WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences;
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
>
> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
>
> (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22,48; 2015, c. 13, s. 18..

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could

identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. N.G., 2020 ONCA 494
DATE: 20200805
DOCKET: C66296

Lauwers, Trotter and Fairburn JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

N.G.

Appellant

Wayne A. Cunningham, for the appellant

Grace Choi, for the respondent

Richard Elliott and Ryan Peck, for the interveners, the HIV Legal Network, HIV & AIDS Legal Clinic Ontario and Coalition des organismes communautaires québécois de lutte contre le SIDA

Heard: February 12, 2020

On appeal from the conviction entered on November 15, 2017 by Justice Edward E. Gareau of the Superior Court of Justice.

Fairburn J.A.:

OVERVIEW

[1] Over a period of many months, after being diagnosed with HIV and warned about the need to disclose his HIV status to sexual partners, the appellant engaged in repeated acts of vaginal sexual intercourse with three different women. The

appellant wore condoms but did not disclose his HIV-positive status and was not on antiretroviral medication. The complainants testified that they would not have consented to having sexual intercourse with the appellant had they been aware of his HIV-positive status.

[2] The appellant was charged with multiple offences, including three counts of aggravated sexual assault. The trial focused on whether the appellant's failure to disclose his HIV status to the complainants, prior to sexual intercourse, constituted fraud vitiating their consent to that sexual activity in accordance with the principles laid down in *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584. Although one of the complainants was diagnosed with HIV after her sexual relationship with the appellant, there was no proof that she contracted the virus from him.

[3] *Mabior* holds that an accused may be found guilty of aggravated sexual assault under s. 273(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, if he or she fails to disclose an HIV-positive status to a sexual partner, consent to the sexual activity would not have been given had the sexual partner known about that status, and there exists a "realistic possibility of transmission" of HIV during that sexual activity: *Mabior*, at para. 4. The unanimous court in *Mabior* determined that a realistic possibility of HIV transmission is "negated" where two factors come together and work in combination: (a) the non-disclosing person's viral load (the quantity of HIV circulating in his or her blood) at the time of sexual relations is "low";

and (b) a condom is used during the sexual activity in question: *Mabior*, at paras. 94, 103-4.[1]

[4] While the trial judge found as a fact that the appellant used a condom during every act of vaginal sexual intercourse, it is indisputable that the appellant did not have a "low" viral load during a number of those acts of intercourse.

[5] Unable to argue that he met the two-prong test for negating the realistic possibility of transmission of HIV, the appellant instead argued that the *Mabior* test should be changed to reflect the fact that condom use alone is sufficient to negate the realistic possibility of transmission. The trial judge rejected the call to adapt the *Mabior* test and found the appellant guilty on all three counts of aggravated sexual assault.

[6] The appellant then brought a reopening application, at which he sought to introduce expert evidence that use of a condom alone negated any realistic possibility of transmission. The trial judge heard and dismissed the application to reopen the trial. Convictions were entered and the appellant was sentenced to 42 months in custody.

[7] In this court, the appellant renews his argument and seeks to buttress it with fresh evidence. For the reasons that follow, I would dismiss the appeal.

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[1] Although the *Mabior* decision does not specifically define what constitutes a low viral load, it describes a viral load of less than 1,500 copies of HIV present in a millilitre of blood as "low": at para. 100.

[8] While there is much to be said for the fact that there have been significant medical and scientific strides in our understanding of HIV transmission and treatment in recent years, strides that may well inform the proper direction of the criminal law in the future, I do not accept that the *Mabior* judgment rests on a flawed understanding of the effectiveness of condoms at preventing HIV transmission. The appellant's dispute with *Mabior* rests on the central legal underpinnings of that decision. As I will explain, the reasons for those underpinnings were carefully explained by the unanimous court in *Mabior* and it is not for this court to upend them.

BACKGROUND FACTS

I. The Sexual Activity with A.G.

[9] The appellant and A.G. met on a dating website. She estimated that they had vaginal intercourse 10 to 12 times between September 2013 and October 2014. That activity took place in public parks, behind a school, in the back seats of motor vehicles, and once at A.G.'s home.

[10] A.G. testified that she also performed fellatio on the appellant about 75 or 80 percent of the time that they also had sexual intercourse. He did not use a condom during the fellatio. He sometimes would ejaculate in her mouth and she would swallow his semen.

[11] A.G. testified the appellant always wore a condom during the vaginal intercourse. She recalled bringing the condoms and thought the appellant may have also brought them sometimes. The appellant would put condoms on himself after he had an erection. A.G. could not recall a condom breaking.

[12] When A.G. found out about the appellant's HIV-positive status, she "died a little bit inside." She felt suicidal while awaiting test results to determine whether she had contracted the disease. She ultimately tested negative. She testified that she would not have consented to any sexual activity with the appellant had she known his HIV-positive status.

II. The Sexual Activity with A.C.

[13] The appellant also met A.C. through a dating website. Their sexual relationship involved mutual oral sex without condoms. It also involved vaginal sexual intercourse. That activity took place between July 2013 and March 2014. Although much of their sexual activity took place at A.C.'s home, the appellant and A.C. also had intercourse outside in the bushes and on the ground. During certain periods of time, they had intercourse a couple of times a week.

[14] A.C. said that the appellant would bring his own condoms and put them on. She said that she could hear the package open and saw them "being disposed [of] because most times I would give him the Kleenex, he'd put it in the Kleenex, and I would throw it away". Like A.G., she would not have consented to engaging in

sexual activity with the appellant had she known his HIV status. This was particularly true given that she had her own serious health issues at the time.

[15] Although A.C. tested positive for HIV in October 2014, there was no finding that she contracted the disease from the appellant.

III. The Sexual Activity with N.W.

[16] The appellant's brother introduced N.W. to the appellant. N.W. testified about numerous incidents of oral sex and at least one incident of vaginal intercourse that took place at her home somewhere between December 2013 and January 2014. The trial judge found that a condom was used during sexual intercourse.

[17] Like the other complainants, N.W. testified that she would not have consented to engaging in any sexual activity with the appellant had he disclosed his HIV-positive status to her.

IV. The Uncontroverted Facts About the Appellant's Viral Load

[18] Health authorities informed the appellant about his HIV-positive status on October 20, 2013. At that point, his sexual relationships with A.G. and A.C. had already started. The appellant was told about the risks of transmission, the importance of using condoms, and the need to disclose his HIV-positive status to all sexual partners.

[19] The appellant did not start taking antiretroviral medication until April 3, 2014, over five months after diagnosis. Despite having been specifically warned about the risk of transmission and need for disclosure, the appellant continued in his sexual relationships with A.C. and A.G., and started his sexual relationship with N.W., without disclosing to any of them.

[20] Between his initial diagnosis and his first viral load reading after beginning antiretroviral drugs, the appellant's viral load ranged between 11,345 and 27,868 copies of HIV in a millilitre of blood, well above the 1,500 copies described as "low" in *Mabior*. The higher the number, the greater the risk of transmission: *Mabior*, at para. 100. By October 29, 2014, the appellant's viral load had become non-detectable.

[21] Therefore, there is no dispute in this case that the appellant was having vaginal sexual intercourse with the complainants during a time when his viral load was not low within the meaning of *Mabior*.[2] Accordingly, despite his use of condoms, the appellant failed to meet the *Mabior* test for negating a realistic possibility of transmission of HIV during those sexual acts.

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[2] Although the complainants in this case testified about also having had condomless oral sex with the appellant, the trial judge's reasons focus on the risks of transmission associated with the acts of vaginal intercourse. Therefore, these reasons are similarly focused on the acts of vaginal sexual intercourse.

V. Defence Expert at Trial: Dr. Wendy Wobeser

[22] The defence called an infectious disease specialist, Dr. Wendy Wobeser. She was qualified to give opinion evidence in the following areas: (a) biology and treatment of HIV; (b) the risk of transmission of HIV; and (c) the general area of infectious diseases.

[23] Dr. Wobeser testified that HIV is a necessary precursor to Acquired Immune Deficiency Syndrome ("AIDS"). Given the advances in science and the availability of antiretroviral medication, today, very few people with HIV develop AIDS. Even so, Dr. Wobeser testified that HIV remains a serious, life-endangering infection if not treated properly.

[24] The most significant risk factors for a person with HIV transmitting the infection through sexual activity are: (a) whether a condom is used; (b) the person's viral load; (c) whether the person is undergoing antiretroviral therapy; and (d) the type of sexual activity undertaken. She testified that vaginal-penile intercourse is less likely to result in transmission of the virus than anal intercourse, with anal intercourse being the highest risk sexual activity for transmission.

[25] Where condoms are used, and "everything works", Dr. Wobeser testified that the risk of HIV transmission is zero. She referred to a study that was cited in *Mabior* with reference to the effectiveness of condoms at preventing transmission: Susan C. Weller and Karen Davis-Beaty, "Condom Effectiveness in Reducing

Heterosexual HIV Transmission" (2002), 1 Cochrane Database Syst. Rev. CD003255 ["Cochrane Review"]. Relying upon the Cochrane Review, she referred to the fact that, in the "real world", condom use reduces the baseline risk (the actual rate at which something occurs in a given population) of HIV transmission by 80 to 85 percent.

PROCEEDINGS BELOW

I. Reasons for Judgment at Trial

[26] Relying upon Dr. Wobeser's evidence, the trial judge accepted as a fact that, where condoms work, the risk of transmission of HIV is "zero". Even so, he concluded that condoms only provide 80 to 85 percent effectiveness in the "real world", and probably closer to the 80 percent range. As the trial judge said:

> The act of sexual intercourse is not a theoretical concept where theoretical statistics and theories should be applied. It is, rather, a real life action where real life scenarios and real life numbers should be applied. In theory, if all is perfect it may very well be that condom use is 100% effective in [preventing the transmission of] the HIV virus, but the sexual act between two people is not a theoretical experience; it is a real life action where realistic approaches should be taken especially when it concerns the realistic possibility of the transmission of the HIV virus, which is still a life threatening virus if left untreated.

[27] The trial judge rejected as unpersuasive the reasoning in another trial decision where an accused was acquitted of aggravated sexual assault on the basis of condom use alone: see *R. v. Thompson*, 2016 NSSC 134, 373 N.S.R (2d)

167, rev'd but not on this point 2018 NSCA 13, 359 C.C.C. (3d) 222.[3] He also felt bound by this court's decisions in *R. v. Felix,* 2013 ONCA 415, 307 O.A.C. 248 and *R. v. Mekonnen,* 2013 ONCA 414, 299 C.C.C. (3d) 134, two cases that applied the *Mabior* rule for negating the realistic possibility of HIV transmission.

[28] While the trial judge accepted that a great deal has changed in relation to antiretroviral therapy, a subject I will return to later, he concluded that "when the scientific evidence as a whole is examined with respect to condom use in real life situations", nothing had changed since *Mabior*. Therefore, he found:

> Since there is not the combined effect of a low viral load and condom use at the time [the appellant] had sexual intercourse with A.C., A.G., and N.W., there exists, in law, a realistic possibility of HIV transmission during the occurrences of sexual intercourse that [the appellant] had with A.C., A.G., and N.W. [Emphasis in original.]

[29] The appellant was found guilty of three counts of aggravated sexual assault.

II. The Reopening Application

[30] After being found guilty of three counts of aggravated sexual assault, the appellant brought an application to reopen the trial. In support of that application, the appellant filed the affidavit of Dr. John Richard Middleton Smith, the same expert who testified in *Mabior.* Like Dr. Wobeser at trial in this case, during his

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[3] The appellant and interveners also draw this court's attention to the trial decision in *Thompson,* what they put forward as the only post-*Mabior* decision that suggests that condom-use alone (combined with no ejaculation) is sufficient to negate the realistic possibility of HIV transmission.

evidence in *Mabior,* Dr. Smith relied upon the Cochrane Report to estimate the reduction in the baseline risk of HIV transmission when condoms are used. As the court noted in *Mabior,* at para. 98: “Dr. Smith testified that consistent condom protection reduces the risk of HIV transmission by 80%, relying on the widely accepted Cochrane review.”

[31] On the reopening application at trial, Dr. Smith said that his thinking on the risks associated with the sexual transmission of HIV where condoms are used has evolved since he testified in *Mabior*. Adopting a passage from a consensus statement prepared by Canadian experts in the field of HIV, Dr. Smith now emphasizes that “when correctly used and no breakage occurs, condoms are 100% effective at stopping the transmission of HIV” (emphasis added): see *Loufty*, *et al.*, “Canadian Consensus Statement on HIV and its Transmission in the Context of Criminal Law” (2014), 25:3 Can J. Infect Dis. Med. Bicrobiol. 135 [“Canadian Consensus Statement”].

[32] Dr. Smith now underscores that the 80 to 85 percent effectiveness rate for condoms, as reflected in the Cochrane Review, is only applicable at a population level and, in his view, should no longer be used for assessing individual risk on a per sex act basis. As he said:

> It is simply incorrect to state that in [an] individual case condoms are only 80-85% effective. In my opinion 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.
>
> …
>
> In my opinion, 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. [Emphasis added.]

[33] In the trial judge's view, Dr. Smith's evidence added nothing new to the evidence of Dr. Wobeser that, where condoms work perfectly, the HIV transmission rate is zero. The trial judge concluded, though, that the condom error rate across the population is still an important consideration when determining the realistic possibility of transmission of HIV because sexual intercourse takes place in the "real world" where condoms do not always perform perfectly. Accordingly, he concluded that Dr. Smith's evidence was insufficiently cogent to be granted admission on the reopening application. The application was dismissed, and the matter proceeded to sentencing.

ANALYSIS

I. Overview

[34] In challenging his convictions, the appellant returns to the same argument he made at trial and on the reopening application. He contends that the *Mabior*

requirement that condom use be coupled with a low viral load in order to negate a realistic possibility of transmission of HIV overshoots the mark. He says that condom use alone should be sufficient to negate the realistic possibility of transmission because “consistent and correct” condom use creates a zero percent chance of transmission.

[35] Although the appellant acknowledges that in rare situations condoms will fail, he says that this failure is strictly owing to incorrect usage. Therefore, according to the appellant, where a condom is used, regardless of the level of the HIV-positive sexual partner’s viral load, condom usage alone should be sufficient to negate the realistic possibility of HIV transmission. To displace that presumption, the appellant contends that it should fall to the Crown to prove condom failure.

[36] At the same time, and importantly, the appellant is not prepared to acknowledge that the criminal law necessarily has a role to play in the wake of condom failure. He argues that all issues surrounding the mechanics of such proof, and whether proof of condom failure could even rise to the level of criminality, be left to another day. Therefore, I refer to the appellant’s position on this appeal as a condom-alone rule.

[37] Although they put it slightly differently, the interveners join the appellant in the position that “correct” condom use alone should be able to negate the *Mabior*

threshold of a realistic possibility of transmission. They ask this court to "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"). [Emphasis in original. Footnote omitted.]

[38] To be clear, this case is not about advances in the understanding around the non-transmissibility of HIV in the context of a suppressed or undetectable viral load. In particular, it does not raise the question of whether a suppressed or undetectable viral load, standing on its own, should now be sufficient to negate the realistic possibility of transmission.

[39] The sole issue that this court is asked to resolve in this case is whether, at law, the use of a condom alone – despite the presence of a non-low or perhaps even high viral load – should remove HIV non-disclosure cases from the reach of the criminal law, barring proof that the condom failed in some way. The record before this court addressed that issue alone, and the legal argument followed suit.

[40] The appellant makes two broad arguments in support of his position that it is open to this court to set aside the *Mabior* finding that condom use alone does not negate the realistic possibility of HIV transmission. He maintains that this court can arrive at a different conclusion than *Mabior* on this point because, in

determining the rate at which condoms fail to protect against the baseline risk of HIV transmission, the Supreme Court of Canada (a) relied upon Dr. Smith's approach to population-level statistics, an approach that Dr. Smith no longer endorses; and (b) relied upon what are in hindsight flawed statistics.

[41] In support of his argument, the appellant relies upon the evidence of Dr. Smith at the reopening application, as well as evidence contained within a fresh evidence record on appeal. Together, I will refer to all of this evidence as the "new evidence".

[42] The appellant acknowledges that if he is unsuccessful in having his fresh evidence admitted on appeal, then it is unrealistic to expect that this court will find error with the trial judge's decision to exclude Dr. Smith's evidence on the reopening application. His position on this point is a sensible one, particularly given that the tests for the admission of evidence on a reopening application and on appeal align.

[43] In a judge alone trial, a finding of guilt can be vacated prior to the sentence being imposed or other final disposition made, but this should only occur in "exceptional circumstances and where it is clearly called for": *R. v. Lessard* (1976), 30 C.C.C. (2d) 70 (Ont. C.A.), at p. 73. Where an application to reopen a trial is predicated on the admission of further evidence, the well-known *Palmer* test for the admission of fresh evidence on appeal applies: *R. v. Palmer*, [1980] 1 S.C.R.

759, at p. 775; *R. v. Kippax*, 2011 ONCA 766, 286 O.A.C. 144, at para. 63, leave to appeal refused, [2012] S.C.C.A. No. 92. The *Palmer* criteria are now commonly understood as reflected in a three-part test:

> Is the evidence admissible under the operative rules of evidence?
>
> Is the evidence sufficiently cogent in that it could reasonably be expected to have affected the result?
>
> What is the explanation offered for the failure to adduce the evidence at trial and should the explanation affect the admissibility of the evidence on appeal?

Truscott (Re), 2007 ONCA 575, 226 O.A.C. 200, at para. 92; *R. v. Reeve,* 2008 ONCA 340, 236 O.A.C. 92, at para. 66.

[44] The central question in this appeal is whether the trial judge erred when he concluded that Dr. Smith's evidence was insufficiently cogent to be granted admission on the reopening application.[4] There are three aspects to the cogency consideration:

> Is the evidence relevant in that it bears upon a decisive or potentially decisive issue at trial?
>
> Is the evidence credible in that it is reasonably capable of belief?

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[4] The respondent also raises a concern about the final prong of the *Palmer-Truscott* test: diligence. In my view, there is no need to address that concern given that the appeal fails on the cogency element.

> Is the evidence sufficiently probative that it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result?

Truscott, at para. 99.

[45] The first two cogency requirements are clearly met in this case.

[46] First, the new evidence bears upon a decisive issue at trial, being whether the appellant's use of condoms negated the realistic possibility of transmission of HIV despite his viral load.

[47] Second, there is no dispute that the new evidence is credible. No one suggests otherwise.

[48] The real question is whether, when considered against all of the evidence at trial, the new evidence is "sufficiently probative" to allow this court to change the *Mabior* rule, so that condom use alone can negate the realistic possibility of HIV transmission, thereby requiring acquittals to be entered. I see no error in the trial judge's conclusion that Dr. Smith's evidence was insufficiently cogent to be granted admission on the reopening application. There is nothing in the fresh evidence on appeal that changes my view in that regard.

II. The *Mabior* Rule for Fraud Vitiating Consent

[49] In order to understand the appellant's position about why condom use alone should negate the realistic possibility of transmission, it is first necessary to understand how the Supreme Court of Canada came to reject that very suggestion

in *Mabior.* I will start by reviewing the *Mabior* test and how it came to be. I will then address the narrow basis upon which that test can be revisited by lower courts, after which I will explain why, in my view, the appellant's arguments for adapting the test must fail.

1. From *Cuerrier* to *Mabior*

[50] A range of criminal offences have been used to prosecute HIV non-disclosure cases in Canada, such as criminal negligence causing bodily harm, common nuisance, administering a noxious substance, attempted murder, murder, and various degrees of assault and sexual assault.[5] A report prepared by the Department of Justice suggests that aggravated sexual assault is the most frequently prosecuted offence in this context: Canada, Department of Justice, *Criminal Justice System's Response to Non-Disclosure of HIV* (2017), at p. 15 ["Department of Justice Report"].

[51] This case, *Mabior*, and *Mabior's* predecessor, *R. v. Cuerrier,* [1998] 2 S.C.R. 371, are all cases involving convictions for aggravated sexual assault. The reasons must be considered within that offence-based context. Therefore, to understand the *Mabior* rule that lies at the centre of this appeal, it is necessary to first

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[5] See, for instance, cases that include convictions for offences in addition to aggravated sexual assault: *R. v. Iamkhong*, 2009 ONCA 478, 250 O.A.C. 220; *R. v. Booth*, 2005 ABPC 137, 382 A.R. 116; *R v. Boone*, 2019 ONCA 652; *R. v. Aziga*, 2011 ONSC 4592, appeal as of right filed. See also, Department of Justice Report, at pp. 11 and 13.

understand how consent operates in the context of sexual assault prosecutions involving HIV non-disclosure.

[52] Consent to sexual activity constitutes the voluntary agreement to "engage in the sexual activity in question": *Criminal Code*, s. 273.1(1). Consent must be freely given, constituting the "conscious agreement of the complainant to engage in every sexual act in a particular encounter": *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 31.

[53] Consent as defined in s. 273.1(1) of the *Criminal Code* is not to be "considered in the abstract": *R. v. Barton,* 2019 SCC 33, at para. 88. Rather, as set out in *R. v. Hutchinson,* 2014 SCC 19, [2014] 1 S.C.R. 346, at paras. 55, 57, and recently reinforced in *Barton,* at para. 88, consent is linked to the "sexual activity in question", which encompasses "the specific physical sex act", "the sexual nature of the activity", and the "identity of the partner". It does not, though, include the "conditions or qualities of the physical act, such as … the presence of sexually transmitted diseases". See also: *R. v. Kirkpatrick,* 2020 BCCA 136, at para. 89, *per* Bennett J.A. (majority).

[54] Even where the requirements of s. 273.1(1) are met – the complainant has agreed to the specific physical sex act, the sexual nature of the act, and the identity of the sexual partner – this does not end the inquiry into whether consent has been given. This is where ss. 265(3) and 273.1(2) of the *Criminal Code* come into play,

setting out the circumstances where consent is deemed not to have been given: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 36.

[55] As first addressed in *Cuerrier*, HIV non-disclosure cases prosecuted as aggravated sexual assault engage directly with s. 265(3)(c) of the *Criminal Code*, dealing with fraud capable of vitiating consent:

> For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
>
> …
>
> (c) fraud.

[56] Seven judges sat in *Cuerrier* and three judgments emerged. Cory J. held the plurality. His decision set the course for how the fraud component in s. 265(3)(c) operates to vitiate consent where certain criteria are present in HIV non-disclosure cases. Like *Mabior* and this case, *Cuerrier* also involved HIV non-disclosure in the context of acts of vaginal-penile sexual intercourse.

[57] Expressing concern over casting the criminal net too widely, Cory J. determined that HIV non-disclosure could only constitute fraud capable of vitiating consent if two things were proven: (a) a deception; and (b) a deprivation or risk of deprivation.

[58] The deception component of s. 265(3)(c) can be proven through either an active lie about one's HIV status, or silence as to that status: *Cuerrier*, at para. 126.

[59] The deprivation component can be proven through actual harm (the actual transmission of the virus) or through a “risk of deprivation” (a risk of transmission of the virus). A “risk of deprivation” means that the complainant did not contract HIV through the sexual activity in question but was placed at risk of contracting the disease during that activity. It is the “risk of deprivation” component of the element of fraud under s. 265(3)(c) that has attracted substantial attention in the context of HIV non-disclosure cases.

[60] Where the prosecution is relying upon only a risk of deprivation to vitiate consent (as in *Cuerrier, Mabior*, and this case), according to *Cuerrier,* the risk must rise to the level of a “significant risk of serious bodily harm”: at paras. 128, 135. See also: *Hutchinson*, at para. 34.

[61] In time, that test proved somewhat elusive and difficult to apply, resulting in concerns regarding the inconsistent application of the test and the overbroad application of the criminal law: *Mabior*, at paras. 13-15. These concerns eventually resulted in two different appellate courts specifically asking the Supreme Court of Canada for clarification on the test: *R. v. Mabior*, 2010 MBCA 93, 245 Man. R. (2d) 81, at para. 152; *R. v. D.C.*, 2010 QCCA 2289, 270 C.C.C. (3d) 50, at para. 121.

[62] The Supreme Court answered that call in *Mabior*.[6]

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[6] *R. v. D.C.*, 2012 SCC 42, [2012] 2 S.C.R. 626, was released at the same time as *Mabior,* simply applying the *Mabior* test to the facts of that case.

[63] The parties and interveners in *Mabior* advanced various models for solving the perceived difficulties arising from the *Cuerrier* test. Each model was rejected by the court, including the suggestion by Mr. Mabior that judicial notice be taken of the fact that "condom use always negates a significant risk of serious bodily harm": *Mabior,* at para. 70.

[64] Ultimately, the Supreme Court refused to jettison the *Cuerrier* test. Instead, the court opted to clarify the meaning of that test for purposes of finding a sufficient risk of deprivation to vitiate consent in the context of HIV non-disclosure. The court concluded that a significant risk of serious bodily harm is established where there exists a "realistic possibility of transmission of HIV": *Mabior,* at paras. 4, 84, 91, 93, 104, 108. In other words, where a person fails to disclose his or her HIV-positive status before engaging in sexual intercourse, in circumstances where there exists a realistic possibility of HIV transmission, a deception and risk of deprivation will align such that fraud will be capable of vitiating the unwitting sexual partner's consent.

[65] In an effort to provide even further clarity in the law, the *Mabior* court went on to explain, at para. 94, that where two factors come together to form a symbiotic relationship, the realistic possibility of HIV transmission will be negated:

> 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 [Italics in original, underline added.]

[66] In other words, *Mabior* made clear that if a person's viral load is "low" during sexual relations and a condom is used during those relations, the realistic possibility of HIV transmission will be negated. Therefore, as a matter of criminal law, *Mabior* clarified that where these two things align, there will be no realistic possibility of HIV transmission, thereby removing the risk of deprivation necessary for consent to be vitiated under s. 265(3)(c) of the *Criminal Code*.

[67] While the *Mabior* decision places the burden on the Crown to establish the dishonest act and risk of deprivation beyond a reasonable doubt, the court made the practical observation, at para. 105, that where the Crown establishes a *prima facie* case of deception and deprivation, a tactical burden may shift to the accused to trigger the two-part test:

> The usual rules of evidence and proof apply. The Crown bears the burden of establishing the elements of the offence – a dishonest act and deprivation – beyond a reasonable doubt. Where the Crown has made a *prima facie* case of deception and deprivation as described in these reasons, a tactical burden may fall on the accused to raise a reasonable doubt, by calling evidence that he had a low viral load at the time and that condom protection was used. [Emphasis added.]

[68] The application of the test to the facts of *Mabior* assists in understanding how it is intended to operate. The court allowed the appeal insofar as the decision

of the Court of Appeal had conflicted with the test. This led to the reinstatement of convictions where, despite Mr. Mabior's low viral load, he did not use a condom during vaginal sexual intercourse: *Mabior*, at paras. 108-9. See also this court's application of this test for negating a realistic possibility of HIV transmission in *Felix*.

[69] Having completed this review of the *Mabior* rule that is under challenge in this appeal, and before moving on, it is perhaps worth emphasizing the crux of HIV non-disclosure cases prosecuted as aggravated sexual assaults. The essence of the crime lies in the failure to disclose one's HIV-positive status to an unwitting sexual partner in circumstances where there exists a realistic possibility of transmission of the virus to that unwitting partner. In my view, what is criminalized is the unilateral imposition of risk of very serious harm onto another person without offering the at-risk party an opportunity to decide whether to assume that risk, or how to manage that risk, before making a decision to proceed.

2. The Importance of *Stare Decisis*

[70] The principle of *stare decisis* casts a long shadow in this case and, as I will explain, governs the result.

[71] There are sound reasons for why, except in limited circumstances, lower courts do not depart from precedents of higher courts. At the forefront of those

reasons is the need for certainty in the law. As noted in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 38:

> Certainty in the law requires that courts follow and apply authoritative precedents. Indeed, this is the foundational principle upon which the common law relies.

[72] Despite the importance of certainty in the law, and the need to follow precedent in order to achieve that certainty, where the factual underpinnings guiding a legal decision give way, so too may the principle of *stare decisis.* Indeed, the *Mabior* decision makes specific note of this fact.

[73] *Mabior* is clear that the means by which a realistic possibility of HIV transmission can be negated – condom use combined with a low viral load – represents a conclusion that is inextricably linked to the factual record before the court: see, for instance, paras. 94, 95, 101, 103, 109. The decision is also clear that the court was alive to the fact that this approach to negating risk is directly linked to science and medicine, both disciplines that are inherently dynamic in nature and ever on the move toward better health outcomes.

[74] Recognizing that medical and scientific developments may take place in the future, the court extended – twice over – a specific invitation to lower courts to, if necessary, adapt the means by which a realistic possibility of HIV transmission can be negated:

> 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. [Emphasis added.]

Mabior, at para. 104. See also para. 95.

[75] The appellant argues that the *Mabior* invitation to adapt is this court's gateway to reconsidering the factors that must be at play before a realistic possibility of transmission can be negated. I do not agree.

[76] While I accept that the *Mabior* decision leaves it open to lower courts to adapt the criteria necessary to negate a realistic possibility of HIV transmission, it does so in a way that is consistent with the principles of *stare decisis.* In my view, the invitation to adapt is directly linked to "future advances in treatment and to circumstances where risk factors other than those considered" in *Mabior* are at play. In other words, the invitation to adapt is linked to potential changes to the factual pillars upon which *Mabior* rests, in circumstances where those pillars are particularly susceptible to change.

[77] As I will shortly explain, though, the appellant's argument in favour of a condom alone rule rests on a challenge, not to the factual pillars upon which *Mabior* rests, but to the legal foundation upon which the decision rests.

[78] Although I take no final view on the matter, because it extends beyond the scope of this judgment, it is noteworthy that since *Mabior* was decided, it is

arguable that the factual underpinnings of the decision have already changed, although not in relation to the effectiveness of condoms. There appears to have been significant changes involving the understanding around the ability to transmit HIV with a suppressed or undetectable viral load. The record in this case includes references to the post-*Mabior* medical and scientific communities' broad consensus that it is no longer considered possible to transmit HIV with a suppressed or undetectable viral load: see *Barre-Sinoussi et al.*, "Expert Consensus Statement on the Science of HIV in the Context of Criminal Law" (2018), 21:7 J. Int'l AIDS Society e25161, at s. 2.1 ["International Consensus Statement"]; Canadian Consensus Statement, at pp. 136-7.

[79] So widely accepted is that view today that it appears some prosecution services across the country have now put policies in place directing Crown counsel not to prosecute HIV non-disclosure cases any longer in circumstances where the HIV-positive partner's viral load is either suppressed (a level defined within those policies) or undetectable: see e.g., Federal: Office of the Director of Public Prosecution, *Directive* (30 November 2018) [Federal Prosecution Policy]; Ontario: Ministry of the Attorney General, "D. 33 Sexual Offences Against Adults: Sexually Transmitted Infections and HIV Exposure Cases", in *Crown Prosecution Manual* (December 1, 2017); British Columbia: Prosecution Service, "Sexual Transmission, or Realistic Possibility of Transmission, of HIV, in *Crown Counsel Policy Manual* (April 16, 2019).

[80] Lower courts have also started acknowledging that viral loads below a defined level, standing on their own, are sufficient to negate the realistic possibility of HIV transmission: see e.g., *R. v. Vatcher* (November 22, 2019), Ottawa, 0411-998-17-51-27 (Ont. C.J.); *R. v. J.T.C.*, 2013 NSPC 105, at paras. 55-56, 63, 99-101; *R. v. J.T.C.*, 2013 NSPC 88, at paras. 14-15, 17, 19-21; *R. v. C.B.*, 2017 ONCJ 545, at paras. 87, 90-92, 99; *Thompson*, at paras. 97, 132-134.

[81] Without weighing in on the matter, as it is not before us, the apparent evolution in the medical and scientific communities' understandings around the transmissibility of HIV in the face of suppressed or undetectable viral loads illustrates precisely the kind of evolution the *Mabior* court left open for consideration in the future. This is the kind of situation where *stare decisis* would not bind lower courts to the *Mabior* rule.

[82] In my view, the new evidence in this case is not of a similar type. Its primary focus is not upon changes to the factual backdrop upon which the *Mabior* decision rests. Rather, its primary focus is upon desired changes to the legal foundations upon which the *Mabior* decision rests.

III. The New Evidence Does Not Add Anything New

1. The New Evidence

[83] At the reopening application, Dr. Smith expressed that he has changed his mind since *Mabior* about the appropriateness of using population-level statistics

when considering the risk of HIV transmission in the context of the criminal law. He reinforced this view in his fresh evidence on appeal.

[84] As reflected in the *Mabior* decision, Dr. Smith provided evidence that the baseline risk of HIV transmission per act of unprotected vaginal-penile sexual intercourse (no condom and a non-low viral load), where the male partner is HIV-positive, varies from "study to study", but is somewhere between 1 in 2,000 and 1 in 384. The court also summarized other evidence, suggesting that the baseline risk of transmission in these circumstances ranges from 1 in 1,000 to 1 in 1,250: *Mabior*, at para. 97. In this case, Dr. Wobeser referred to this baseline risk of transmission as around 8 in 10,000.

[85] The Supreme Court relied upon the Cochrane Review, as put forward by Dr. Smith in *Mabior*, for the proposition that "consistent" condom use can reduce that baseline risk by 80 percent: *Mabior*, at para. 98. The court concluded that, despite the reduction in risk of transmission provided by condom use, something more was required to negate the "realistic possibility of transmission": *Mabior*, at para. 99. That something more is a low viral load.

[86] Contrary to his *Mabior* evidence, Dr. Smith now eschews the use of the Cochrane Report – predicated on population-level statistics – to determine the effectiveness of condoms at reducing the risk of HIV transmission. Dr. Smith now opines that: "it is incorrect to state that in any individual case condoms are only

80% to 85% effective" because, in his current view, correct and consistent condom use leads to 100 percent protection from transmission when considered on a per act basis where nothing goes wrong.

[87] While Dr. Smith acknowledges that condoms do fail from time-to-time, it is his view that the law should only consider what happened in each individual case. As he puts it: "[o]ne has to find out the truth of what occurred" and the "legal system should not be dealing with cases where there [has] not been transmission". He says that, instead, the legal system should only "function" by looking at the "outcome of the event", rather than the risk going into the event.

[88] In formulating his opinion, Dr. Smith relies upon a number of reports, including the Canadian Consensus Statement, where HIV physicians and medical researchers have expressed a similar view. That report is aimed at addressing what the authors perceive to "be at stake in individual criminal cases" and "does not extend to HIV transmission at a population level in relation to HIV prevention efforts" (emphasis added): at p. 136.

[89] Within that context, the authors focus upon condoms that are "used correctly" and where "no breakage occurs." The authors specifically point out that their opinion is based upon the assumption that the "condom was applied to the penis and worn throughout sex, and that no condom breakage occurred": at p.

136.[7] Assuming these prerequisites are met, the Canadian Consensus Statement says “condoms are 100% effective at stopping the transmission of HIV”: at p. 136.

[90] Dr. Smith also relies upon the International Consensus Statement to a similar end. That report was prepared by 20 HIV scientists from different regions across the world. “Correct” condom use is defined as a condom being worn throughout the sex act and its integrity not being compromised: International Consensus Statement, at s. 2.2.

[91] Bearing that definition in mind, the International Consensus Statement concludes that when a condom is correctly used, in an individual act of sexual intercourse, there is zero risk of transmission of HIV because bodily fluids containing the virus, like blood, semen, pre-seminal fluid, vaginal and anal fluids, cannot come into direct contact with sites in the body of an HIV-negative person where infection can be initiated, like mucous membranes or damaged tissue: International Consensus Report, at ss. 2.1 and 2.2.

[92] Finally, Dr. Smith relies upon the Department of Justice Report, that concludes with a recommendation that the criminal law should “generally not apply to persons living with HIV who … are not on treatment but use condoms … because the realistic possibility of transmission test is likely not met” (emphasis

[7] The new evidence on appeal is focused upon male condoms. As this case involved the use of male condoms, I remain similarly focused.

added): at p. 30. The appellant points out that in response to that report, the Attorney General of Canada adapted its policy direction to federal prosecutors, suggesting that the Director "shall generally not prosecute…where the person has not maintained a supressed viral load but used condoms or engaged only in oral sex or was taking treatment as prescribed, unless other risk factors are present" (emphasis added): see Federal Prosecution Policy.

[93] The Crown responds with evidence from two other experts: (a) Dr. William Yarber, a health behavioural scientist with specialized knowledge in the area of male condoms and problems with usage; and (b) Dr. David Fisman, the current Head of the Division of Epidemiology at the University of Toronto, with an expertise in, among other things, the epidemiology of sexually transmitted diseases including HIV. As will be explained later, Dr. Yarber catalogues the multiple challenges associated with "correct" condom use and the difficulties in achieving a perfect latex barrier to transmission. Among other things, Dr. Fisman addresses the importance of using population-level statistics when determining the risk of transmission associated with a sexual activity before it is undertaken.

2. There is No Basis to Revisit the Supreme Court's Reliance on Population-Level Statistics

[94] The appellant points to the following sentence from *Mabior*, at para. 98, to suggest that the court did not understand what he argues the new evidence shows, that consistent and correct condom use makes for a zero risk of transmission:

> Dr. Smith testified that consistent condom protection reduces the risk of HIV transmission by 80%, relying on the widely accepted Cochrane review …. It was pointed out that the 80% reduction in the transmission refers to consistent condom use: the reduction may be larger for consistent *and* correct condom use, but this has not been verified empirically. [Emphasis added.]

[95] The appellant and interveners argue that the new evidence now verifies empirically that consistent and correct condom use brings the risk of HIV transmission to zero and *Mabior* should be adapted accordingly. Although they accept that some people are irresponsible condom users, they argue that the lack of due care on the part of others should not be visited upon responsible condom users. In other words, the criminal law should not be used to punish those who correctly use their condoms because those individuals do not place their sexual partners at risk.

[96] The interveners clearly and helpfully summarize this position in the following passage reproduced from their factum:

> 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), particularly in the absence of a finding that that individual engaged in incorrect condom use. [Emphasis added.]

[97] In my view, there are three overarching difficulties with the appellant and interveners' position: (a) the position conflates "consistent and correct" condom use with the ideal scenario in which condoms function perfectly, thereby failing to account for real-world situations in which condoms do not function perfectly; (b) it is contrary to the principles underlying epidemiology and the criminal law; and (c) it is inconsistent with the *Charter* values animating the *Mabior* rule.

a. "Consistent and Correct" Condom Use Does Not Mean Zero Risk of Transmission

[98] First, the position conflates fundamentally different concepts. The term "correct condom use" is used as if it were a proxy for knowing in advance that a condom would be used perfectly and that the condom would function perfectly. These are not the same things.

[99] There is no dispute that a perfectly functioning latex condom provides a perfect barrier to HIV transmission. Indeed, the Supreme Court of Canada well appreciated this fact in *Mabior*, as reflected at para. 98 of the decision: "It is

undisputed that HIV does not pass through good quality male or female latex condoms".

[100] But, as the Supreme Court of Canada also understood, condoms do not always work as they are intended to work: "condom use is not fail-safe, due to the possibility of condom error and human error": *Mabior,* at para. 98. Indeed, from time-to-time, despite the very best intentions and efforts of sexual partners, condoms sometimes fail to work. Dr. Smith agreed during cross-examination that it is "not possible to know prior to a sexual encounter whether perfect or correct use versus condom failure may happen."

[101] Indeed, this court recently captured this concept in *R. v. Boone,* 2019 ONCA 652, at para. 122:

> Dr. Tyndall agreed with Dr. Remis that condom use reduced the risk of transmission overall by about 80 percent. Dr. Tyndall also testified that if the condom was properly applied and did not malfunction during use, the risk reduction approached very near 100 percent. Of course, no one could know ahead of any particular sexual activity whether the condom would malfunction in some way.

[102] There is an ample record on appeal, primarily led through Dr. Yarber's affidavit evidence, testimony, and accompanying reports, that supports the fact that sometimes condoms slip, break, leak, and otherwise fail. These events can happen despite efforts to the contrary.

[103] As the respondent points out, multiple experts in this case, including Dr. Wobeser, Dr. Smith, and Dr. Yarber, provided evidence demonstrating just how many things can go wrong with male latex condoms, including:

- Using a condom that has expired
- Using a condom that has been incorrectly stored, including in a pocket and sat on
- Using a condom that has been exposed to excessive heat
- Opening a condom package in a way that damages the condom
- Not squeezing the air out of the tip of the condom before application in order to leave a sufficient reservoir for semen
- Not rolling the condom onto the entire penis
- Using improper lubrication that can damage the condom
- Withdrawing the penis in a way that results in the condom slipping off or spilling semen
- Reusing a condom.

[104] Moreover, these problems can be magnified when condoms are used in less than perfect settings, such as when they are applied in the dark, in small spaces,

in awkward positions, or under the influence of intoxicants. To adopt an expression used by the trial judge in this case, in the “real world”, even despite the best of intentions, things can and do go wrong with condom usage.

[105] In fact, this case involves precisely some of those “real world” kinds of circumstances that may lean more heavily toward things going wrong: sexual intercourse taking place in locations that are less than conducive to the careful handling of this piece of latex, including in the dark in cars, parks, bushes, and school yards.

[106] In addition, condom failure incidents are not always obvious. While some condom failure may come to the attention of the sexual participants, this is not always the case. As Dr. Fisman points out:

> You don’t have a biophysics lab present at the bedside after two people have sex so that you can look and see, is there any compromise of the condom’s integrity… and some of it may well be unrecognized because you’re talking about potentially very small quantities of fluid and very small particles.

[107] Indeed, the chances of noticing condom failure might be further minimized where one party to the sexual act has no knowledge that there is a risk of HIV transmission should the condom fail. Where a complainant is unaware of the risk, he or she may not be as vigilant with the condom use as might otherwise be the case.

[108] Again, the circumstances of this case underscore that fact. By way of example, A.C. testified that the appellant usually brought his own condoms, put them on himself and disposed of them. She did not pay much attention to the procedure. In fact, she was not even sure if the condoms contained ejaculate when they came off: “It was dark, so I couldn’t tell. The lights were always off.” As it turns out, unbeknownst to her, those condoms that she paid so little attention to were her sole line of defence against the baseline risk of HIV transmission because the appellant had not started taking antiretroviral medication during the many months while they were engaged in sexual acts.

[109] Accordingly, “correct” usage does not necessarily mean that the condom functioned perfectly. Even in situations where there is a well-intentioned effort to achieve perfect usage, things can and do go wrong.

b. Assessing Risk from a Population Level is Consistent with Epidemiology and the Criminal Law

[110] What the appellant and interveners are really looking for is a legal rule that favours determining the realistic possibility of transmission by looking to the actual effectiveness of condoms at the exact time they are used. As the appellant argued on appeal, it should be for the Crown to prove beyond a reasonable doubt that a condom failed before the criminal law could even possibly apply.

[111] This argument is inconsistent with risk assessment from an epidemiology perspective and is also inconsistent with the legal underpinnings of *Mabior.*

[112] As Dr. Fisman explains, looking to population-level statistics to predict risk at an individual level is the "premise that underpins the entire field of epidemiology" and is "crucial" to predicting "the risk for an individual person." Any other approach assesses risk from an *ex post facto* perspective, one where the harm arising from the risk has either happened or not. As Dr. Fisman explains:

> [I]t's very difficult to talk about probabilities when you are talking about an individual, because the event either happens or doesn't happen with an individual, it's a 0 or a 1. Whereas in a population we can get into estimation of risks. … Post hoc you know with certainty what happened, but it's sort of horse-and-barn-door stuff, it's nonmodifiable, which is why it's important to have estimates of risk ex-ante.

[113] In contrast, I read Dr. Smith's evidence as essentially supporting the idea that, for purposes of the criminal law, risk of HIV transmission should only be assessed based upon the "outcome of the event". When asked about whether population data has some relevance to informing the "predictive probability of transmission" of the virus, he answered: "Well, I think in terms of preventive health education it would, but in terms of just legal system it would not."

[114] Dr. Smith confirmed that this is his view of "how the legal system should function." He went even further and provided his opinion that the "legal system" should not be dealing with cases involving only risk of transmission:

> I think that the legal system should not be dealing with cases where there [has] not been transmission. Personally, I think it would be reasonable for the legal system to deal with cases where there has been transmission.

[115] Of course, that is not a scientific or medical conclusion, but a legal one that is antithetical to the reasoning in both *Cuerrier* and *Mabior.* In my view, Dr. Smith's evidence contains no new information about the effect of condom use on HIV transmission rates; rather, what has changed is his opinion that the criminal law should approach these risks differently than the Supreme Court chose to in those cases.

[116] Although the appellant and interveners do not go quite as far as Dr. Smith by suggesting that only transmission cases should fall within the reach of the criminal law, they heavily rely upon his evidence to advance the position that the risk of transmission should only be looked at from an after-the-fact perspective. They argue that, at its highest, an after-the-fact inquiry should be made into whether the complainant was actually put at risk. This stands in direct opposition to the current forward-looking *Mabior* approach to assessing whether there exists a realistic possibility of HIV transmission at the time when the unwitting sexual partner offers his or her consent to the sexual activity in question.

[117] In my view, their position is really a request to conduct a "case-by-case" approach to risk assessments in HIV non-disclosure cases. That approach was specifically rejected in *Mabior* because of the inherent lack of predictability that

would result from any such approach: *Mabior*, at paras. 68-69. Indeed, it is that very kind of approach that led to great uncertainty in the wake of *Cuerrier* and why *Mabior* came along to inject certainty into this complex area of the law.

[118] It is important that the criminal law be predictable. People need to know with some degree of certainty, before they engage in conduct, whether that conduct will be labelled criminal or not. The desire in *Mabior* to provide clarity in the operation of the criminal law is one of the foundational principles upon which the decision rests, and one that pushed toward a clear and easily applied test for when the realistic possibility of transmission of HIV would be negated: *Mabior*, at paras. 14, 19.

[119] The appellant's and interveners' suggestion that the law move toward an assessment of whether there was a risk of transmission of HIV during a specific sexual encounter, based on whether condoms actually slipped, leaked, broke, or otherwise malfunctioned, would return the law in HIV non-disclosure cases to the undesirable world of uncertainty.

[120] Moreover, I do not accept the appellant's suggestion that the criminal law is designed only to address what actually happens as a result of what people do, not the risk they potentially put others at while doing it. Indeed, there are examples of the criminal law addressing its attention to risks before they materialize.

[121] As the respondent points out, drinking and driving and unsafe storage of firearm offences constitute two examples of the criminal law specifically targeting perceived risk of harm before that risk is actually visited upon others.

[122] I do not wish to be taken as suggesting that drinking and driving or unsafe storage of firearms offences are perfect analogies to HIV non-disclosure sexual assault-based offences. There is one important difference between them. When it comes to drinking and driving and unsafe storage of firearms offences, members of the public are not given the choice to voluntarily assume the risks associated with those activities. When it comes to HIV non-disclosure cases, though, members of the public are given that choice. The key is that they need to know there is a risk before they can choose to assume that risk.

[123] HIV non-disclosure cases are therefore targeted at the deception involved in unilaterally placing complainants at risk without giving them the choice to voluntarily assume that risk and decide how to best manage that risk.

[124] To this end, I would add the crime of fraud to this discussion. Indeed, the essential elements of fraud were discussed at some length in *Cuerrier* and, with some adaptation, formed the genesis of the approach to how fraud can vitiate consent in the HIV non-disclosure context: *Cuerrier*, at paras. 114-17. Drawing upon the court's prior authorities setting out the elements of fraud, including reference to *R. v. Théroux*, [1993] 2 S.C.R. 5, Cory J. emphasized in *Cuerrier* that

the “essential elements of fraud are dishonesty, which can include non-disclosure of important facts, and deprivation or risk of deprivation” (emphasis added): at para. 116. In other words, a risk of deprivation to one’s economic interests, through dishonest means, is sufficient for fraud. Take away the dishonesty and someone can voluntarily assume the risk of financial harm.

[125] *Cuerrier* took the same risk approach to HIV non-disclosure, by focussing on the risk to the complainant at the time that the consent is dishonestly procured. Take away the dishonesty and someone can voluntarily assume the risk of HIV transmission.

c. Assessing Risk from a Population Level is Consistent with *Charter* Values

[126] *Mabior* reflects an exquisitely difficult balance between the rights of those living with HIV and the rights of those offering their consent to sexual activities without all of the information they need and would like to make that decision.

[127] On the one hand, the court emphasized that the stigma attaching to a criminal conviction in this context should be “reserved for conduct that is highly culpable” in nature: *Mabior,* at para. 19. On the other hand, the court emphasized the *Charter* values of equality, autonomy, privacy, liberty, and bodily integrity, all of which promote respect for sexual participants and their dignity as human beings: see *Mabior*, at para. 45. See also *Ewanchuk*, at paras. 27-28; *Barton*, at paras. 88-

90, 109. These are the *Charter* values animating the *Mabior* decision and underpinning the complainant's right to be informed of a partner's HIV status in the circumstances described in *Mabior.*

[128] It is against that backdrop that the court spoke of "[o]ur modern understanding of sexual assault", one that "is based on the preservation of the right to refuse sexual intercourse" and the need to interpret s. 265(3)(c) within that context: *Mabior,* at para. 45.

[129] In my view, the use of population-level statistics to assist in determining the risk of HIV transmission during condom-use-alone sexual intercourse is entirely consistent with our modern notion of consent to sexual activity and what may operate to vitiate that consent.

[130] From a consent perspective, it makes sense to consider the risk of HIV transmission during a sexual act from a forward-looking perspective. After all, if risk is to be looked at after condom failure, then the complainant has already been put at risk without having voluntarily assumed that risk. This hindsight approach to risk, after the risk has been involuntarily and unknowingly assumed, would do little for the modern-day notion of consent and the preservation of the "right to refuse intercourse". In my view, the *Mabior* rule is about preventing the consenting party from having the risk of contracting an indisputably serious, life-altering disease unilaterally imposed upon him or her in the first place: *Mabior,* at para. 88.

[131] While I accept that HIV is now a manageable disease, it remains incurable and indisputably chronic, such that it could change the entire course of a sexual partner's life: Canadian Consensus Statement, at p. 138; International Consensus Report, at s. 2; Department of Justice Report, at pp. 3-6. While AIDS can be avoided, to date, HIV cannot be cured: Department of Justice Report, at p. 3. Among other health complications, HIV requires antiretroviral medication, leaves a person susceptible to other infections because of the immune system impairment, and brings about periods of ill health and disability: Department of Justice Report, at pp. 5-6.

[132] It is only by resorting to population-level statistics that forward-looking risk can be assessed.

3. The Risk of Condom Failure in the Cochrane Review is Not Overinflated

[133] The appellant also argues that the population-level statistics contained in the Cochrane Review are suspect. First, he says that those statistics – as relied upon by the Supreme Court of Canada in *Mabior* and by Dr. Wobeser at trial – are predicated on groups of "always condom users" and "never condom users".

[134] As for the always condom users, the appellant argues that there is likely some social acceptability bias embedded in the statistics because it involves self-reporting, where people will be motivated to suggest they took appropriate

precautions prior to becoming seroconcordant (the non-HIV-positive sexual partner moving to a positive status). This would lead to some people reporting using condoms when they did not actually use condoms, causing some instances of transmission from sex without condoms to be recorded as transmission from sex with condoms. That could lead to condoms appearing less effective than they actually are.

[135] The appellant also suggests that there may have been some difficulties with some of the underlying studies informing the Cochrane Review. For instance, in one of the studies, where there had been four seroconversions involving people who claimed to have always used condoms, the authors of that study noted that there had been "improper or incomplete condom use" in a number of the cases. In another study, the appellant suggests that, because of the way in which the seroconversions were assigned to specific time frames, it may be that it had the effect of misclassifying the effectiveness of condoms. He argues that some seroconversions were assigned to timeframes during which the couple reported always using condoms, but transmission may have occurred during an earlier timeframe when they were not using condoms. Again, if this occurred, it would lead to condoms appearing less effective than they actually are.

[136] This argument is rooted in the suggestion that, even if it was right for the Supreme Court to assess the risk of transmission of HIV with the use of population-

level statistics, it was wrong to have uncritically accepted the Cochrane Review as accurately containing the condom failure error rate across the population.

[137] The respondent relies upon the evidence of Dr. Yarber, an expert on condom use and failure rates. The appellant challenges Dr. Yarber's numbers, arguing that, in fact, the rates for condom breakage, leakage, slippage, late application, and early removal events are much smaller than he suggests.

[138] The respondent disputes the appellant's characterization of the statistics, claiming they are actually much higher than the appellant suggests. Relying upon a study that Dr. Yarber co-authored, the respondent suggests that condom use errors must be considered in light of studies showing the combined rates for different types of condom failure together, some of which are well over the 20 percent range: *Sanders et al.*, "Condom use errors and problems: a global view" (2012), 9 Sexual Health 81, at p. 90. That is, the chance of the condom slipping *or* breaking *or* otherwise failing – the chance of the condom failing in some way – can be over 20 percent.

[139] I do not intend to address the specific statistics for condom slippage, breakage, leakage, and the like. At the end of the day, in my view, the Cochrane Review relied upon by the Supreme Court in *Mabior* has not been shaken in any meaningful way by the new evidence here.

[140] Indeed, Dr. Smith acknowledged during cross-examination on the reopening application that the Cochrane Review is a meta-analysis that remains "widely respected as a valiant attempt to measure the average risk of transmission in the real world". Dr. Smith also referred to the Liu Study that suggests much lower rates of transmission with condom use, but the validity of that study has been called into question. Dr. Fisman provides evidence that the study is highly questionable and, in fact, is "out of keeping with scientific consensus": see *Liu*, *et al.*, "Effectiveness of ART and Condom Use for Prevention of Sexual HIV Transmission in Serodiscordant Couples: A Systematic Review and Meta-Analysis" (2014) 9:11 PLoS ONE e111175. "Serodiscordant" means one partner is infected and the other is not.

[141] I agree that the Cochrane Review, as Dr. Smith suggested on the reopening application, is still "widely accepted". Indeed, the Public Health Agency of Canada performed a synthesis of current medical evidence relating to HIV transmission rates published in 2018 and relied in part on data from the Cochrane Review: *Traversy LeMessurier*, *et al.*, "Risk of Sexual Transmission of Human Immunodeficiency Virus with Antiretroviral Therapy, Supressed Viral Load and Condom Use: A Systematic Review" (2018), 190, Can. Med. Assoc. J. E1350. An earlier version of that synthesis was also relied upon by the Department of Justice in determining the rate of HIV transmission when condoms are used alone:

Department of Justice Report, at p. 8. The International Consensus Statement also relied on the Cochrane Review: see fns. 17, 22, 69.

[142] According to Dr. Fisman, whose evidence I accept, the Cochrane Review represents a “reasonable” assessment of condom effectiveness across the population, “as imperfect as that is.” For every act of vaginal intercourse, the Cochrane Review concluded that condom use resulted in an 80.2 percent relative reduction in HIV transmission, the best-case estimate being 94.2 percent and the worst-case estimate being 35.4 percent. In other words, as Dr. Fisman put it, condoms “could be better than we think they are” or they could be “worse than we think they are.” Indeed, the Cochrane Review itself acknowledges that condom effectiveness could be under- or overestimated by the study and, importantly, the Supreme Court of Canada had that evidence before it when *Mabior* was decided.

[143] Even if the reduction rate for the transmission of HIV is slightly higher than what the Cochrane Review suggests, the fact remains that, from an admissibility perspective, that new evidence is not sufficiently cogent to be granted admission.

[144] While the appellant quarrels with the precise reduction in risk of transmission arising from condom use alone, even if he is right, his position cannot succeed. To this end, it is notable that the Supreme Court decided that the potential reduction in baseline HIV transmission rates arising from the taking of antiretroviral medication was in the range of 89 to 96 percent: *Mabior*, at para. 101. Yet the court

was not satisfied that even that level of reduction in baseline risk of transmission could qualify as negating the realistic possibility of HIV transmission.

[145] Therefore, even if I were to accept (which I do not), that at a population level, the use of condoms alone reduce the risk of transmission of HIV up to even the 96 percent mark, on the *Mabior* analysis, that would still be insufficient, on its own, to negate the court's view of what constitutes a realistic possibility of transmission.

[146] I conclude this section by making two practical observations in response to the appellant's and interveners' characterization of the *Mabior* decision as criminalizing an "infinitesimal" risk of transmission. They emphasize that the baseline risk of HIV transmission is so "infinitesimal" that it cannot possibly rise to the level of a realistic possibility of harm, let alone when that baseline risk is pulled down by another at least 80 percent through condom use. I note that the appellant and interveners are not alone in that position: Martha Shaffer, "Sex, Lies, and HIV: Mabior and the Concept of Sexual Fraud" (2013), 63 U. Toronto L.J. 466, at pp. 472-73; Isabel Grant, "The Over-Criminalization of Persons with HIV" (2013), 63 U. Toronto L.J. 475, at pp. 479-80.

[147] It is important to note, though, that the argument suggesting that there is only an "infinitesimal" risk of transmission arises from statistics predicated on two things: (a) a per-sex-act consideration of risk; and (b) only the baseline risk relating to vaginal-penile intercourse.

[148] First, the baseline statistic for risk of transmission in *Mabior* is based upon a single act of vaginal-penile intercourse. As pointed out by Dr. Wobeser, though, that risk repeats itself with every repeated act of sexual intercourse. Therefore, even if the per-act baseline risk, as reduced by condom use, could be called "infinitesimal", one cannot lose sight of the fact that the risk adds up over time. In other words, even if the risk of engaging in a behaviour with an infected partner once could be called infinitesimal, when that behaviour is repeated, so too is the risk of transmission.

[149] As Dr. Fisman explained, the risk is "cumulative with each sexual act", meaning that following a number of sex acts involving the same serodiscordant couple, the "Bernoulli (or coin-toss) model" would apply. The "risk of the event occurring at least once would be estimated using a formula" that applies an "exponent equivalent to the number of sex acts that have occurred". Put simply, the risk of transmission exponentially increases with each sexual act involving the same serodiscordant couple.

[150] In my view, the repeated risk of harm that comes with each act of sexual intercourse between the same serodiscordant couple partially informs the *Mabior* rule that condom use alone does not negate the "realistic possibility of transmission". While some HIV non-disclosure cases involve one-time encounters, others involve repeated acts of sexual intercourse where there is no disclosure made to the unwitting partner, such as the acts of vaginal sex with A.G. and A.C.

in this case. Clearly, the cumulative risk for these complainants rose with each act of intercourse.

[151] Second, I would make the observation that, when it comes to sexual intercourse, the baseline transmission rates differ somewhat significantly between vaginal and anal intercourse. One systemic review, adopted in the Department of Justice Report, at p. 10, places the baseline transmission rate for “receptive vaginal intercourse” (risk to the receptive partner) at 8 in 10,000 (0.08 percent), while it places the transmission rate of “receptive anal intercourse” at 138 in 10,000 (1.38 percent). See also International Consensus Statement, at ss. 2.3.2. and 2.3.3.

[152] In my view, these two factors, cumulative risk over many sex acts, and differing baseline risks depending upon the nature of the sex acts, informs the wisdom of the *Mabior* approach in creating a singular, easy-to-understand, and easy-to-apply rule for the application of the criminal law. Under the present *Mabior* regime, the criminal law cannot apply differently based upon the nature of a sexual act or the number of times those acts take place within the same serodiscordant couple. Any other approach would carry serious implications in terms of equality and return this already complex area of the law to the world of uncertainty.

[153] Accordingly, while the statistical backdrop for the *Mabior* decision may be at the low end of what is meant by a realistic possibility of transmission, there are other scenarios to which the statistical backdrop looks much different.

IV. Policy Reasons to Change *Mabior*

[154] I will conclude by addressing the interveners' arguments about policy. As they say, it is "bad public policy to criminalize people who use condoms." They advance four arguments in support of that position. They maintain that the criminalization of HIV non-disclosure where condoms are used:

- is too blunt an instrument because the HIV-positive person's conduct is not truly blameworthy in nature, particularly given that the risk of HIV transmission in these circumstances is non-existent or negligible at worst;

- ignores scientific evidence and results in "state-sanctioned stigma and discrimination against people living with HIV";

- has the effect of contributing to a broad societal misunderstanding about HIV and serves to exacerbate the stigma surrounding the disease, all of which can work to the detriment of public health; and

- compounds the disadvantage of already significantly disadvantaged groups.

[155] There is no doubt that the criminal law is the bluntest of instruments, properly reserved for only those situations where conduct is so morally blameworthy that it deserves to be labelled “criminal”.

[156] Nor can there be any doubt that the stigma associated with a criminal conviction only compounds the difficulties of those living with HIV, an already vulnerable group, many of whom come from historically marginalized and disadvantaged situations: See e.g. Department of Justice Report, at p. 4.

[157] The fact is that there are many different models for how to approach HIV non-disclosure cases. Some of those other models were reviewed by the Supreme Court of Canada in *Mabior*: at paras. 49-55. And, as noted in *Mabior,* at para. 51, there are few jurisdictions that criminalize deception that only exposes a partner to the risk of transmission (as opposed to actual transmission).

[158] Not only is the deception that exposes a sexual partner to a risk of transmission criminalized in Canada, but the most frequently chosen path of prosecution is by way of the most serious sexual offence known to law: aggravated sexual assault, an offence punishable by up to life in prison.

[159] Although this appeal raises the singular issue of the effectiveness of condoms at preventing HIV transmission, there is much to be said for the fact that other things may have changed since *Mabior*. A prime example of change involves the current understanding around suppressed and undetectable viral loads. This

significant change is reflected in the policies of some Attorneys General in Canada not to prosecute matters involving these circumstances. There are others, like the federal Attorney General, who have also started to put in place specific condom-related prosecution policies, directing that, as a "general" rule, there be no prosecutions in situations where condoms are used as long as there are no other risk factors present.

[160] The ability of the common law to adapt is important in this context. Even so, the interveners' arguments call upon this court to overturn the clear legal result in *Mabior* based upon policy arguments.

[161] While there may come a day where there is a reconsideration of the intersection between the law of aggravated sexual assault and HIV non-disclosure risk of transmission cases, this is not that case. The sole issue raised in this appeal relates to the suggestion that, since *Mabior,* there have been changes to how we should understand the effectiveness of condoms at preventing HIV transmission. To that end, I adopt the trial judge's observation that "when the scientific evidence as a whole is examined with respect to condom use in real life situations, nothing has changed in the past five years from the time *Mabior* was decided in 2012 to the present day".

[162] The *Mabior* decision reflects the Supreme Court's appreciation for the fact that perfectly operating latex condoms provide a perfect barrier to the transmission

of HIV. It also reflects the court's understanding that sex happens in the real world and that, in that world, human error and condom failure are concerns across the population. It also reflects the court's decision to criminalize the risk of transmission from a forward-looking perspective, one that takes into account the need for certainty in the criminal law. Finally, it accommodates an interpretation of s. 265(3)(c) of the *Criminal Code* that is consistent with our modern notion of consent to sexual activity.

[163] In my view, there is nothing in the new evidence that reveals a change in the facts upon which *Mabior's* legal reasoning rests. The fresh evidence on appeal is not cogent and is not admissible. The trial judge did not err in excluding Dr. Smith's evidence on the reopening application.

CONCLUSION

[164] On consent, I would amend count 3 on the indictment to reflect the offence commencing on October 20, 2013 and continuing to June 24, 2014.

[165] I would dismiss the fresh evidence application. I would dismiss the appeal.

Released: "P.L." August 5, 2020

"Fairburn J.A."
"I agree. P. Lauwers J.A."
"I agree. Gary Trotter J.A."