

# COVERING RISK

## HIV CRIMINALIZATION AND CONDOMS



## The Context

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In Canada, people living with HIV can be criminalized for not disclosing their status before engaging in a sexual activity where there is a “realistic possibility of HIV transmission.”

Although the possibility of HIV transmission when a condom is used ranges from negligible to none, the law remains unsettled about whether condoms are sufficient on their own to negate a realistic possibility of transmission. While some policymakers and courts have recognized condom use as sufficient to negate that possibility, people living with HIV in Canada remain at risk of prosecution for alleged non-disclosure before sex with a condom.

Criminalizing people who take precautions to protect their partners and pose no to negligible risk of transmission is unfair and discriminatory against people living with HIV. It is contrary to scientific evidence and international recommendations. It is bad for public health. Policymakers must take action to prevent these unjust prosecutions.

## Condoms are Efficient for HIV Prevention

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Since the early days of the HIV epidemic, condoms have been at the centre of prevention efforts because HIV is unable to pass through intact latex or polyurethane.<sup>1</sup> It is estimated that condoms have averted a total of 50 million new HIV infections globally.<sup>2</sup> Even with the availability of antiretroviral therapy and Pre-exposure Prophylaxis (PrEP), condoms remain an invaluable and uncontested tool in HIV prevention because they are inexpensive, cost effective, and easy to use.<sup>3</sup> According to a group of leading Canadian scientists, “[w]hen used correctly and no breakage occurs, condoms are 100% effective at stopping the transmission of HIV,” and thus, sex with a condom poses, at most, a “negligible” possibility of transmission.<sup>4</sup>

## HIV Criminalization in Canada

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In Canada, there is no criminal statute imposing an obligation to disclose one’s HIV-positive status to a sexual partner; instead, this obligation was established by the courts. In *R. v. Cuerrier* (1998), the Supreme Court of Canada ruled that people living with HIV can be criminalized for not disclosing their HIV-positive status before engaging in sexual activity that poses a “significant risk of serious bodily harm.”<sup>5</sup> In its latest landmark decision on this issue, *R. v. Mabior* (2012), the Supreme Court clarified that such a risk exists where there is a “realistic possibility of transmission of HIV.”<sup>6</sup>

People living with HIV are usually charged with aggravated sexual assault for alleged non-disclosure before engaging in (otherwise) consensual sex. Aggravated sexual assault carries a maximum penalty of life imprisonment, mandatory sex offender registration, and the possibility of deportation in the case of non-citizens. In Canada, people can be convicted even if they had no intent to transmit HIV and the virus was not actually transmitted.

# Condom Use and HIV Criminalization: Evolution in Case Law

In *Mabior*, the Supreme Court ruled that, based on the medical evidence in that case and as a “general matter,” a “realistic possibility” of HIV transmission does not exist where a condom is used *and* the accused’s viral load is “low” (defined as less than 1500 copies/ml).<sup>7</sup> *Mabior* was interpreted at the time as imposing a legal duty to disclose before vaginal or anal sex unless a condom is used *and* the partner living with HIV has a low viral load. As such, it was widely criticized for being unfair and at odds with the scientific evidence that using a condom or having a low viral load *alone* prevents transmission.

## Initial rulings favoured not criminalizing people who use condoms

The decision in *Mabior* was a step backward. Prior to that decision, condom use was often viewed as sufficient to preclude criminal liability in HIV non-disclosure cases. In *Cuerrier* — the first Supreme Court decision on the issue in 1998 — six out of the seven judges either suggested or explicitly affirmed in their ruling that using a condom would preclude criminal liability in cases of non-disclosure.<sup>8</sup>

Following *Cuerrier*, only a few trial courts addressed the issue of condom use, but of those that did, most ruled in favor of not criminalizing people who use condoms.<sup>9</sup> Similarly, prosecutorial guidelines developed in British Columbia in 2007 regarding sexually transmitted infections interpreted the Supreme Court’s decision in *Cuerrier* as establishing a legal duty to disclose before “unprotected sex” (understood at the time as sex without condom).<sup>10</sup>

## *R. v. Mabior* and subsequent case law

By suggesting that a person must necessarily both use a condom *and* have a low viral load to negate a realistic possibility of transmission, the Supreme Court’s decision in *Mabior* significantly expanded the reach of the criminal law. However, a careful reading of the decision and subsequent jurisprudence confirm that the law *can* and *must* evolve — especially as our understanding of medical evidence evolves. As stated by the Supreme Court itself 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.”<sup>11</sup> [emphasis added]

The subsequent developments of the law in relation to viral loads demonstrates the capacity of *Mabior*’s “realistic risk” standard to evolve. It is now clearly established that a person living with HIV who has a suppressed (or undetectable) viral load (i.e. < 200 copies/ml) cannot transmit HIV through sex<sup>12</sup> and, as a result, people have been acquitted on the basis of having a suppressed viral load (even if they did not use a condom).<sup>13</sup> Recent prosecutorial guidelines at both federal and provincial levels also clearly preclude prosecutions against people living with HIV with a suppressed viral load.<sup>14</sup>

In comparison to viral load, the law in relation to condom use has remained unsettled since *Mabior*. While an accused in Nova Scotia was acquitted in 2016 based on medical evidence regarding condom use,<sup>15</sup> a young man in Ontario was convicted of aggravated sexual assault for not informing his partner of his HIV-positive status before engaging in sex with a condom.<sup>16</sup>



## Condom Use and HIV Criminalization: Policy Developments and Calls for Reform

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Outside the courts, important policy developments have taken place in Canada in favour of not criminalizing people who use condoms. In December 2018, recognizing the overcriminalization of HIV, the Attorney General of Canada released a directive to federal lawyers. The directive clearly states that: "the Director [of Public Prosecutions] shall **generally not prosecute HIV nondisclosure cases where the person has not maintained a suppressed viral load but used condoms** [...] unless other risk factors are present, because there is likely no realistic possibility of transmission."<sup>17</sup> [emphasis added]

Similarly, recent prosecutorial policies and guidelines in British Columbia and Quebec, offer some (albeit too limited) degree of protection against prosecutions in cases where a condom was used.<sup>18</sup>

In June 2019, the House of Commons Standing Committee on Justice and Human Rights made clear recommendations against prosecuting people who use condoms in its report on HIV criminalization in Canada:<sup>19</sup>

The Committee also agrees with the witnesses that "the criminal law is a blunt instrument that must be used sparingly in order to ensure that only those who are deserving of its sanction are prosecuted."

[...] **HIV non-disclosure should never be prosecuted if** (1) the infected individual has an undetectable viral load (less than 200 copies per millilitre of blood); (2) **condoms are used**; (3) the infected individual's partner is on PrEP or (4) the type of sexual act (such as oral sex) is one where there is a negligible risk of transmission. [emphasis added]

Further action is urgently needed for these recommendations to be implemented.





## Medical Evidence on Condom Use

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 because they prevent the contact between HIV-containing bodily fluid and the target cells of an HIV-negative individual.<sup>20</sup>

### CANADIAN EXPERT CONSENSUS STATEMENT ON HIV AND ITS TRANSMISSION IN THE CONTEXT OF THE CRIMINAL LAW

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).<sup>21</sup>

### EXPERT CONSENSUS STATEMENT ON THE SCIENCE OF HIV IN THE CONTEXT OF CRIMINAL LAW

While the law has struggled to clarify its position on condom use, the science has become increasingly clear: the risk of HIV transmission where condoms are used is negligible. But how did the law become out of step with the science?

In concluding that condoms alone are not sufficient to negate a realistic possibility of HIV transmission, the Supreme Court in *Mabior* — and more recently, the Ontario Court of Appeal in *R. v. N.G.* — relied on a 2002 study known as the “Cochrane review.” Based on a meta-analysis of 14 existing observational studies on condoms and HIV transmission, the Cochrane review found that, at a population level, consistent use of condoms reduces the possibility of HIV transmission by at least 80% in penile-vaginal sex among serodiscordant couples (i.e. one partner lives with HIV and the other does not).<sup>22</sup> The Supreme Court of Canada did not consider that an 80% reduction in the risks of transmission was sufficient to preclude criminal liability. However, this figure means that the already low per-act risk of HIV transmission associated with vaginal sex (0.08%)<sup>23</sup> would be reduced by an additional 80%.

Moreover, while this 80% population-level estimate indicates a dramatic reduction in the risk of HIV transmission in cases of condom use, research suggests that this figure is likely an underestimate.<sup>24</sup> Indeed, there are several limitations to the Cochrane review (and observational studies in general) that should be considered in critically assessing the courts’ decisions:<sup>25</sup>

- The Cochrane review relied on couples to self-report their condom use. This method of data collection raises issues of “social desirability bias,” meaning that couples may have reported using a condom, even when they did not use one. This, in turn, could have resulted in a lower estimate of condoms’ effectiveness.
- The Cochrane review analyzed *observational* studies on condom use and HIV transmission. Compared to randomized control trials, which are considered the gold standard of studies, observational studies may overlook key differences between different populations studied (in this case, between couples who consistently used condoms and couples who did not). These unexamined differences may partly account for the lower level of condom effectiveness observed in the studies.
- The Cochrane review did not examine whether condoms were used *correctly*, only whether they were used *consistently*. This means that the 80% figure already accounts for instances of incorrect use or breakage (both situations in which HIV transmission is possible). In cases where a condom is used throughout sex and there is no evidence that its integrity was compromised, there is no reason to believe sex posed any risk of HIV transmission.

It is unfair to convict an individual condom user — whose correct use of a condom would mean zero risk of transmission<sup>26</sup> — on the basis of a population-level estimate that condoms are 80% effective in reducing the risk of transmission.

# Criminalizing People who Use Condoms is Bad Public Policy on Multiple Grounds

- The heavy hand of the criminal law should be reserved for conduct that is truly blameworthy.<sup>27</sup> This is particularly so when contemplating harsh penalties such as years of imprisonment, lifetime sex offender registration, and likely deportation in the case of non-citizens — penalties currently faced by people charged for not disclosing their HIV-positive status in Canada. Taking effective precautions to protect partners from HIV transmission does not fall into that category.
- Provided that condoms are used correctly, transmission of HIV is impossible, meaning that a person living with HIV is “no different from anyone else.”<sup>28</sup> Yet in Canada they currently still face the spectre of criminal prosecution and punishment. This is state-sanctioned stigma and discrimination.
- An overly broad use of the criminal law against people living with HIV contributes to misinformation about HIV and further exacerbates stigma including to the detriment of public health. As recognized by the federal Department of Justice, “fear of prosecution may discourage persons living with HIV from seeking testing, counseling and education, and obtaining treatment, which could exacerbate HIV transmission.”<sup>29</sup>
- Criminalizing HIV non-disclosure despite condom use compounds disadvantages faced by particular communities and people affected by HIV. Some people living with HIV (including women, Indigenous people, and migrant communities) are less likely to have access to health care and other services,<sup>30</sup> and therefore face additional barriers to achieving a low or suppressed viral load. Criminalizing people living with HIV who use condoms — a highly effective tool to prevent transmission — but who cannot achieve a low or suppressed viral load, creates an additional burden on some of the most marginalized people living with HIV.<sup>31</sup>
- Finally, feminist scholars and advocates 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. These considerations all point to the importance of restraint in the scope of the criminal law.

## Community Calls for Action

In 2017, the Canadian Coalition to Reform HIV Criminalization — a national coalition of people living with HIV, community organizations, lawyers, researchers, and others — called upon policymakers across the country to limit the unjust use of the criminal law against people living with HIV. Specifically, the Coalition called for an end to HIV-related criminal charges in cases of anal or vaginal sex with a condom.<sup>32</sup>



## Recommendations:

For almost 10 years, courts and prosecutors across Canada have grappled with the legacy of *Mabior*, particularly regarding condom use. While the law may be unsettled, the science and policy reasons are clear: prosecuting people living with HIV who use condoms is unscientific and unfair. Law- and policymakers must act to definitively preclude prosecutions against people living with HIV who use condoms.

### Recommendations for action at the federal level

Reform the *Criminal Code* to remove HIV non-disclosure from the reach of sexual assault laws and limit prosecutions to cases of actual, intentional transmission. Law reform should clearly preclude criminal liability where a person engages in activities that, according to the scientific evidence, pose no significant risk of transmission, including sex with a condom.

### Recommendations for action at the provincial level

Each province should develop and implement sound prosecutorial policy that clearly precludes criminal liability in instances a person uses a condom because there is no significant risk of transmission.

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