Éditorial/Editorial

In 1998, the Supreme Court of Canada ruled in *R. v. Cuerrier* that a person living with HIV must disclosure his/her HIV-positive status in situations where there is what the court called a "significant risk" for HIV transmission. Problematically, the threshold of "significant risk"—i.e., the measure of sexual or other practices that were deemed "significantly risky"— was never clarified in the *Cuerrier* ruling. This left the subsequent and often varying interpretation of this legal precedent to trial judges across the country. On the whole, the outcome of these ensuing criminal proceedings was a relatively stable legal interpretation which appeared to suggest that either proper condom use or an undetectable HIV viral load, which is a serological measure of the number of copies of HIV in a person's blood, would sufficiently negate the possibility of HIV transmission to such a degree that, from a legal perspective, the potential for transmission was below the threshold of "significant risk". In such cases, a person was therefore not criminally obliged to disclose his/her HIV-positive status before sexual activity.

Fourteen years later, the Supreme Court examined two subsequent cases on HIV-positive status nondisclosure (*R. v. Mabior* and *R. v. D.C.*), thus offering the criminal justice system an opportunity to clarify ambiguous case law. On Friday, October 5th, 2012, the Supreme Court of Canada released its updated ruling about HIV-status disclosure, and identified that a person does not need to disclose his or her HIV-positive status provided that he/she uses condoms and has what the court called a "low", not "undetectable", viral load. In all other situations, HIV-positive status nondisclosure constitutes a criminal offence.

At first glance, this ruling appears to amend previous flaws in the *R. v. Cuerrier* decision. There is now greater clarity about the "significant risk" threshold: Anything less than both condom use and a low viral load is above this legal measure, and thereby warrants criminal repercussions Upon further inspection, however, it is evident that the *Mabior* decision is actually more severe than the previous *Cuerrier* ruling. While trial judges had previously accepted that condom use OR an undetectable viral load—defined by the Supreme Court as an HIV viral load that is less than 50 copies per milliliter of blood—would push the potential of HIV transmission during sexual contact below the "significant risk" threshold, now a person living with HIV must both use condoms AND have a "low viral load" for a sexual contact not to pose a "significant risk" for HIV transmission. Setting aside the legal issues that relate to this ruling, such as, what evidence

is required to demonstrate a "low viral load", which was defined as fewer than 1500 copies per millilitre, further examination of this precedent uncovers some potential complications for public health, HIV prevention, and the provision of care for persons living with HIV.

For one, this ruling ignored the extant empirical evidence which suggests that nondisclosure prosecutions could negatively affect both public health HIV prevention efforts and clinical care for people living with HIV. More specifically, the *R. v. Mabior* ruling rejected the research findings which suggested (a) that the ambiguity of the criminal law has caused nurses and other health professionals to negate decades of scientific literature about the differing degrees of probability for HIV prevention and instead classify all possibilities of HIV transmission as identical (e.g., Myhkalovskiy and colleagues); (b) that some persons living with HIV feel unsafe speaking candidly with health professionals, and, consequently, are unable to seek help for HIV-related problems, including symptom management and safer sex practices (e.g., O'Byrne and colleagues); (c) that nondisclosure prosecutions permit persons who believe they are HIV-negative to blame others for HIV transmission, and, accordingly, shirk any sense of personal responsibility regarding HIV acquisition (e.g., Dodds and colleagues); and (d) that disclosing one's HIV-positive status involves psychosocial costs, such as, potential rejection, violence, depreciation, or hostility (e.g., Adam and colleagues).

From a health care perspective, another issue with the *R. v. Mabior* decision is that it does not promote, or at least afford any protection to, HIV prevention work in clinical practice. Indeed, while, on the one hand, the decision accepted a "low viral load" and condoms as the conditions of a valid defence against nondisclosure prosecutions, on the other hand, it failed to include any protection of the information that patients reveal to their health professionals on either of these matters. In other words, the court did not offer any protection to persons who openly and honestly discusses issues, concerns, or problems they might be having with condom use and/or with HIV medications. It is, therefore, possible that anything a person living with HIV says to his or her health professional could be used as evidence against him or her in the criminal justice system if this person living with HIV were to be prosecuted for HIV-positive status nondisclosure. Problematically for both persons living with HIV and overall HIV prevention efforts, people's potential reticence to raise their concerns about condoms or medication use with nurses or other health professionals constitutes a disconcerting barrier to clinical care for persons living with HIV, and a potential hurdle for effective HIV prevention work.

Lastly, the *R. v. Mabior* decision relied on a Cochrane Library systematic review about the effectiveness of condoms to reduce HIV transmission, which suggested that condoms reduce

HIV transmission by 80%. While one could uncritically accept the findings of this review, assuming falsely that the Cochrane Library suggests proper rigour, understanding, or valid outcomes, a review of this Cochrane document uncovered a series of major errors in the authors' understanding of HIV transmission. In fact, it was quite clear that, while the authors understood the principles of a systematic review, they did not have a solid appreciation of the dynamics and mechanisms of HIV transmission. For example, confounding factors that would affect HIV transmission—such as, circumcision, the presence of secondary sexually transmitted infections (STIs), spermicide use, and the occurrence of other types of sexual contact without condoms (e.g., oral and/or anal sex)—were simply listed as "notes" in the review document. Notwithstanding the fact that each of the foregoing factors has been established in the literature to independently correspond with an increased probability of HIV transmission, for some unstated reason, the authors of this Cochrane review did not consider these items in their analysis or conclusions. Instead, without acknowledging the variability that the aforementioned items induce in HIV transmission, they stated that condoms are 80% effective. While this oversight should render the findings of this Cochrane review invalid, this methodologically proper, but content deficient, document was nevertheless used to guide the *R. v. Mabior* decision.

In closing, the recent Canadian legal decision on HIV-positive status disclosure, which could have both greatly clarified the law and aligned more precisely with the extant scientific literature about HIV prevention and HIV transmission, has left persons living with HIV and health professionals with no more guidance than they had with the previous *R. v. Cuerrier* decision. Furthermore, the Supreme Court of Canada accepted the current practice of using patients' health records against them in nondisclosure prosecutions, which could undermine the abilities of health professionals to provide appropriate care and undertake person-specific HIV prevention initiatives for persons living with HIV. Based on such a conclusion by the court system, should Canadian health professionals introduce themselves in a fashion similar to police? Should they inform patients that anything they do or say in the presence of health professionals, could potentially be used against them in a court of law in the future? If this is the case, did the Supreme Court of Canada just formally and publicly acknowledge that health professionals are, as Foucault argued, agents of the state who not only provide health care services, but also discipline bodies and exact compliance and adherence? If this is the case, then the "care" in health care has yet again been further compromised.

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