Criminalization of HIV Exposure: Canada

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1. Country summary and analysis

1.1 Criminalization of sexual exposure to HIV without disclosure: a snapshot[1]

In Canada, as of mid-November 2009:[2]

- **Total number of prosecutions:** There had been a total of 96 prosecutions in which a person living with HIV was alleged to have transmitted HIV or exposed a sexual partner to the risk of infection without disclosing HIV-positive status. These 96 prosecutions involved 91 different accused, as a few accused had faced more than one prosecution.
- **Sex of the accused:** Of those individuals prosecuted, 90% were men and 10% were women.
- **Sexual orientation:** Of the men prosecuted, 72% were prosecuted for sex involving only female partners, 17% were men prosecuted for sex involving only male partners, 5% were prosecuted for sex involving both male and female partners, and in 6% of prosecutions, the sex of the accused's partners was not known based on available data sources.
- **Geographic distribution:** Of the total number of prosecutions (n=96), 45% were in the province of Ontario (which accounts for approximately 39% of the country's population), 14% were in Quebec and 13% were in British Columbia.
- **Race/ethnicity (overall):** Of the total number of people prosecuted (n=91), 29% were identified as white, 23% as black, 4% as aboriginal and 2% had some other race/ethnicity. Data on the race/ethnicity of the remaining 42% of accused could not be determined from the available data sources.
- **Race/ethnicity (male accused):** Among men with HIV prosecuted since 2005 (n=44), 43% were identified as black, 30% as white, none as aboriginal; 2% had some other race/ethnicity and the race/ethnicity of the remaining 25% of male accused could not be determined from the available data sources.

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[1] Note that this analysis focuses on the application of the criminal law to HIV transmission or exposure in the context of consensual sexual activity, which accounts for the vast majority of cases in Canada and the area of greatest concern. There has been a handful of other circumstances in which various criminal charges have been laid in relation to transmitting HIV or exposing someone to a risk, real or perceived, of HIV infection in other contexts that are physically assaultive or coercive (e.g., biting, spitting, scratching, threatening or assaulting someone with a syringe, etc.). There has also been one (known) case in which an HIV-positive mother pled guilty to the offence of "failing to provide the necessaries of life"; despite pre-natal counselling during her pregnancy, she did not inform medical staff of her HIV-positive status during the delivery of her second child (with the result that no measures were taken to reduce the risk of transmission) and subsequently insisted on breastfeeding the newborn, who later tested HIV-positive: *R.* v. *J.I.*, 2006 ONCJ 356 (Ontario Court of Justice).

[2] Most figures derived from: E. Mykhalovskiy, G. Betteridge, "The criminalization of HIV non-disclosure in Canada: A preliminary analysis of trends and patterns," Paper Presented at Ontario HIV Treatment Network Research Conference, Toronto, 16 November 2009.

- **Outcome of prosecutions:** Of the total number of cases (n=96), 31% resulted in a conviction following a trial on the merits, 28% resulted in a conviction based on a guilty plea, and 11% resulted in an acquittal at trial; the outcome of 19% of cases was unknown based on available data sources and the remaining 10% of cases were still in progress.
- **Transmission vs. exposure:** Of the cases which resulted in a conviction (n=57), 39% involved no allegation that HIV had been transmitted (i.e., only exposure to HIV was alleged), 23% involved allegations that HIV had been transmitted, 21% involved both complainants alleged to have been infected and other complainants only alleged to have been exposed to the risk of infection. In the remaining 17% of cases, it could not be determined at the time of the analysis, based on available information, whether the prosecution alleged actual transmission or simply exposure.
- **Sentencing:** Of those cases which resulted in a conviction (n=57), 88% led to the imposition of a prison term. Of the 57 convictions, 12% resulted in a conditional or suspended sentence, while 12% resulted in a prison term of 2 years or less, 28% a term of between 2 and 4 years, 14% a term between 4 and 6 years, 12% a term between 6 and 8 years, 7% a term between 8 and 10 years, and 7% a term exceeding 10 years; in 7% of cases, the length of sentence could not be determined from available data sources. At this time, it is not possible to draw any firm conclusions as to whether the severity of sentences is disproportionate in relation to 'equivalent' crimes, largely because sentences are to be tailored to the circumstances of a particular case and accused, and there is considerable variation between cases regarding the factors relevant to sentencing.

1.2 Criminalization of HIV exposure in Canada: analysis of legal developments and trends in application of the law

Landmark decision and its fallout

In the late 1980s and early 1990s, a handful of cases were brought before the courts in which people living with HIV were charged with a range of criminal offences – such as *common nuisance*, *criminal negligence causing bodily harm*, *administering a noxious thing* and *aggravated (sexual) assault* – for either transmitting HIV or engaging in conduct that carried, or was perceived to carry, a risk of transmitting HIV. Several of these cases were settled by way of guilty pleas, in some cases accused died before trial or before a verdict could be rendered. In a few cases, specifically related to charges of assault, there were mixed results – but a few trial courts ruled that an assault charge could not stand, as a matter of law, because the complainants in those cases had consented to the sexual activity, and the courts

were not willing to interpret the *Criminal Code* offence of assault more expansively to rule that not disclosing HIV-positive status would render this consent invalid.

However, one such case, originating in British Columbia in 1992, ultimately made its way on appeal up to the Supreme Court of Canada, and in 1998, the Court ruled that a person living with HIV could be found guilty of aggravated assault if he or she did not disclose his or her HIV-positive status and exposed another person to a "significant risk" of HIV transmission: *R. v. Cuerrier*, [1998] 2 SCR 371 (summarized in more detail below). The decision raised many questions; more than a decade later, many of those questions remain unanswered and new issues have been added to the debate.

Since the *Cuerrier* decision, a number of trends can be observed:

- *Increase in incidence of prosecution:* There has been a marked upswing in the frequency of prosecutions for alleged non-disclosure of HIV-positive status to a sexual partner: approximately 88% of prosecutions to date (for sexual exposure to HIV) have been in the decade since the Supreme Court's decision.

- *Greater publicity of prosecutions by police:* This has been accompanied a greater frequency of police issuing public notices (including to the media) with the names, and often photographs, of a person accused of having sex without disclosing HIV-positive status. Often defended as being necessary to "warn the public," these statements regularly encourage possible additional complainants to contact the police.

- *Escalation of charges:* In addition, an increasing number of defendants are facing charges of aggravated sexual assault (which carries a maximum penalty of life imprisonment), as opposed to the lesser charges of aggravated assault or criminal negligence causing bodily harm. Furthermore, several high-profile cases involving multiple complainants and violent or exploitative circumstances have gone to trial in the last few years. The uproar over the criminalization of HIV exposure reached a new pitch in 2008 when the trial of Johnson Aziga began in Ontario. Aziga was accused of having sex with 11 women without disclosing his HIV-positive status; two of the women he was alleged to have infected subsequently died. He was ultimately convicted of 10 counts of aggravated assault and one count of attempted aggravated assault, as well as two counts of first-degree murder, for allegedly not disclosing his HIV-positive status to sexual partners. To the best of our knowledge, Aziga thereby became the first person to be convicted of murder for not disclosing his HIV-positive status to a sexual partner.

In *Cuerrier*, the Supreme Court of Canada addressed the question of when non-disclosure of HIV-positive status to a sexual partner may amount to a "fraud" that vitiates that partner's consent, thereby rendering the sexual intercourse an assault under the relevant provisions of the *Criminal Code of Canada* (sections 265 and 273). Specifically, Justice Cory, writing for the majority, stated that there are two elements the Crown must prove in order to establish such a fraud. First, there must be a "dishonest representation", consisting of either deliberate deceit about HIV status or non-disclosure of that status. Second, the Crown must prove that the dishonesty resulted in some "deprivation" to the complainant, "which may consist of actual harm or simply a risk of harm." HIV transmission need not occur for the offence of aggravated (sexual) assault to be made out.

The Court's majority was clear that not any risk of harm will suffice to trigger the duty to disclose:

> Yet it cannot be any trivial harm or risk of harm that will satisfy this requirement in sexual assault cases where the activity would have been consensual if the consent had not been obtained by fraud.... In my view the Crown will have to establish that the dishonest act (either falsehoods or failure to disclose) had the effect of exposing the person consenting to a significant risk of serious bodily harm. The risk of contracting AIDS as a result of engaging in unprotected intercourse would clearly meet that test. [emphasis added]

It is clear in the judgment that the Court was not imposing a blanket obligation on persons living with HIV to disclose their status in every sexual encounter. However, what was left – and remains – unclear is where the line will be drawn between activities requiring disclosure and those not requiring disclosure: how will the test of "significant risk" be interpreted and applied?

For example, Justice Cory's majority judgment contemplated that disclosure might not be required with respect to intercourse for which a condom was used, but did not make an explicit ruling on the issue. In a separate minority opinion, two other judges of the Court agreed with the ultimate disposition of the case, but disagreed with Justice Cory's approach to defining fraud as based on "significant risk"; they explicitly took the view that, while unprotected sex without disclosure was appropriately criminalized, sex with a condom was not and should remain outside the ambit of the crime of assault. Therefore, 6 out of the 7 Supreme Court judges who heard the case either suggested or explicitly affirmed that condom use would remove the legal obligation to disclose.

To date, the exact contours of the criminal law in Canada regarding non-disclosure of HIV-positive status remain uncertain, particularly with regard to lower risk practices (e.g., protected sex, oral sex) and undetectable viral load. In a handful of cases, trial

courts have suggested that non-disclosure of HIV-positive status to a sexual partner would not vitiate consent because the risk of a particular activity does not rise to the level of being legally "significant."

- In *R*. v. *Edwards*, a case involving two gay men, a Nova Scotia trial judge was clear that the legal obligation was either "to practice safe sex or make clear disclosure so that there can be informed consent if unprotected sex is to be pursued." (In addition, the Crown's medical expert testified that the per-act risk of transmission through unprotected oral sex was 1 in 10,000 (or 0.01%). The trial judge noted that this did not meet the "significant risk" threshold: "The Crown acknowledges the unprotected oral sex is conduct at a low risk that would not bring it within s. 268(1) of the Criminal Code and had only unprotected oral sex taken place, no charges would have been laid."[3]

- In the case of *R.* v. *Agnatuk-Mercier*, an Ontario trial judge stated that the Crown must prove beyond a reasonable doubt that the vaginal sex in question sex did not involve condom use in order to secure a conviction.[4]

- In *R. v. Nduwayo*, a jury trial in British Columbia, the judge instructed the jury that there was a duty to disclose HIV-positive status in the event of unprotected vaginal sex, but that "there was no legal duty on Mr. Nduwayo to disclose his HIV-positive status if he used condoms at all times. […] These instructions on the issue of consent and fraud vitiating consent were taken from the decision of the Supreme Court of Canada in *R. v. Cuerrier*…."[5]

- In *R. v. Smith*, a Saskatchewan trial judge, in delivering oral reasons for judgment, instructed himself as follows: "Simply because I don't believe him [on the matter of disclosure of HIV-positive status], it doesn't follow that he's guilty of the offence charged. I have to go on and satisfy myself beyond a reasonable doubt that if he did have sex that that sex was unprotected sex…"[6]

- In *R.* v. *D.C.*, the Cour du Québec convicted the accused for not disclosing her HIV-positive status to her male partner, after finding as fact that no condom

[3] *R.* v. *Edwards*, 2001 NSSC 80 (Nova Scotia Supreme Court).

[4] *R.* v. *Agnatuk-Mercier*, [2001] OJ No. 4729 (Ontario Superior Court of Justice) (QL).

[5] *R.* v. *Nduwayo*, 2006 BCSC 1972 (British Columbia Supreme Court); *R.* v. *Nduwayo*, Charge to the Jury, Transcript, pp. 625-626 [on file]. The B.C. Court of Appeal allowed Nduwayo's appeal, on other grounds, and ordered a new trial: *R.* v. *Nduwayo*, 2008 BCCA 255.

[6] *R.* v. *Smith*, [2007] SJ No. 116 (QL). The Saskatchewan Court of Appeal dismissed Smith's appeal on other grounds: *R.* v. *Smith*, 2008 SCKA 61.

had been used and hence there was a significant risk of transmission. Condom use was the key question for the trial judge: "… le Tribunal est d'avis que la question la plus fondamentale à résoudre á cet étape est la suivante : les relations sexuelles ont-elles été protégées ou non protégées?"[7]

- In *R.* v. *Imona-Russell*, another Ontario trial judge repeatedly affirmed that the Crown must prove beyond a reasonable doubt that the accused had "unprotected" vaginal sex with the complainant to secure a conviction for HIV non-disclosure.[8]

- Also of interest is the one reported case in Canada of a criminal prosecution for non-disclosure of hepatitis C virus (HCV), a serious infection which is primarily blood-borne. In *R.* v. *Jones*, a New Brunswick trial judge accepted the expert medical evidence that the per-act risk of HCV infection from unprotected sex was less than 1% for vaginal sex and from 1– 2.5% for anal sex. Applying *Cuerrier*, the trial judge found that the risk of contracting HCV "through unprotected sex is so low that it cannot be described as significant. Therefore, the positive duty to disclose does not arise."[9]

However, in a more recent Manitoba decision, *R.* v. *Mabior* (summarized below), the trial judge stated the law rather differently. The decision criminalized non-disclosure even when condoms were used.[10] This case was also the first to directly examine the issue of low viral load and its relevance in terms of "significant risk." The judge ruled that *both* an undetectable viral load *and* the use of a condom would reduce the risk of transmission below the level that would be considered a "significant risk." Neither condom use nor low viral load on its own would suffice to remove the obligation to disclose one's HIV-positive status, in this judge's interpretation.

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[7] *R.* v. *D.C.*, Unreported, Reasons for Judgment, Court du Québec (Longeuil), No. 505-01-058007-051 (February 14, 2008) [on file]. Note that as of January 2010, this judgment was under appeal on other grounds.

[8] *R.* v. *Imona-Russell*, Unreported, Reasons for Judgment, 23 February 2009, Transcript of (Oral) Reasons for Judgment, pp. 28, 50 [on file]

[9] *R.* v. *Jones*, 2002 NBQB 340 (New Brunswick Court of Queen's Bench). The trial judge also noted that the Crown's medical expert testified that he does not advise his patients to disclose their condition because of the stigmatization associated with the disease.

[10] *R. v. Mabior*, 2008 MBQB 201 (Manitoba Court of Queen's Bench). At this writing, the decision was under appeal and the Canadian HIV/AIDS Legal Network was intervening to challenge this ruling; the matter was scheduled to be heard by the Manitoba Court of Appeal in February 2010.

1.3 Public health and human rights concerns

People living with HIV and service-providers in various fields regularly raise concerns about potential criminal liability and about the negative impacts of such criminal prosecutions. There is certainly disagreement among people living with HIV, AIDS organizations and others working in the field about where to draw the lines with respect to the use of the criminal law, and the appropriate strategies that should be pursued in so doing. However, a number of concerns have been raised repeatedly over the years and from many quarters – in community fora, in the media and increasingly in the courts, especially as the first cases post-*Cuerrier* begin to reach appellate courts and provide opportunities to address some of the outstanding questions regarding the "significant risk of transmission" threshold for requiring HIV disclosure.

Three primary areas of concern can be identified: (1) little beneficial impact of criminalization for HIV prevention; (2) potential harmful consequences for public health and human rights of criminalization; and (3) the potential for unfairness in the application of the law.

Criminal law plays little role in HIV prevention

Critics argue there is little reason to think that the criminal law plays any significant role in reducing the spread of HIV. Despite claims to the contrary, applying criminal law to HIV risk behaviour has not been shown to reduce the spread of HIV by incapacitating or rehabilitating particular offenders, or by deterring others. Indeed, what little evidence there is suggests the absence of any deterrent impact.[11] Furthermore, the function of the criminal law as an HIV prevention tool is largely non-existent when applied to those whose use of condoms or whose low or undetectable viral load means they already pose little risk of transmission — and so to extend the criminal law as far as the trial court did in *Mabior* (above), declaring that not disclosing is a crime even if a condom is used or the person's viral load is undetectable, cannot be justified primarily on the grounds that to do will serve any significant HIV prevention function.

Overly broad criminalization undermines HIV prevention, harms human rights

In contrast, there is a substantial body of research demonstrating the beneficial impact of HIV testing and other public health initiatives in modifying

[11] S. Burris et al., "Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial", (2007) 39 *Arizona State Law Journal* 467-517.

behaviour that risks transmitting HIV, making testing a centrepiece of national and international HIV strategies. Promoting regular HIV testing, and hence earlier detection of infection and interventions to modify risk behaviour with that diagnosis in mind, is particularly important, given that it is in the early weeks following initial HIV infection that a person's viral load tends to be highest and hence s/he is most infectious. The more people engage in high-risk activity while unaware of their own HIV infection, the greater the damage to public health. The Public Health Agency of Canada estimates that, as of the end of 2008, an estimated 26% of those living with HIV in Canada were unaware of their infection. To the extent that overly broad criminalization creates an *additional disincentive to HIV testing* (which impact has unfortunately not been well studied) — either directly because knowledge of HIV-positive status exposes a person to a greater risk of criminal prosecution for subsequent non-disclosure, or indirectly by creating further stigma surrounding HIV and people with HIV — it hinders HIV prevention.

Invasions of privacy and the *stigmatizing effect of criminalization* are other public policy considerations in circumscribing the use of the criminal law. Cases involving criminal charges against persons living with HIV garner considerable media attention, disproportionate given the small number of such cases overall (96 known prosecutions to date in Canada as of mid-November 2009), compared to the cumulative number of people infected with HIV to date in Canada.[12] Long before any resolution at trial, police media advisories and media reports may reveal publicly an accused's identity (including photograph) and HIV status, as well as the criminal allegations and details about his or her personal and sexual life. Stigma also has adverse effects on the effective diagnosis and treatment of HIV among people living with it and on the further spread of HIV amongst the population, including impeding testing, disclosure (including to sexual partners) and the adoption of protective measures. The persistent and widespread nature of HIV-related stigma in Canada is evident from attitudinal surveys commissioned by the Public Health Agency of Canada (PHAC) in recent years.[13] Concerns about stigmatization and discrimination have often been particularly heightened in smaller and/or more closely-knit communities – something that has been raised for some Aboriginal and ethno-racial minority communities, for example.

[12] The Public Health Agency of Canada reports that, as of the end of 2009, there had been a total of 67,442 reported cases of HIV since November 1, 1985, of which 99.2% were among persons 15 years of age or older: HIV and AIDS Canada: Surveillance Report to December 31, 2008 (Ottawa: Public Health Agency of Canada, 2009), online: **http://www.phac-aspc.gc.ca/aids-sida/publication/survreport/2008/dec/index-eng.php**.

[13] See, e.g., EKOS Research Associates Inc., *HIV/AIDS Attitudinal Tracking Survey 2006: Final Report* (Ottawa: Public Health Agency of Canada, 2006), online: **http://www.phac-aspc.gc.ca/aids-sida/publication/por/2006/index-eng.php**.

Critics have also argued that criminal prosecutions create *distrust in relationships between HIV-positive people and their providers of health care and support services*, as people may fear that information regarding their HIV status may be used against them in prosecutions, impeding the provision of quality treatment and care. There has been little systematic documentation of this concern in the Canadian context. However, anecdote and experience – such as the inquiries regularly directed to organizations such as the Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic – Ontario (HALCO) – indicate that it is a common concern for people living with HIV, as well as for service-providers uncertain as to how to satisfy professional and practical requirements in their work without acquiring or recording information from clients that can be used to prosecute them.

As noted below, these sorts of concerns were largely dismissed by the majority of the Supreme Court of Canada (in Justice Cory's judgment) when it heard the *Cuerrier* case in 1998, but they did receive some sympathetic commentary from the minority judgment by two of the judges (one of whom is now the Chief Justice of the Supreme Court). In disagreeing with the broader approach to defining "fraud" proposed by the majority (and the even broader approach proposed by the other minority judgment), Justice McLachlin noted that:

> The broad extensions of the law proposed by my colleagues may also have an adverse impact on the fight to reduce the spread of HIV and other serious sexually transmitted diseases. Public health workers argue that encouraging people to come forward for testing and treatment is the key to preventing the spread of HIV and similar diseases, and that broad criminal sanctions are unlikely to be effective… Criminalizing a broad range of HIV related conduct will only impair such efforts…. The material before the Court suggests that a blanket duty to disclose may drive those with the disease underground…

Concerns have also been raised that criminalization, often seen as a response that aims to protect women and provide justice in instances where women have been infected or exposed to HIV by their male sexual partners, will also *operate to the detriment of women* – particularly women living with HIV. There have been relatively few fora specifically addressing the ways in which criminalization of HIV non-disclosure does or can affect women. However, one such forum in 2007, consisting of approximately 40 women living with HIV and 40 front-line service-providers working with women, highlighted a range of concerns. These included those already noted above, but also included such things as:

- the added challenges that some women, particularly those in vulnerable relationships, may face in insisting on condom use by their partners, meaning they then must either disclose or lose even this possibility of avoiding criminal liability;

- fears that disclosure could trigger the loss of relationships (with not only emotional, but also financial consequences or consequences for immigration status if the woman is sponsored to immigrate by her husband); and
- fears of abuse and physical violence, as well as the use of the criminal law as a weapon, especially in situations where relationships break down and the person with HIV may be subjected to unfounded accusations or threats to lay criminal charges as a means of seeking revenge or exerting control.[14]

Uncertainty and unfairness in application of the criminal law

Finally, there is the potential for *unfairness* in the application of the criminal law. In her criticism of the "significant risk" test set out by Justice Cory in the Supreme Court of Canada's majority decision in *Cuerrier*, Justice raised this issue as well as her concern that uncertainty would undermine the presumed deterrent effect of the criminal law:

> When is a risk significant enough to qualify conduct as criminal? In whose eyes is "significance" to be determined - the victim's, the accused's or the judge's? … The criminal law must be certain. If it is uncertain, it cannot deter inappropriate conduct and loses its raison d'être. Equally serious, it becomes unfair. People who believe they are acting within the law may find themselves prosecuted, convicted, imprisoned and branded as criminals. Consequences as serious as these should not turn on the interpretation of vague terms like "significant" and "serious".

Indeed, this concern has begun to manifest itself in the judgments since *Cuerrier*, as lower courts have been called upon to flesh out the contours of the "significant risk" test. In some cases (e.g., *Edwards*, noted above), a person living with HIV has avoided prosecution for oral sex without a condom because of the sensible exercise of prosecutorial discretion; yet within the last year, the prosecutor in at least one other case is proceeding with criminal charges solely on the basis of allegations of unprotected oral sex. As noted above, in a number of cases, trial judges have seemingly accepted that vaginal or anal sex with a condom does not attract criminal liability, yet in *Mabior* (under appeal) this interpretation has been rejected, in a judgment that seems to require disclosure as long as there is even a miniscule risk of transmission.

Furthermore, if the question of which acts and circumstances meet this threshold is always to be left to the trier-of-fact, whether a judge alone or a jury, as some courts have done, then we face the prospect that one person may be convicted of one of the most serious crimes under Canadian law for not disclosing

[14] "To Tell or Not to Tell: the Criminalization of HIV Non-Disclosure & its Impact on HIV-Positive Women", Report of a Community Forum, Toronto, 25 May 2007 [on file].

his or her HIV-positive status, while another person who has engaged in exactly the same sexual activity could be acquitted – all because one jury deems that an estimated 0.05% chance of transmission is "significant" while another deems it to fall below this threshold. In the absence of a clearly delineated test for when people living with HIV are, and are not, required to disclose their status in order to avoid criminal liability, the potential for inconsistent and unfair application of the law is only magnified.

1.4 Circumscribing the criminal law: the way forward

Although there has been a trend in Canada over the past decade to ever more expansive and frequent use of the criminal law in cases of HIV exposure, we have reached a moment where perhaps some significant changes can be achieved if advocates take strategic advantage of emerging opportunities. Several specific interventions may be particularly pertinent:

- There is growing public debate, including in the media, on the criminalization of HIV exposure and its impacts – although it is difficult to say that much of the media commentary, with a few exceptions, is well-informed or attempts honestly to present a careful, nuanced assessment of the public policy considerations at stake, both pro and con. GNP+NA could consider becoming more actively engaged in this debate in the public arena, bringing the perspective of people living with HIV more into the discussion.

- The first study in Canada has been initiated (in Ontario) to build a base of evidence on the impacts of criminalization of HIV exposure. Results from this 3-year study should be released in 2011 and provide an opportunity for further education and advocacy.

- Materials are being developed to assist defence lawyers in handling such cases, in collaboration between a number of organizations.

- The Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic – Ontario are collaborating with the National Judicial Institute to develop, for the first time, a training session on HIV/AIDS and criminalization for judges (to be delivered in March 2010).

- The Canadian HIV/AIDS Legal Network, often in collaboration with local AIDS or PWA organizations, is intervening in a number of cases now reaching provincial appellate courts that raise the some of the outstanding questions following the *Cuerrier* decision about the scope of the criminal law (e.g., the

implications of condom use or undetectable viral load). In appropriate cases, GNP+NA might consider joining as an intervener.

- In one province (Ontario), a working group of AIDS service, legal and PWA organizations has been formed and has begun a project that will seek to engage the provincial Attorney-General's office with a view to developing prosecutorial guidelines that would limit the inappropriately expansive application of the criminal law.[15] This work could serve as a model for use in other provinces (as provinces has the constitutional responsibility for the administration of justice, including the application of the federal *Criminal Code*). A campaign for the development and adoption of good prosecutorial guidelines will require broad support from community groups and from PWA groups; GNP+NA could play an important role here.

[15] For example, a Legal Guidance (for prosecutors and caseworkers) and a Policy Statement (for a more general readership) on prosecutions to the sexual transmission of infections were published in March 2008 by the Crown Prosecution Service of the United Kingdom. See Y. Azad, "Developing guidance for HIV prosecutions: an example of harm reduction?" *HIV/AIDS Policy & Law Review* 13(1) (2008): 13–19.

2. Case studies: *R.* v. *Cuerrier* (1998) and *R.* v. *Mabior* (2008)

R. v. Cuerrier, [1998] 2 S.C.R. 371

Factual Background

The accused HC tested HIV-positive in August 1992. A public nurse who met with him instructed him to use condoms each time that he had sexual intercourse and to inform all prospective partners of his HIV-positive status. Upon receiving these instructions, he reacted angrily, stating that he would never have a sex life if he was forced to tell all potential partners that he had HIV.

Approximately three weeks after being informed of his HIV diagnosis, he met KM, one of the two complainants. Shortly thereafter, the two began a sexual relationship. Over the course of an 18-month relationship, the couple had sexual intercourse more than 100 times; most occasions did not include the use of a condom. KM discussed sexually transmitted diseases several times with the accused, although they did not speak specifically about HIV. He informed her that he had tested negative for HIV eight or nine months before. He did not reveal that he had tested positive one month before their relationship began.

Later in their relationship, KM developed hepatitis and was advised to take an HIV test. In January 1993, both she and the accused were tested. In February, a public nurse informed her that the accused HC was HIV-positive, but that she had currently tested HIV-negative (although it could be a false negative as she was still in the window period since the last exposure). The accused was reminded to use condoms and inform partners of his HIV status. He stated that he would wait to determine KM's status, and would leave her if she was HIV-negative in subsequent tests.

Until May 1994, KM continued to have unprotected sex with HC. She testified that she loved the respondent and did not want to put another woman at risk of becoming infected. In May, the two separated. She testified that if she had known that the respondent was HIV-positive, she would not have engaged in unprotected sexual intercourse with him.

When a public health nurse learned that KM and HC had ended their relationship, she again advised him to use condoms and inform partners of his HIV status. He began a sexual relationship shortly thereafter with BH, the second complainant in this case. They had sexual intercourse 10 times, usually without a condom. She told him that she was afraid of diseases. He did not reveal that he was

HIV-positive. In June 1994, she discovered his status and confronted him. She testified that she would not have engaged in unprotected sexual intercourse with him had she been aware of his status.

At the time of trial, neither KM nor BH had tested positive for HIV.

Charges

Cuerrier was charged with two counts of *aggravated assault*, one against each of KM and BH, under the *Criminal Code of Canada* (sections 265 and 268). Under s. 265, "a person commits an assault when without the consent of another person, he applies force intentionally to that other person…," and "for the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of… fraud…". Under s. 268, "every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant." The maximum penalty upon conviction for aggravated assault is a term of imprisonment not exceeding 14 years.

Outcome

At trial, the judge granted the defence's motion for a directed verdict of acquittal, on the basis that the facts alleged by the Crown (prosecution) could not amount to the crime of (aggravated) assault as a matter of law. The Crown appealed; the British Columbia Court of Appeal agreed with the trial judge and dismissed the Crown's appeal. However, the Supreme Court of Canada allowed the prosecution's further appeal, overturning the lower courts' judgments and ruling that, as a matter of law, the facts alleged could amount to an assault under the *Criminal Code*. Having clarified the applicable law, the Supreme Court of Canada ordered a new trial.

Sentencing

For a variety of reasons, the Crown elected not to proceed with a new trial against the accused.

Highlights of the Judgment

Justice Peter Cory wrote the majority judgment of the Supreme Court of Canada (by 4 of the 7 judges who decided the case).

To support a charge of aggravated assault, the Crown is required to prove that the respondent applied force intentionally without consent. Because the complainants had agreed to engage in sexual intercourse with the respondent, it was

necessary to show that their consent was vitiated by fraud. In addition, an aggravated assault requires that the assault "wounds, maims, disfigures or endangers the life of the complainant." Since neither of the women had tested positive for HIV at the time of trial, and therefore no actual physical harm had occurred, the burden was on the Crown to show that the complainant's lives were endangered by the respondent's force.

Endangering the life of the complainant

Justice Cory had no trouble finding that the respondent endangered the life of the complainants by exposing them to the risk of HIV infection through unprotected sexual intercourse: "The potentially lethal consequences of infection permit no other conclusion." He further ruled that "it is not necessary to establish that the complainants were in fact infected with the virus. There is no prerequisite that any harm must actually have resulted." The offence of "aggravated" assault can be made out where there is an assault that "endangers life".

Assault: applying force intentionally without consent

On the underlying question of whether there was an assault at all, as defined in the law, the question before the Supreme Court was whether the failure of the respondent to inform his partners of his HIV-positive status constituted fraud that would vitiate (i.e., render invalid) their consent to sexual intercourse.

Prior to 1983, the indecent assault provision of the *Criminal Code* provided that consent was vitiated if it was obtained through fraudulent representations regarding "the nature and quality of the act" (e.g., fraudulently gaining 'consent' to touch a person's sexual organs by fraudulently purporting to conduct a medical exam). This was the formulation inherited from the law of the United Kingdom, and in the earlier U.K. case of *R. v. Clarence* (1888), a wife's consent to sexual activity was found to be valid although the husband had undisclosed gonorrhoea, because the disease did not relate to the "nature and quality of the act." However, in 1983, the separate rape and indecent assault provisions in Canada's *Criminal Code* were replaced with the current, single provision creating the offence of "sexual assault", which simply stated that consent could be vitiated by fraud. The qualification that the fraud had to pertain "to the nature and quality of the act" was omitted, which raised the question of whether this limitation was still implied. Relying on the legislative history and plain language interpretations of the provision, Justice Cory concluded that Parliament intended to remove the term so as to remove the rigidity of the common law definition. Therefore, fraud could encompass more than just things relating to the nature and quality of the act itself.

After reviewing various sources of law regarding the meaning of 'fraud', and drawing in particular on cases that had defined this term in the context of

commercial transactions, Justice Cory determined that there were two key elements to a finding of fraud, which the Crown must prove beyond a reasonable doubt: *dishonesty* and *deprivation*.

The Crown must show proof of *dishonesty*: "[t]he actions of the accused must be assessed objectively to determine whether a reasonable person would find them to be dishonest. The dishonest act consists of either deliberate deceit respecting HIV status or non-disclosure of that status… The possible consequence of engaging in unprotected intercourse with an HIV-positive partner is death. In these circumstances there can be no basis for distinguishing between lies and a deliberate failure to disclose."

The dishonesty must also result in some *deprivation* before it amounts to fraud, which means either actual harm or a risk of harm. However, Justice Cory cautioned as follows:

> ¶ 128 … Yet it cannot be any trivial harm or risk of harm that will satisfy this requirement in sexual assault cases where the activity would have been consensual if the consent had not been obtained by fraud. For example, the risk of minor scratches or of catching cold would not suffice to establish deprivation. What then should be required? **In my view, the Crown will have to establish that the dishonest act (either falsehoods or failure to disclose) had the effect of exposing the person consenting to a <u>significant risk of serious bodily harm</u>.** The risk of contracting AIDS as a result of engaging in unprotected intercourse would clearly meet that test. In this case the complainants were exposed to a significant risk of serious harm to their health. Indeed their very survival was placed in jeopardy. It is difficult to imagine a more significant risk or a more grievous bodily harm. [emphasis added]

Justice Cory found that unprotected sexual intercourse could pose a significant risk of the serious bodily harm of HIV infection, and thus not disclosing HIV-positive status in that circumstance could amount to fraud that vitiates a partner's consent to have sex.

Very importantly, Justice Cory's judgment suggests – but does not definitively decide – that protected sexual intercourse may not trigger the duty to disclose:

> ¶ 129 To have intercourse with a person who is HIV-positive will always present risks. Absolutely safe sex may be impossible. Yet the careful use of condoms might be found to so reduce the risk of harm that it could no longer be considered significant so that there might not be either deprivation or risk of deprivation. To repeat, in circumstances such as those presented in this case, there must be a significant risk of serious bodily harm before the section can be satisfied. In the absence of those criteria, the duty to disclose will not arise.

On this specific point, it is worth noting that 2 of the other judges (Justices McLachlin and Gonthier), who wrote a separate (minority) opinion with a different approach to how to define the law of assault so that it applies to this sort of circumstance, were more explicit in their view that the criminal law should only extend to unprotected sex:

> ¶ 73 This suffices to justify the position of the common law pre-Clarence that deception as to venereal disease may vitiate consent…. Again, protected sex would not be caught; the common law pre-Clarence required that there be a high risk or probability of transmitting the disease: Sinclair, supra. These observations largely displace the fear of unprincipled overextension that motivated the majority in Clarence to exclude deceit as to sexually transmitted disease as a basis on which fraud could vitiate consent.

As a result, 6 of the 7 judges who decided the case either suggested or explicitly stated that protected sex might or would not be covered by the criminal law because it would not pose a great enough risk of HIV transmission. The majority judgment, however, is only suggestive of this and did not settle this key question.

Finally, in addition to the requirements of *dishonesty* and *deprivation*, the Crown must prove beyond a reasonable doubt that the complainant would not have consented to sexual relations if the accused had disclosed their HIV status.

Other issues

In coming to his ruling, Justice Cory considered submissions from a number of interveners: the Canadian HIV/AIDS Legal Network, Canadian AIDS Society, British Columbia Persons With AIDS Society and the British Columbia Civil Liberties Association. Among other things, the interveners argued that the criminal law should not be applied where people practice safer sex (e.g., condom use), and urged the Court to consider the implications of criminalization for people living with HIV, including especially women with HIV. Interveners raised a number of public policy concerns.

First, interveners argued that public health initiatives are more appropriate to control the spread of HIV and AIDS, and that their mandate gives them substantial capacity to protect the public, Justice Cory found that the criminal law still had a role to play in deterring the spread of the disease, as public health initiatives can be insufficient.

Second, interveners argued that criminal sanctions could deter people from seeking testing. Justice Cory ruled that:

> ¶ 143 … I cannot accept this argument. It is unlikely that individuals would be deterred from seeking testing because of the possibility of criminal sanctions arising

> later. Those who seek testing basically seek treatment. It is unlikely that they will forego testing because of the possibility of facing criminal charges should they ignore the instructions of public health workers.

Third, interveners argued that educational efforts encouraging everyone to take precaution to protect themselves against HIV could be undermined by criminalization: Justice Cory rejected this argument:

> ¶ 144 … Surely those who know they are HIV-positive have a fundamental responsibility to advise their partners of their condition and to ensure that their sex is as safe as possible. It is true that all members of society should be aware of the danger and take steps to avoid the risk. However, the primary responsibility for making the disclosure must rest upon those who are aware they are infected. I would hope that every member of society no matter how "marginalized" would be sufficiently responsible that they would advise their partner of risks. In these circumstances it is, I trust, not too much to expect that the infected person would advise his partner of his infection. That responsibility cannot be lightly shifted to unknowing members of society who are wooed, pursued and encouraged by infected individuals to become their sexual partners.

Finally, interveners argued that criminalizing non-disclosure would exacerbate the stigmatization of HIV+ people. In response, Justice Cory stated that the stigmatization was not related to the disease, but to the fact of committing a sexual assault.

Justice Cory concluded by reiterating that the criminal law played an important role in deterring transmission, which outweighed the potentially negative implication for people living with HIV and AIDS.

Comment

The *Cuerrier* judgment in 1988 is the landmark decision in Canada on the use of criminal charges (of assault) for not disclosing HIV-positive status. Since this decision, in which the Supreme Court of Canada clarified that non-disclosure of HIV-positive status could be the basis, in some circumstances, for a conviction for *aggravated assault* (or the similar, but more harshly penalized, offence of *aggravated sexual assault*), there has been a significant and sustained increase in the number of such prosecutions brought forward each year.

The key test it established is that of a “significant risk of serious bodily harm” – where such a risk exists, there is a legal duty to disclose, such that not disclosing amounts to “fraud” rendering otherwise-consensual sex into an assault. Therefore, the key question is: what circumstances are to be considered as posing a (legally)

significant risk? This has been one of the principal questions preoccupying people living with HIV, AIDS organizations and lawyers handling such cases and it remains unsettled in Canadian law. While the facts of the *Cuerrier* case, and subsequent cases, make it clear that unprotected vaginal and anal sex are accepted as meeting the threshold of a "significant risk" of HIV transmission, questions remain about whether disclosure is required by the criminal law in cases of other activities that are considerably lower-risk.

* * * * *

***R. v. Mabior*, 2008 MBQB 201**

Factual Background

The accused CM was diagnosed as HIV-positive in January 2004 by a doctor at the local public health department in the city of Brandon, Manitoba. At the time of his diagnosis, and numerous times afterward, he was advised by a public health nurse to tell his sexual partners about his HIV status before engaging in sexual contact with them and to always use condoms.

The accused began antiretroviral therapy (ART) shortly after his diagnosis. The therapy resulted in an undetectable viral load between early October 2004 and December 2005. According to the Crown's medical expert, during this time he was likely not infectious.

In March 2006, a statement was taken by police from JS, who claimed to have had sex with the accused (although charges related to this complainant were eventually stayed at trial). Two days later, police issued a press release containing a photo of the accused and information about his HIV status, in order to encourage other complainants to come forward. The complainants came forward after seeing the press release. CM ultimately faced criminal charges for having sex without disclosing his HIV status to 9 women in the cities of Brandon and Winnipeg.

The accused CM did not testify at trials. Details of the encounters with the nine complainants whose allegations proceeded at trial are as follows, based on the complainants' testimony:

- MP had sex with the accused on 10-15 occasions, between February and March or April 2004. On each occasion, they were drinking, and MP only remembered moments of the encounters. She could not remember if condoms had been used or not. They did not discuss, and he did not disclose, his HIV status.

- KR met the accused in early January 2004 at a bar. They became friends and entered into a relationship between April and November 2004. They sometimes drank and used drugs together. She testified that condoms were always used during the relationship; 3 or 4 times the condom had broken, and sex was either stopped or a new condom was used. She stated that she would not have had sex, even with a condom, if she had known of his HIV status.

- KG had consensual sex with the accused once after meeting at a bar in June 2004. She was intoxicated at the time. She testified that she was fairly certain that a condom had been used. She stated that she would not have engaged in sexual intercourse had she known of his HIV status.

- SH was in a relationship with the accused from February to April 2005. After a week of protected sex, she asked him if he had any "STDs" or "anything else", to which he replied no. For about three weeks after that, they had unprotected sexual intercourse and he ejaculated inside of her. Although she saw him take medication everyday, she testified that the accused told her he had a liver condition. An acquaintance told SH of the accused's HIV status, but she testified that she did not believe what she was told, and one more unprotected sexual encountered followed. She testified that she would not have had a sexual relationship with CM had she known of his HIV status.

- DCS was 12 years of age at the she had sex with CM on various occasions in 2005, although she had told him she was 16 and was described by the trial judge as "street-wise" beyond her years. Alcohol was always supplied at the accused's home. She stated that she had sex with the accused "without okaying it" and without a condom. She stayed at the home of the accused for 4 days before being escorted back to a group home operated by the local child welfare agency. She was later told of the accused's HIV status by a friend. She continued to have sex with him another 10 to 15 times. She stated that she did not want to have sex with the accused, but repeatedly returned to the home and admitted that she was not forced or threatened into the sexual activity.

- CB had one sexual encounter with the accused at the residence of a friend. She was intoxicated at the time of the event but a condom was used. She testified that she would not have had sex with the accused if she had known of his HIV status.

- DH had sex with the accused several times. She normally required him to wear a condom. However, on at least one encounter, at a time when she was intoxicated, she noticed semen coming out of her after sex when she went to the

bathroom and noticed a condom on the floor that had not been there before. They had stopped having sex for a few seconds, she testified, although she did not see him remove the condom. She stated that she would not have had sex with him if she had known of with HIV status.

- FL had sexual intercourse with the accused several times, starting with a first instance of unprotected sex in January 2006. She testified that she had sex with the accused and repeatedly returned to his house to party, although she never consented to the sex. She could not recall whether condoms were used after the first (unprotected) encounter. She testified that she would not have had sex with the accused had she known his HIV status.

- JLL had sex with the accused twice in 2005. On the first occasion, she testified that the accused locked the two in the bedroom and refused to allow her to leave until she engaged in sexual relations with him. A condom was not used, albeit there was no ejaculation. On the second incident, she testified that she "let it happen again" while intoxicated, and had sex without a condom. She later found out about the accused's HIV-positive status and confronted him. She testified that she would not have had sexual intercourse with the accused had she known of his HIV status.

None of the complainants contracted HIV.

Charges

The defendant CM was charged with 10 counts of *aggravated sexual assault* (as well as one count of *forcible confinement* with respect to the complainant JLL and, with respect to the underage complainant DCS, one count each of *invitation to sexual touching by a minor* and *sexual interference with a minor*). The charge on one of the counts of aggravated sexual assault (regarding complaint JS) was stayed at trial. Of the remaining nine complainants, six testified that they had consented to sexual intercourse with the accused, but were unaware of his HIV-positive status at the time. Three of the complainants allege that their sexual encounters with the accused were non-consensual. However, the judge was not persuaded of this, and therefore treated these three complainants in the same manner as the other six – i.e., the primary consideration was whether their consent was vitiated by CM not having disclosed his HIV-positive status.

Held

On July 15, 2008, Justice McKelvey of the Manitoba Court of Queen's Bench found the accused CM guilty of six counts of aggravated sexual assault with respect to the six complainants MP, KR, KG, DCS, DH and SH. He was acquitted of aggravated sexual assault against the three complainants CB, FL and JLL. (In

addition, the accused was found guilty of the charges of invitation to sexual touching and sexual interference against the complainant DCS. He was acquitted of the charge of forcible confinement against the complainant JLL.)

Sentence

Mabior was sentenced to 14 years in prison.

Highlights of the Judgment (delivered by Justice McKelvey)

Aggravated Sexual Assault

To obtain a conviction for aggravated sexual assault, the Crown is required to prove that the accused applied force intentionally to a complainant without consent, in circumstances of a sexual nature. The trial judge rejected the evidence of three complainants that the sex was forced. She held that all of the complainants had agreed to engage in sexual intercourse with the accused, and therefore the Crown had to prove their consent was vitiated by fraud. In addition, an *aggravated* assault requires that the assault "wounds, maims, disfigures or endangers the life of the complainant." Since none of the women had tested positive for HIV at the time of trial, and therefore no actual harm had occurred, the burden was on the Crown to show that the complainants' lives were endangered by the accused.

Use of Expert Testimony

The trial judge relied heavily on the evidence provided by the medical expert called by the Crown, Dr. Richard Smith, an experienced HIV physician (but not the accused's treating physician). His evidence regarding risks of transmission, including the impact of condoms and viral load on said risk, was central in the case.

With regarding to <u>condom use</u>, the medical expert's evidence was as follows:

- Studies cited specifically in his medical report put the risk of transmission per act of unprotected vaginal sex as ranging from 0.05% (1 in 2000) to 0.26% (1 in 384), which risk is lowered by the use of a condom.
- He noted that "HIV is unable to pass through good quality condoms" and "[t]here is no scientific justification to require HIV status disclosure if a condom is always used."
- However, human error, particularly with respect to correct application and use of a condom, reduces their overall effectiveness, and use of drugs or alcohol could serve to impair the ability to follow correct condom application procedures.
- "A Cochrane review of condom effectiveness concludes that consistent use of condoms results in an 80% reduction in HIV incidence. The studies used in this review did not report on the 'correctness' of use…. There is enough evidence of

transmission due to condom breakage or improper use to classify this activity as low (rather than negligible) risk."

- The Crown's medical expert variously described vaginal sex using a condom as posing a "low risk", "very low risk" or "extremely low risk" of HIV transmission.

With regard to viral load and HIV transmission risk, the judgment, medical expert's report and the transcript of evidence at trial include the following highlights:

- The trial judge noted that, according to UNAIDS and WHO: "Research suggests that when the viral load is undetectable in blood the risk of HIV transmission is significantly reduced. However, it has not been proven to completely eliminate the risk of transmitting the virus. More research is needed to determine the degree to which the viral load in blood predicts the risk of HIV transmission and to determine the association between the viral load in blood and the viral load in semen and vaginal secretions."
- The Crown's medical expert testified at trial that it is an "unquestioned fact" that "infectiousness is directly proportional to viral load." According to the medical expert, in the case of a viral load of less than 1500 copies/mL, the risk of HIV transmission is considered "low" and transmission is "extremely unusual", and in the case of an undetectable viral load, the risk is "very low" – or, according to one expert review in 2008 by the Swiss Federal Commission on HIV/AIDS, even "negligible or possibly non-existent."
- It was the "strong opinion" of the Crown's medical expert that "from a scientific perspective", there would be a "certainly very low risk" of transmission through unprotected sex by someone with undetectable viral load and no other sexually transmitted infections.

As noted above, of particular interest at trial was the statement issued in 2008 by the Swiss Federal Commission on HIV/AIDS, which states that: "an HIV-infected person on antiretroviral therapy with a completely suppressed viremia is not sexually infectious, i.e. cannot transmit HIV through sexual contact." This statement is subject to the qualifications that the successful adherence to antiretroviral therapy (ART) keeps viral load suppressed for at least six months and there are no other sexually transmitted infections. Referring to this statement, the Crown's medical expert testified that, absent other sexually transmitted infections (STIs), the risk of transmission via an act of unprotected intercourse by a person with a sustained undetectable viral load was "very low". In particular, he noted the Swiss Federal Commission had estimated this risk at less than 0.001% (1 in 100,000), which it described as "a level of risk considered acceptable in other situations such as flying in a plane."

The Crown introduced other materials (e.g., from the US Centers for Disease Control, WHO and UNAIDS) to illustrate that the Swiss statement was controversial. While he agreed that the Swiss statement has been "controversial", the Crown's medical expert also noted in his written report that this is "not because there is any convincing scientific refutation of the Swiss Commission's facts and risk assessment." At trial, in the face of repeated questioning by the Crown, he maintained: "there's been no scientific refutation, there's been no disproof of what they've said." According to the expert, while the claim of "negligible" risk has provoked controversy, there is no controversy among HIV-treating physicians that the risk is "low" in circumstances of a viral load that is undetectable or low (e.g., under 1500 copies/mL).

Specifically with respect to the accused CM, Dr. Smith noted that his circumstances did not meet the qualifications attached to the Swiss Federal Commission's statement in that he had had multiple sexual partners. In late 2003 and again in early 2004, CM was diagnosed with gonorrhea; in Dr. Smith's opinion, these instances of STIs were evidence of improper condom use by the accused. However, in his opinion, which was accepted by the trial judge, until early October 2004, the accused had viral loads that were consistent with "... probably low but possible infectivity." Subsequently, between October 2004 and December 2005, his viral load was undetectable and therefore "there was a very high probability that the accused was not infectious and could not have transmitted HIV throughout that period". The medical expert also noted that "[t]here is no evidence that he had any sexually transmitted infection during this time" and that "[i]f he had had an STI his viral load might have increased above the level of detection but as he was taking a potent antiretroviral combination throughout this period it seems unlikely that his viral load would have achieved even the low levels that he had… at the time of his gonoccal [*sic*] urethritis." The Crown's expert noted "there are several documentations of a high degree of adherence or compliance with his [antiretroviral] regimen. The fact that his viral load has never become detectable lends strong support to this."

Endangerment of Life

In concluding that CM had endangered the lives of the complainants, the trial judge relied on earlier Supreme Court of Canada decisions. In *R.* v. *Cuerrier*, [1998] 2 S.C.R. 371 (above), the Supreme Court had held that for cases of unprotected sexual intercourse there can "... be no doubt that the accused endangered the lives of the complainants by exposing them to the risk of HIV infection through unprotected sexual intercourse. The potentially lethal consequences of infection permit no other conclusion." (There was no discussion of viral load and its legal implications in *Cuerrier* in 1998.) In an earlier case, *R.* v. *Thornton*, [1993] 2 S.C.R. 445, the accused had donated blood despite knowing he had HIV. While the screening process for

keeping unsafe blood out of the blood supply was good, it was not perfect: it was found to be 99.3% accurate in filtering contaminated blood, with the remaining 0.7% inaccuracy attributed to human failure or the failure of the material used in the screening process. The trial judge noted that, in that case, the courts found endangerment to life because the "gravity of the potential harm is great, in this case 'catastrophic.'"

The trial judge stated that, in assessing whether the complainants' lives were endangered, she was "not prepared to consider factors involving the possible implications of the viral load of the accused…. The statements of the CDC and WHO express very well the continuing risks of the transmission of this disease." In light of this understanding of endangerment, the trial judge found that there was endangerment in the case of unprotected sexual intercourse. Further, she found endangerment in those cases where a condom had been used, but it broke or was discarded, noting that this circumstance "essentially equates" to unprotected sex.

The trial judge also found that endangerment of life occurred in instances where condoms were used. In reaching this conclusion, she relied upon the medical expert's evidence that condoms only provide an 80% reduction in the risk of transmission.

Consent and non-disclosure of HIV: the question of "significant risk" of transmission

The trial judge then explored whether consent to sexual intercourse was vitiated by fraud. As set out by the Supreme Court of Canada in *Cuerrier* (above), this required the Crown to show that the accused was dishonest, and that this dishonesty resulted in a deprivation or risk of deprivation (i.e., harm or risk of harm).

Applying the approach in *Cuerrier*, the trial judge accepted that not disclosing HIV-positive status could amount to dishonesty. The question was whether there was an underlying duty to disclose: as set out in *Cuerrier*, this required the Crown to prove beyond a reasonable doubt that there was a "significant risk of serious bodily harm".

Justice McKelvey found that neither an undetectable viral load nor condom use was, by itself, sufficient to reduce the risk of bodily harm below the level of "significant." In coming to this conclusion, she again relied on *Thornton*, which suggests an extremely low threshold for meeting the "significant risk" test.

With respect to condom use, the judge held that there still exists a "significant risk" of HIV transmission as long as a person is "infectious". She rejected the argument that condom use removes the need for HIV disclosure by relying on

evidence that condom use only reduces the risk of HIV transmission by 80%. However, she apparently failed to consider that this is a reduction of a per-act risk that, according to the Crown's medical expert, ranged from 0.05% (1 in 2000) to 0.26% (1 in 384) – that is, condom use reduces the per-act risk of transmission associated with vaginal sex by 80 percent, such that it then falls in the realm of 0.01% (1 in 10,000, akin to oral sex without a condom) to 0.052% (approx. 1 in 2,000).

With respect to the question of viral load, the trial judge noted that none of the evidence supported the notion that the accused's actions were made in consideration of his undetectable viral load and assessments such as those by the Swiss Federal Commission. She accepted as fact that "there was a very high probability that the accused was not infectious and could not have transmitted HIV throughout" the relevant period, and the uncontradicted evidence of the prosecution's medical expert was that the risks of transmission were "certainly very low". Nonetheless, the trial judge held that a "significant risk" of transmission existed in every instance where no condom was used. She stated this finding in various ways in relation to different complainants; the following two examples are representative (emphasis added):

> "I have found the medical and scientific evidence to be very persuasive that even with an undetectable viral load, there remains a risk of transmission of HIV…"
>
> During those times when the viral load is undetectable in the blood, the risk of HIV transmission is reduced. However, the research has not proven that such a situation completely eliminates the risk of transmitting the virus. … I am satisfied… that there was a significant risk of serious bodily harm in that HIV could have been passed to S.H. in those circumstances when the accused had an undetectable viral load and engaged in unprotected sexual contact."

While the trial judge concluded that neither condom use nor an undetectable viral load would suffice, on its own, to reduce the risk sufficiently, she did allow that the combination of condoms and an undetectable viral load would mean the risk was no longer "significant", and therefore there would be criminal sanction for not disclosing HIV-positive status.

On the basis of this analysis, the trial judge determined that the accused was guilty of aggravated sexual assault against the complainants MP, KR, KG, DCS, DH and SH. These results were found on the basis that the accused had either used a condom during the time in which he had a detectable viral load, or that he had not used a condom during a period in which he had an undetectable viral load. In the cases of complainants CB, JLL and FL, the judge was satisfied that a condom had been used and the accused had an undetectable viral load at the time of the sexual

encounters; as this meant there was no "significant risk", there was no crime for not having disclosed HIV-positive status.

Comment

The Canadian law regarding assault is clear that there is no duty to disclose HIV-positive status unless there is a "significant risk" of transmitting the virus. This case is the first in Canada to address directly the legal implications of an undetectable or low viral load. It is also the first case to include any detailed discussion by a judge of whether condom use reduces the risk sufficiently that there is no legal requirement to disclose, something that a majority of the Supreme Court of Canada had contemplated, but not definitively decided, in the leading case of *Cuerrier* (above). A minority of the judges in *Cuerrier* did say explicitly that the criminal law would not extend to protected sex, and in a number of subsequent cases, trial judges have stated that the prosecution had to prove the sex was unprotected in order to secure a conviction and, in the case of *R.* v. *Edwards*, recognized that performing oral sex on an HIV-positive man not wearing a condom was a low risk activity that would not meet the "significant risk" threshold. The judgment at trial in this case, *Mabior*, is at odds with that interpretation.

At this writing, the judgment of the Manitoba trial court is under appeal to the Manitoba Court of Appeal (scheduled to be heard in February 2010). The intervener Canadian HIV/AIDS Legal Network is arguing that the trial judge erred legally in her interpretation and application of the "significant risk" test for requiring HIV disclosure, essentially requiring the complete elimination of any risk, contrary to the express direction of the Supreme Court of Canada. The intervener argues there are good public policy reasons to reject such an approach, which substantially expands the ambit of potential criminal liability of people living with HIV; there is little reason to believe the criminal law will have any significant HIV prevention benefit, and overly broad application of the criminal law will undermine HIV prevention efforts in various ways, while the absence of clarity about what "significant risk" means will lead to unfairness in the application of the criminal law. The intervener asks the Court of Appeal to overturn the judgment and to clarify, as a matter of law, that either condom use or an undetectable viral load suffices to reduce the risk sufficiently that it is no longer "significant" for purposes of the criminal law, and hence there is no crime for not disclosing HIV status in those circumstances.