



## R. v. Mabior

2012 SCC 47; 2010 MBCA 93

**Country:** Canada

**Region:** Americas

**Year:** 2012

**Court:** Supreme Court

**Health Topics:** HIV/AIDS, Infectious diseases, Medicines, Sexual and reproductive health, Violence

**Human Rights:** Right to bodily integrity

### Facts

The Respondent was charged with nine counts of aggravated sexual assault for not disclosing his HIV-positive status to nine Complainants before engaging in sexual intercourse with them. None of the Complainants tested positive for HIV.

At trial, the Respondent was convicted on six counts and acquitted on three. He was acquitted on the basis of the principle that sexual intercourse using a condom when viral loads are undetectable does not place a sexual partner at a “significant risk of serious bodily harm.” On appeal, the Court of Appeal held that either low viral loads or condom use could negate the “significant risk of serious bodily harm.” The Respondent was thus acquitted of four more counts, leaving two convictions in place. The Crown appealed the acquittals to the present court.

### Decision and Reasoning

The Court noted that in *R. v. Cuerrier*, 2 S.C.R. 371 (1998), it established that “failure to disclose that one has HIV may constitute fraud vitiating consent to sexual relations.” The Court explained that fraud consisted of two components: (1) a dishonest act, including either falsehoods or failure to disclose one’s HIV status; and (2) deprivation, “denying the complainant knowledge which would have caused him or her to refuse sexual relations that exposed him or her to a significant risk of serious bodily harm.” The Court thus held that failure to disclose one’s HIV-positive status “may amount 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 actual serious bodily harm.”

The Court declared that the values of equality, autonomy, liberty, privacy and human dignity in Canadian Charter of Rights and Freedoms (the Charter) are “particularly relevant” to the determination of what constitutes fraud vitiating consent to sexual relations. In this regard, the Court stated that the requirement of “significant risk of serious bodily harm” requires disclosure of HIV status only “if there is a realistic possibility of transmission of HIV.” The Court further held that 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.” The Court stated that this standard respects “the interest of a person to choose whether to consent to sex with a particular person or not,” in line with the values of autonomy and liberty in the Charter.

The Court rejected the Crown’s submission that all HIV-positive people should be required to disclose their HIV status to all sexual partners in all cases. It observed that under this approach, individuals “who act responsibly and whose conduct causes no harm and indeed may pose no risk of harm, could find themselves criminalized and imprisoned for lengthy periods.” The Court added that the “absolute disclosure approach” was “arguably unfair and stigmatizing to people with HIV, an already vulnerable group.” It noted that people living with HIV who act responsibly and pose no risk of harm to others “should not be put to the choice of disclosing their disease or facing criminalization.”

### Decision Excerpts

“[93] A review of the case law pertaining to fraud vitiating consent to sexual relations leads to the following general principle of law: the *Cuerrier* requirement of a “significant risk of serious bodily harm” entails a realistic possibility of transmission of HIV. This applies to all cases where fraud vitiating consent to sexual relations is alleged on the basis of the non-disclosure of HIV-positive status.

[94] 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."

"[103] This leads to the conclusion that on the evidence before us, the combined effect of condom use and low viral load precludes a realistic possibility of transmission of HIV. In these circumstances, the Cuerrier requirement of significant risk of serious bodily harm is not met. There is no deprivation within the meaning of Cuerrier and failure to disclose HIV status will not constitute fraud vitiating consent under s. 265(3)(c) of the Criminal Code."

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