

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE MANITOBA COURT OF APPEAL)**

Between

HER MAJESTY THE QUEEN

Appellant
(Prosecution)

- and -

CLATO LUAL MABIOR

Respondent
(Defendant)

--- AND ---

(ON APPEAL FROM THE QUEBEC COURT OF APPEAL)

Between:

HER MAJESTY THE QUEEN

Appellant
(Prosecution)

- and -

D.C.

Respondent
(Defendant)

FACTUM OF THE INTERVENERS

**CANADIAN HIV/AIDS LEGAL NETWORK, HIV & AIDS LEGAL CLINIC ONTARIO,
COALITION DES ORGANISMES COMMUNAUTAIRES QUEBECOIS DE LUTTE
CONTRE LE SIDA, POSITIVE LIVING SOCIETY OF BRITISH COLUMBIA,
CANADIAN AIDS SOCIETY, TORONTO PEOPLE WITH AIDS FOUNDATION,
BLACK COALITION FOR AIDS PREVENTION AND
CANADIAN ABORIGINAL AIDS NETWORK
(Pursuant to Rules 37 and 42 the *Rules of the Supreme Court of Canada*)**

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PART I: OVERVIEW

1. These appeals raise the question of whether the offence of aggravated sexual assault can and should be established for HIV non-disclosure in circumstances where, in the Interveners' submission, there is no "significant risk" of transmission because of factors that dramatically reduce that risk, such as the use of condoms or an undetectable or low viral load.

PART II: INTERVENERS' POSITION ON ISSUES

2. The Interveners recognize that criminal prosecution for alleged HIV non-disclosure may be appropriate in some circumstances, but submit that the "significant risk" test established in *R. v. Cuerrier*, [1998] 2 S.C.R. 371 is an appropriate and necessary limitation on the use of the criminal law. However, the uneven interpretation and application of this test has resulted in the unfairness and uncertainty that were cause for concern when *Cuerrier* was decided.¹ The law must be clarified and evolve, *incrementally*, in accordance with the current science on HIV transmission and treatment, and respond to public policy concerns. Accordingly, the Interveners respectfully submit that, at a bare minimum, the "significant risk" test must be retained and refined as follows:

- a) a person who uses **condoms** for vaginal or anal sex is not criminally liable for not disclosing her or his known HIV-positive status;
- b) a person with a **low or undetectable viral load** who engages in sexual activity, including unprotected penetrative sex, is not criminally liable for non-disclosure of known HIV-positive status, absent evidence establishing beyond a reasonable doubt a significant risk of transmission; and
- c) a person who engages in **oral sex**, with or without the use of a condom or other latex barrier and whether performing or receiving oral sex, is not criminally liable for non-disclosure of known HIV-positive status.

Such refinements are consistent with the judgments of the Manitoba and Quebec Courts of Appeal below and with the preponderance of other judgments on these important points.

3. The law should consider the severity of the harm in determining the appropriate charge. HIV remains a serious medical condition for which there is no cure, but current evidence

¹ E.g, *Cuerrier* at paras. 48, 69 (per McLachlin and Gonthier JJ.).

demonstrates that it is no longer a death sentence. When people have proper access to treatment, HIV becomes a chronic and manageable condition.² Accordingly, HIV transmission does not necessarily equate to endangerment of life; thus, the appropriate charge where transmission occurs is *sexual assault causing bodily harm*. In cases where there is no transmission, the appropriate offence is (sexual) assault *simpliciter* (at most).

4. In 1998, when *Cuerrier* was decided, this Court was correctly sensitive to the pitfalls associated with over-criminalization and limited the criminal law to cases where there is a “significant risk of serious bodily harm.” Now, with the benefit of scientific advances, we know HIV is difficult to transmit and that, in many cases, the risk is insignificant (e.g., when a condom is used or when a person’s viral load is low or undetectable). Yet the Appellants seek to criminalize people living with HIV even in such circumstances. This radical approach would trivialize the criminal process through a proliferation of prosecutions where the risk of harm is negligible (e.g., kissing, oral sex without a condom) and cases where an HIV-positive person has taken steps to prevent transmission (e.g., condom use). It would expose every person living with HIV, already the subject of prejudice, fear and stigmatization, to prosecution regardless of risk of harm. Moreover, the Appellants’ approach would reinforce misconceptions and stigma regarding HIV and undermine HIV prevention efforts and access to testing, treatment and care.

PART III: ARGUMENT

5. Since *Cuerrier*, scientific knowledge relating to HIV has evolved considerably. Even unprotected penetrative vaginal or anal sex carries very low per-act risks of transmission, and as found by the Manitoba Court of Appeal below, consistent condom use further reduces the risk by 80%.³ For example, the commonly cited estimate of the risk of transmission per act of unprotected vaginal sex is 0.08% (1 in 1250),⁴ meaning condom use would lower this further to

² D. McLay et al., “Scientific research on the risk of the sexual transmission of HIV infection and on HIV as a chronic manageable infection,” (updated December 2011) at 15-16, originally published in E. Mykhalovskiy et al., *HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario* (August 2010).

³ S.C. Weller & K. Davis-Beaty, “Condom effectiveness in reducing heterosexual HIV transmission (Review),” Cochrane Database of Systematic Reviews 1 (2002) No.: CD003255. DOI: 10.1002/14651858.CD003255; *R. v. Mabior (C.L.)*, 2010 MBCA 93 at para. 89. See also Canadian HIV/AIDS Legal Network, *HIV non-disclosure and Canadian criminal law: condom use* (November 2011).

⁴ M.C. Boily et al., “Heterosexual risk of HIV-1 infection per sexual act: systematic review and meta-analysis of observational studies,” *Lancet Infect Dis* 2009; 9(2): 118–129. At trial in *Mabior*, preceding this systematic review,

0.016% (1 in 6250). As also recognized by the courts below, the use of highly active antiretroviral therapy (HAART) also significantly reduces the number of copies of the virus and hence the risk of transmission⁵ – by 96% according to a recently-published breakthrough study affirming a new era of “treatment as prevention.”⁶ Even for unprotected sex, the risk is virtually zero with an undetectable viral load and exceedingly small with a low viral load.⁷ (For example, applying this 96% reduction to the above-noted risk estimate for unprotected vaginal sex would mean an estimated per-act risk of transmission of 0.0032% or 1 in 31,250.⁸)

6. Despite these developments, more than 130 people have been charged to date in Canada for allegedly not disclosing known HIV-positive status to a sexual partner.⁹ They have been most commonly charged with aggravated sexual assault and sentenced to lengthy custodial terms, which have a disproportionate impact on people with HIV.¹⁰ Police often publicize the accused’s picture, name and HIV-positive status, and media coverage is often sensational.¹¹ The

the Crown’s expert noted estimates ranging from 0.05% (1 in 2000) to 0.26% (1 in 384): *Mabior* (MBCA) at para 75. See also McLay et al., *supra* note 2.

⁵ In the case of the defendant *Mabior*, the Crown’s medical expert stated, and the trial judge accepted, that “there was a very high probability that the accused was not infectious and could not have transmitted HIV throughout that period”: *Mabior* (MBCA) at para. 106. In the case of the defendant *D.C.*, whose viral load was undetectable at the relevant time, the medical experts’ uncontradicted testimony at trial was that the risk of transmission could be estimated at approximately 0.01% (1 in 10,000) and was “very low, truly minimal” and “very, very low” as a result: *R. v. D.C.*, 2010 QCCA 2289 at para. 97.

⁶ M.H. Cohen et al., “Prevention of HIV-1 Infection with Early Antiretroviral Therapy,” *NEJM* 2001; 365: 493–505; UNAIDS, “Ground-breaking trial results confirm HIV treatment prevents transmission of HIV,” News release, Geneva, May 12, 2011. See also: M-J. Milloy et al., “Ending Canada’s HIV trials,” *CMAJ* (in press); Canadian HIV/AIDS Legal Network, *HIV non-disclosure and Canadian criminal law: Antiretroviral treatment and viral load* (November 2011).

⁷ P. Vernazza et al., “Les personnes séropositives ne souffrant d’aucune autre MST et suivant un traitement antirétroviral efficace ne transmettent pas le VIH par voie sexuelle,” *Bull. des médecins suisses* 2008; 89(5): 165–169. In 2009, a systematic review and meta-analysis of evidence then available estimated the risk of HIV transmission could be as high as 0.013% (1.3 in 10,000) when an individual’s viral load is below 400 copies/ml (detectable but very low): S. Attia et al., “Sexual transmission of HIV according to viral load and antiretroviral therapy: systematic review and meta-analysis,” *AIDS* 2009; 23: 1397–1404.

⁸ McLay et al., *supra*, note 2.

⁹ This information is based on the ongoing tracking of cases by the Canadian HIV/AIDS Legal Network.

¹⁰ Ontario Working Group on Criminal Law & HIV Exposure, *Consultation on Prosecutorial Guidelines for Ontario in Cases Involving Non-Disclosure of Sexually Transmitted Infections: Community Report and Recommendations to the Attorney General of Ontario* (June 2011) at 13-15.

¹¹ E.g.: The picture and HIV status of a 17-year-old Aboriginal girl was publicized in the media and circulated online: “HIV-positive teen may be having unprotected sex: Edmonton Police Service,” *Global News*, August 6, 2011. See also: M.S. Petty, “Social Responses to HIV: Fearing the Outlaw,” *Sex Res & Soc Pol’y* 2005; 2(2): 76-88.

law may be disproportionately applied to certain communities.¹² Convictions are frequent and consequences severe,¹³ including DNA orders and registration as a sex offender.

7. Canada is known internationally for one of the harshest approaches to the criminalization of HIV non-disclosure in the Western world.¹⁴ This stands in stark contrast with limits recommended by UN agencies¹⁵ and the law in other Commonwealth jurisdictions, notably the United Kingdom, Australia and New Zealand. In the UK, only actual transmission (and not exposure) constitutes an offence.¹⁶ In Australia, no state treats HIV non-disclosure as fraud that vitiates consent to sex.¹⁷ Only three (of nine) states criminalize exposure without transmission, and two of them apply lesser charges, as does New Zealand.¹⁸ This allows a more nuanced approach than the blanket application of aggravated sexual assault charges.

8. Moreover, prosecutions in Canada are *ad hoc* and inconsistent. For example, in *D.C.*, the Quebec Attorney General has conceded that vaginal sex with a condom does not pose a “significant risk” of transmission,¹⁹ but in *Mabior*, Manitoba takes the position that even

¹² E.g., in Ontario, which accounts for approximately half of all such prosecutions to date, Black men represent 50% of the heterosexual men charged between 2004 and 2009: E. Mykhalovskiy et al., *HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario* (August 2010) at 12. See also: A. Larcher & A. Symington, *Criminals and Victims? The Impact of the Criminalization of HIV Non-Disclosure on African, Caribbean and Black Communities in Ontario* (Toronto: ACCHO, 2010). Note that 4 of the 12 women charged to date for not disclosing their HIV-positive status are Aboriginal, and Aboriginal women represent 32% of women in prison in Canada: Affidavit on C. Kazatchkine on behalf of the Interveners (September 20, 2011) at para. 100.

¹³ Of cases decided in 2009, 63% resulted in convictions and 83% of these resulted in imprisonment: Mykhalovskiy et al., *ibid.* at 13, 15.

¹⁴ Global Network of People Living with HIV (GNP+), 2010 Global Criminalisation Scan Report, July 2010, at 12.

¹⁵ UNAIDS & UNDP, *Criminalization of HIV Transmission: Policy Brief* (2008). A recent study found that 90% of Québécois agree that transmitting HIV should only be a crime when intentional: Agence de la santé et des services sociaux de Montréal, *Attitudes de la population québécoise envers les personnes vivant avec le VIH*, 2011 at 23.

¹⁶ I. Grant, “The Prosecution of Non-disclosure of HIV in Canada: Time to Rethink *Cuerrier*” (2011) 5:1 McGill J. L. & Health 7 at 31-36.

¹⁷ Such an approach was suggested in one case, in dissent in *R. v. Reid*, [2006] QCA 202. The suggestion was not taken up by the High Court of Australia, which denied leave to appeal: *R. v. Reid*, 2006 HCA Trans 666 (8 Dec 2006), online: AustLII www.austlii.edu.au/au/other/HCA/Trans/2006/666.html.

¹⁸ I. Grant, *supra* note 16 at 39, 42.

¹⁹ Factum of the Respondent (Quebec Attorney General) in *D.C.* (QCCA) at para. 84 : « L’intimée partage l’opinion de l’appelante que s’il y avait eu une conclusion à l’effet que le rapport sexuel était protégé ou du moins que le témoignage de l’appelante soulevait un doute raisonnable à cet effet, il devait y avoir acquittement .»

protected sex may be caught. With this uneven application of the law, many people have been charged, and some convicted, where there was no significant risk of serious bodily harm.²⁰

The Interveners' proposal: an incremental approach

9. The Interveners submit that the criminal law – society's harshest weapon – must be reasoned, just and reserved for the most blameworthy cases.²¹ Removing rational limits to the use of the criminal law in cases of HIV non-disclosure – the radical departure proposed by the Appellants – would ignore scientific realities and vastly over-expand the criminal law. Instead, this Court should refine the legal test established in *Cuerrier* in the ways set out below.

A. Condom use for vaginal or anal sex precludes prosecution for non-disclosure

10. In *Cuerrier*, six of seven Justices of this Court either suggested or explicitly affirmed that condom use could preclude prosecution for HIV non-disclosure.²² Post-*Cuerrier*, most decisions have favoured not criminalizing people with HIV who use condoms.²³ As noted above (para. 8), this has also been the position of the Attorney General of Quebec in *D.C.* In *Mabior*, the uncontested evidence from the Crown's medical expert was that consistent condom use reduces the risk of transmission by 80% and that, even taking into account occasional condom breakage or improper use, vaginal sex using a condom poses an "extremely low risk."²⁴ The Court of Appeal concluded that, with condom use, "the risk of transmission per act falls into the realm of 0.01 percent (1 in 10,000) to 0.052 percent (approximately 1 in 2000)."²⁵ Precluding liability in

²⁰ E.g., a man with HIV was recently prosecuted in Ontario for performing oral sex, which conduct clearly poses at most an infinitesimal risk of transmission: Canadian HIV/AIDS Legal Network, "AIDS Organization Welcomes Crown Decision to Stay Criminal Charges in Hamilton HIV Case," News release, Toronto, April 22, 2010. Some people have also been convicted despite condom use or the fact that the Crown could not establish beyond a reasonable doubt that sex was unprotected, while others have been acquitted in the same circumstances: e.g., *R. v. Mekonnen*, 2009 ONCJ 643 (under appeal); *R. v. Felix*, 2010 ONCJ 322 (at para. 71-72).

²¹ "Criminal sanctions should be reserved for those deliberate, irresponsible or reckless individuals who do not respond to public health directives and who are truly blameworthy": *Mabior* (MBCA) at para. 55.

²² *Cuerrier* at para. 129 (per Cory J.) and at para. 73 (per McLachlin J.)

²³ E.g., *R. v. Edwards*, 2001 NSSC 80 at paras. 17, 19, 22; *R. v. Agnatuk-Mercier*, [2001] O.J. No. 4729 (QL) at paras. 6-7; *R. v. Nduwayo*, 2006 BCSC 1972 at paras. 7-8. For a full description of case law on this point, see Canadian HIV/AIDS Legal Network, *HIV non-disclosure and Canadian criminal law: condom use*, *supra* note 3 at 4. Courts in other Commonwealth jurisdictions have expressly recognized that condom use precludes liability: e.g., *New Zealand Police v. Dalley*, [2005] 22 C.R.N.Z. 495 at paras. 39, 47-49.

²⁴ Evidence (Smith), Transcript p. 89, ll. 32-33, Appellant's Record, Vol. 4, p. 179; *Mabior* (MBCA) at paras. 83-89.

²⁵ In the Crown expert's view, as "HIV is unable to pass through good quality condoms," "[t]here is no scientific justification to require HIV status disclosure if a condom is always used": *Mabior* (MBCA), *ibid.* at para. 83.

the case of condom use not only protects against over-expansion of the criminal law, but also accords with the sound public policy of promoting condom use to prevent HIV. Prosecuting those who act responsibly by using condoms is at odds with that public health objective.

B. A low or undetectable viral load precludes prosecution for non-disclosure

11. Provincial courts of appeal, including in the instant cases, have found viral load an important, and potentially decisive, factor in determining whether there existed a significant risk.²⁶ In *Mabior*, the uncontradicted evidence from the Crown’s expert was that it is “extremely unusual” to transmit HIV with a viral load below 1500 copies/ml and that, in his “strong opinion,” the risk is “very low” in the case of an undetectable viral load. Accordingly, there was “a very high probability that the accused was not infectious and could not have transmitted HIV” when his viral load was undetectable.²⁷ The Manitoba Court of Appeal recognized that “the application of the legal test in *Cuerrier* must evolve to account appropriately for the development in the science of HIV treatment.”²⁸ So, too, did the Quebec Court of Appeal below in acquitting D.C. because her viral load was “very, very low.”²⁹ Since treatment dramatically reduces the risks of HIV transmission, encouraging people to be tested and seek treatment is crucial to reducing the spread of the virus – and is increasingly an area of focus in domestic and global HIV prevention efforts.³⁰ Prosecuting people who seek testing and effective treatment reducing infectiousness undermines such efforts. Given the available science, it should be presumed there is no significant risk of transmission when persons are on effective antiretroviral treatment.

C. Cases of oral sex do not attract prosecution for non-disclosure

12. While very few cases have addressed the issue of oral sex, they have generally recognized the science establishing that oral sex (even unprotected) poses a negligible risk of HIV

²⁶ *D.C.* (QCCA) at paras. 115-120, 122; *Mabior* (MBCA) at para. 4; *R. v. Wright*, 2009 BCCA 514 at para. 32.

²⁷ *Mabior* (MBCA) at para. 106. The expert also pointed to the assessment by the Swiss Federal Commission on HIV (by Vernazza et al., *supra* note 7): “So the Swiss study has just taken it a notch further in saying that it would be negligible or possibly non-existent”: Evidence (Smith), Transcript p. 60, l. 14, Appellant’s Record, Vol. 4, p. 150.

²⁸ *Mabior* (MBCA) at para 104. A man who had a low (but not undetectable) viral load was recently acquitted in Ontario: *R. v. J.U.*, 2011 ONCJ 457 at paras. 146-149. A Swiss court reversed conviction of an HIV-positive man with an undetectable viral load because the risk associated with unprotected vaginal sex was “too low to be scientifically quantified”: *S. v. Procureur-Général*, Judgment, Feb 23, 2009, Court of Justice (Penal Division) at 4.

²⁹ *D.C.* (QCCA) at paras. 97, 100, 115.

³⁰ Milloy et al., *supra* note 6; “Global: A radical new UNAIDS Treatment strategy,” IRIN PlusNews, July 16, 2010.

transmission. In *R. v. Williams*, 2003 SCC 41, there were occasions on which the complainant performed oral sex on the HIV-positive defendant, but no related charges were laid, indicating that the risk was deemed not to be significant. This Honourable Court’s unanimous judgment confirmed that it was “unprotected sex” (vaginal intercourse in that case) that was at issue (see paras. 3, 28). In *R. v. Edwards*, 2001 NSSC 80 (at para. 6): “the Crown acknowledge[d] 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.” In the interests of greater clarity and avoiding unfair prosecutions, the Interveners invite this Court to affirm clearly this appropriate interpretation of the *Cuerrier* “significant risk” test.

D. Conviction for aggravated sexual assault is not tenable

13. HIV is no longer synonymous with AIDS and premature death. Someone who starts treatment before significant damage has occurred to the immune system is likely to have a normal or near-normal lifespan.³¹ This evolution has been recognized by several courts in Canada.³² Thus, the Manitoba Court of Appeal queried “whether the charge of aggravated sexual assault is appropriate in in this type of case,” and suggested it might not be.³³ The Interveners submit that a significant risk of transmission is insufficient *per se* to convict for *aggravated* sexual assault. If the Crown proves beyond a reasonable doubt both the existence of a significant risk and that the defendant infected the complainant, liability should not exceed the offence of sexual assault *causing bodily harm* – unless there is, in the particular circumstances of the case, also proof that the life of the complainant has been thereby endangered. Where the prosecution has established a significant risk of transmission but no actual transmission by the

³¹ D. Mclay et al, *supra* note 2. See also Van Sighem et al., “Life expectancy of recently diagnosed asymptomatic HIV-infected patients approaches that of uninfected individuals,” *AIDS* 2010; 24:1527–1535; In Denmark, the Justice Minister suspended the HIV-specific criminal law noting that HIV can no longer be considered life-threatening: E.J. Bernard, “Denmark: justice Minister suspends HIV-specific criminal law, sets up working group,” February 17, 2011, online: www.criminalhivtransmission.blogspot.com.

³² At trial in *Mabior*, the evidence of the Crown’s medical expert was as follows: “It is now believed that with the advances thus far achieved in HIV care many if not most persons infected with HIV who receive and are compliant with optimal care will die of a non-AIDS cause”: *Mabior* (MBCA), para. 63, 142. See also “Advances in science appear to have changed HIV/AIDS from being a “death sentence” into a chronic one. HIV is now a more manageable disease, allowing those with it to continue a normal life”: *R. v. J.U.*, 2011 ONCJ 457 at para. 132; “It is no longer the case that all people infected with the virus will eventually develop AIDS and die prematurely”: *R. v. J.A.T.*, 2010 BCSC 766 at para. 77.

³³ *Mabior* (MBCA) at paras. 138-146; see also *R. v. J.U.*, 2011 ONCJ 457 at paras. 132-137.

defendant, there is no bodily harm, and only (sexual) assault *simpliciter* or a lesser serious offence should be applied.

E. Clarification of the *mens rea* required for conviction

14. The *mens rea* for aggravated assault is the intent to apply force intentionally or recklessly or being wilfully blind to the fact that the victim does not consent plus objective foresight of the risk of bodily harm.³⁴ The interveners take no issue with the prosecution for aggravated assault of those who intentionally set out to infect others without consent. However, most prosecutions for HIV non-disclosure typically fall under the rubric of recklessness. Where recklessness is the applicable *mens rea*, this Court should identify factors to be considered in order to limit the law to the most blameworthy cases, including: the reasonableness of the risk taken in circumstances known to the defendant at the time; the level of risk of transmission, which is dependent on the number of exposures and the nature and status of the infection; the use of appropriate safeguards by the defendant to prevent transmission; fear of violence in case of disclosure; the defendant's understanding of the risks of transmission; the defendant's reasonable belief, in the circumstances of the encounter, that a partner had consented to the risk; and the timing of disclosure (e.g., shortly afterward if a condom were to break).³⁵

The Appellants' radical shift: contrary to the science and harmful to health and human rights

15. In contrast to the incremental, scientifically-based position advanced by the Interveners, the Appellants propose a radical change in the law that is not only unfounded in the science (as outlined above) but risks trivializing the offence of sexual assault and diverting the law from its original purpose.³⁶ This approach would automatically equate HIV non-disclosure with lack of consent. As observed in *Cuerrier*, “[t]he equation of non-disclosure with lack of consent oversimplifies the complex and diverse nature of consent” (per McLachlin J. at para. 49). It falsely presumes that every person who has sex is a vulnerable, passive individual who is

³⁴ *R. v. Williams*, [2003] 2 S.C.R. 134 at para. 22.

³⁵ Several of these factors are reflected in: Crown Prosecution Service for England and Wales (CPS), *Intentional or Reckless Transmission of Sexual Infection* (Originally published 2008; updated 15 July 2011) at www.cps.gov.uk.

³⁶ A. Symington, “HIV Exposure as Assault: Progressive development or misplaced focus?,” in E. Sheehy (ed.), *Sexual Assault in Canada Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, forthcoming March 2012); Ontario Working Group on Criminal Law & HIV Exposure, *supra* note 10 at 13.

unaware of the risks associated with sex. This does not correspond to the reality and contradicts the public health message of shared responsibility for protected sex. Unlike situations of coerced sex, which is clearly non-consensual, HIV non-disclosure cases involve consent to sex at the time of the encounter. These cases are not akin to the situation in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, where the concern of the Court was fear and force, not fraud. Aware of the distinction, this Court was careful in *Cuerrier* to say that consent is only vitiated when non-disclosure amounts to fraud (i.e., when there is a significant risk of serious bodily harm).

16. Furthermore, the Appellants' proposal fails to consider important public policy considerations.³⁷ The available evidence does not support the theory that criminalization serves as effective HIV prevention policy; rather, it suggests the absence of any positive impact on safer sex practices.³⁸ Furthermore, the criminal law is unhelpful if it encourages people to rely on a partner's disclosure of HIV-positive status and fosters a false sense of security that no precautions are required unless so notified.³⁹ One-quarter of HIV-positive Canadians are unaware of their infection,⁴⁰ and a considerable proportion of HIV transmission occurs during unprotected penetrative sex between partners unaware that one of them has HIV.⁴¹ Because diagnosis exposes a person to greater risk of prosecution for non-disclosure, and because over-criminalization reinforces stigma surrounding HIV, emerging data suggests that prosecutions may operate as an additional disincentive to HIV testing, especially for marginalized

³⁷ Hon. Justice Edwin Cameron, "Criminalization of HIV transmission: poor public health policy," *HIV/AIDS Policy & Law Review* 2009; 14(2): p. 1, 63-75.

³⁸ S. Burris et al., "Do criminal laws influence HIV risk behaviour? An empirical trial," *Ariz. State Law Journal*, 2007; 39:467-520; K. J. Horvath et al., "Should it be illegal for HIV-positive persons to have unprotected sex without disclosure? An examination of attitudes among US men who have sex with men and the impact of state law," *AIDS Care* 2010; 22: 1221-1228; P. O'Byrne, "Criminal Law and Public Health Practice: Are the Canadian HIV Disclosure Laws an Effective HIV Prevention Strategy?," *Sex Res & Soc Policy* 2011, DOI 10.1007/s13178-011-0053-2; National Alliance of State and Territorial Aids Directors (US), *Statement: National HIV/AIDS strategy imperative: fighting stigma and discrimination by repealing HIV-specific criminal statutes*, February 2011.

³⁹ C. Galletly & S.D. Pinkerton, "Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV," *AIDS Behav* 2006; 10: 451-461. Moreover, the relationship between the legal obligation to disclose and safer sex remains uncertain. According to existing research, emphasizing disclosure is not necessarily associated with higher rates of protected sex: J. Simoni & D. Pantalone, "Secrets and safety in the age of aids: does HIV disclosure lead to safer sex?" *Topics in HIV Medicine* 2004; 12(4): 109-118.

⁴⁰ At the end of 2008, approximately 26% of people living with HIV in Canada were not aware of their infection: Public Health Agency of Canada, *HIV/AIDS Epi Updates*, July 2010.

⁴¹ B. G. Brenner et al., "High rates of forward transmission events after acute/early HIV-1 infection," *J Infect Dis* 2007; 195: 951-959. According to a U.S. study, up to 70% of new infections are acquired from people who are undiagnosed: G. Marks et al., Estimating sexual transmission of HIV from persons aware and unaware that they are infected with the virus in the USA, *AIDS* 2006, 20: 1447-1450.

communities and/or communities most at risk of HIV.⁴² The use of private medical records for prosecutions hinders open discussion with health professionals and counsellors of sexual practices and of challenges to disclosure, thereby undermining both HIV prevention efforts and care for people living with HIV.⁴³ Moreover, a blanket obligation to disclose ignores the serious consequences that may follow, including violence, abandonment, discrimination or breaches of privacy.⁴⁴ Some people living with HIV have reported blackmail by vindictive partners,⁴⁵ a particular concern for those in abusive and/or dependent relationships (e.g., the defendant D.C.). Criminal prosecutions for HIV non-disclosure do not necessarily protect women: most of those charged have occupied marginal positions, both increasing their risk of HIV infection in the first place and making subsequent disclosure for women living with HIV more difficult.⁴⁶

PART V: ORDER SOUGHT

17. The Interveners seek an order granting them 20 minutes for oral submissions at the hearing of this case, and a further order clarifying the legal test from *R. v. Cuerrier* as set out above.

All of which is respectfully submitted, this 20th day of December, 2012.



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Solicitors for the Interveners Canadian HIV/AIDS Legal Network et al.

⁴² P. O'Byrne et al., "Criminal Prosecutions for HIV Status Non-disclosure and HIV Prevention: Results from an Ottawa-Based Gay Men's Sex Survey," Submitted to *Journal of the Association of Nurses in AIDS Care* (under review) at 4; P. O'Byrne, "Criminal Law and Public Health Practice," *supra* note 37 at 8; Canadian Association of Nurses in AIDS Care, *Position on criminalization*, 2011; M. Chesney & A Smith, "Critical Delays in HIV Testing and Care: The Potential Role of Stigma," *Am Behav Sci* 1999; 42(7): 1162-1174; Agence de la santé et des services sociaux de Montréal, *supra* note 15 at 29.

⁴³ E. Mykhalovskiy, "The problem of "significant risk": Exploring the public health impact of criminalizing HIV non-disclosure," *Soc Sci & Med* 2011; 73(5): 668-675; P. O'Byrne et al., "Criminal Prosecutions for HIV Status Non-disclosure and HIV Prevention," *ibid.* at 4.

⁴⁴ A survey commissioned by the Public Health Agency of Canada revealed that 49% of Canadians would feel uncomfortable using a restaurant drinking glass once used by a person living with HIV: EKOS Research Associates Inc., *HIV/AIDS Attitudinal Tracking Survey 2006: Final Report* (Ottawa: Public Health Agency of Canada, 2006) at 58-59; P. Allard et al., "Criminal Prosecutions for HIV Non-Disclosure: Protecting Women from Infection or Threatening Prevention Efforts?" in *Women and HIV Prevention in Canada: The Past, The Present and the Future - Implications for Research, Policy and Practice* (Canadian Scholars' Press, forthcoming 2012) at 19.

⁴⁵ Mykhalovskiy et al., *supra* note 12 at 51-52; Affidavit of Maude Perras, Application by Interveners to intervene in *R. v. D.C.*, 2010 QCCA 2289.

⁴⁶ Allard et al., *supra* note 44 at 20; ATHENA Network, *Ten reasons why criminalization of HIV exposure of transmission harms women* (2009). See also, the Affidavit by C. Kazatchkine on behalf of the Interveners (September 20, 2011) at para. 100.

PART VI TABLE OF AUTHORITIES

<u>Cases</u>	Paragraph
<u>Canadian cases</u>	
<i>R. v. Agnatuk-Mercier</i> , [2001] O.J. No. 4729	10
<i>R. v. Cuerrier</i> , [1998] 2 S.C.R. 371	2, 10
<i>R. v. D.C.</i> , 2010 QCCA 2289	5, 11,
<i>R. v. Edwards</i> , 2001 NSSC 80	10, 12
<i>R. v. Felix</i> , 2010 ONCJ 322	8
<i>R. v. J.A.T.</i> , 2010 BCSC 766	13
<i>R. v. J.U.</i> , 2011 ONCJ 45	11, 13
<i>R. v. Mabior (C.L.)</i> , 2010 MBCA 93	5, 9, 10, 11, 13
<i>R. v. Mekonnen</i> , 2009 ONCJ 643	8
<i>R. v. Nduwayo</i> , 2006 BCSC 1972	10
<i>R. v. Reid</i> , 2006 HCA Trans 666 (8 Dec 2006)	7
<i>R. v. Williams</i> , [2003] 2 S.C.R. 134	12, 14
<i>R. v. Wright</i> , 2009 BCCA 514	11
<u>International cases</u>	
<i>New Zealand Police v. Dalley</i> , [2005] 22 C.R.N.Z. 495	10
<i>S. v. Procureur-Général</i> , Judgment, Feb 23, 2009, Court of Justice (Penal Division)	11
<u>Commentary</u>	
Allard P. et al., “Criminal Prosecutions for HIV Non-Disclosure: Protecting Women from Infection or Threatening Prevention Efforts?” <i>Women and HIV Prevention in Canada: The Past, The Present and the Future – Implications for Research, Policy and Practice</i> (Canadian Scholars’ Press, forthcoming 2012)	para 16

Attia S. et al., "Sexual transmission of HIV according to viral load and antiretroviral therapy: systematic review and meta-analysis," *AIDS* 2009; 23: 1397–1404 para 5

Boily M.C. et al., "Heterosexual risk of HIV-1 infection per sexual act: systematic review and meta-analysis of observational studies," *Lancet Infect Dis* 2009; 9(2): 118–129 para 5

Brenner et al. B. G., "High rates of forward transmission events after acute/early HIV-1 infection," *J Infect Dis* 2007; 195: 951–959 para 16

Burris S. et al., "Do criminal laws influence HIV risk behaviour? An empirical trial," *Ariz. State Law Journal*, 2007; 39:467–520 para 16

Cameron E. Hon. Justice, "Criminalization of HIV transmission: poor public health policy," *HIV/AIDS Policy & Law Review* 2009; 14(2): p. 1, 63-75 para 16

Chesney M. et al., "Critical Delays in HIV Testing and Care: The Potential Role of Stigma," *Am Behav Sci* 1999; 42(7): 1162-1174 para 16

Cohen M.H. et al., "Prevention of HIV-1 Infection with Early Antiretroviral Therapy," *NEJM* 2001; 365: 493–505 para 5

Galletly C. & Pinkerton S.D., "Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV," *AIDS Behav* 2006; 10: 451-461 para 16

Grant I., "The Prosecution of Non-disclosure of HIV in Canada: Time to Rethink *Cuerrier*" (2011) 5:1 McGill J. L. & Health 7 para 7

Horvath K. J. et al., "Should it be illegal for HIV-positive persons to have unprotected sex without disclosure? An examination of attitudes among US men who have sex with men and the impact of state law," *AIDS Care* 2010; 22: 1221-1228 para 16

Larcher A. & Symington A., *Criminals and Victims? The Impact of the Criminalization of HIV Non-Disclosure on African, Caribbean and Black Communities in Ontario* (Toronto: ACCHO, 2010) para 6

Marks G. et al., Estimating sexual transmission of HIV from persons aware and unaware that they are infected with the virus in the USA, *AIDS* 2006, 20:1447–1450 para 16

McLay D. et al., "Scientific research on the risk of the sexual transmission of HIV infection and on HIV as a chronic manageable infection," (updated December 2011) at 15-16, originally published in E. Mykhalovskiy et al., *HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario* (August 2010). para 3, 5, 13

Milloy M-J. et al., "Ending Canada's HIV trials," *CMAJ* (in press) para 5, 11

Mykhalovskiy E. et al., *HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario* (August 2010) para 6, 16

Mykhalovskiy E., “The problem of "significant risk": Exploring the public health impact of criminalizing HIV non-disclosure,” *Soc Sci & Med* 2011; 73(5): 668-675 para 16

O’Byrne P., “Criminal Law and Public Health Practice: Are the Canadian HIV Disclosure Laws an Effective HIV Prevention Strategy?”, *Sex Res Soc Policy* 2011, DOI 10.1007/s13178-011-0053-2 para 16

O’Byrne P. et al., “Criminal Prosecutions for HIV Status Nondisclosure and HIV Prevention: Results from an Ottawa-Based Gay Men’s Sex Survey,” Submitted to *Journal of the Association of Nurses in AIDS Care* (under review) para 16

Petty M.S., “Social Responses to HIV: Fearing the Outlaw,” *Sex Res & Soc Pol’y* 2005; 2(2): 76-88 para 6

Simoni J. & Pantalone D., “Secrets and safety in the age of aids: does HIV disclosure lead to safer sex?” *Topics in HIV Medicine* 2004; 12(4): 109–118. para 16

Symington A., “HIV Exposure as Assault: Progressive development or misplaced focus?,” in E. Sheehy (ed.), *Sexual Assault in Canada Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, forthcoming March 2012) para 15

Van Sighem et al., “Life expectancy of recently diagnosed asymptomatic HIV-infected patients approaches that of uninfected individuals,” *AIDS* 2010; 24:1527–1535 para 13

Vernazza P. et al., “Les personnes séropositives ne souffrant d’aucune autre MST et suivant un traitement antirétroviral efficace ne transmettent pas le VIH par voie sexuelle,” *Bull. des médecins suisses* 2008; 89(5): 165–169 para 5

Weller S.C. & Davis-Beaty K., “Condom effectiveness in reducing heterosexual HIV transmission (Review),” *Cochrane Database of Systematic Reviews* 1 (2002) No.: CD003255. DOI: 10.1002/14651858.CD003255 para 5

Other materials

Agence de la santé et des services sociaux de Montréal, *Attitudes de la population québécoise envers les personnes vivant avec le VIH*, 2011 para 7, 16

ATHENA Network, *Ten reasons why criminalization of HIV exposure of transmission harms women* (2009) para 16

Bernard E.J., “Denmark: justice Minister suspends HIV-specific criminal law, sets up working group,” February 17, 2011 para 13

Canadian Association of Nurses in AIDS Care, *Position on criminalization*, 2011 para 16

Canadian HIV/AIDS Legal Network, *HIV non-disclosure and Canadian criminal law: condom use* (November 2011) para 5, 10

Canadian HIV/AIDS Legal Network, *HIV non-disclosure and Canadian criminal law: Antiretroviral treatment and viral load* (November 2011) para 5

Canadian HIV/AIDS Legal Network, “AIDS Organization Welcomes Crown Decision to Stay Criminal Charges in Hamilton HIV Case”, News release, Toronto, April 22, 2010 para 8

Crown Prosecution Service for England and Wales (CPS), *Intentional or Reckless Transmission of Sexual Infection* (Originally published 2008; updated 15 July 2011) at www.cps.gov.uk para 14

EKOS Research Associates Inc., *HIV/AIDS Attitudinal Tracking Survey 2006: Final Report* (Ottawa: Public Health Agency of Canada, 2006) para 16

“Global: A radical new UNAIDS Treatment strategy,” IRIN PlusNews, Johannesburg, July 16, 2010 para 11

Global Network of People Living with HIV (GNP+), 2010 Global Criminalisation Scan Report, July 2010 para 7

“HIV-positive teen may be having unprotected sex: Edmonton Police Service,” *Global News*, August 6, 2011 para 6

National Alliance of State and Territorial Aids Directors (US), *Statement: National HIV/AIDS strategy imperative: fighting stigma and discrimination by repealing HIV-specific criminal statutes*, February 2011 para 16

Ontario Working Group on Criminal Law & HIV Exposure, *Consultation on Prosecutorial Guidelines for Ontario in Cases Involving Non-Disclosure of Sexually Transmitted Infections: Community Report and Recommendations to the Attorney General of Ontario* (June 2011) para 6, 15

Public Health Agency of Canada, *HIV/AIDS Epi Updates*, July 2010 para 16

UNAIDS & UNDP, *Criminalization of HIV Transmission: Policy Brief* (2008) para 7

UNAIDS, “Ground-breaking trial results confirm HIV treatment prevents transmission of HIV,” News release, Geneva, May 12, 2011 para 5

PART VII STATUTORY PROVISIONS

None.