IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for the Province of Manitoba)

(On Appeal from the Court of Appeal for the Province of Quebec)

B E T W E E N :

HER MAJESTY THE QUEEN

Appellant

- and -

CLATO LUAL MABIOR

Respondent

- and -

THE CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO, THE CANADIAN HIV/AIDS LEGAL NETWORK, HIV & AIDS LEGAL CLINIC ONTARIO, COALITION DES ORGANISMES COMMUNAUTAIRES QUÉBÉCOIS DE LUTTE CONTRA LE SIDA, POSITIVE LIVING SOCIETY OF BRITISH COLUMBIA, CANADIAN AIDS SOCIETY, TORONTO PEOPLE WITH AIDS FOUNDATION, BLACK COALITION FOR AIDS PREVENTION, CANADIAN ABORIGINAL AIDS NETWORK, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION ASSOCIATION DES AVOCATS DE LA DÉFENCE DE MONTRÉAL L'INSTITUT NATIONAL DE SANTÉ PUBLIQUE DU QUÉBEC

Interveners

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Interveners

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INDEX

PART I – OVERVIEW AND STATEMENT OF THE FACTS

I. OVERVIEW OF THE INTERVENER'S POSITION

1. In *R. v. Cuerrier,* a majority of this Court held that consent to sexual activity will be vitiated where the accused has failed to disclose his HIV status and the non-disclosure has resulted in actual harm to the complainant or a significant risk of serious harm. In these appeals, the Attorneys General of Manitoba and Québec take issue with how the Court of Appeal in those provinces applied that test. They point out that this test fails to ensure that all risk is completely eliminated. They suggest the approach taken by the Courts of Appeal fails to correctly emphasize the importance of consent by failing to conclude that consent is vitiated where the accused's HIV status is not disclosed, even where it cannot be established that the non-disclosure gave rise to a significant risk of serious harm.

R. v. Cuerrier, [1998] 2 S.C.R. 371 at ¶ 138-139

2. These cases raise important issues for people living with HIV and their partners and important issues about public health. However, on a more general level, these cases also raise questions about the proper role the criminal law should play in regulating human conduct and the law of consent in criminal cases. It is in relation to these broader issues that this Intervener intends to restrict its submissions.

II. STATEMENT OF FACTS

3. The Intervener accepts the statements of facts set out in the facta of the parties.

PART II – POINTS IN ISSUE

4. The Intevener's position with respect to the issues that have been raised is as follows:

(1) The test set down by this Court in *Cuerrier* appropriately restricts the operation of the criminal law to those situations where its application is truly necessary, namely, where there is a significant risk of serious harm. The criminal law cannot and was never intended to protect everybody against all risks of harm and to allow it to do so broadens its reach far beyond what is necessary or desirable in a free and democratic society.

(2) Consent and the subsequent vitiation of consent are entirely distinct concepts based on entirely different considerations. Consent is completely subjective and can be given or withheld for any reason. Courts cannot and should not pass judgment on the reasons why a complainant may choose to give or withhold consent. Determining whether consent was vitiated is a different issue. If such determinations are not restricted to issues respecting significant risks of serious harm, Courts will be in the position of having to pass judgment on what does or does not constitute a reasonable basis for withholding consent. Not only is this unnecessary, it is inimical to our conception of consent as something purely subjective and personal.

PART III – ARGUMENT

I. OVERVIEW

5. In *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General),* McLachlin C.J., writing for a majority of this Court, made the following observation:

> The criminal law is the most powerful tool at Parliament's disposal. Yet it is a blunt instrument whose power can also be destructive of family and educational relationships. As the Ouimet Report explained:
>
> > To designate certain conduct as criminal in an attempt to control anti-social behaviour should be a last step. Criminal law traditionally, and perhaps inherently, has involved the imposition of a sanction. This sanction, whether in the form of arrest, summons, trial, conviction, punishment or publicity is, in the view of the Committee, to be employed only as an unavoidable necessity. Men and women may have their lives, public and private, destroyed; families may be broken up; the state may be put to considerable expense: all these consequences are to be taken into account when determining whether a particular kind of conduct is so obnoxious to social values that it is to be included in the catalogue of crimes. If there is any other course open to society when threatened, then that course is to be preferred. The deliberate infliction of punishment or any other state interference with human freedom is to be justified only where manifest evil would result from failure to interfere. [Emphasis added.]
>
> (Canadian Committee on Corrections, Toward Unity: Criminal Justice and Corrections (1969), at pp. 12-13)

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General, [2004] 1 S.C.R. 76 at ¶ 60

6. In *R. v. Cuerrier,* this Court held that consent to sexual contact will be vitiated where there has been non-disclosure resulting in actual harm or a significant risk of actual harm. In so doing, this Court carefully delineated those situations involving conduct which requires the use of the "blunt instrument" of the criminal law from other types of conduct which, although

perhaps socially undesirable, can be addressed through other means. The *Cuerrier* test represented a sensible balance and should be retained.

R. v. Cuerrier, *supra*, at ¶ 118-147

II. CERTAINTY IS AN IMPOSSIBLE IDEAL

A. There Can Be No "Clear Line of Responsibility"

7. The Attorneys General of Manitoba and Québec seek to modify the *Cuerrier* test (or at least the way it has been interpreted) on the basis that it fails to criminalize conduct which carries with it *some* element of risk and because it fails to establish a "clear line of responsibility" and is therefore arbitrary and unjust. While it is true that criminalizing *any* degree of risk will add some certainty to the application of the law, it will do so at the expense of ensuring that the blunt instrument of the criminal law is not brought to bear in situations where other measures of social control will suffice. A standard of absolute certainty is impossible. A standard of intelligibility is preferable. This is what *Cuerrier* accomplished.

R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606 at 623-627

8. The sexual activity of persons living with HIV is not the only sphere of human conduct that can range from the clearly innocent to the unquestionably criminal, with a wide continuum between these two extremes. For example, dangerous driving contrary to section 249 of the *Criminal Code* has been defined as driving which constitutes a "significant departure" from the standard of care of a reasonable driver. Everybody would agree that a person who drives a kilometre or two per hour over the speed limit on an empty highway has not departed from this standard. Similarly, everybody would agree that a person who runs through red lights at crowded intersections at high rates of speed is deserving of criminal sanction. But what of the

person who drives 10 kilometres per hour over the limit on a snowy day on a moderately busy road? The answer is such cases may not be clear and may require a trier of fact to carefully consider all of the circumstances in order to arrive at a just result. In some cases, the standard cannot with precision be delineated in advance, resulting in some element of uncertainty. While this uncertainty could be reduced if dangerous driving were defined as *any* departure from the standard of care of the ordinary driver, the reduction would come at too high a price.

R. v. Hundal, [1993] 1 S.C.R. 867 at 888
R. v. Beatty, [2008] 1 S.C.R. 49 at ¶ 2

9. The fact that the test for dangerous driving involves an element of imprecision does not occasion any unfairness to drivers. Those who choose to engage in conduct that comes close to the line of what is acceptable knowingly accept the risk that their conduct may be deemed to be criminal. The same applies to the suggestion that viral loads vary and an accused will have no way of knowing what his viral load is at the time of the sexual act.

R. v. Hundal, *supra* at 886-889

B. The Law Cannot Eliminate All Risks

10. At the heart of the Appellants' complaint is the concern that regardless of any advances in medical science, there will always be *some* risk of transmission, even where condoms are used and the individual's viral load is low. While that may be true, if *Cuerrier* is applied correctly, acquittals will only occur where this is an *insignificant* risk. The law cannot operate so as to protect all individuals from all risks, no matter how insignificant. Any pedestrian may be hit by a car. Anybody eating in a restaurant may get food poisoning. The law cannot guarantee absolute safety. The test propounded by the Appellants would serve to protect individuals from insignificant risks associated with having sexual relations with those individuals who happen to

know that they are HIV infected. It would do nothing to protect those who have relations with individuals who do not know that they are infected and who therefore are less likely to take precautions and obtain treatment. This slight increase in the degree of protection would come at the price of expanding the use of the blunt instrument of the criminal law far beyond what is necessary.

C. Statistical Evidence and Proof of Probabilities

11. The Appellants' complaints about the courts' reliance on statistics is misplaced. Statistical analyses allow for the quantification of likelihoods or probabilities. Attempting to quantify probability is by no means foreign to the criminal law. Many offences require proof of some probable state of affairs. Some examples are proof that the actions of the accused were "likely to cause a breach of the peace" (ss. 72, 319), "likely to endanger the safety of an aircraft" (s. 77), "likely to cause damage to a ship" (s. 78.1), "likely to cause bodily harm or damage to property" (ss. 80, 81), "likely to alarm, inconvenience, discommode or cause discomfort to any person or to cause damage to property" (s. 178), "likely to cause injury or mischief to a public interest" (s. 181), "likely to leave a child exposed to risk" (s. 214), "likely to cause the health of [a] person to be injured permanently" (ss. 215, 218), "likely to cause death" (s. 229), "likely to cause death or bodily harm" (ss. 247, 248), "likely to injure the reputation of any person" (s. 298), likely to endanger the life or liberty of a . . . person" (ss. 431, 431.1), or "likely to result in major economic loss" (s. 431.2). In each of these cases, showing that there was *some* risk that the accused's actions might cause the specified result would be insufficient.

12. In most such cases where proof of an offence requires the Crown to establish the probability of some state of affairs, statistics are not relied on not because they are inappropriate,

but rather because they are unavailable. Rarely will the Crown be able to rely on statistics to show that the accused's actions were likely to result in death in or damage to property. As a result, courts have to determine issues of probability with far less precision than is possible in cases such as those before this Court. The fact that statistical evidence is available makes it easier for the Courts to apply the law correctly and fairly.

13. The example given by the Attorney General of Manitoba of a person who closes his eyes and fires a gun in a crowded room undermines rather than proves the point sought to be made. The risk of harming somebody in such a situation is not insignificant. A statistical analysis is unnecessary to determine this. The firing of a gun is not "dangerous in and of itself." Rather, it is dangerous in that particular situation because there is a significant risk of harm. In contrast, a person who fires a gun in an empty field is unlikely to be found to have engaged in dangerous behaviour. The difference between the two situations turns on the likelihood of harm.

III. CONSENT AND THE VITIATION OF CONSENT ARE DISTINCT CONCEPTS

A. The Appellants' Arguments

14. Relying on the explanation of the term "consent" in this Court's jurisprudence, particularly in *R. v. Ewanchuk* and *R. v. J.A.*, the Appellants' argue that the Courts of Appeal's application of *Cuerrier* is inconsistent with fundamental principles respecting the importance of consent. With respect, the Appellants have confused the question of whether there was consent with the question of whether the consent was subsequently vitiated. These are entirely different questions engaging entirely different policy considerations. The distinction was recognized in *J.A.*, where the majority held that "[t]he complainant's views towards the touching before or after are not directly relevant. An offence has not occurred if the complainant consents at the

time but later changes her mind (absent grounds for vitiating consent)."

R. v. Ewanchuk, [1999] 1 S.C.R. 330 at ¶ 28, 61-66
R. v. J.A., [2011] 2 S.C.R. 440 at ¶ 46

B. Consent is Purely Subjective

15. There can be no question that consent is entirely subjective. A person has an absolute right whether or not to choose to have sexual contact with another individual and may make that choice on whatever basis he or she chooses. A person may choose not to have sex with another person because she is not married to him, or she may choose to decline because she dislikes the person's race. The law will protect either choice equally. Indeed, the only question the law concerns itself with is whether there was consent and not the reasons why consent was given or withheld.

C. The Vitiation of Consent

16. Entirely different considerations apply where there has been consent but the complainant subsequently determines after the fact that she would not have consented had certain facts been known. In such cases, the reasons why the complainant has had a change of heart become relevant and the law must distinguish between those which are significant and those which are not. The law will not take action where a complainant consented to sexual activity but subsequently determined that she would not have done so had she known the accused's religion. The law would, however, have protected that same complainant's decision not to consent on the basis of the accused's religion had it been known in advance. It is precisely because consent is entirely subjective that such "after the fact" inquiries must look behind the reasons for the choice.

17. In *Cuerrier,* this Court held that consent is vitiated where there has been a failure to disclose "significant relevant factors." Because it is easy to see how a complainant may choose to decline to have sexual relations with a person who is HIV positive, the Appellants argue that the existence of *any* risk constitutes a "significant relevant factor." However, the risk in these cases has been found to not be significant. It is difficult to understand how, objectively speaking, an insignificant risk can be a significant factor.

R. v. Cuerrier, *supra* at ¶ 127

10 18. Aside from those in long term monogamous relationships, few people who choose to engage in sexual activity can do so with the objectively reasonable expectation that they are not exposing themselves to *any* risk of contracting some form of sexually transmitted disease. Most are in effect choosing to accept some measure of risk, albeit a small (and insignificant) risk. Those who subsequently determine that they would not have consented had they known that their partner was HIV positive do not come to that determination because they had previously thought that there was no risk. This is not to say that their feelings are not genuine or that they would not have been free to decline to consent had they been privy to the same information before the fact. However, it is important that the question of what constitutes a "significant relevant factor" be assessed on an objective basis.

20

19. To require courts to assess what might be a significant relevant factor apart from considerations about the risk of serious harm would in effect require courts to pass value judgments on complainant's choices and preferences. To do so is inconsistent with the understanding that whether or not to consent is a wholly subjective and personal decision.

PART IV – COSTS

20. The CLA asks that no costs be awarded against it and does not seek costs.

PART V – ORDER REQUESTED

21. The CLA takes no position on the disposition of these appeals.

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