Court File No.: 33976

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

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(RESPONDENT)

– and –

CLATO LUAL MABIOR

RESPONDENT
(APPELLANT)

– and –

CANADIAN HIV/AIDS LEGAL NETWORK, HIV & AIDS LEGAL CLINIC ONTARIO, COALITION DES ORGANISMES COMMUNAUTAIRES QUÉBÉCOIS DE LUTTE CONTRE 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, CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO AND BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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PART I – OVERVIEW

1. The primary position of the British Columbia Civil Liberties Association (the "BCCLA") is that *R. v. Cuerrier*, [1998] 2 S.C.R. 371 should be set aside for the following reasons:

(a) the "significant risk of serious bodily harm" concept introduced by the majority has led to unacceptable uncertainty in the criminal law and inconsistency in its application;

(b) the majority's overhaul of the law of consent to capture HIV non-disclosure (*i.e.*, an accused's failure to disclose his or her HIV-positive status to a sexual partner) went too far given Parliament's prior recognition that sexually transmitted infections should be treated primarily as matters of public health;

(c) other provisions of the *Criminal Code*, R.S.C. 1985, c. C-46 already capture egregious cases involving intentional or even reckless transmission of HIV; and

(d) restricting the criminal law to cases involving the transmission of HIV would be consistent with the approach taken in several other Commonwealth jurisdictions and with the recommendations of the Joint United Nations Programme on HIV/AIDS.

2. Setting aside *Cuerrier* would reinstate the rule that deception of a sexual partner as to one's sexually transmitted infections does not vitiate consent to sexual contact.

3. Alternatively, if this Court is not prepared to set aside *Cuerrier*, then it should refine it in at least two ways.

4. First, it should confirm that a reasonable doubt about condom use or the accused having had an undetectable viral load precludes criminal liability as the Crown at all times bears the burden of proving a "significant risk". This refinement would recognize that condom use or an undetectable viral load significantly reduces the already minute risks of HIV transmission, be consistent with public health objectives and promote certainty in the criminal law.

5. Second, it should emphasize the need for a context-sensitive approach to determining whether an accused's lack of disclosure of his or her HIV-positive status was dishonest. The current, absolute duty to disclose, even to a stranger who asks no questions and chooses to engage in unprotected sex, undermines personal autonomy, discourages personal responsibility for sexual health and rests on a invariant view of sexual relationships. People sometimes choose to engage in inherently unsafe sex.

PART II –ARGUMENT

A. *Cuerrier* should be set aside.

6. Over the past 14 years, *Cuerrier* has proven to be an inapt response to the spread of HIV. As McLachlin J. (as she then was) predicted at the time, the majority's judgment has created uncertainty in the criminal law and led to inconsistency in its application. *Cuerrier*'s overhaul of the law of consent went too far, especially in light of (i) clear parliamentary intent to treat sexually transmitted infections primarily as matters of public health and (ii) the existence of provisions in the *Criminal Code* that address egregious cases involving intentional or even reckless transmission of HIV. Accordingly, *Cuerrier* should be overruled. This Court should return to the rule that deception of a sexual partner as to one's sexually transmitted infections does not vitiate his or her consent.

(i) *Cuerrier* has created an unacceptable level of uncertainty in the criminal law.

7. It is a foundational principle of our criminal law that citizens must have clear guidance as to whether their actions are unlawful.[1] Indeed, the rule of law itself depends on the principle of "fair notice to citizens".[2] In her concurring judgment in *Cuerrier*, McLachlin J. predicted that the majority's response to the issue of HIV non-disclosure would create uncertainty in the criminal law:

> The commercial fraud theory of consent offers no principled rationale for allowing some risks to vitiate consent to sex but excluding others. … The proposed rule thus has the potential to criminalize a vast array of sexual conduct. Deceptions, small and sometimes large, have from time immemorial been the by-product of romance and sexual encounters. They often carry the risk of harm to the deceived party. Thus far in the history of civilization, these deceptions, however sad, have been left to the domain of song, verse and social censure. Now, if the Crown's theory is accepted, they become crimes.
>
> … [The "significant risk of serious bodily harm" concept] introduces uncertainty. 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? What is the ambit of "serious bodily harm"?[3]

8. McLachlin J.'s prediction has been borne out. The vague "significant risk" concept announced in *Cuerrier* has resulted in a parade of experts giving different assessments of the HIV-

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[1] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1152.
[2] *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at pp. 632-635.
[3] *Cuerrier*, at paras. 47-48.

transmission risk for similar sexual acts, and convictions and acquittals that are irreconcilable with one another.[4]

9. For example, the Crown's expert in *Mabior* gave evidence that the risk of HIV transmission falls between 0.05% and 0.26% for each act of unprotected vaginal intercourse between an HIV-positive man and an HIV-negative woman. In *R. v. Nduwayo*, 2010 BCSC 1277, the "estimated rate" adopted by the expert was 1 in 1,000 or 0.1%. By contrast, the expert in *R. v. Wright*, 2009 BCCA 514 settled on a "composite average" of 0.5% – *i.e.*, *nearly double* the *high end* of the range in *Mabior*, and *five times* the "estimated rate" in *Nduwayo*.

10. In terms of irreconcilable outcomes, the accused in *Nduwayo* was acquitted for a single act of unprotected vaginal intercourse (with the complainant D.T.; see para. 158); by contrast, the accused in *Wright* was convicted for a single similar act (with the complainant D.C.; see para. 5).

11. People who engage in essentially the same conduct should be guilty, or not guilty, of the same crime. Their fates should not depend on which expert is called to testify, nor which trial judge or jury is asked to determine whether a minuscule risk is minuscule enough to be called insignificant. Under *Currier*, people living with HIV do not have clear guidance on how to conduct themselves. Members of this already vulnerable and marginalized group must broadly announce their membership or else risk criminal sanction. In deciding these appeals, the need for an approach that is both fair and clear should be top of mind.

(ii) *Cuerrier* created a judge-made crime in the face of clear parliamentary intent to treat sexually transmitted infections as matters of public health.

12. The spread of HIV and, for that matter, of other potentially life-threatening sexually transmitted infections, is a public health issue first and foremost. Even prior to *Cuerrier*, Parliament had signalled this. Accordingly, the issue of HIV non-disclosure should generally be left to be addressed by public health authorities and legislators as part of an overall strategy for prevention and treatment.

13. To begin, there is little or no evidence that the criminal law is effective to reduce the spread of HIV.[5] To the contrary, criminalization may be inconsistent with public health objectives,

[4] See, in addition to the examples given below, Patrick O'Byrne, "Criminal Law and Public Health Practice: Are the Canadian HIV Disclosure Laws an Effective HIV Prevention Strategy?" (2011), Sexuality Research and Social Policy DOI 10.1007/s13178-011-0053-2, at pp. 3-4 and Isabel Grant, "The Prosecution of Non-Disclosure of HIV in Canada: Time to Rethink Cuerrier?" (2011), 5 McGill J. Law & Health 7, at pp. 27-30.

including by giving the public a false of security, by creating distrust in relationships between people living with HIV and their care providers and by fuelling fear and stigma.[6]

14. Before *Cuerrier*, Parliament had recognized that sexually transmitted infections are primarily a public health issue. Until its repeal in 1985, the *Criminal Code* made it an offence to transmit a venereal disease. In 1985, Parliament repealed the venereal diseases provision. The explanatory notes to the amending bill explained that the repeal would recognize that venereal diseases are "a matter of public health" and that no use was made of the section in practice.[7] Though the provision did not apply to HIV, given the timing of its repeal,[8] it did apply to other sexually transmitted infections known to cause death.[9]

15. A little over a decade later, in 1998, a majority of this Court saw fit to enter the fray, making it a crime even to *risk* transmitting HIV without first announcing that risk. It did so despite Parliament's choice not to resuscitate the venereal diseases provision of the *Criminal Code* and to leave HIV to be addressed as a public health issue.[10] At the time, McLachlin J. rightly expressed concerns about the relative competence of the courts to determine how to proceed in this sphere:

> The broad changes to the criminal law proposed [by the majority] will have complex ramifications. Parliament is better equipped than the courts to foresee the ramifications of such sweeping changes and make the necessary value choices. It can debate. It can commission studies. It can have public hearings across the country, should it deem this necessary. Through such means it may arrive at a considered conclusion as to whether such sweeping changes should be adopted.[11]

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[5] See O'Byrne, *supra*; Scott Burris *et al*., "Do Criminal Laws Influence HIV Risk Behaviour? An Empirical Trial" (2007), 39 Ariz. St. L.J. 467; and Keith 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" (2010), 22 AIDS Care 1221.

[6] See O'Byrne, *supra* and Open Society Institute (now Open Society Foundations), *10 Reasons to Oppose the Criminalization of HIV Exposure and Transmission* (New York: Open Society Institute, 2008). See also Carol L. Galletly and Steven D. Pinkerton, "Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV" (2006), 10 AIDS Behav. 451.

[7] Bill C-18, *An act to amend the Criminal Code and to amend the Combines Investigation Act, the Customs Act, the Excise Act, the Food and Drugs Act, the Narcotic Control Act, the Parole Act and the Weights and Measures Act and to repeal certain other Acts and to make other consequential amendments*, 1st Sess., 33rd Parl., 1984, s. 41.

[8] There was relatively limited knowledge about HIV and AIDS in 1985. The first patients with AIDS were identified in 1981 and by 1984, there was only indirect evidence that HIV was the cause of AIDS: see Robert C. Gallo and Luc Montagnier, "The Discovery of HIV as the Cause of AIDS" (2003), 349 N Engl. J. Med. 2283.

[9] The definition of "venereal disease" included, for example, syphilis. While syphilis can be cured, it can also be hard to detect and will cause death if untreated. As with HIV, there is no vaccine for syphilis. See Centers for Disease Control and Prevention, S*yphilis – CDC Fact Sheet*, updated September 16, 2010, available at: <http://www.cdc.gov/std/syphilis/stdfact-syphilis.htm>.

[10] Indeed, by the time of *Cuerrier*, two bills that would have criminalized exposure and transmission of HIV had withered in Parliament: see Bill C-290, *An Act to amend the Criminal Code (exposure to Human Immunodeficiency Virus)*, 2nd Sess., 33rd Parl., 1988 and Bill C-354, *An Act to amend the Criminal Code (transmission of HIV)*, 1st Sess., 35th Parl., 1995. This is further evidence that Parliament saw the matter as a public health issue.

[11] *Cuerrier*, at para. 57.

16. Today, the results of *Cuerrier* extend well beyond HIV. For example, the Crown has sought to apply *Cuerrier*'s "significant risk" concept to situations involving an undisclosed risk of transmitting the hepatitis C virus[12] and becoming pregnant.[13] In principle, there is no reason that the concept should not apply in respect of other life-threatening sexually transmitted infections, such as syphilis.[14] This is dreadful from the perspective of predictability, given that the contours of criminal liability for even HIV non-disclosure remain uncertain so long after *Cuerrier*. In addition, the potential for *Cuerrier* to apply to infections specifically enumerated in the *repealed* venereal diseases provision of the *Criminal Code* only amplifies the concern that the majority went much too far.

17. In summary, even when it was decided, *Cuerrier* ran contrary to Parliament's view that sexually transmitted infections are best treated as matters of public health, not subjects of the criminal law.[15] Today, that view is supported by empirical research. If *Cuerrier* was an excessive response to the alarming threat of HIV that existed in the late 1990s, before highly active antiretroviral treatments were widespread, it is yet more excessive today given the dramatic improvements in the treatment and prognosis of people living with HIV that have taken place since that time.[16] Governments should now be left to address the issue of HIV non-disclosure as an issue of public health.

(iii) The *Criminal Code* already addresses egregious cases involving HIV transmission.

18. Setting aside *Cuerrier* will not create an unacceptable gap in the criminal law. Even without *Cuerrier* and the "significant risk" concept, the offences of murder (*Criminal Code* s. 229), attempted murder (s. 239), aggravated assault (s. 268), assault causing bodily harm (s. 267) and criminal negligence causing bodily harm (s. 221) all have at least arguable potential for application where a person acts with intent, or even recklessly, to transmit HIV and does so.

19. Restricting the criminal law's reach to cases involving intentional or reckless HIV transmission (and not mere HIV exposure) is consistent with the approach taken in several other

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[12] See, *e.g.*, *R. v. Jones*, 2002 NBQB 340. Remarkably, even though the trial judge found a 1-2.5% risk of transmission of hepatitis C virus *per* act, and even though these risks considerably exceed nearly all estimates of HIV transmission risks, the trial judge found no "significant risk".

[13] *R. v. Hutchinson*, 2010 NSCA 3. See also Grant, *supra*, at footnote 8.

[14] See note 9.

[15] It is interesting to note that *Cuerrier* does not mention the repeal of the *Criminal Code*'s venereal diseases provision, nor the bills criminalizing HIV exposure and transmission that had been introduced in Parliament but never passed.

[16] See the Court of Appeal's judgment in *Mabior*, at paras. 60-64; *R. v. J.A.T.*, 2010 BCSC 766, at para. 15; and *R. v. J.U.*, 2011 ONCJ 457, at para. 86. See also, *e.g.*, The HIV-Causal Collaboration, "The effect of combined antiretroviral therapy on the overall mortality of HIV-infected individuals" (2009), 24 AIDS 123.

Commonwealth jurisdictions, including England,[17] and with the recommendations of the Joint United Nations Programme on HIV/AIDS (or UNAIDS):

> UNAIDS urges governments to limit criminalization to cases of intentional transmission i.e. where a person knows his or her HIV positive status, acts with the intention to transmit HIV, and does in fact transmit it.
>
> …
>
> States should also … avoid introducing HIV-specific laws and instead apply general criminal law to cases of intentional transmission … .[18]

20. Moreover, it avoids the current situation, in which merely exposing someone in the course of otherwise consensual sex to the *risk* of contracting HIV, *without that risk ever being realized*, is put on the same footing as rape.

B. Alternatively, *Cuerrier* should be refined.

21. If this Court is not prepared to set aside *Cuerrier*, then it should refine it in two ways. First, it should emphasize that a reasonable doubt regarding condom use or the accused having had an undetectable viral load precludes criminal liability as the Crown at all times bears the burden of proving a "significant risk". Second, the Court should adopt a context-sensitive approach to determining whether an accused's non-disclosure of his or her HIV-positive status was dishonest.

(i) Reasonable doubt regarding condom use or an undetectable viral load must result in an acquittal as the Crown always bears the burden of proving "significant risk".

22. In *Cuerrier*, the majority acknowledged that the use of condoms could reduce the risk of HIV exposure and thereby preclude the "significant risk" needed to ground a finding of fraud.[19] For her part, McLachlin J. held that condom use would preclude criminal liability even where an accused deceived the complainant as to his or her HIV-positive status.[20] If this Court is to retain *Cuerrier*, it should now explicitly confirm that a reasonable doubt regarding condom use must result in an acquittal.

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[17] See Grant, *supra*, at pp. 31-43.
[18] United Nations Development Programme and UNAIDS, *Policy brief on the criminalization of HIV transmission* (Geneva: UNAIDS, 2008). Note, however, that UNAIDS says that the criminalization of reckless transmission "should be avoided" (p. 3).
[19] *Cuerrier*, at para. 129. See also, *e.g.*, paras. 95-96, 126, 128 and 147, which refer consistently to "unprotected" intercourse.
[20] *Cuerrier*, at para. 73.

23. This confirmation would recognize the massive reduction in already miniscule risks in which condom use indisputably results[21] and be consonant with public health objectives.[22] It would also promote predictability in the criminal law. At present, not all judges and juries regard condom use as precluding liability.

24. For example, in *Wright*, there was some evidence that the accused had used a condom during vaginal intercourse with one of the complainants. Despite expert evidence that the use of a condom could have reduced the risk of HIV transmission to as little as 0.01%, the jury was not instructed to acquit if it had a reasonable doubt about condom use. The Court of Appeal for British Columbia unanimously dismissed the accused's appeal on this ground, noting that "it is a question of fact in each case … whether the use of a condom has reduced the risk of HIV transmission to a level that does not represent a significant risk" (para. 39). In *R. v. Aziga*, 2011 ONSC 4592, a jury convicted the accused of aggravated sexual assault of a complainant, D, who had engaged in protected vaginal intercourse with him on 12 occasions. She had performed unprotected fellatio on the accused on three or four occasions, but he had never ejaculated, and so the protected vaginal intercourse must have been regarded as creating a "significant risk".[23] And in *R. v. Mekonnen*, 2009 ONCJ 643, apparently based on counsel's agreement, the trial judge simply treated as irrelevant the complainant's evidence that the accused had used a condom when engaged in vaginal intercourse with her and that he may have used a condom on the one occasion when she performed fellatio.[24]

25. On the other hand, in *Nduwayo*, the existence of "some question" as to whether a condom was used in intercourse with one complainant was sufficient to raise a reasonable doubt as to a "significant risk" (paras. 145-146). Similarly, in *R. v. Smith*, [2007] S.J. No. 116 (Prov. Ct.) (QL), the trial judge stated that he had to satisfy himself "beyond a reasonable doubt that if [the accused] did have sex that that sex was unprotected sex" (para. 59).

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[21] Grant, *supra*, at pp. 12-14 gives a helpful synopsis of the scientific literature. See also, *e.g.*, the Court of Appeal's judgment in *Mabior*, at paras. 78-89 and *Nduwayo*, at para. 106 ("the generally accepted understanding is that [condom use] will be approximately 90 percent effective in preventing transmission of the virus").

[22] See Isabel Grant, "Rethinking Risk: The Relevance of Condoms and Viral Load in HIV Nondisclosure Prosecutions" (2009), 54 McGill L.J. 389, at pp. 398-400. See also, *e.g.*, Health Canada, *It's Your Health: Condoms* (Ottawa: Health Canada, 2010).

[23] The only other possibility is that the jury regarded the unprotected fellatio as creating a "significant risk". This would be even more troubling, given that the risks of HIV transmission from fellatio are infinitesimal: see, *e.g.*, Rebecca F. Baggaley *et al.*, "Systematic review of orogenital HIV-1 transmission probabilities" (2008), 37 Int. J. Epidemiol. 1255.

[24] The Court of Appeal for Ontario is scheduled to hear the appeal in this case on February 14, 2012.

26. For similar reasons, this Court should also state that a reasonable doubt that the accused had an undetectable viral load must result in an acquittal. As the Court of Appeal noted in *Mabior*, an undetectable viral load significantly reduces the already small risks of HIV transmission (para. 98):

> The transmission or infectiousness of an HIV-positive individual is directly proportional to viral loads so that the lower the viral load, the lower the risk of transmission. When the viral load is below approximately 40 copies [*per* ml] or "undetectable," HIV transmission is significantly reduced, although not proven to be completely eliminated.

27. Similar evidence was cited by the Court of Appeal in *D.C.* (para. 97):

> [L]orsque la charge virale est indétectable, le risque de transmission passe à 1 sur 10 000 (et à 1 sur 50 000 ou 100 000 avec le condom). Sans être nul, le risque de transmission est alors, selon la Dre Klein, « très faible, très minime », ou selon le Dr Routy, « très, très faible » et « infime » lorsqu'il y a port du condom, ne dépassant pas celui de conduire une automobile … .

28. And like condom use, antiretroviral treatment to decrease viral loads is an important public health strategy for treating and preventing the spread of HIV that the criminal law should promote, not discourage.[25]

29. In the *Mabior* appeal, the Crown makes a radical argument regarding condom use and viral load. First, the Crown cites all the factors that could have reduced the effectiveness of the accused's condom use or caused his viral load to spike.[26] Then the Crown refers to a lack of evidence pertaining to the factors, and suggests it would be impossible to prove the exact risk of transmission even if more about the factors were known.[27] The argument ends with the Crown urging this Court to *ignore* condom use and viral load altogether, implicitly alleviating the Crown of its unmet burden of proving "significant risk" beyond a reasonable doubt.[28]

30. This Court should reject the Crown's argument. Logically, the impossibility of the Crown proving "significant risk" beyond a reasonable doubt where condom use or an undetectable viral load is raised is but a *further* reason for this Court to state that they preclude liability. It is certainly *not* a reason for the Court to blind itself, disregarding evidence that condom use or an undetectable viral load significantly reduces the risks of HIV transmission.

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[25] See, *e.g.*, World Health Organization, *A Public Health Approach for Scaling Up Antiretroviral (ARV) Treatment* (Geneva: World Health Organization, 2003) and UNAIDS, *Treatment 2.0 Fact Sheet* (Geneva: UNAIDS, 2010).
[26] Appellant's factum (*Mabior*), at paras. 19, 23 and 83.
[27] Appellant's factum (*Mabior*), at paras. 93.
[28] Appellant's factum (*Mabior*), at para. 122.

(ii) There must be a context-sensitive approach to determining whether an accused's non-disclosure of his or her HIV-positive status was dishonest.

31. *Cuerrier* requires a person to disclose his or her HIV-positive status to *every* sexual partner who may be exposed to a "significant risk" of transmission, lest he or she may be found to have committed fraud that vitiates that partner's consent.[29] This absolute duty to disclose, even to a stranger who has asked no questions and chosen to engage in manifestly high-risk sexual behaviour, is inconsistent with personal autonomy, discourages personal responsibility for sexual health and rests on an invariant view of sexual relationships. This Court should emphasize the need to consider the context of a sexual relationship to determine the expectations of the parties and the risks being assumed before deciding if an accused's non-disclosure of his or her HIV-positive status is dishonest.

32. This Court has linked the need for consent to sexual activity to personal autonomy. "Having control over who touches one's body, and how, lies at the core of human dignity and autonomy".[30] It is inconsistent with personal autonomy to impose, through the blunt tool of the criminal law, an absolute duty to disclose the risk of HIV being transmitted, even to those who make a conscious choice to engage in relatively high-risk sexual activity.[31] In other contexts, the law has recognized that individuals can and do choose to engage in risky activity, and, in so doing, implicitly consent to the risks inherent in that activity for the purposes of the criminal law.[32]

33. Moreover, the absolute duty to disclose discourages personal responsibility for sexual health by creating a false sense of security. The sense of security is a false one because the duty applies only to people who are *aware* that they are living with HIV, and because those people may breach their duty.

34. The personal irresponsibility and false sense of security promoted by an absolute duty of disclosure is well demonstrated by the Crown's argument in *Mabior*. The Crown casts the accused's non-disclosure as giving the complainants "no chance" to protect themselves.[33] Yet only one of the

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[29] *Cuerrier*, at paras. 144.

[30] *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 28. See also *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at paras. 115-116, in which Fish J. (dissenting, but not on this point) emphasizes the need to respect "sexual autonomy".

[31] See, *e.g.*, Gordon Mansergh *et al.*, "'Barebacking' in a diverse sample of men who have sex with men" (2002), 16 AIDS 653, describing some men's practice of intentionally engaging in anal intercourse without a condom with a non-primary male partner in order to experience greater physical stimulation or to feel emotionally connected. While this practice may well be objectionable from a public health perspective, it is wrong to proceed as though those who choose to engage in it are unaware that it is a relatively high-risk sexual activity, and wrong to punish only people living with HIV for their participation.

[32] A useful analogy can be drawn from assault cases arising from hockey games: see, *e.g.*, *R. v. Cey*, [1989] 5 W.W.R. 169 (Sask. C.A.). Hockey is an inherently risky game. People who choose to play the game consent to some form of bodily contact and to the risk of resulting injury. The consent analysis focuses on whether the conduct in question falls within the range of conduct ordinarily accepted in the type of hockey game being played.

[33] Appellant's factum (*Mabior*), at para. 4.

complainants ever asked whether the accused had HIV, and it was open to each of them to decline to have sex with him without a condom – or at all.

35. Sexual relationships vary. In relationships of trust – for example, a long-term, ostensibly monogamous marriage – there may be an implicit but clear expectation that each partner will disclose any risk of HIV transmission to the other, should such a risk become known. In other relationships, no such expectation of disclosure is plausible, *absent a specific inquiry*. For instance, a woman who meets a strange man in a bar and, as part of a one night stand, agrees to have anal intercourse with him, without a condom, and with nary a question as to this stranger's sexual history, must be taken to have made a choice to assume the relatively high risks of her behaviour, including the risk of HIV transmission, and to have no expectation that the stranger will make unprompted disclosure.

36. This was essentially the approach that McLachlin J. favoured in *Cuerrier* (para. 49):

> The equation of non-disclosure with lack of consent oversimplifies the complex and diverse nature of consent. People can and do cast caution to the winds in sexual situations. Where the consenting partner accepts the risk, non-disclosure cannot logically vitiate consent. Non-disclosure can vitiate consent only where there is an assumption that disclosure will be made, and that if HIV infection were disclosed, consent would be refused. Where a person consents to take a risk from the outset, non-disclosure is irrelevant to consent. Yet the proposed test would criminalize non-disclosure nonetheless. This effectively writes out consent as a defence to sexual assault in such cases. The offence of sexual assault is replaced by a new offence – the offence of failure to disclose a serious risk.

37. Accordingly, this Court should emphasize the need to look at the context of a sexual relationship to determine the expectations of the parties and the risks being assumed before determining whether an accused's non-disclosure of his or her HIV-positive status is dishonest. Absent an inquiry, or a relationship of trust, non-disclosure will not ordinarily be dishonest.

PART III – ORDER REQUESTED

38. The BCCLA seeks an order granting it permission to make oral submissions for 20 minutes at the hearing of these appeals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 4th day of January, 2011.

MICHAEL A. FEDER **ANGELA M. JUBA**

PART IV – TABLE OF AUTHORITIES

Paragraph(s)

Legislation

Secondary sources

	Paragraph(s)
The HIV-Causal Collaboration, "The effect of combined antiretroviral therapy on the overall mortality of HIV-infected individuals" (2009), 24 AIDS 123	17
Keith 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" (2010), 22 AIDS Care 1221	13
Gordon Mansergh *et al.*, "'Barebacking' in a diverse sample of men who have sex with men" (2002), 16 AIDS 653	32
Patrick O'Byrne, "Criminal Law and Public Health Practice: Are the Canadian HIV Disclosure Laws an Effective HIV Prevention Strategy?" (2011), Sexuality Research and Social Policy DOI 10.1007/s13178-011-0053-2	8 & 13
Open Society Institute (now Open Society Foundations), *10 Reasons to Oppose the Criminalization of HIV Exposure and Transmission* (New York: Open Society Institute, 2008)	13
UNAIDS, *Treatment 2.0 Fact Sheet* (Geneva: UNAIDS, 2010)	28
United Nations Development Programme and UNAIDS, *Policy brief on the criminalization of HIV transmission* (Geneva: UNAIDS, 2008)	19
World Health Organization, *A Public Health Approach for Scaling Up Antiretroviral (ARV) Treatment* (Geneva: World Health Organization, 2003)	28