Case Name:
R. v. J.T.C.

Between
Her Majesty The Queen, and
C.(J.T.)

[2013] N.S.J. No. 525

2013 NSPC 88

Dockets: 2370912-2370915

Registry: Halifax

Nova Scotia Youth Justice Court

A.S. Derrick Prov. Ct. J.

Heard: September 5-6, 9, and 26, 2013.
Judgment: October 7, 2013.

(116 paras.)

Charges: Sections 273(2)(b), 151, 137 x 2, of the *Criminal Code*.

Counsel:

Alex Keaveny, for the Crown.

Megan Longley and Karlan Modeste, articling clerk, for C.(J.T.).

TRIAL DECISION

A.S. DERRICK PROV. CT. J.:--

Introduction

1 On July 7, 2011, then sixteen year old C and thirteen year old P had sex. This led to C being charged with aggravated sexual assault and having sex with someone who could not legally consent. In July 2011, sixteen was the age of consent.

2 C was charged with the aggravated sexual assault of P because he is HIV-positive, did not disclose this fact to P, and, according to the Crown, engaged in unprotected sex with P. P testified that she would not have had sex with C had she known about his HIV status. In the Crown's submissions, proof beyond a reasonable doubt of these facts establishes the essential elements of the offence of aggravated sexual assault where the accused is HIV-positive: P's agreement to have sex with C was obtained by deceit as she would not have had sex with him had she known he was HIV-positive, and the failure to use a condom exposed her to the risk of transmission of a potentially deadly virus.

3 C has defended against the aggravated sexual assault charge on several grounds but in particular, it was his evidence that he used a condom when he and P had sexual intercourse. He argues it is also relevant that he did not ejaculate and that, although he is HIV-positive, he has an undetectable viral load.

4 As for the sexual interference charge -- that C had sex with P who was only 13 and could not legally consent -- C submits that he took all reasonable steps to ascertain P's age. A successful "all reasonable steps" defence is a complete answer to a charge of sexual interference. To secure a conviction against C, the Crown must prove beyond a reasonable doubt that C did not take all reasonable steps to determine P's age, before he had sex with her.

5 C is also charged with breaching two conditions of a probation order dated June 3, 2011. He testified that he was drinking alcohol on July 7 and concedes this makes him guilty of breaching the no-alcohol condition of his probation order, Count 4 of the Information. The other probationary condition he is charged with breaching is a condition to keep the peace and be of good behaviour. Whether he can be convicted of that charge will depend on whether he is convicted of the aggravated sexual assault and/or the sexual interference charges.

Presumption of Innocence and Reasonable Doubt

6 C is presumed innocent of the charges and that presumption of innocence can only be displaced by the Crown proving the charges against him beyond a reasonable doubt.

The Law - Aggravated Sexual Assault in HIV Non-Disclosure Cases

7 In two recent decisions, *Mabior* and *D.C.*, the Supreme Court of Canada dealt with the issue of what proof is required for a conviction for aggravated sexual assault where there has been a non-disclosure of HIV-positive status.[1]

8 In *Mabior*, the Court considered the issue of a "significant risk of serious bodily harm" and concluded that a "significant risk of serious bodily harm" entails a "realistic possibility of transmission of HIV." The Court held: "This applies to all cases where fraud vitiating consent to sexual relations is alleged on the basis of non-disclosure of HIV-positive status."[2]

9 The *Mabior* decision explained the basis for a conviction of aggravated sexual assault in the case of an HIV-positive accused who did not disclose his or her status prior to engaging in sexual intercourse:

> ... the Crown must show that the complainant's consent to sexual intercourse was vitiated by the accused's fraud as to his HIV status. Failure to disclose (*the dishonest act*) amounts to fraud where the complainant would not have consented had he or she known the accused was HIV-positive, and where sexual contact poses a significant risk of or causes serious bodily harm (*deprivation*). A significant risk of serious bodily harm is established by a realistic possibility of transmission of HIV ...[3]

10 In C's case it is not contested that the Crown has met its burden of proving the dishonest act, that C did not disclose his HIV-positive status to P.

11 The Supreme Court held in *Mabior* 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."[4] The Court found that a low viral load combined with the use of a condom reduces the risk of transmission "to a speculative possibility rather than a realistic possibility."[5]

12 The *Mabior* decision establishes that a conviction for aggravated sexual assault in the HIV non-disclosure context can only be secured where it is proven beyond a reasonable doubt that the complainant would not have had sex with the accused had she known he was HIV-positive, and where sexual contact poses a significant risk of or actually causes serious bodily harm. As noted, a significant risk of serious bodily harm is established by a realistic possibility of transmission of HIV.[6]

13 The Supreme Court of Canada has criminalized even unprotected sex where the HIV-positive, non-disclosing partner has an undetectable viral load. In *D.C.*, the companion case to *Mabior*, the Court unanimously held as follows:

> To convict, it is necessary to establish beyond a reasonable doubt that D.C. failed to disclose her HIV status to the complainant, where there is a significant risk of serious bodily harm. As discussed in Mabior, a significant risk of serious bodily harm, in the case of HIV, is found in the presence of a realistic possibility of transmission and is negated by both low viral load and condom protection. Here low -- indeed undetectable -- viral load was established. The critical issue on the trial was therefore whether a condom was used on the single pre-disclosure act of sexual intercourse between the complainant and D.C.[7]

14 It is difficult to understand how the Supreme Court of Canada determined that a non-detectable viral load could constitute "a realistic possibility of transmission". If the use of a condom in the case of a low viral load reduces the risk of transmission to a "speculative possibility rather than a realistic possibility", it is unclear to me at least how a viral load that is undetectable rates a risk assessment greater than speculation.

15 The effect of the *Mabior* and *DC* decisions is the increased criminalization of persons living with HIV. The criminalizing of a non-disclosing HIV-positive person with an undetectable viral load who has unprotected sex is inconsistent with the Supreme Court's statement in *Mabior* that a significant risk of serious bodily harm, which is established by a realistic possibility of transmission of HIV, "cannot mean any risk, however small."[8] The Court has said that adopting for the purposes

of criminalization an "any risk, however small" standard "would come down to an absolute disclosure approach."[9] The Court has rejected an absolute disclosure standard.

16 The Supreme Court's decision to come down on the side of expanding criminal sanctions for HIV-positive accused is at odds with its view of the risks of creating an overly broad reach of criminalization:

> ... The danger of an overbroad interpretation is the criminalization of conduct that does not present the level of moral culpability and potential harm to others appropriate to the ultimate sanction of the criminal law. A criminal conviction and imprisonment, with the attendant stigma that attaches, is the most serious sanction the law can impose on a person, and is generally reserved for conduct that is highly culpable -- conduct that is viewed as harmful to society, reprehensible and unacceptable. It requires both a culpable act -- *actus reus* -- and a guilty mind -- *mens rea* -- the parameters of which should be clearly delineated by the law.[10]

17 I note that paragraph 29 of *D.C.*, which I reproduced at paragraph 13 above, leads inexorably to the following result: an HIV-positive person with an undetectable viral load who does not disclose his or her status before having unprotected sex cannot avoid criminal liability once these facts are proven beyond a reasonable doubt. There is much to question about widening the criminal net to this extent, as expressed by Professor Isabel Grant as follows:

> ... In *Mabior,* the Court phrased the issue as being whether a person who engages in sexual relations without disclosing his or her condition commits aggravated sexual assault. No distinction was made between cases where the virus is transmitted and those where it is not. The Court did not consider any options for criminalization short of our most serious sexual offence of aggravated sexual assault, a crime which is punishable by a maximum sentence of life in prison.
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> The scheme of sexual assault offences in the *Criminal Code* is tiered from 'simple' sexual assault through to aggravated sexual assault, based on the consequences or additional harm to the complainant beyond the harm of sexual assault. A sexual assault is a sexual touching without consent. An aggravated sexual assault is one in which the accused 'wounds, maims, disfigures or endangers the life of the complainant' in the course of that sexual assault. The potential life sentence for aggravated sexual assault is justified by the harmful consequences that ensue from the sexual assault, along with a heightened level of moral culpability. This distinction is lost in HIV non-disclosure prosecutions ...[11]

18 Professor Grant makes note of the pile-on effect of imposing expanded criminal liability on an already stigmatized population:

> ... While sexual assault is not a crime that is measured by the degree of harm caused to the complainant, aggravated sexual assault is. Sexual assault is about the denial of the complainant's autonomy to choose the circumstances in which he or she will participate in sexual activity. But aggravated sexual assault applies to situations where that autonomy is negated *and* further serious harm is caused.

> The judgment in *Mabior* trivializes the significance of such harm when it does occur.
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> Why is it only in the HIV context that even the slightest possibility of endangerment is sufficient to trigger our most serious sexual offence? It is as if the idea of HIV is enough to endanger life. The Court acknowledged that other jurisdictions have taken a more nuanced approach, either by prosecuting only cases where transmission takes place or by prosecuting cases where no transmission takes place as a less serious offence, but it dismissed these options without explanation ...[12]
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> ...
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> ... It is the marginalization of persons with HIV that makes disclosure so difficult. Widespread criminalization increases the stigma associated with HIV and makes disclosure *more* difficult, not easier. We have made tremendous gains in treating and preventing the spread of HIV; yet, ironically, in the face of these gains we see a more punitive approach to non-disclosure which will inevitably enhance the marginalization of people living with HIV in Canada.[13]

19 It may be thought from the above references that I have strayed far afield from my task in this case, which is to determine if the Crown has proven all the elements of the offence of aggravated sexual assault against C. But my profound unease with the Supreme Court of Canada's treatment of the very issues I am required to address is highly relevant in this regard: I am unable to reconcile the Court's determinations in *Mabior* and *D.C.* In *Mabior*, the Court emphasized that it is a "realistic possibility of transmission" that underpins the requirement in an aggravated sexual assault prosecution for a "serious deception with serious consequences" to vitiate consent to sexual relations.[14] Yet in *D.C.*, the Court treats an accused with an undetectable viral load as capable of transmitting HIV, and thereby criminally culpable, notwithstanding the *Mabior* requirement that a significant risk of serious bodily harm must be present. In *D.C.* the "critical issue" for the Court was the use of a condom even where the evidence had established that D.C.'s viral load was "undetectable."[15]

20 My difficulties with the *Mabior* and *D.C.* decisions are amplified by the fact that the Crown has not proven beyond a reasonable doubt that C's undetectable viral load was subject to any of the concerns identified by the Supreme Court of Canada in *Mabior*, that is, the potential for fluctuations -- "spikes" or "blips" -- in viral load.[16] In due course I will discuss the expert medical evidence that leads me to say this.

21 In C's case I have heard evidence that he is an "elite controller", naturally and effectively suppressing the HIV in his system; that he did not ejaculate which raises the question of how, without the assistance of bodily fluids, HIV could have been transmitted; and that, aside from any other considerations, he wore a condom when he had sex with P. I must ask myself if any or all of this evidence raises a reasonable doubt about C's criminal liability for aggravated sexual assault, applying the law set out by the Supreme Court of Canada. Before I can answer that essential question, I must first review the evidence and make findings of fact.

The Aggravated Sexual Assault Charge - Facts

22 July 7, 2011 was a hot, sunny day. A Facebook exchange, initiated by C, led to C and P meeting up at their old elementary school. They hung around there for a bit, smoking cigarettes and talking. P testified that she was bored but had no interest in C. Later, her level of interest changed.

23 It was an obvious day for a swim, even by late afternoon. P and C walked back to her house. She put on a different tank top and jean shorts for the swim: C was wearing shorts and a t-shirt. P took a towel with her. C had nothing with him.

24 P and C first tried swimming in the ocean behind P's house but the tide was low and the area, mucky. They went instead to where C was staying with his aunt, getting a drive there from P's older brother.

25 After swimming and getting cold, C and P went to hang out in a small shed on the property. There wasn't much room in the shed which was used for storage. C went and got some beer from his aunt's house and he and P each had some. P describes experiencing a "buzz" although she did not drink much. C drank quite a bit more than P and was feeling "really good." He was using alcohol a lot at this time in his life, to deal with his issues.

26 After consuming the beer, P got out of her wet clothes. It was her evidence that she did this either of her own accord or because C asked her to. She testified that she willingly took her clothes off. It was P's evidence that she did not expect anything to happen and did not anticipate that removing her clothes would arouse C. This was either extremely naïve at the time or a less than candid recollection. P testified there had been no discussion about having sex. That accords with C's evidence.

27 C described being "stunned" by P removing her clothing. He says he did not ask her to do so. Once P had undressed he took off his muscle shirt and started to kiss P on the lips. P's memory about kissing C is hazy.

28 P recalls being seated on a piece of plywood in the shed with C standing. She performed oral sex -- fellatio -- on C. She testified that she is "pretty sure" C asked her to do this. She says it is possible there was some kissing beforehand. When it was put to her on cross-examination that she did not make any mention in her police statement of July 20, 2011 of C asking her to perform oral sex, P testified that she had been "really nervous" when she gave her statement but allowed that her memory would have been better in 2011 than now.

29 Even though C has testified that he did not ask P to perform oral sex on him, I do not find anything turns on how the oral sex came about. There is no suggestion by the Crown that C coerced P into doing anything. It was C's evidence that P reached into his boxers and took his penis out and told him she was "not very good at this." After 15 - 20 seconds he asked her to stop as it hurt. He did not ejaculate.

30 C was not wearing a condom and does not claim that he was. It was P's testimony that she could tell by the feel of C's penis that he did not have a condom on. She was familiar with the feel of condoms from using them as water balloons. She was also familiar with the packaging for condoms.

31 After the fellatio, C and P had sexual intercourse. She was lying down on the plywood sheet in the shed and C lay on top of her. Before the intercourse there was some digital penetration of P by C.

32 P is now "pretty sure" that she and C had unprotected sexual intercourse. When it was put to her on cross-examination that C reached over and retrieved a condom from the pocket of his shorts, she testified that he did not. Although the light in the shed was diminishing as the sun set, and P's vision was blurry without glasses, she emphasized that she would have been able to see a condom package if there had been one.

33 P testified that she never saw a condom or a condom package in the shed. She did not see C with anything in his hand before or after they had sexual intercourse. It was her evidence that she did not see C doing anything with his hands or to his penis before they started to have intercourse. It was P's evidence that she could "kinda" see C's body although it was "blurry."

34 P's testimony about C's use of a condom differed from what she told police in her videotaped statement of July 20, 2011. This statement was admitted into evidence once P adopted it at the start of her testimony. When P was asked on July 20 if she and C had had protected sex, she responded by saying: "I think so." She then said she was "not 100 percent sure." Asked to explain what she meant by "I think so", P said: "I think he may have used a condom but I'm not sure." It was then that she said, on the question of whether it was light or dark out, that "It was at sunset so you couldn't really see in the shed." Further along in her statement, again describing the events in the shed, P was asked about the point when she and C started to have sexual intercourse "... can you see in the shed or is it light or dark?" She told police: "You can't really see."

35 P's trial testimony of now being "pretty sure" that C did not use a condom was also at odds with what she told Cst. Tillman, a police officer who was investigating the case on July 12, 2011. Following a *voir dire* at which Cst. Tillman and P's father testified, I found that P had told Cst. Tillman, in the presence of her father, that she and C had engaged in protected sex. This was expressed by P either saying a condom was used or that safe sex had been practiced. When asked about this on cross-examination, P testified that she had told Cst. Tillman this because her father was in the room during their discussion.

36 C testified to a distinct memory of using a condom. It was his evidence that while P was lying down and he was placing his fingers in her vagina, she was making sounds that indicated she was enjoying being touched. C then reached over and retrieved a condom from the pocket of his cargo shorts. He had placed the shorts nearby after removing them. The green Lifestyle condom in its plastic packaging had been in this pocket, a pocket closed by a snap or Velcro, while he was swimming.

37 C testified that he did not tell P he had a condom with him or that he was going to put it on. He had been told by the health professionals involved with his care to always use a condom. It was C's understanding that there is both a legal and a moral obligation to use a condom. He views it as "almost good practice to use a condom ... really for everyone." He said it had been recommended to him to take a condom wherever he went because "you don't know what situation you might be in." He was also concerned to protect himself from sexually transmitted diseases.

38 C says there was no discussion with P about the condom which took him seconds to open and put on his penis. He then started to have sexual intercourse with P.

39 P estimates the sexual intercourse lasted about 5 to 10 minutes although C recalls it lasting no more than 5 minutes. C testified that at first P seemed to enjoy it but when he started to go faster, she complained, saying "ouch." He stopped, starting up again only once P said she was "okay." When she again complained of discomfort, C stopped without ejaculating.

40 P agrees that C stopped the intercourse. She testified that she has "no clue" if C ejaculated. P told police in her July 20, 2011 statement that she did not think C ejaculated. Asked about this in the witness box, P could not recall it there was any "wetness or "mess". She testified that she "really can't remember if there was anything I had to clean up."

41 P and C did not linger in the shed after they stopped having sex. Before they left the shed together, P recalls that C went out of the shed and returned. It was C's testimony that after the sex, he turned his back to P and in the process of pulling his shorts back on, removed the condom. He then went outside with the condom. He says he checked it to make sure it hadn't broken -- "a habit kind of thing" as a result of what he had been taught in school -- and threw it in a garbage pile on the property. The garbage pile was a boggy area where the family trash was taken to be burned. It was approximately 10 to 15 feet from the shed. C was familiar with the area because garbage removal and burning had been his responsibility during the time he had been living with his aunt and uncle.

42 P wanted to call her mother and C facilitated this by getting his aunt's phone. P used the phone and then walked to the end of the lane. C knew she would be safe doing so and didn't go with her. He testified that he went back into the shed and picked up the condom wrapper which he crumpled up and put in his pocket.

43 P testified that she and C parted as friends. They had no further contact after July 7.

44 C readily acknowledges he did not tell P he was HIV-positive. He testified that he felt he did not need to as he used protection when having sex with her. He believed there was no risk of transmission. His evidence on this issue also indicates that he felt disclosure might open him up to being ostracized.

The Condom Issue

45 Before I proceed further with my reasons, I will deal with the condom issue as it is dispositive of the aggravated sexual assault charge. The Crown's case for unprotected sexual intercourse rests on P's evidence. Her greater certainty now about the absence of a condom is based on the fact that she says she saw no evidence of one in the shed. She testified that lately she has not been sleeping well and remembering more from the events of July 7, 2011 with the result that she is now "pretty sure" no condom was used.

46 "Pretty sure" is the high water mark of P's recollection. She originally said that a condom was used (the July 12 conversation with Cst. Tillman) and then that she thought one had been used but was not "100 percent sure" (the July 20 police interview).

47 There are several reasons why P's recollections on the condom issue fall short of dispelling reasonable doubt. On the facts of this case, the statements do not amount to proof beyond a reasonable doubt. P's growing certainty to the point of now being "pretty sure" no condom was used is not reassuring, especially as she testified her memory would have been better closer to July 7. I am not satisfied that, without more, it can be sufficient to simply say she has thought more about the matter with the result that a clearer memory has emerged. P offered no new facts or observations, just that she now remembers more. What P actually offers is a more confident belief that a condom was not used but there are no additional details offered to explain that greater confidence.

48 There are cogent reasons that explain how C could have used a condom without P being aware of it. Most notably, the light level in the shed was very low and P's vision was further im-

paired by the fact that she did not have her glasses on. These factors could have contributed to P not noticing any of the details C described about the condom: that he retrieved it from his shorts and put it on before sex, that it was still on after sex, and that the condom wrapper was left in the shed and retrieved by C after P had left.

49 There is also the evidence of C leaving the shed after he and P had sex. I accept this happened. Both P and C testified that after the sexual intercourse ended, C left the shed briefly and returned. C says this was for the purpose of disposing of the condom. That is a plausible explanation. There is nothing in the evidence that gives me a basis to disbelieve him.

50 C was able to describe his use of a condom in detail. On a review of all of the evidence, I am not satisfied that the Crown has proven beyond a reasonable doubt that C did not use a condom when he had sexual intercourse with P.

51 My reasonable doubt on the "no condom" issue is not based on P's statement to Cst. Tillman that a condom was used. The fact she made that statement on July 12, 2007 can only be considered in an assessment of her credibility. P says she made it because her father was present. That may well be true. But P's evidence on the condom issue did not change much in her police interview when her father was not present. Then she said she thought a condom had been used but was not 100 percent sure. Ultimately P's credibility is not really the issue. My concerns about P's evidence on the condom issue are more about her reliability. The Crown has sought to establish beyond a reasonable doubt that C did not use a condom when he had sex with P. The evidence on the issue consists of P's continued uncertainty, conditions in the shed that plausibly explain why she may not have been able to see evidence of condom use, and the fact that C left the shed, plausibly explained by C as a mission to dispose of the condom. This evidence and C's testimony about using a condom during sexual intercourse leave me with a reasonable doubt on the issue.

52 A reasonable doubt on the condom issue is sufficient to deal with the aggravated sexual assault charge. The Crown has failed to prove a critical element of the offence of aggravated sexual assault with the result that I am acquitting C of this charge.

53 Before I leave the issue of the aggravated sexual assault charge, I want to note the expert medical evidence I heard about C's HIV-positive status. This will help to illustrate the problems I was discussing earlier about the *Mabior* and *D.C.* decisions. The expert evidence also establishes that the unprotected oral sex in this case cannot support a conviction for aggravated sexual assault as there is no significant risk of serious bodily harm, indeed, no such risk at all. (I should add that I did not understand the Crown to be seeking a conviction for aggravated sexual assault based on unprotected oral sex.)

The Expert Medical Evidence of Dr. Walter Schlech

54 Dr. Walter Schlech was qualified by consent as an expert in infectious diseases and able to give opinion evidence in the epidemiology of HIV including the transmission of the HIV virus and treatment and prognosis of those diagnosed as HIV-positive. He prepared an expert report for the Crown, dated May 28, 2012. (*Exhibit 6*) The Crown decided not to call him to testify. The Defence therefore did so. Dr. Schlech's opinions were not challenged by the Crown.

55 Dr. Schlech has had no direct dealings with C or his treatment for HIV. He reviewed all the medical records for C provided by the Crown.

56 Dr. Schlech explained that the human immunodeficiency virus (HIV) is a retrovirus and requires a human host. It has an affinity for certain cells in the immune system and once lodged in the cells, it is there for life. In male to female transmission, the virus is transferred by seminal fluid.

57 The most important indicator for potential transmission is the amount of virus in plasma (viral load) which correlates well to the amount of virus to be found in semen.

58 Following infection, antibodies show up about 4 to 6 weeks later. Specialized testing can detect the virus itself within 10 to 14 days after it has been transmitted to a previously uninfected person. Even late "sero-converters" -- persons who convert due to infection from negative to positive status but do so on a delayed basis -- will show antibodies by six months and not later.

59 Treatment with anti-retroviral medications has been very successful. Dr. Schlech testified that HIV is evolving from a fatal condition to a chronic disease like diabetes, controlled by a drug regime that must be adhered to for life. It is no longer a death sentence as was once the case. Dr. Schlech noted that the virus can be managed if the HIV-positive person is amenable to taking the required medications.

60 Dr. Schlech testified that C's viral load in May 2011, the latest test before the sexual encounter with P, was undetectable. Indeed, according to Dr. Schlech, the only time C tested positive for HIV was in March 2000 when he was 5 years old. All C's tests since then have shown the virus to be at an undetectable level. In Dr. Schlech's opinion, in July 2011, C had no realistic possibility of transmitting the virus to anyone.

61 Dr. Schlech was asked about various scenarios. He assessed C's risk of transmitting the virus during unprotected oral sex with no ejaculation at zero. Even with a detectable viral load, kissing offers an extremely low risk. Intercourse with a condom is a near zero risk: Dr. Schlech put the risk at "nil" where the condom remains intact. In the case of C having an undetectable viral load, even without a condom, Dr. Schlech assessed his risk of transmission as nil, especially where no ejaculation occurred.

62 Dr. Schlech believes it is probable that C is an "elite controller", that is, one of a small number of people whose immune systems control the virus, seemingly indefinitely. C's CD4 cells, which are immune system cells, have remained very good and within the normal range which indicates that his immune system is functioning well and has not been compromised by the HIV.

63 It was Dr. Schlech's evidence that "elite controllers" can still have bursts of viral activity although his review of C's medical records cause him to conclude this has not happened with C. He acknowledged that between tests there is a possibility of very low, increased viral activity. This may have been suppressed by C's use of anti-retrovirals. And even though C's drug compliance was inconsistent[17], there is no indication of viral replication.

64 I will note here that C testified to having been "off his meds" for six months with no effect on his viral load numbers. It was his evidence that he "went back to the hospital and got my numbers and they were outstandingly good ... no real difference." He has since resumed taking anti-retrovirals because he is about to become a father and decided ongoing treatment was the more prudent choice.

65 It is Dr. Schlech's conclusion that in the case of a single act of sexual intercourse the risk of transmission by someone with an undetectable viral load is less than 1 in 1 million. He concluded in his report that: "In summary, because of [C's] status as an "elite controller" and the fact that he was

also taking anti-retroviral agents, albeit irregularly, I don't believe that there was *any* risk of transmission of HIV to the alleged victim of the assault." Dr. Schlech based what he described in his testimony as "a very strong belief" on the assumption that the sexual activity involved had been "straight-forward heterosexual sex with ejaculation."

66 Dr. Schlech put the risk of HIV transmission in a single episode of intercourse with someone who had an undetectable viral load at less than 1 in a million, a number he testified to having used in his report because it is easily understandable. Dr. Schlech testified that another way to describe the risk of transmission in C's case is "zero for one hundred patient years." It was his evidence that "for all intents and purposes, the risk is zero."

67 Dr. Schlech observed that condom use is to be encouraged even for individuals with low or nondetectable viral loads. Condoms that are properly maintained and used reduce risk even further. When asked about the effect of swimming on the integrity of a condom and whether there are concerns about degradation, Dr. Schlech said there were no particular concerns as condoms are usually protected by foil packaging.

The Medical Evidence in this Case and Mabior and D.C.

68 Dr. Schlech's evidence underscores the problem with the standard for criminal culpability established by the Supreme Court of Canada's decision in *D.C.* In C's case, his undetectable viral load even with ejaculation creates a "nil" risk of transmission. I find as a fact, considering the evidence of both P and C that C did not ejaculate when he had sexual intercourse with P. Had the evidence established beyond a reasonable doubt that C did not use a condom, the application of the *D.C.* decision would require his conviction for aggravated sexual assault where there is uncontested expert evidence that he could not transmit the virus. And there is also the probability that he is an "elite controller", which also renders him incapable of transmitting the virus.

69 There is no suggestion that Dr. Schlech's expert opinion evidence is based in radical, untested science. Where there is uncontested medical evidence of this nature, I cannot see how the requisite elements for aggravated sexual assault in an HIV non-disclosure case could be established. To reiterate the law set out by the Supreme Court in *Mabior*:

> ... Failure to disclose (*the dishonest act*) amounts to fraud where the complainant would not have consented had he or she known the accused was HIV-positive, and where sexual contact poses a significant risk of or causes serious bodily harm (*deprivation*). A significant risk of serious bodily harm is established by a realistic possibility of transmission of HIV ...[18]

70 Although I have determined the aggravated sexual assault charge on the basis of reasonable doubt with respect to the use of a condom, surely the absence of ejaculation or the "elite controller" status or the "undetectable viral load" comes within what the Supreme Court of Canada contemplated in *Mabior* when commenting that the low viral load coupled with condom use standard for avoiding criminal liability "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*."[19] It is to be remembered that in HIV non-disclosure prosecutions a charge of aggravated sexual assault rests on the endangerment of the complainant's life.

Condoms are Public Health Policy Best Practice

71 I will conclude my discussion of the aggravated sexual assault charge by emphasizing that nothing I have said should be taken to suggest that condoms are optional for HIV-positive persons engaging in sexual intercourse. Dr. Schlech noted that even with "almost infinitesimally small risk",

> ... public health authorities still recommend that HIV positive individuals use condoms with each episode of sexual intercourse and inform their sexual partners of their HIV status ...

72 I have been discussing the legal requirements for a conviction for aggravated sexual assault in an HIV non-disclosure case, that is, what is required to find criminal culpability and not the public health or ethical considerations for persons living with HIV who are sexually active.

73 My discussion of the medical evidence on the aggravated sexual assault charge should not be read as suggesting any change to C's practice of engaging in protected sex. And it should be understood that other judges dealing with these issues will not necessarily share my discomfort with the *Mabior* and *D.C.* decisions.[20]

The Law - Section 151 (Sexual Interference)

74 I will now move on to deal with the section 151 charge of sexual interference.

75 The evidence establishes that when C had sex with P on July 7, 2011, P was 13 and he was 16. By virtue of section 150.1(1) of the *Criminal Code,* P aged 13 was legally incapable of consenting to sex with C. The purpose of the section is to protect young people from sexual activity that may harm them at an age where they lack the maturity to deal with the experience.

76 However, the *Criminal Code* provides a defence for an accused who honestly but mistakenly believed a 13 year old complainant was old enough to consent and took all reasonable steps to ascertain her age before having sex with her.[21]

77 On the reasonable steps issue, the burden is an evidentiary one. This means that the accused is obliged to advance evidence which, if true, would entitle him to an acquittal. This evidence need not be believed; it is only necessary that it create a reasonable doubt.[22] To secure a conviction on a section 151 sexual interference charge, the Crown has the burden of proving beyond a reasonable doubt that the accused failed to take all reasonable steps to ascertain the complainant's age before he had sex with her.

78 Sexual activity carries with it certain responsibilities and it is appropriate to expect diligence in ascertaining the age of prospective sexual partners. There is a fundamental public interest in promoting responsible and respectful sexual behaviour. Parliament has identified children under the age of 16 as vulnerable to sexual exploitation, and employs the criminal law to denounce and prohibit sexual activity where all reasonable steps have not been taken to ascertain the age of a youthful participant. The "all reasonable steps" requirement applies in all cases, even where an accused was himself only 16.

79 Various courts have discussed what can constitute "all reasonable steps". The New Brunswick Court of Appeal has held that the wider the age gap, the more of an inquiry will be expected.[23] The Appeal Division of the Newfoundland Supreme Court has talked about the requirement for an inquiry as being "more than a casual requirement." There must, the Court said, "... be an earnest inquiry or some other compelling factor that obviates the need for an inquiry."[24]

80 The British Columbia Court of Appeal has held that beyond a visual observation of the complainant, further reasonable steps could include indicators of her age, the ages and appearance of others in whose company she is found, the activities being engaged in by her individually or as part of the group, and other circumstances. Referring to the age of consent at the time, the Court held that the trial court must ask whether, looking at such indicators, "a reasonable person would believe the complainant was fourteen years old or more without further inquiry, and if not, what further steps a reasonable person would take in the circumstances to ascertain her age."[25]

81 According to the Manitoba Court of Queen's Bench, asking the complainant, or some other apparently knowledgeable person how old she is, constitutes a reasonable "and perhaps minimally reasonable step."[26] The Court held this inquiry to be a threshold step, and was critical of the notion that an accused could be allowed to guess at the complainant's age based on her stage of physical development. Reliance on physical development does not accord protection to vulnerable girls whose sexualized appearance suggests they are older than they are.

82 There is no exhaustive list of reasonable steps for ascertaining a young girl's age. Each case must be decided on its own facts. However, it does seem to me that the *Criminal Code* requirement of "all reasonable steps" appears to include, as it should, a direct inquiry about the complainant's age. In my view, that inquiry should at least be an inquiry of the girl herself. At the very least, she should be accorded the opportunity to disclose her true age. Depending on the facts, further inquiries may be necessary and criminal liability may result from the failure to make them.

The Sexual Interference Charge - Facts

83 C testified that on July 7, 2011 he honestly believed P was 15 years old and could consent to having sex with him. He says he based his honest belief on P telling him a couple of weeks earlier that she was 15 and headed off to high school in the fall. Other indicators suggested to him that she was an older teen. It is his submission that the Crown has failed to prove he fell short of the "all reasonable steps" requirement. He argues that the "all reasonable steps" requirement has to be assessed contextually, taking into account that he was only 16.

84 According to an Agreed Statement of Facts dated September 5, 2013 (*Exhibit 1*), C and P attended the same elementary school from September 2002 to February 2007. C was two grades ahead of P during this time. This fact accords with P's recollection: she testified that C had been ahead of her by a couple of grades. It was C's evidence that he did not know what grade P was in. He resisted the suggestion on cross-examination that he had known P was a couple of grades behind him at school.

85 P and C were not close friends either during their time at school together or afterwards. They both testified that they had not "hung out" together at school. The evidence indicates they socialized in different groups which is consistent with them not being in the same grade. In his evidence, C confirmed that the "older kids played sports and the younger kids played on the monkey bars." He socialized with the sports kids which P did not. I find that this would have been an indication that P was younger than C, one of the "younger kids."

86 An incident described by C in his evidence is suggestive of a difference in ages. C recalls returning to the school after he had left and being at the swings with K, a girl he had a crush on. P was over on the next swing set, nearby, but not with C and K. K told C that P had a crush on him, and asked him: why don't you give her a chance? C's response was to say to K: why don't you give me a chance?

87 This is a description that suggests a younger girl with an unvoiced crush on an older boy, a crush revealed to the boy by an age-related peer. The boy's interest is in the girl his own age, not the younger girl who is not part of his peer group. C's evidence disclosed no signs that he had any romantic interest in P while they were at the same school.

88 P and C eventually connected through Facebook, after they had both left the school. Although P said in her direct examination that she had seen C only once prior to July 2011, about a year earlier, on cross-examination, she recalled a couple of other occasions in the relatively recent past. This accorded more closely to C's recollections of when he saw P before July 7, 2011.

89 On one of these occasions P had invited C up to her room. The Defence argues that what C would have observed in P's room, e.g., certain posters, would have suggested to C that P was an older teen. The Defence has also submitted that P's enthusiasm for the video game, Grand Theft Auto IV, was consistent with the interests of an older teen. However I am not satisfied that posters or video games are necessarily reliable indicators of a girl's age. It is fair to note that C could not have known P's full birth date from her Facebook page as only her birth month and date were displayed.

90 On July 7, P knew that C was older but testified that she was not worried he would be put off hanging around with her if he knew she was 13. She denies telling him, as C claimed in his evidence, that she was 15 and starting high school in the fall. She is uncertain about whether a conversation about high school happened at all and says she doesn't think it did but agreed she could not say with certainty that they did not talk about school.

91 P was uncertain in her direct testimony about whether she told C on July 7, 2011 how old she actually was. She says she thinks she told him she was 13 and that he told her how old he was. She did not sound confident about this. She cannot recall how the issue arose but says it occurred when they were in the shed. It was P's evidence that C did not ask her any questions about her age, such as what grade she was going into.

92 On cross-examination, P testified that she did tell C she was 13. It was pointed out to her that she had not said this in her interview with police on July 20, 2011. In the police interview when asked if C knew how old she was P had said: "I think he knew it from Facebook." She testified that because she was nervous during the interview she forgot to mention to police that she had told C she was 13.

93 P explained why her memory of events had improved over time. Leading up to the trial she had been thinking "every night" about the events "to see if there was anything new [she] could remember." This led to her recalling that she had told C she was 13.

94 On July 7, when P and C went back to P's house before going swimming, P's father was there. He took an aggressive stance with C, demanding to know "who the fuck" he was and "how old are you?" C told him he was 15. P's father testified that C "looked like a punk, a gangster wannabe ... I wanted him to be afraid of [P's] dad ..." He did not go so far as to tell C that P was only 13. Contrary to C's evidence, P testified that she did not advise C to lie to her father about his age because she was not allowed to hang around with 16 year olds.

95 C denies that P ever told him her true age. He detailed a vivid recollection of meeting up with P in late June 2011 at the swings on the elementary school grounds. Sweating hard after the walk to the school, C told P, "I am too old for this", referring to the physical exertion. According to

C, P responded by asking him how old he was. He told her he was 16 and when he asked P her age, she said she was 15.

96 P rejected the suggestion that she had seen C a couple of weeks before July 7 at the school. She testified that it was not possible this happened. It was established during C's cross-examination that when he was questioned by police on August 16, 2011, he made no mention of the late June meeting with P.

97 C testified that on July 7 he believed that P was 15 because of their discussion in late June at the school. He says she told him she was 15 and going to high school in the fall. He says he had no reason to doubt her.

98 Several factors made P seem older than she actually was: she smoked and drank, and C had observed that she was developing physically: "like she was turning into a woman." C did not infer from his interaction with P's over-protective father that P was younger. No red flags went up.

99 On July 7, 2011, C knew that he would have been going into Grade 11 had he not failed Grade 10 the previous year, his first year at the high school. Notwithstanding this, he says he believed P was going to high school in September although this would have meant she was just a year behind him. He testified that he did not turn his mind to the fact that this could not be correct. There was some confusing evidence about whether C believed that P had failed a grade but I am not satisfied this was anything more than a recollection by him of gossip.

100 C acknowledges that he did not ask P on July 7 how old she was. He says he believed he already knew her age, that she was 15. He saw no need to make any further inquiries. There is no evidence that C and P were planning to have sex on July 7 before P took her clothes off. C testified that he had not been thinking about this until he saw P with her top off. At this point, the issue of P's age was not on C's radar.

101 When he was interviewed by police in August 2011 C had the view that if someone lies about their age, that is their responsibility and they should get into trouble, not him.

"All Reasonable Steps"

102 Teenage sexual exploration is a natural feature of adolescence. It does however carry certain legal responsibilities and the law obliges even a 16 year old teen to take "all reasonable steps" to determine if a prospective sex partner is old enough to consent.

103 The "all reasonable steps" requirement has to be assessed contextually. The law should expect that a 21 year old's "all reasonable steps" obligation will be more onerous in relation to a 13 year old than a 16 year old's. What constitutes reasonable steps will depend on the circumstances of the case. The New Brunswick Court of Appeal has held: "Almost without exception, the greater the disparity in ages, the more inquiry will be required. More will be expected of an older or more sophisticated accused than from a youth ..."[27]

104 Both Crown and Defence viewed the issue in this case to have been whether C took "all reasonable steps" to ascertain P's age before having sex with her. However, on a careful further review of the *Criminal Code* provisions, I do not see where C has any defence available to him given his evidence that he believed P was 15 when he had sex with her. This belief, that P at 15 was old enough to consent to sex, was a mistake of law and provided C with no defence[28].

105 According to my reading of sections 150.1(2), (4), and (6), the relevant *Criminal Code* provisions, C would have had to be less than two years older than P or have believed that P was 16 in order to have a defence to the section 151, sexual interference, charge.

106 C had sexual intercourse with P, who was 13 at the time. C could not avail himself of a defence under section 150.1(2) of the *Criminal Code* as he was more than two years older than P. Section 150.1(2) provides a defence to a section 151 charge in respect of a complainant who is older than 12 but younger than 14, if the accused is less than two years older. Another section that provides a defence, section 150.1(4) does not apply in this case as it affords a defence to an accused who believed that the complainant was 16 years or older, provided the "all reasonable steps" requirement was met. C says he believed P was 15 years old. Section 150.1(6) contains the "all reasonable steps" requirement but does so in the context of the accused relying on a section 150.1(2) defence, which as I have already noted, is not available to C. Therefore none of the statutory defence sections of the *Code* are available to C who claims to have believed that P was 15 when he had sex with her. That claim constitutes a mistake of law -- that 15 was the age of consent, which it wasn't. In July 2011 the age of consent was 16.

107 However, as this case was argued as an "all reasonable steps" case I have made a determination of whether the Crown has proven beyond a reasonable doubt that C failed to take "all reasonable steps" to ascertain P's age. I have done so in order to assess if the presumption of innocence to which C is entitled has been displaced.

108 I have concluded that C did not take any reasonable steps to ascertain P's age. The issue of her age was not in his mind at all. On C's evidence, there was no reason for it to be as he was not thinking about having sex with her. I find there was no reasonable basis for C to assume that less than two years separated their ages. Even if P did tell him she was 15, I do not find it to have been reasonable for C to have believed her. Unlike his friends K and Z who also lived in the neighbourhood, P was not a peer. It was not reasonable for C to believe that P was going to start high school in two months' time. And the reaction of P's father should have caused C to realize that age was an issue. Why else would P's father immediately demand to know his age? If I accept C's evidence that P coached him to say he was 15, he had to have known that age was a concern. The explanation C says P gave him for not wanting her father to know he was 16 - -- that 16 year olds drink and drive - struck C as "odd" but he says he accepted it. An "all reasonable steps" standard requires that C have done more than sleep-walk his way through the age issue.

109 There is also the question of whether the "all reasonable steps" requirement made it necessary for C to have asked P her age on July 7 when he was going to have sex with her. He says it is unreasonable to expect him to have done that as she had told him only two weeks earlier that she was 15. As I have already indicated, if such a conversation did occur, I find it was reckless of C to have relied on it given what he knew -- that P had not been a peer at school and had not hung out with the older kids.

110 I have not found it possible to place reliance on the evidence of either C or P when it comes to the issue of whether P told C her real age, which she says she did, or that she was 15, as C has testified. I am left with concerns about the reliability and credibility of both of them on this issue. I find it hard to believe that P would have told C she was 13 as I think it is likely she would not have wanted to highlight their age difference. As I have noted, P's evidence about whether she told C she was 13 sounded an uncertain note. And there is the fact that she told police investigators she thought C would have learned her age from Facebook. She never said she told him her age.

111 I am also unable to fully accept as credible C's evidence on the age issue. Credibility is often hard to assess but the net effect of my assessment of C's testimony is that I find myself unable to accept it in its entirety. In his description of meeting P in late June, C offered a very neat explanation for why the subject of P's age came up. I don't believe it did. I believe P would have seen no benefit in raising the issue of her age and I believe that C did not inquire. He made certain assumptions when he should have made inquiries.

112 This is a case where a 16 year old failed to take "all reasonable steps" to ascertain the age of a 13, nearly 14 year old girl before having sex with her. The sexual inference charge is based on the fact that P could not legally consent to sex. The law expects even 16 year olds to comply with the "all reasonable steps" requirement. While I am satisfied that the Crown has proven beyond a reasonable doubt that C did not take "all reasonable steps" to ascertain P's age before having sex with her, his failure to do so has to be seen in light of their ages and the specific facts of this case.

113 I am convicting C of the section 151 charge, Count 2 of the Information.

Concluding Reasons

114 I return briefly to the aggravated sexual assault charge. The Crown argued that if I acquitted C of aggravated sexual assault, which I have, I should convict him of simple sexual assault on the basis that he had non-consensual sex with P. I find it would not be correct to do so. A conviction for simple sexual assault would have to rest on a lack of consent as contemplated by section 265(3) of the *Criminal Code*, specifically, fraud. My finding that the Crown did not prove beyond a reasonable doubt that C had unprotected sex with P disposes of the fraud issue and C's liability for having sex without disclosing his HIV-positive status. C is culpable for having sex with P, not on the consent-vitiated-by-fraud basis, but on the basis that P could not legally consent. C's act of sexual intercourse with P is criminalized because P was incapable of consent due to her age. Had P been legally able to consent to sex with C, his acquittal on the aggravated sexual assault charge would be the end of the matter.

115 As for the charge that C breached the "keep the peace and be of good behaviour" condition of his probation order, I find him guilty in light of the section 151 conviction.

116 In conclusion, C is convicted of Count 2 -- the section 151 charge; and Counts 3 and 4, the breach of probation charges. He is acquitted of aggravated sexual assault, Count 1.

cp/ci/e/qlacx/qlrdp

1 *R. v. Mabior, [2012] S.C.J. No. 47; R. v. D.C., [2012] S.C.J. No. 48*

2 *Mabior, paragraph 93*

3 *Mabior, paragraph 104*

4 *Mabior, paragraph 94 (emphasis in the original)*

5 *Mabior, paragraph 101*

6 *Mabior, paragraph 104*

7 *D.C., paragraph 29*

8 *Mabior, paragraph 85*

9 *Mabior, paragraph 85*

10 *Mabior, paragraph 19*

11 Grant, Isabel: *R v Mabior and R v DC: Sex, Lies, And HIV: The Over-Criminalization Of Persons With HIV* (Summer, 2013) 63 Univ. of Toronto L.J. 475, page 2

12 Grant, Isabel, page 3

13 Grant, Isabel, page 4

14 *Mabior, paragraph 88*

15 *D.C., paragraph 29*

16 *Mabior, paragraph 102*

17 The Agreed Statement of Facts (Exhibit 1) provides as follows: "[C] has been prescribed anti-retroviral medication to manage his HIV+ status since March 2000, and this treatment was ongoing in July 2011. However, there had been compliance issues from 2000 so that up until after 2011 the medications were taken inconsistently. There was a period of 4 to 5 months in 2009 or 2010 where [C] did not take the medication at all. The doctor [C's treating doctor] was unaware of this at the time."

18 *Mabior, paragraph 104*

19 *Mabior, paragraph 95*

20 *See, for example, R. v. Felix, [2013] O.J. No. 2857, paragraphs 48, 50, and 57*

21 *sections 150.1(4) and (6), Criminal Code*

22 *R. v. Osborne, [1992] N.J. No. 312 (C.A.)*

23 *R. v. R.A.K., [1996] N.B.J. No. 104, paragraph 10*

24 *R. v. Osborne*

25 *R. v. L.T.P., [1997] B.C.J. No. 24 at paragraph 20*

26 *R. v. N.W., [2005] M.J. No. 108*

27 *R.A.K., paragraph 10*

28 *R. v. M.L.M., [1994] S.C.J. No. 34*