

# Condom use and HIV criminalization: a remaining issue in 2020

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# The Supreme Court of Canada decision in *R. v. Mabior* (2012)

- In 2012, the Supreme Court of Canada (SCC) decided that people living with HIV can be criminally prosecuted for not disclosing their HIV-positive status before sex that poses “a *realistic possibility of HIV transmission.*”
- The decision has, in some cases, been interpreted as requiring both condom use and a low viral load in order to avoid prosecution, which meant that people who used condoms but didn't have a low viral load were at risk of prosecutions (and were in fact convicted).

# National and international scientific consensus post-*Mabior*

- When a condom is used correctly (meaning the integrity of the condom is not compromised and the condom is worn throughout the sex act in question) **HIV transmission is not possible.**

*Canadian consensus statement on HIV and its transmission in the context of the criminal law (2014); Expert Consensus Statement on the science of HIV in the context of the criminal law (2018)*

# Some (insufficient) positive policy developments

- In December 2018, the Attorney General of Canada directed federal lawyers to generally not prosecute people who use condoms (regardless of viral load) “because there is likely no realistic possibility of transmission.”
- In June 2019, the House of Commons Standing Committee on Justice and Human Rights also made strong recommendations against prosecution when a condom is used.
- But provinces are lagging behind in developing sound guidelines for prosecutors that would protect people from prosecution when they use condoms.

# But the law remains unsettled

- Since the SCC decision in 2012, people have been acquitted in circumstances when they had a low or suppressed viral load (even if they did not use a condom).
  - *However, people remain at risk of prosecution when a condom is worn and they do not have a low viral load.*
- In Nova Scotia, courts have found that sex with a condom does not pose a “realistic possibility of HIV transmission” (regardless of viral load). But in Ontario, a man was convicted for not disclosing his HIV status before sex although he used a condom (his viral load was not low).
- The Ontario conviction was appealed. The Canadian HIV/AIDS Legal Network, HIV & AIDS Legal Clinic Ontario and COCQ-SIDA intervened. A decision by the Court of Appeal for Ontario should be released in 2020.