Unofficial English Translation

**D.C. c. R.** **2010 QCCA 2289**

# COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-10-004068-084
(505-01-058007-051)

DATE: December 13, 2010

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**CORAM: THE HONOURABLE JACQUES CHAMBERLAND J.A.**
**JACQUES A. LÉGER J.A.**
**GUY GAGNON J.A.**

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**D. C.**
APPELLANT – Accused
v.

**HER MAJESTY THE QUEEN**
RESPONDENT – Prosecutrix
and
**COALITION DES ORGANISMES COMMUNAUTAIRES QUÉBÉCOIS DE LA LUTTE CONTRE LE SIDA**
and
**CANADIAN HIV/AIDS LEGAL NETWORK**
INTERVENERS

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JUDGMENT

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[1] THE COURT; - On the appeal of a judgement rendered on February 14, 2008, by the Court of Quebec, Criminal Division, District of Longueuil (the Honourable Mr. Justice Marc Bisson), convicting the appellant on the following two charges:

[TRANSLATION]

1. Between June 24, 2000, and August 31, 2000, at City A and City B, District of Longueuil and District of Montreal, did commit aggravated assault against J. P., endangering his life, thereby committing the indictable offence provided at section 268 of the *Criminal Code*.

2. Between June 24, 2000, and August 31, 2000, at City A and City B, District of Longueuil and District of Montreal, did sexually assault J. P., thereby committing the indictable offence provided at paragraph 271(1)(*a*) of the *Criminal Code*.

[2] After having examined the file, heard the parties, and on the whole deliberated;

[3] For the reasons of Chamberland J.A., with which Léger and Gagnon JJ.A. concur:

[4] **ALLOWS** the appeal;

[5] **SETS ASIDE** the judgment under appeal; and

[6] **ACQUITS** the appellant of the two charges brought against her.

JACQUES CHAMBERLAND J.A.

JACQUES A. LÉGER J.A.

GUY GAGNON J.A.

Mtre Christian Desrosiers
DESROSIERS JONCAS MASSICOTTE
For the appellant

Mtre Magalie Cimon
Mtre Caroline Fontaine
Criminal and penal prosecutors
For the respondent

Mtre Stéphanie Claiveaz-Loranger
COCQ-SIDA
Mtre Maude Perras
Delegatus services juridiques inc.
For the intervener Coalition des organismes communautaires québécois de lutte contre le SIDA

Date of hearing: September 14, 2010

MOTIFS DU JUGECHAMBERLAND

[7] The appellant appeals from a judgment convicting her of sexual assault and aggravated assault against her ex-partner. The trial judge found that during the summer of 2000, at the start of the appellant's relationship with the complainant, the appellant had unprotected sexual intercourse without telling the complainant of her HIV-positive status.

[8] The appeal raises the thorny issue of whether, in so doing, the appellant, whose viral load was undetectable at the time, committed an offence by obtaining the complainant's consent to sexual intercourse without first telling him of her condition.

**Background**

[9] In 1991, following her spouse's death, the appellant found out that he had given her the human immunodeficiency virus (HIV).

[10] She has been under a doctor’s care since then.

[11] The appellant and the complainant met during the soccer season, as their respective sons played the sport. Their first meeting, which the appellant places in early July of 2000, was followed by many more and took place at the soccer field. Over the course of these meetings, their relationship evolved to a point where it became intimate.

[12] This brings us to a critical aspect in the narrative of facts, an aspect on which the appellant and the complainant's versions are completely contradictory, and which the trial judge had to decide before pursuing his analysis of the case. The complainant asserts that they had unprotected sexual intercourse on several occasions before the appellant told him of her HIV-positive status; the appellant, however, states that they only had sexual intercourse once before she told him of her condition. She also states that they used protection in the form of a condom.

[13] Following his analysis of the evidence, the trial judge concluded that there was unprotected sexual intercourse before the appellant told the complainant about her HIV-positive status. The appellant maintains that this factual finding is unreasonable and unlawful. Though I will return to this subject, I will now resume the narrative of facts.

[14] The complainant was shaken by the appellant's disclosure of her medical condition in early September of 2000. A few weeks went by before he saw her again, but he is the one who contacted her. Shortly thereafter, he went to the appellant's home,

and she came out to meet him in his vehicle. At the end of this meeting, the two agreed to continue their relationship and kissed upon saying their goodbyes.

[15] In fact, they lived together for four years until November or December of 2004.

[16] Throughout this period, they had protected sexual intercourse.

[17] The end of their relationship was tumultuous. Following a brief hospitalization toward the end of 2004, the appellant was housed in a residence affiliated with a psychiatric day clinic. Around mid-December, she asked the complainant to leave the house; he refused. A few days later, she went home with her son to pick up her personal effects. The meeting was stormy; the complainant assaulted the appellant and her son. He was accused, tried, and convicted of assault. He was then sentenced for the offence.

[18] On February 11, 2005, the complainant filed a complaint against the appellant for the events that had taken place during the summer of 2000. Two charges were brought:

> [TRANSLATION]
>
> 3. Between June 24, 2000, and August 31, 2000, at City A and City B, District of Longueuil and District of Montreal, did commit aggravated assault against J. P., endangering his life, thereby committing the indictable offence provided at section 268 of the *Criminal Code*.
>
> 4. Between June 24, 2000, and August 31, 2000, at City A and City B, District of Longueuil and District of Montreal, did sexually assault J. P., thereby committing the indictable offence provided at paragraph 271(1)(*a*) of the *Criminal Code*.

[19] The trial took place over five days in May, August, and September of 2007.

## The judgment under appeal

[20] The judgment was rendered on February 14, 2008.

[21] Following a summary of the facts, the parties' respective positions, and the law applicable to sexual assault and aggravated assault, including the *Cuerrier*[1] and *Williams*[2] judgments, the trial judge proceeded with his analysis of the issues raised in the file.

[22] On the sexual assault charge, he concluded that there was an absence of genuine consent by the complainant at the time of the first sexual encounter as he was

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1 *R. v. Cuerrier*, [1998] 2 S.C.R. 371.
2 *R. v. Williams*, [2003] 2 S.C.R. 134, 2003 SCC 41.

unaware of the appellant's HIV-positive status and they had unprotected sexual intercourse. The appellant's HIV-positive status was, according to the trial judge, an [TRANSLATION] "important and relevant factor" within the meaning of *Cuerrier*, an essential factor for the consent to be valid.

[23] According to the trial judge, the fact that the complainant consented to sexual intercourse multiple times—over the course of four years—after having been informed of the appellant's condition does not change the prevailing situation during those first sexual encounters.

[24] In his view, HIV-positive people have two fundamental responsibilities: (1) to inform their partner of their condition, and (2) to ensure that sexual intercourse presents the least amount of risk possible.

[25] In both *Cuerrier* and *Williams*, the accused and the complainants had had unprotected sexual intercourse. In this case, the versions were completely contradictory as to whether or not the initial sexual encounters—or, at least, the very first one—were protected. The appellant claimed that they were; the complainant, however, claimed that they were not.

[26] The trial judge characterized this issue as a fundamental one. He then analyzed each version and found that he could accept neither the appellant's testimony (para. 150) nor, when considered on its own, the complainant's (para. 152). In the testimony of Dr. Marina Klein, the appellant's attending physician at the time, he found, however, [TRANSLATION] "an independent piece of evidence allowing the inference that a condom was not used, thereby corroborating the complainant's testimony on this point" (paras. 159, 171). The appellant argues that this inference is completely unreasonable. It is her first ground of appeal. I will revisit it later.

[27] On the aggravated assault charge, the trial judge wondered if the sexual assault committed by the appellant, which resulted from the invalidity of her partner's consent from a criminal law standpoint, endangered the complainant's life. He wrote that, according to *Cuerrier*, for the victim's life to be endangered, there must be "a significant risk of serious bodily harm" (*Cuerrier* at paras. 128–129) and that "the risk of contracting AIDS as a result of engaging in unprotected intercourse would clearly meet this test" (*Cuerrier* at para. 128).

[28] The trial judge summarized the evidence regarding the risk of transmission of the disease.

[29] When it is the woman that is infected, this risk is 1 in 1000, regardless of the viral load, even if sexual intercourse takes place without the use of a condom.

[30] When the viral load is undetectable, which was the appellant's case at the time, the risk becomes 1 in 10,000, and 1 in 50,000 (or 100,000) if a condom is used.

[31] In light of the seriousness of this disease and the fact that the first sexual encounter was unprotected, the judge found that the appellant exposed the complainant to a significant risk of serious bodily harm. He therefore convicted her of the two charges brought against her.

**The issues in dispute**

[32] The appellant raises several grounds of appeal that I would reword as follows:

1. The judge should have acquitted her after finding that neither her testimony nor the complainant's were credible with regard to whether or not their first sexual encounter was protected.

   Three more issues can be grafted onto this ground: (a) the admissibility of the appellant's confidences to her physician, (b) the appellant's cross-examination regarding the meaning of the annotation in her medical file, and finally, (c) the judge's characterization of this evidence as corroborating the complainant's testimony.

2. The judge erred by placing on the appellant the onus of proving her innocence.

3. The judge erred in concluding that evidence of good character could not be used in a sexual assault charge.

4. The judge unduly limited her cross-examination and that of the complainant concerning certain incidents of violence, fraud, and civil proceedings between the parties.

5. The judge exceeded his role by questioning the appellant insistently.

6. The judge erred in finding that all HIV-infected individuals must disclose their positive status regardless of the existence of a significant risk to their partner's health.

   The issue of whether the judge erred in dismissing the undisputed expert evidence regarding the very minimal transmission risk of the disease and thereby straying from the notion of significant risk set out in *Cuerrier* can be here joined.

7. The verdict is unreasonable.

[33] Before proceeding on these issues, in that order, it would be appropriate to reproduce the sections of the *Criminal Code* referred to in the two charges:

> **265.** (1) A person commits an assault when

(*a*) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

(*b*) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or

(*c*) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

(*a*) the application of force to the complainant or to a person other than the complainant;

(*b*) threats or fear of the application of force to the complainant or to a person other than the complainant;

(*c*) fraud; or

(*d*) the exercise of authority.

(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

**268.** (1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

(2) Every one who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(3) For greater certainty, in this section, "wounds" or "maims" includes to excise, infibulate or mutilate, in whole or in part, the labia majora, labia minora or clitoris of a person, except where

(*a*) a surgical procedure is performed, by a person duly qualified by provincial law to practise medicine, for the benefit of the physical health of the person or for the

> purpose of that person having normal reproductive functions or normal sexual appearance or function; or
>
> (*b*) the person is at least eighteen years of age and there is no resulting bodily harm.
>
> (4) For the purposes of this section and section 265, no consent to the excision, infibulation or mutilation, in whole or in part, of the labia majora, labia minora or clitoris of a person is valid, except in the cases described in paragraphs (3)(*a*)and (*b*).
>
> **271.** (1) Every one who commits sexual assault is guilty of:
>
> (*a*) an indictable offence and is liable to imprisonment for a term not exceeding ten years;
>
> (*b*) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

## 1. CONTRADICTORY VERSIONS AND ACQUITTAL

[34] The question of whether or not the sexual encounters prior to the appellant's disclosure of her HIV-positive status were protected is the very basis of the trial judge's reasoning; indeed, the judge called this issue [TRANSLATION] "the most fundamental" (para. 97).

[35] Under paragraph 265(3) (c) *Cr. C.* there can be no consent when the complainant submits, or does not resist, by reason of "fraud".

[36] In *Cuerrier*, *supra*, the Supreme Court of Canada writes that the essential elements of fraud are the same when consenting to sexual intercourse as they are in commercial matters: dishonesty and deprivation (or risk of deprivation) (para. 116).

[37] It is not enough that the accused's behaviour was dishonest; it must also have entailed deprivation in the form of actual harm or the mere risk of harm.

[38] Insignificant harm or risk of harm will not answer this second requirement. Indeed, the dishonest act must expose the complainant to "a significant risk of serious bodily harm" (paras. 128–129) (in French, “un risque important de lesions corporelles graves”) or to a “significant risk of serious harm” (para. 135) (in French, “un risque important de prejudice grave”).

[39] That being the case, six of the seven judges sitting on the *Cuerrier* case imply (reasons of Cory J. at para. 129) or explicitly state (reasons of McLachlin J. at para. 73) that using a condom reduces the risk of harm to a point where it passes below the

threshold of "significant risk of serious harm", wherefore the importance afforded by the trial judge to whether or not these first sexual relations were protected.

[40] The evidence on the subject was entirely contradictory.

[41] The appellant claimed that they were; the complainant, on the other hand, claimed that they were not.

[42] Who is to be believed?

[43] The trial judge concluded, after analyzing both testimonies, that neither was credible. Continuing his reflection, he saw one piece of evidence in the record that allowed him to infer that the initial sexual encounters in the summer of 2000 were unprotected. This allowed him to credit the complainant's version.

[44] On August 31, 2000, the appellant visited her attending physician at the time, Dr. Klein. In the course of that visit, Dr. Klein wrote a note in her patient's medical file indicating that the patient had told her of a new partner with whom she had had sexual intercourse during which the condom had broken (in the text, "Sex c new partner—condom broke—connsl to disclo").

[45] The judge accepted that this note was true to what the appellant had told her doctor, but, as a result, concluded that she had lied. From this lie, he inferred that the appellant had unprotected sexual intercourse with her new partner, the complainant. According to the judge, the appellant invented this broken-condom story to camouflage her carelessness in having had unprotected sexual intercourse, while seeking reassurance regarding the fact that she had just put her partner at risk.

[46] The appellant argues that what the trial judge characterized as an [TRANSLATION] "inference" is nothing more than [TRANSLATION] "pure conjecture" that does not correspond to either version of the facts. I will return to this, but for now, I would like to consider the three other issues raised by the appellant: the admissibility of this evidence, the Crown's cross-examination of the appellant, and, finally, the characterization of the evidence by the trial judge.

**The admissibility of this evidence**

[47] The appellant argues that, in light of its confidentiality, her medical file (and particularly the notes referring to the conversation she had with her physician) should not have been filed into evidence. In her opinion, the evidence was not essential as it was information that could have been obtained from the complainant. Breaching the confidentiality of the information exchanged between HIV-positive patients and their physicians risks further ostracizing those who are sick and their loved ones.

[48] The Crown countered, rightly in my opinion, that doctor-patient confidentiality is not a class privilege and thus that the party opposing its admissibility into evidence must object to it at trial, which was not done in this case. An appeal is not a second trial; the parties must live with the strategic choices that were made in the court below, including, as is the case here, the choice of not objecting to the filing into evidence of a medical file. Because doctor-patient confidentiality is not a class privilege, it behoved the appellant to establish the facts giving rise to the privilege she is now claiming. She did not, and it is now too late to consider doing so on appeal.

**The Crown's cross-examination**

[49] The appellant argues that the trial judge should not have allowed the Crown to cross-examine her concerning the meaning that should be given to the note found in Dr. Klein's file.

[50] This criticism does not hold water. First, the appellant's attorney of record did not object to this series of questions. Second, it was in the appellant's interest to explain why she told her doctor during her August 31, 2000, visit that the condom broke, contrary to her testimony at trial. Finally, it was not so much a case of examining the appellant on the veracity of Dr. Klein's testimony but of confronting her with the contradiction of the prior statements she had made to her doctor.

**Characterization of the evidence**

[51] In Dr. Klein's testimony and the note she wrote in her patient file, the judge saw [TRANSLATION] "an independent piece of evidence allowing the inference that a condom was not used, thereby corroborating the complainant's testimony on this point" (paras. 159, 171).

[52] Regarding the medical visit on August 31, 2000, Dr. Klein testified from her patient file. She had no memory of the appellant's remarks. This is not, in my opinion, independent evidence. The notes put in the medical file do nothing more than convey, in abridged form, the appellant's remarks of August 31, 2000, seven years before the trial and four years before the charges.

[53] Regardless of the exact characterization of this evidence, however, the trial judge infers from the lie he attributes to the appellant that her first sexual encounter with the complainant was unprotected, thus confirming the complainant's version.

[54] I will now return to the appellant's first ground of appeal: inference or conjecture?

[55] The appellant argues that what the trial judge characterizes as [TRANSALATION] "inference" is nothing more than [TRANSLATION] "pure conjecture" or, at least, that it is an unreasonable inference.

[56] With all due respect for the contrary view, I think that the trial judge's reasoning was logical and that the inference he drew from what he considered to be the appellant's lie to her doctor was reasonable under the circumstances. It must be borne in mind that the inference here concerns a specific fact: the presence or absence of a condom. The fact the trial judge is attempting to establish does not lend itself to nuance: either a condom was used, or it wasn't. From the moment the judge, who had the opportunity to hear and assess the appellant's testimony regarding the visit to Dr. Klein, concluded that the appellant had lied regarding the use of a condom, he was perfectly free to infer that a condom had not been used.

[57] In this context, it is not conjecture but an inference of fact that the judge may reasonably draw.

[58] The author Watt[3] defines an inference as follows:

> An *inference* is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. It is a conclusion that *may*, not must be drawn in the circumstances. It effects no change in the location of the burden of proof, nor alteration in the standard of proof to be met by any party.
>
> The boundary that separates permissible inference from impermissible speculation in relation to circumstantial evidence is often a very difficult one to locate.

[59] In this case, the fact from which the inference is drawn is the finding relative to the appellant's lie to her doctor regarding the use of a condom. The logical and reasonable inference drawn by the judge is that, contrary to what the appellant told her doctor, a condom was not used. There is no cause here to warrant intervention on appeal.

[60] However, when the judge sought to explain why the appellant had lied to her doctor by saying that she wished to camouflage her carelessness while seeking reassurance, that was conjecture. People lie for all manner of reasons. Why accept this explanation rather than another? I believe that, on this point, the judge was speculating. But the fact that this part of the trial judge's reasoning constitutes conjecture does not affect the validity of the inference of fact drawn from the appellant's lie to her doctor concerning the use of a condom.

[61] I will therefore move on to the other grounds of appeal.

## 2. THE BURDEN OF PROOF

[3] David G. Watt, *Watt's Manual of Criminal Evidence*, (Toronto: Carswell, 2010) No. 12.01 at 103.

[62] The appellant claims that the trial judge placed the onus of convincing him of the correctness of her testimony on her, adding that he arrived at his conclusion even before assessing credibility.

[63] This criticism does not hold water. The trial judge applied the analytical framework established by the Supreme Court in *R. v. W. (D.)*, [1991] 1 S.C.R. 742. He explained why he could not accept the appellant's testimony and why said testimony did not raise a reasonable doubt in his mind. I do not see cause for intervention on this point.

## 3. EVIDENCE OF GOOD CHARACTER

[64] The appellant presented evidence of good character by having both a musician friend and a hospital social worker testify because these two persons know her very well and have followed her evolution since learning that she was infected with HIV.

[65] The trial judge stated that this evidence was of no help to the appellant in light of the nature of the alleged offences. The fact that she was knowledgeable on the consequences of her disease and that she had always been prudent in the past did not exclude, according to the judge, the possibility that she may, at least once, have failed to inform her partner of her HIV status prior to having sexual intercourse with him (para. 195).

[66] The appellant argues that the judge erred, and distinguishes *Chevreuil v. R.* [2008] R.J.Q. 326, 2008 QCCA 82 and *R. v. Profit*, [1993] 3 S.C.R. 637 pointing out that there is no question of children in this case but rather of "fraud" within the meaning of paragraph 265(3)(*c*) *Cr. C.*, which has to do with her integrity or honesty. She reiterates that evidence of good character is used to assess not only the probability that the accused did not act like a criminal, but also her credibility. Finally, she claims that her good character is certainly relevant to assess her dishonesty (or, on the contrary, her honesty) in the context of the offence with which she was charged as, by legal fiction, it is essentially an offence of dishonesty.

[67] The trial judge was undoubtedly too categorical in stating that the evidence of good character was of [TRANSLATION] "no help" to the appellant. In my view, however, this is not cause for the Court’s intervention. Evidence of good character is relevant not only to assess the appellant’s conduct toward the complainant, as she points out, but also to assess her credibility. In addition, we must point out that the weight that should be afforded this evidence is up to the trier of fact. From the evidence as a whole, the latter was free to consider that the appellant's behaviour toward the complainant was different from that which she had shown prior partners and therefore that he could not rely on her good character.

## 4. THE LIMIT PLACED ON THE COMPLAINANT AND THE APPELLANT'S CROSS-EXAMINATIONS REGARDING INCIDENTS IN THEIR RELATIONSHIP

[68] The appellant criticizes the judge for limiting her examination and the complainant's cross-examination regarding the tumultuous breakdown of their relationship, the charges of violence brought against the complainant and, finally, the civil proceedings he brought against her.

[69] This criticism is without merit in my opinion.

[70] Cross-examination is central to the accused’s exercise of the right to full answer and defence; the judge is free to limit this to relevant elements, however, and even to put an end to it in cases of abuse, marked repetition, or, more generally, if it affects the fairness of the trial. In the present case, I believe that the judge did not unduly limit the complainant's cross-examination. In fact, at the end of his analysis of the evidence, he concluded that the complainant lacked credibility.

[71] Concerning the complainant's conviction on assault charges, the judge considered that this conviction was *res judicata*; therefore, he limited the appellant's examination on the subject. This decision was fair and fell within the trial judge’s discretion. The appellant did not suffer any prejudice as a result.

## 5. THE JUDGE'S ROLE AT TRIAL

[72] The appellant argues that the judge exceeded the limits of his role by questioning her insistently. His questions were not intended to clear up ambiguous evidence but rather to attack her credibility. The appellant criticizes the judge for having used the transcript from the first day of trial to try and contradict her prior testimony.

[73] For its part, the respondent claims that the judge, through his questions, was allowing the appellant to better explain points that had left him perplexed. The judge interjected very little during the trial and made decisions that alternately favoured the prosecution and the defence.

[74] In my view, this ground of appeal must be dismissed.

[75] In *Brouillard aka Chatel v. R.*, [1985] 1 S.C.R. 39, the Supreme Court of Canada sets guidelines for a judge's conduct at trial. In the present case, after reading the trial transcripts, it seems apparent that the trial judge's conduct was far from crossing the threshold for finding that he departed from the accepted norms of judicial conduct and thereby influenced the fairness of the trial.

## 6. THE LINK BETWEEN THE DUTY TO DISCLOSE, THE SIGNIFICANT HEALTH RISK, AND THE MEDICAL EVIDENCE

[76] This issue is at the very heart of the appeal.

[77] As these principles are the very basis for the following analysis, I believe it is necessary to reiterate the words of the Supreme Court of Canada in *Cuerrier* regarding the essential elements of fraud in matters of sexual relations, that is, dishonesty and deprivation (or risk of deprivation).

[78] Regarding 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" (para. 126). "The extent of the duty to disclose will increase with the risks attendant upon the act of intercourse. ... The nature and extent of the duty to disclose, if any, will always have to be considered in the context of the particular facts presented" (para. 127).

[79] Regarding deprivation in the form of actual harm or mere risk of harm, "... 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" (para. 128). "...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" (para. 128). "The existence of fraud should not vitiate consent unless there is a significant risk of serious harm" (para. 135). "The phrase 'significant risk of serious harm' must be applied to the facts of each case in order to determine if the consent given in the particular circumstances was vitiated... The phrase should be interpreted in light of the gravity of the consequences of a conviction for sexual assault and with the aim of avoiding the trivialization of the offence" (para. 139).

[80] The appellant argues the necessity of interpreting these principles as restrictively as possible because, in the wake of repealing the offence related to the transmission of a venereal disease,[4] the Supreme Court created a new offence from scratch, tying the transmission of HIV to sexual assault offences and aggravated assault.[5]

[81] The appellant contends that the trial judge erred in stating that HIV-positive persons have two fundamental duties: (1) to inform their partner of their HIV status and (2) to then ensure that their sexual relations present as little risk as possible. According to the appellant, these obligations must be adapted in light of the risk that a given situation presents for the partner; absent a significant health risk, there should be no duty to disclose the condition and, consequently, no consent vitiated by fraud.

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4 Former section 289 *Cr. C*, repealed, R.S.C. (1985), c. 27 (1st suppl.), s. 41.

5 I note that in 1983, Parliament repealed the offence of rape and created the offences of sexual assault, sexual assault with a weapon, and aggravated assault, the *Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. (1980-81-82-83), c. 125, s. 19.

[82] The interveners' position echoes that of the appellant. They deem that the trial judge should have examined the risk factors in detail and, applying the principles of the Supreme Court, acquitted the appellant because of the undetectable viral load.

[83] In their opinion, the offences related to a person's failing to disclose his or her HIV status must be limited to unprotected sexual intercourse. There can only be fraud capable of vitiating consent in the presence of a significant risk that the virus will be transmitted and, consequently, criminal law does not impose on HIV-positive persons a general duty of disclosing their condition. The interveners ask this Court to confirm that wearing a condom sufficiently reduces the risk of transmission to exempt an HIV-positive person from the duty to disclose his or her condition to sexual partners.

[84] For its part, the respondent argues that failure by HIV-positive individuals to disclose their condition during unprotected sexual intercourse carries enough risk to vitiate the partner’s consent.

[85] Before I embark upon the analysis of this ground of appeal, I will allow myself a preliminary remark. In spite of the wishes of the interveners, I do not believe that the time is opportune to [TRANSLATION] "confirm" that wearing a condom relieves HIV-positive individuals of their duty to disclose their condition to sex partners. First, this is not the case we must now decide. In the present case, according to the trial judge's findings, a condom was not used during the first sexual encounter between the appellant and the complainant. The issue with which we are here faced is that of a person who has been HIV-positive for several years but whose viral load is undetectable. Second, the evidence on the record essentially concerns the risks associated with disease transmission where an HIV-positive person presents an undetectable viral load following treatments, not those associated with transmitting the disease when a condom is used. Third, it would be bold to [TRANSLATION] "confirm" that which what the Supreme Court has written regarding the use of a condom, since the remarks of Cory J. are conditional and stop short of making a final pronouncement on an issue that was not submitted.

[86] According to *Cuerrier*, insignificant harm or risk of harm (that of catching a cold, for example) would not lead to a conclusion that there was fraud vitiating consent even if one of the partners had hidden his or her poor health from the other. Dishonesty must consequently put the other at risk of "a significant risk of serious harm". Cory J. continues his reasoning by suggesting that prudent use of a condom might lead a judge to find that the risk was minimized to a point where it no longer met the threshold requiring that HIV-positive persons disclose their condition prior to engaging in sex.

[87] According to the Supreme Court, there is definitely a link between the risk represented by the situation and the obligation for the sick person to inform their partner of their condition

[88] I believe the trial judge was highly aware of this because he wrote the following in paragraphs 182 and 183:

> [TRANSLATION]
>
> [182] After all, we are not speaking of the possibility of catching a cold or another benign disease here, but of a disease where failure to disclose "can lead to a devastating illness with fatal consequences".
>
> [183] Having already concluded that a dishonest act had been committed by the accused, to wit, the non-disclosure of her condition, the Court finds that this dishonest act exposed the complainant to a significant risk of serious bodily harm because of unprotected sexual intercourse.

[89] Therefore, it seems wrong to criticize him for not making the link between the risk to health and the duty to disclose even if, in another stage of his reasoning, he seemed to suggest that an HIV-positive person's duty to disclose existed independently from the risk the situation presented for the partner (para. 92 of the judgment under appeal).

[90] The question which must now be answered is whether the trial judge was right to conclude that there existed a sufficiently significant risk of serious harm and that the appellant had a duty to disclose her condition even if the presence of HIV in her blood was undetectable at the time.

[91] What does the evidence disclose on this subject?

[92] The parties called two witnesses concerning HIV transmission risks, but no written report or excerpt of scientific literature was filed into the record.

[93] I would have hoped for more rigorous, specific, and complete evidence on an issue that, after all, was at the heart of the present dispute.

[94] The two witnesses heard were, for the Crown, Dr. Marina Klein, an infectiologist specializing in patient care for HIV-infected individuals and the appellant's attending physician since mid-April 2000, and for the defence, Dr. Jean-Pierre Routy, who attended the appellant from 2004 to 2006 while Dr. Klein was on maternity leave.

[95] According to the evidence, the appellant was HIV-positive during the period of time relevant to the charges, the summer of 2000, but because of the effectiveness of her medication, her viral load was undetectable and thus inferior to fifty copies of the virus per millilitre of blood—the threshold at which the screening test used by Dr. Klein was capable of measuring the viral load in her patient's blood.

[96] I understand from Dr. Klein's testimony that this situation is subject to change based on the patient's response to medication, a response that can vary over time

depending on each patient's particular circumstances. In the appellant's case, I also understand that her viral load had become undetectable toward the end of June 2000 and that this was the case until the spring of 2001, at which time the viral load once again became detectable because of the appellant's intolerance to certain medications. The medication that makes it possible to control the disease has significant side effects and the challenge of triple therapy lies in finding a balance between the medication's capacity to control the virus and the patient's capacity to endure the effects of that medication.

[97] Concerning the risks of HIV transmission, I accept the following:

- That the risk of transmission from female to male is considerably lower than the risk from male to female, that is, 1 in 1000 for unprotected sexual intercourse, regardless of the viral load;

- the risk of transmitting HIV is proportionate to the amount of virus in the blood, semen, or vaginal discharge;

- when the viral load is undetectable, the risk of transmission decreases to 1 in 10,000 (and 1 in 50,000 or 100,0000 when a condom is used). Without being zero, the risk of transmission is then, according to Dr. Klein, [TRANSLATION] "very low, very minimal", or according to Dr. Routy, [TRANSLATION] "very, very low" and [TRANSLATION] "remote" when a condom is used, no greater than the risks associated with driving a car;

- regardless of the viral load, the risk of transmission is never so low that sexual partners can dispense with using a condom;

- all numbers attempting to assess the risk of transmission are estimates;

- HIV is a [TRANSLATION] "potentially fatal" infection;

- HIV is a reportable illness (though anonymous), regardless of whether or not the carrier's viral load is detectable.

[98] I will now return to the question asked earlier. The appellant's viral load was undetectable in the summer of 2000. Consequently, was there a sufficient risk of serious harm requiring that the appellant disclose her condition prior to engaging in unprotected sex with the complainant?

[99] This is a difficult question as it directly relates to risk assessment. For some, the risk of transmitting HIV in this case was negligible, relieving the appellant, from a criminal standpoint, of her duty to disclose her condition prior to obtaining the complainant's consent to sexual relations, whether protected or not. For others, the transmission risk was more than theoretical; it was real. This last group insists on the

irreversible, and potentially fatal, nature of HIV and concludes that the appellant had a duty to disclose her condition in order to obtain true, free, and informed consent from the complainant.

[100] Upon reflection, I believe that in this case, the risk of transmitting HIV was so low that it did not constitute a "significant risk of serious harm" for the complainant and, consequently, the fact that the appellant did not inform him of her condition cannot have vitiated his consent to unprotected sex.

[101] The Crown's position is not without sense, quite the contrary, but it does not reflect the state of the law in Canada since *Cuerrier*. With regard to sexual relations, the existence of fraud only vitiates consent if there is a "significant risk of serious harm", an expression that must be interpreted in light of the gravity of the consequences of a conviction for sexual assault and with the aim of avoiding the trivialization of the offence.

[102] *R. v. Mabior* [2010] M.J., No. 308, 2010 MBCA 93, a recent judgment from the Manitoba Court of Appeal, is to this effect. The unanimous reasons of the Court were written by Steel J.A. She points out that the test set out by the majority in *Cuerrier* is a compromise and that it involves a certain degree of uncertainty, especially since the results of its application will vary over time depending on medical advances.

[103] The test is twofold: the significance of the risk, and the seriousness of the harm.

[104] At what level is the risk sufficiently "significant" and the harm sufficiently "serious" to characterize a particular conduct as criminal?

[105] In the case of HIV, the seriousness of the harm is undisputed. HIV infection remains a serious one, [TRANSLATION] "potentially fatal", according to Dr. Routy, regardless of the brilliant advances made by medicine in recent decades. According to current medical data, HIV infection is irreversible. The drugs developed to fight this disease are efficient, but they come with significant side effects and the challenge of striking a balance between the ability to control the virus and the ability of the patient to tolerate the medication remains.

[106] In *Mabior*, in paragraph 64, Steel J.A. wrote:

> **64** Nonetheless, I do not think it can be disputed that being infected with HIV subjects an individual to serious bodily harm. Although no longer necessarily fatal if treated medically, HIV is an infection that cannot be cured at this time and is a lifelong, chronic infection. For those who become infected, it is a life-altering disease, both physically and emotionally. Individuals must take medications every day, and the condition is potentially lethal if they do not have access to treatment or fail to take the medications. Even with treatment, HIV infection can still lead to devastating illnesses. Moreover, the emotional and psychological impact of dealing with such a disease is, no doubt, overwhelming. In their

> factums, both the accused and the intervener acknowledged that acquiring HIV constitutes serious bodily harm.

[107] I share her opinion.

[108] The significance of the risk is a more difficult question to solve. At which point can one say that the risk is "significant"? 1 in 50,000, 1 in 10.000, 1 in 1000, 1 in 100, 1 in 10? The complete absence of risk is certainly not the test that *Cuerrier* intended us to apply.

[109] The argument claiming that, in light of the seriousness of the harm associated with HIV, any risk of transmission is "significant" cannot be accepted without distorting the test.

[110] For the failure by HIV-positive individuals to disclose their condition to partners to be sanctioned by criminal law, the risk of transmitting the virus must be significant.

[111] In *Mabior*, in paragraphs 68 and 69, Steel J.A. wrote:

> **68** I agree that the nature of the harm can affect the determination of what is considered to be a significant risk. As the magnitude of the harm goes up, the threshold of probability that will be considered significant goes down. However, to have required a complete elimination of risk rather than a significant risk was an error in law.
>
> **69** So one must determine what constitutes a "significant risk" of transmission in any particular case. ...

[112] I agree. Each case must be assessed by the light of its own circumstances.

[113] Again in *Mabior*, in paragraph 113, Steel J.A. wrote the following on the subject:

> **113** Consequently, no comprehensive statement can be made about the impact of low viral loads on the question of risk. Each case will depend on the facts regarding the particular accused, and each case will depend on the state of the medical evidence at the time and the manner in which it is presented in that particular case.

[114] Once again, I agree.

[115] In the present case, according to the evidence on the record, the viral load was undetectable, and remained so for the whole period of time identified in the indictments, that is, June to August of 2000. At the time, the risk of transmitting HIV during unprotected sexual intercourse was 1 in 10,000. Without being zero, the risk was, according to Dr. Klein, [TRANSLATION] "very weak, very minimal", or, according to Dr. Routy, [TRANSLATION] "very, very low".

[116] Also, we must not lose sight of the fact that in this particular case, unprotected sexual intercourse only occurred once before the complainant was informed of the appellant's HIV-positive status.

[117] In this context, I believe that the fact that the appellant did not disclose that she was HIV-positive did not expose the complainant to a "significant risk of serious harm" within the meaning of *Cuerrier*.

[118] The words used by both experts to quantify the risk, that is, [TRANSLATION] "very weak", [TRANSLATION] "very minimal", and [TRANSLATION] "very, very low", are incompatible with the existence of any significant risk whatsoever.

[119] With respect for the trial judge, I believe the Crown did not establish that the complainant's consent to unprotected sexual intercourse, prior to being informed of the appellant's HIV-positive status, was vitiated by fraud.

[120] Consequently, there was no sexual assault and, therefore, no aggravated assault.

[121] In *Mabior*, Steel J.A. concluded her reasons by saying that she understood that for the complainants, any risk of being infected was too much risk, and that they would have wanted to know prior to consenting to sexual intercourse. She adds that this point of view is shared by many, at least from an ethical or moral standpoint, but that, for the time being, this is not the test that the judiciary must apply. As the test was conceived at a time when the fight against HIV was in its infancy, Steel J.A. alluded to the possibility that the Supreme Court might want to revisit the test of "significant risk of serious harm" in order to dispel any inherent uncertainty. I add my voice to hers and note that in light of its numerous social, ethical, and moral ramifications, the initiative of revisiting the entire notion of transmission risks for serious infectious diseases, in the context of Canadian criminal law, should be the responsibility of Parliament.[6]

[122] For these reasons, I would allow the appeal, set aside the judgment under appeal, and acquit the appellant of the two charges brought against her.

JACQUES CHAMBERLAND J.A.

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[6] Regarding the importance of eliminating the uncertainty regarding the case-by-case application of this test and the interest that Parliament may have in studying the question, see Gerry Ferguson, *Failure to Disclose HIV-Positive Status and Other Unresolved Issues in Williams*, (2004) 20 C.R. (6th) 42.