerous occasions ruled that the Crown must prove that sex had occurred without a condom in order to reach the threshold of a "significant risk" — i.e., the law does not extend to criminalizing non-disclosure by people living with HIV who use condoms because the possibility of transmission was sufficiently low.[24] Courts in other

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[22] *Mabior*, at paras. 70-71 [emphasis added].

[23] *Cuerrier*, at para. 129 (per Cory J. for the majority) [emphasis added].

In fact, McLachlin J., as she then was, joined by Gonthier J., was prepared to go further at that time. Their proposed approach to defining the scope of fraud vitiating consent would have encompassed only "unprotected sex" (i.e., sex without a condom) accompanied by a "high risk" of infection: "Again, protected sex would not be caught […] the proposed extension of the law is relatively narrow, catching only deceit as to venereal disease where it is established, beyond a reasonable doubt, that there was a high risk of infection and that the defendant knew or ought to have known that the fraud actually induced consent to unprotected sex.": ibid. at paras 73-74. In the result, 6 of the 7 justices who deliberated in *Cuerrier* already accepted that condom use *might* (per Cory J.) or *should* (per McLachlin J.) preclude liability.

It should also be recalled that Cory J.'s statement contemplating that condom use might sufficiently reduce the risk of transmission to obviate the duty to disclose was made at a time when our understanding of HIV and the risks of transmission were highly different. Thanks to remarkable scientific developments, HIV is no longer inevitably fatal and has become a manageable chronic infection (with life expectancy of a newly-infected person approaching that of the general population): Barré-Sinoussi et al, *supra* at p. 7; Loutfy et al., *supra* at p. 138. It is now also well established that absolutely safe sex is, in fact, possible. It has been demonstrated that the risk of sexual transmission from a person living with HIV with a suppressed viral load (whether a condom is used or not) is effectively zero. There is now a similar consensus that HIV cannot be transmitted when a condom is used correctly: Barré-Sinoussi et al., *supra* at p. 3.

[24] E.g., see: *R. v. Edwards*, 2001 NSSC 80 at paras. 14-15, 17, 19 22 (Crown bore burden throughout to prove beyond a reasonable doubt that the accused's conduct had created a "significant risk," meaning in this case

Commonwealth jurisdictions have also expressly recognized that condom use *per se* can preclude criminal liability for HIV non-disclosure.[25]

13. Subsequently, as noted above, the Supreme Court of Canada declined in *Mabior* the suggestion to "take judicial notice of the fact that condom use always negates a significant risk of serious bodily harm."[26] It did so because it concluded that on the record before it:

> … the evidence does not establish that condom protection alone precludes a *realistic possibility* of transmission, the standard proposed here. According to the expert evidence, the risk might still fall above the 'negligible' threshold.[27]

The Court's conclusion rested entirely on the opinion of expert Dr. Richard Smith at trial (in 2008) testifying, as McLachlin J. summarized it, "that consistent condom use reduces the risk of HIV transmission by 80%, relying on the widely accepted Cochrane review."[28] McLachlin J. did expressly allow that "the 80% reduction in the transmission risk refers to consistent condom use: the reduction may be larger for consistent *and* correct condom use, but this has not been verified empirically."[29] The Court also observed, in declining to take judicial notice:

> Yet the record here is replete with debate about whether use of a condom alone negates significant risk of serious bodily harm, and the controversy is exacerbated by the rapidly changing state of the science and by the fact-specific nature of risk. Judicial notice is not

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"unprotected anal intercourse" with the complainant) (IntBOA Tab 8); *R v. Agnatuk-Mercier* [2001] O.J. No. 4729 (Ont. S.CJ.) (QL) at paras. 6- 7 (condoms used for the acts of vaginal sex in question; trial judged noted that "both counsel agree that in order for this court to convict him, it must be established by the Crown beyond a reasonable doubt that unprotected sex with him, took place between the parties as alleged") (IntBOA Tab 9); *R. v. Nduwayo*, 2006 BCSC 1972 at paras. 7-8 (instruction to jury that accused had a legal duty to disclose his HIV-positive status to his sexual partner in the event of unprotected sexual intercourse, but that there was no legal duty to disclose his HIV-positive status if he used condoms at all times) (IntBOA Tab 10); *R. v. Smith*, [2007] S.J. No. 166 (Sask. P.C.) (QL) at para. 59 (trial judge instructed himself that he had to be satisfied beyond a reasonable doubt that the sex was unprotected to convict the accused in relation to HIV non-disclosure) (IntBOA Tab 11).

[25] E.g., in *New Zealand Police* v. *Dalley*, [2005] 22 CRNZ 495, the court, having considered the evidence regarding risk of transmission, acquitted a man living with HIV of charges of "criminal nuisance" in relation to both condomless oral sex and vaginal sex with a condom: at paras. 46-48. (IntBOA Tab 12)

[26] *Mabior*, at para. 70.

[27] *Mabior*, at para. 99 [emphasis in original].

[28] *Mabior*, at para 98, citing: S.C. Weller and K. Davis-Beaty, "Condom effectiveness in reducing heterosexual HIV transmission," (2002) 1 *Cochrane Database Syst. Rev.* CD003255 ("the Cochrane review") (Fresh Evidence Record, Vol. III, Tab 6B).

[29] *Mabior,* at para. 98 [emphasis in original],

available here and cannot form the basis for formulating general propositions relating to the factual issue of risk, in the absence of indisputable consensus.[30]

In this passage specifically discussing condoms, the Court recognized expressly that the science is changing and that the risk is "fact-specific," which underscores the importance of courts having regard to the evidence actually before them. As already noted above, the Court also declared that the law is not precluded from adapting beyond its "general proposition" that "low viral count coupled with condom use precludes a realistic possibility of transmission," which conclusion it declared "flows from the evidence in this case."[31]

14. In contrast to the thin record before the Court in *Mabior*, more than a decade later, the courts now have the benefit of much more extensive scientific evidence to the effect that the possibility of HIV transmission through vaginal sex with condom use **varies from none to negligible <u>at the most</u>**. The record before this Court includes the expert witness evidence at trial[32] and the additional fresh evidence from experts put forward.[33] It also includes the 2014 expert consensus opinion of HIV scientific experts endorsed by nearly 80 leading Canadian HIV experts (in evidence at trial) and the 2018 consensus statement of leading HIV scientific experts and organizations internationally (part of the fresh evidence record), both of which expert

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[30] *Mabior*, at paras. 70-71.
[31] *Mabior*, at para. 95.
[32] *R. v. N.G.*, 2017 ONSC 6739 (Appeal Book, Tab 3) records the evidence at trial of Dr. Wobeser that correct use of intact condom is "100% effective at stopping the transmission of HIV" (para. 63), that risk of HIV transmission is "negligible" assuming "correct and consistent condom use" (para. 77). It should be noted that she equally characterizes as "negligible" the risk of sexual transmission when a person with HIV has an undetectable viral load (para. 71). See also: Appellant's Factum, paras. 21-22 (summarizing evidence of Dr. Wobeser at trial as to the "negligible" risk of HIV transmission in the event of correct condom use).
[33] *R. v. N.G.*, 2018 ONSC 4291 (Application to Reopen the Conviction) (Appeal Book, Tab 4) includes (at para. 18) the evidence of Dr. Smith, the same expert cited by the Supreme Court in *Mabior*, that: "an individual who always uses a condom and is careful in its use can be almost 100% sure that the HIV virus will not be transmitted"; "it is agreed amongst the medical profession, that as far as science has been able to determine, condoms are near 100% effective in preventing HIV transmission if correctly used. I say near 100% because of the negligible prospect that even when properly used, there may be an unknown problem with the condom that allows transmission of bodily fluid.') See also: Appellant's Factum, paras. 24-26 (summarizing the affidavit and *viva voce* evidence of Dr. Smith on the application to reopen the conviction) and paras. 28, 31 (summarizing his subsequent fresh evidence); Affidavit of Dr. Smith, Fresh Evidence Record, Vol. 1, Tab 1.

opinions were published in the peer-reviewed literature after *Mabior* and directly address the issue of condom use and HIV transmission:

> ***Canadian consensus statement (2014)***
>
> Condoms are a cornerstone of HIV prevention. Latex and polyurethane condoms act as an impermeable physical barrier through which HIV cannot pass. When used correctly and no breakage occurs, condoms are 100% effective at stopping the transmission of HIV... Where the present consensus statement discusses the possibility of HIV transmission in the context of condom use, it is assumed that the condom was applied to the penis and worn throughout sex, and that no condom breakage occurred.[34]
>
> Where a condom is used or where the HIV-positive individual is on effective antiretroviral therapy, vaginal-penile intercourse poses a negligible possibility of transmitting HIV.[35]
>
> ***International expert consensus statement (2018)***
>
> Correct use of a condom (either male or female) prevents HIV transmission because the porosity of condoms is protective against even the smallest sexually transmissible pathogens, including HIV; latex and polyurethane condoms act as an impermeable physical barrier through which HIV cannot pass. Correct condom use means the integrity of the condom is not compromised and the condom is worn throughout the sex act in question. Correct use of a condom during sex means HIV transmission is not possible.[36]
>
> The possibility of HIV transmission from vaginal-penile intercourse when the HIV-positive partner has a low viral load **or** uses a condom **or** the HIV-negative partner is taking PrEP varies from none to negligible depending on the context.[37]

15. Since the decision in *Mabior*, in *R. v. Thompson* a Nova Scotia court again agreed with the view previously expressed in *J.T.C.* that in *Mabior* "the Supreme Court of Canada was not instructing trial judges to ignore evidence and find a realistic possibility of transmission when such a risk was speculative or negligible."[38] In *Thompson*, a man living with HIV, who did not

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[34] M. Loutfy et al., at p. 136 [emphasis added]. (Appeal Book, Tab 17)
[35] Ibid., at p. 137 [emphasis added]. The experts express the same conclusion of "negligible" possibility of HIV transmission in the case of anal intercourse with a condom: ibid.
[36] Barré-Sinoussi et al, p. 3 [emphasis added].
[37] Ibid. at p. 6 [bolded emphasis in original, underlining added]. The experts express the same conclusion of "negligible" possibility of HIV transmission in the case of anal intercourse with a condom: ibid. at p. 6.
[38] *Thompson*, at para. 95.

have a low viral load, was acquitted of aggravated sexual assault. The trial judge had the benefit of evidence from three different medical experts, who "all agreed…that condoms, properly used, are 100 percent effective against transmission."[39] She found: "I therefore conclude condom usage by a person with HIV precludes a realistic possibility of transmission of HIV."[40]

16. The Interveners submit that, based on the jurisprudence and the evidence before it, this Court should conclude as a matter of law that (i) condom use *per se* can negate a realistic possibility of transmission for the purpose of the criminal law, and (ii) there is no realistic possibility of transmission in the case of correct condom use (i.e., "the integrity of the condom is not compromised and the condom is worn throughout the sex act in question"[41]).

B. Unfair to convict based on a presumed possibility of HIV transmission, rather than actual demonstrated risk

17. It is unjust to convict a person of aggravated sexual assault not because their own conduct posed a proven significant risk of serious bodily harm, but based on a *presumption* that HIV transmission remained a *possibility* despite the use of a condom — and a conviction based on such a presumption is particularly unfair absent any finding supporting such a presumption.

18. This presumed possibility of HIV transmission despite condom use is based on *population-level* estimates of condoms' effectiveness in preventing HIV transmission – specifically, the 2001 Cochrane review referenced in *Mabior*. However, while such population-level estimates are helpful to *approximate* risks associated with a particular activity, for the

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[39] *Thompson*, at para. 125 (and see paras. 104, 132-134). The trial judge expressly noted that Dr. Smith, called as an expert by the Crown in this case, was the expert who testified at trial in *Mabior* (at para. 117) and noted that "Dr. Smith testified that either an undetectable viral load or condom usage would provide protection" (at para. 119, emphasis added).
[40] Ibid., at para. 132.
[41] Barré-Sinoussi et al., at p. 3 (defining 'correct condom use').

purposes of determining beyond a reasonable doubt the criminal liability of an individual accused, they cannot replace the specific facts of a specific case. By definition, population-level estimates factor in instances where condoms are not used correctly; those instances reduce the overall observed effectiveness, *at the population level*, of condoms for HIV prevention. It is unfair to convict an individual condom user — whose correct use of a condom would mean zero risk of transmission — on the basis of a population-level estimate that condoms are "only" 80% effective in reducing the risk of transmission (already an exceedingly small per-act risk),[42] particularly in the absence of a finding that that individual has engaged in incorrect condom use.

19. Moreover, the Cochrane review (providing population-level estimates) must be understood as likely under-estimating condoms' effectiveness. The Cochrane review authors themselves note expressly at the outset that "the studies used in this review did not report on the 'correctness' of use" of condoms."[43] As noted above, in *Mabior* the Supreme Court observed that the 80 percent reduction in transmission risk refers to consistent use, and that the figure might be higher for correct condom use, but it did not have evidence on this point (again underscoring the limited evidentiary basis for it to decide categorically at that time that condom use always precludes a realistic possibility of transmission).[44] Since *Mabior*, the 2018 international expert consensus statement has pointed out, in relation to the Cochrane review's population-level estimate of 80% effectiveness of condoms, that "more recent research suggests

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[42] As explained in the international *Expert consensus statement* (2018), the population-level estimate of 80% condom effectiveness must be applied against the risk associated with different sex acts. Given the estimated risk of HIV transmission from an HIV-positive man to a woman during a single act of condomless vaginal sex is 0.08%, "then the risk of transmission when a condom is used can be understood as *at least* 80% lower, or 0.016% (less than 2 in 10,000)": Barré-Sinoussi et al., pp. 3-4 (emphasis in original).

[43] Cochrane review, at p. 2. The Appellant has also identified numerous caveats regarding the methodology of the Cochrane review and the limitations in the underlying studies it analysed: Appellant's Factum, at paras. 33-47. The Interveners submit these further call into question the appropriateness and fairness of applying its population-level estimate of 80% condom effectiveness without regard to the specific facts of a given case.

[44] *Mabior*, at para. 98.

that this may be an underestimate, with the meta-analysis described including non-standard data analysis methods which may have led to recruitment and other biases which could have lowered the level of prevention observed."[45]

20. Given current scientific knowledge, where a condom is used throughout sexual intercourse and there is no evidence that its integrity was compromised, there is no reason to presume *any* risk of HIV transmission. According to the 2018 international expert consensus:

> To reiterate, HIV cannot be transmitted in individual cases where a condom has been used correctly (i.e. it was worn through the sex act in question and its integrity was not compromised). The population-level estimates can only apply in situations where multiple instances of condom use have occurred, including occasional instances of incorrect use and breakage."[46]

21. In any event, "there is no onus on the accused to show zero risk [of transmission]."[47] It is the Crown's burden throughout to prove a realistic possibility of HIV transmission existed.[48] The Interveners submit that in the absence of a finding of incorrect condom use – i.e., that the integrity of the condom was compromised in some way (e.g., broke or slipped off) or that the condom was not worn throughout – the legal threshold of a realistic possibility of transmission has not been proved beyond a reasonable doubt. A "speculative" possibility of HIV transmission cannot suffice to convict someone of aggravated sexual assault.[49] The specific facts of a given

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[45] Barré-Sinoussi et al., p. 3. Scientists with the Public Health Agency of Canada (PHAC) have also observed that these population-level estimates are likely to be underestimates of the effectiveness of condoms: J. LeMessurier et al., "Risk of sexual transmission of human immunodeficiency virus with antiretroviral therapy, suppressed viral load and condom use: a systematic review," *CMAJ* 2018;190: E1350-60 at p. E1358. (Fresh Evidence Record, Vol. III, Tab 6C) Finally, in the instant case, the Crown's own expert epidemiologist is of the view that it is widely accepted among practitioners in the field that 80% is likely an underestimate of condoms' effectiveness: Evidence of Dr. Fisman, October 11, 2019 (Fresh Evidence Record, Vol. III, Tab 7, p. 62, l. 25 to p. 63, l. 5).
[46] Barré-Sinoussi et al., at p. 4 [emphasis added].
[47] *Vatcher*, at p. 19.
[48] *Mabior,* at para. 105; *Cuerrier*, at para. 129.
[49] *Mabior*, at para. 101; *JTC* at paras. 82, 99.

case, not speculation, must ground a court's conclusion as to whether the Crown has proven beyond a reasonable doubt a realistic possibility of transmission.

22. The injustice of convicting a person living with HIV of one of the most serious offences in the *Criminal Code* based on speculations and presumptions is compounded by the sentencing consequences related. It is a fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.[50] "Proportionality is the *sine qua non* of a just sanction" and "ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender."[51] Sentencing must be individualized to take into account any relevant mitigating circumstances, as well as factors related to the defendant's personal circumstances.[52] A conviction for aggravated sexual assault results in years (and possibly life) in prison,[53] mandatory lifetime designation as a sex offender,[54] and likely deportation for a non-citizen.[55] Such outcomes of a conviction for HIV non-disclosure despite condom use are grossly disproportionate given that: (i) the sexual encounter is otherwise consensual (but for the non-disclosure); (ii) condoms are a standard, long-recommended and highly effective means of preventing HIV transmission – such that consistent use of a condom "dramatically" reduces the possibility of transmission by <u>at least</u> 80% (and likely more), and correct condom use indisputably results in zero risk of transmission; and (iii) the use of such an effective measure to prevent transmission indicates the absence of moral blameworthiness warranting criminal sanction.

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[50] *Criminal Code*, s. 718.1.
[51] *R. v. Pham*, 2013 SCC 15 at paras. 6-7 (IntBOA Tab 13), citing *R. v. Ipeelee*, 2012 SCC 13.
[52] Ibid., at para. 8. The collateral impact of a sentence on a particular defendant, including immigration consequences, may be considered in sentencing as personal circumstances of the defendant: ibid., paras. 11-13.
[53] *Criminal Code*, s. 273(2).
[54] *Criminal Code*, ss. 490.011-490.013.
[55] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 36 (inadmissibility), ss. 44-48 (loss of status and removal).

C. Criminalizing people who use condoms is bad public policy on multiple grounds

23. **First, where the evidence establishes there is no or negligible possibility of harm and an absence of moral blameworthiness, this is not a case for the deployment of the criminal law.** As concluded by the Department of Justice in its study of the criminalization of HIV non-disclosure: "Because the criminal law is a blunt instrument, it should be engaged only when other means of social control are inadequate or inappropriate."[56] The heavy hand of the criminal law should be reserved for conduct that is truly blameworthy.[57] As the majority observed in *Cuerrier* (per Cory J.):

> The phrase "significant risk of serious harm" must be applied to the facts of each case in order to determine if the consent given in the particular circumstances was vitiated. Obviously consent can and should, in appropriate circumstances, be vitiated. Yet this should not be too readily undertaken. The phrase should be interpreted in light of the gravity of the consequences of a conviction for sexual assault and with the aim of avoiding the trivialization of the offence.[58]

The Supreme Court subsequently unanimously cautioned in *Mabior* that:

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

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[56] Department of Justice, *Criminal Justice System's Response to Non-Disclosure of HIV* (2017) ("DOJ Report") at p. 28, citing Government of Canada, *The Criminal Law in Canadian Society* (Ottawa: 1982). (Fresh Evidence Record, Vol. 1, Tab 1E)

[57] This is particularly so when contemplating harsh penalties such as years of imprisonment (resulting in barriers to health care and exposure to violence and harassment), lifetime sex offender registration (with all the consequent invasions of privacy and barriers to employment, housing and services) and likely deportation in the case of non-citizens (including to settings where they will face inadequate access to HIV care and possible persecution based on HIV status or other grounds). Justice Canada expressly acknowledges the need for Canada's approach to HIV criminalization to "reflect the varying levels of blameworthiness in these cases": DOJ Report, at p. 30.

[58] *Cuerrier*, at para. 139 [emphasis added]. The concern was shared by McLachlin and Gonthier JJ. in their judgment concurring in the result, in which they would have clearly limited the criminal law to encompass only "unprotected sex" (i.e., without a condom): *Cuerrier*, at paras. 73-74.

> The principal objective of the criminal law is the public identification of wrongdoing which violates public order and is so blameworthy it deserves penal sanction… […]
>
> The potential consequences of a conviction for aggravated sexual assault – up to life imprisonment – underline the importance of insisting on moral blameworthiness in the interpretation of s. 265(3)(c) of the *Criminal Code*.[59]

24. **Second, ignoring scientific evidence and continuing to criminalize people for sex that poses no significant risk of transmission is state-sanctioned stigma and discrimination against people living with HIV.** When correct condom use makes transmission impossible, a person living with HIV is "no different from anyone else,"[60] yet currently still faces in Canada the spectre of criminal prosecution and punishment for consensual sexual activity:

> 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. … [I]n my view the decisions of the Supreme Court of Canada should not be read as producing this result.[61]

As the Supreme Court recognized in *Mabior*, rejecting the absolute disclosure approach: "People who act responsibly and whose conduct causes no harm and indeed may pose no risk of harm, could find themselves criminalized and imprisoned for lengthy periods…. [T]his absolute approach is arguably unfair and stigmatizing to people with HIV, an already vulnerable group."[62]

25. This concern about the harms of "overcriminalization" of HIV is reflected in a statement on World AIDS Day 2016 by the Attorney General of Canada:

> It is […] a time to recognize the tremendous medical advances that have been made since the first World AIDS Day was held in 1988. HIV treatment has slowed disease

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[59] *Mabior*, at paras 19, 23-24 [emphasis added].
[60] *J.T.C.*, at para. 88.
[61] Ibid.
[62] *Mabior*, at para. 67.

> progression to the point that, for many, HIV infection can now be regarded as a chronic, manageable condition.
>
> Still, the over-criminalization of HIV non-disclosure discourages many individuals from being tested and seeking treatment, and further stigmatizes those living with HIV or AIDS. Just as treatment has progressed, the criminal justice system must adapt to better reflect the current scientific evidence on the realities of this disease.[63]

26. This recognized need for the criminal law to adapt, including to reduce it stigmatizing effect, was the impetus for the 2017 study by the federal Department of Justice (DOJ). After reviewing the then-available scientific evidence, key jurisprudence and various public policy considerations, the DOJ concluded *inter alia*:

> The criminal law should generally not apply to persons living with HIV who: are on treatment; are not on treatment but use condoms; or, engage only in oral sex (unless other risk factors are present and the person living with HIV is aware of those risks), because the realistic possibility of transmission test is likely not met in these circumstances.
>
> Unprotected sex with an HIV positive person who has not disclosed their status can no longer be considered to establish a *prima facie* case of HIV non-disclosure as evidence of treatment and viral load will always be relevant to determining whether the realistic possibility of transmission test is met. Moreover, the majority of persons living with HIV in Canada are on treatment, which significantly reduces the risk of transmission. Other types of evidence will also always be relevant, including evidence that condoms were used effectively and consistently and that the only sexual activity at issue was oral sex.[64]

27. Further adaptation of the criminal justice system was acknowledged recently by the Ontario Court of Justice in *R. v. Vatcher* in the course of applying the *Mabior* test:

> The acknowledgment that science has progressed since *Mabior* was decided is perhaps best exhibited by the Minister of Justice's directive to federal prosecutors that was issued in 2018. The purported objective of the directive is to harmonize prosecution practices with scientific evidence and risk of sexual transmission of HIV, and since science evolves over time, the directive reflects recent scientific advances related to the risk of sexual transmission of HIV.[65]

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[63] "Statement from Minister Wilson-Raybould on World AIDS Day," (December 1, 2016) [emphasis added] in DOJ Report, Annex 1 (at p. 32). (Fresh Evidence Record, Vol. 1, Tab 1E)

[64] DOJ Report, at p. 30 [emphasis added].

[65] *Vatcher* at pp. 23-24, reproducing the Attorney General's directive, which is based on and accords with the DOJ's conclusion that: "The criminal law should generally not apply to persons living with HIV who […] are not on

28. Adapting with the science is all the more important given the stigmatizing effect of the law. No other medical condition has been criminalized to the same extent as HIV. As Prof. Isabel Grant has observed, Canadian courts effectively created a new variant of aggravated sexual assault that isolates a systemic disadvantage (living with HIV) as a basis for criminal liability.[66]

29. **<u>Third</u>, overly broad HIV criminalization — including criminalizing people who use condoms — contributes to broader societal misinformation about HIV and further exacerbates the stigma surrounding HIV, ultimately to the detriment of public health.** HIV stigma is rooted in deeply embedded moral judgments surrounding sexuality, pleasure and the groups most affected by the virus; it makes those at risk of HIV reluctant to get tested, makes disclosure difficult, and contributes to the drive to criminalization.[67] Prof. Grant highlights that:

> ... It is the marginalization of persons with HIV that makes disclosure so difficult. Widespread criminalization increases the stigma associated with HIV and makes disclosure more difficult, not easier. We have made tremendous gains in treating and preventing the spread of HIV; yet, ironically, in the face of these gains we see a more punitive approach to non-disclosure which will inevitably enhance the marginalization of people living with HIV in Canada.[68]

In turn, as noted by the DOJ, "[c]riminalization of HIV non-disclosure negatively impacts public health efforts since fear of prosecution may discourage persons living with HIV from seeking testing, counseling and education, and obtaining treatment, which could exacerbate HIV

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treatment but use condoms […] because the realistic possibility of transmission test is likely not met in these circumstances": DOJ Report, *supra* at p. 30.

[66] I. Grant, "The over-criminalization of persons with HIV," (2013) 63 Univ. of Toronto L.J. 475 at p. 476. (IntBOA Tab 15) While the law has been applied in a small handful of cases relating to other sexually transmitted infections (STIs), we cannot ignore the reality, recognized by Justice Canada, that overwhelmingly it has been applied against people living with HIV: see DOJ Report at pp. 11, 17.

[67] Hon. Justice Edwin Cameron, "Criminalization of HIV transmission: poor public health policy," *HIV/AIDS Policy & Law Review* 2009; 14(2): 1, 63-75 at pp. 69-70. (IntBOA Tab 14) Justice Cameron, recently retired from the Constitutional Court of South Africa, is to date the only judge in the world known to be openly living with HIV.

[68] Grant, *supra* at p. 479.

transmission."[69] Criminalizing conduct that poses little or no risk of HIV transmission reinforces stigma by incorrectly exaggerating the perceived risk of such activities, and criminalizing those who use effective recommended HIV prevention strategies contradicts public health messages.

30. **<u>Fourth</u>, criminalizing HIV non-disclosure despite condom use compounds disadvantage faced by particular communities and people affected by HIV.** As recognized by the DOJ: "Statistics show that persons from marginalized backgrounds, particularly indigenous, gay and Black persons, are more likely than others to be living with HIV in Canada. Accordingly, criminal laws that apply to HIV non-disclosure are likely to disproportionately impact these groups."[70] In addition, as described by the DOJ, some people living with HIV (including women and Indigenous people) are also less likely to have access to health care and other services,[71] and therefore face additional challenges in achieving a low or suppressed viral load. Criminalizing people living with HIV who use condoms – a highly effective tool to prevent HIV – but who cannot achieve a low or suppressed viral load, creates an additional burden on some of the most marginalized people living with HIV.[72] Finally, while HIV criminalization may be perceived as a means of advancing sexual autonomy, feminist legal commentators have pointed out that paradoxically it simultaneously discounts women's agency (casting "women as naïve victims at the mercy of smooth-talking men") and overstates it in other instances (ignoring the often-gendered complexities of HIV disclosure for women living with HIV and imposing criminal liability for non-disclosure and for their male partners not using condoms even when

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[69] DOJ Report, at p. 17.
[70] Ibid., at pp. 29. McLachlin and Gonthier JJ. adverted to this concern in *Cuerrier*: Moreover, because homosexuals, intravenous drug users, sex trade workers, prisoners, and people with disabilities are those most at risk of contracting HIV, the burden of criminal sanctions will impact most heavily on members of these already marginalized groups.": *Cuerrier*, at para. 55.
[71] Ibid., at pp. 7 and 30.
[72] M. Weait, "Limit cases: How and why we can and should decriminalise HIV transmission, exposure and non-disclosure," *Medical Law Review* 2019; 27(4): 576–596 at 591. (IntBOA Tab 16)

this may be challenging or possibly to risk violence).[73] In addition, they have drawn attention to how HIV criminalization puts women living with HIV at increased risk of violence and prosecution by providing a tool of coercion or revenge for vindictive partners who can 'weaponize' the law.[74] These considerations all point to the importance of restraint in scope of the criminal law. They conclude that:

> The criminal law is ill-equipped to deal with the multiple challenges faced by women in disclosing their status and practising safer sex. Rather than empowering women living with HIV to protect themselves and others, criminalization of HIV non-disclosure creates additional challenges, fears, and, for some, harsh prison terms.[75]

CONCLUSION

31. Convicting people who use condoms, especially absent any finding of incorrect use, is at odds with the scientific consensus regarding possibility of HIV transmission, is unnecessary and unwarranted at law, is unjust (especially given the grossly disproportionate harsh consequences of a conviction of aggravated sexual assault), and is ill-advised for various public policy reasons.

PART IV – ORDER REQUESTED

32. The Interveners do not request any order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of January 2020.

per: ______________________
Richard Elliott, Léa Pelletier-Marcotte,
Ryan Peck, Khalid Janmohamed
Counsel for the Interveners

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[73] P. Allard, C. Kazatchkine & A. Symington, "Criminal Prosecutions for HIV Non-Disclosure: Protecting Women from Infection of Threatening Prevention Efforts?," in J. Gahagan, ed., *Women and HIV Prevention in Canada: Implications for Research, Policy and Practice* (Toronto: Women's Press, 2013), pp. 195-218. (IntBOA Tab 17)
[74] Ibid., at pp. 204, 205.
[75] Ibid., at p. 207.

SCHEDULE A: LIST OF AUTHORITIES

TAB

Cases

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

2. *R. v. Cuerrier*, [1998] 2 S.C.R. 371

3. *R. v. J.T.C.*, 2013 NSPC 105

4. *R v. Thompson*, 2016 NSSC 134

5. *R v. C.B.*, 2017 ONCJ 545

6. *R v. Felix* (October 19, 2015), Newmarket, Court File No. No. 13-02532 (O.C.J., Chisvin J.), Transcript of Proceedings (Evidence of Dr. El-Helou and Crown's Submission on Acquittal)

7. *R. v. Vatcher* (22 November 2019), Ottawa, Court File No. 0411-998-17-51-27 (O.C.J., Boxall J.)

8. *R. v. Edwards*, 2001 NSSC 80

9. *R v. Agnatuk-Mercier* [2001] O.J. No. 4729 (Ont. S.CJ.) (QL)

10. *R. v. Nduwayo*, 2006 BCSC 1972

11. *R. v. Smith*, [2007] S.J. No. 166 (Sask. P.C.) (QL)

12. *New Zealand Police* v. *Dalley*, [2005] 22 CRNZ 495

13. *R. v. Pham*, 2013 SCC 15

Legal commentary

14. E. Cameron E. (Hon. Justice), "Criminalization of HIV transmission: poor public health policy," *HIV/AIDS Policy & Law Review* 2009; 14(2): p. 1, 63-75

15. I. Grant, "The over-criminalization of persons with HIV," (2013) 63 Univ. of Toronto L.J. 475

16. M. Weait, "Limit cases: How and why we can and should decriminalise HIV transmission, exposure and non-disclosure," *Medical Law Review* 2019; 27(4): 576–596

17. P. Allard, C. Kazatchkine & A. Symington, "Criminal Prosecutions for HIV Non-Disclosure: Protecting Women from Infection of Threatening Prevention Efforts?," in J. Gahagan, ed., *Women and HIV Prevention in Canada: Implications for Research, Policy and Practice* (Toronto: Women's Press, 2013), pp. 195-218.

SCHEDULE B: RELEVANT LEGISLATIVE PROVISIONS

Criminal Code, R.S.C. 1985, c. C-46 as amended

Assault

265 (1) A person commits an assault when

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

(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or

(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

Application

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

Consent

(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;

(c) fraud; or

(d) the exercise of authority.

Aggravated sexual assault

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

(2) Every person who commits an aggravated sexual assault is guilty of an indictable offence and liable […]

(b) in any other case, to imprisonment for life.

Sex Offender Information

Definitions

490.011 (1) The following definitions apply in this section and in sections 490.012 to 490.032. […]

designated offence means

(a) an offence under any of the following provisions: […]

(xvi) section 271 (sexual assault),

(xvii) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm), […]

(xix) paragraph 273(2)(b) (aggravated sexual assault), […]

Order

490.012 (1) When a court imposes a sentence on a person for an offence referred to in paragraph (a) […] of the definition *designated offence* in subsection 490.011(1) […], it shall make an order in Form 52 requiring the person to comply with the *Sex Offender Information Registration Act* for the applicable period specified in section 490.013.

Date order begins

490.013 (1) An order made under section 490.012 begins on the day on which it is made.

Duration of order

(2) An order made under subsection 490.012(1) or (2)

[..]

(c) applies for life if the maximum term of imprisonment for the offence is life.

Purpose and Principles of Sentencing

Fundamental principle

> **718.1** A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Serious criminality

- **36** (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

  > (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

  Criminality

(2) A foreign national is inadmissible on grounds of criminality for

> (a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

Court File No. C66296

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

- and -

N.G.

Appellant

FACTUM OF THE INTERVENERS
HIV LEGAL NETWORK,
HIV & AIDS LEGAL CLINIC ONTARIO AND
COALITION DES ORGANISMES
COMMUNAUTAIRES QUEBECOIS DE LUTTE
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