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

Her Majesty The Queen *Appellant*

v.

Henry Gerard Cuerrier *Respondent*

and

**The Attorney General for Ontario,
the British Columbia Civil Liberties Association,
the Canadian AIDS Society, Persons with AIDS
Society of British Columbia and
Canadian HIV/AIDS Legal Network** *Interveners*

Indexed as: R. *v*. Cuerrier

File No.: 25738.

1998: March 27; 1998: September 3.

Present: L'Heureux-Dubé, Gonthier, Cory, McLachlin, Major, Bastarache and Binnie JJ.

on appeal from the court of appeal for british columbia

Criminal law -- Aggravated assault -- Consent -- Fraud -- Non-disclosure of HIV status -- Accused having unprotected sexual relations knowing he was HIV-positive -- Whether non-disclosure of HIV status can constitute fraud vitiating

partner's consent to sexual intercourse -- Criminal Code, R.S.C., 1985, c. C-46, ss. 265(3)(c), 268.

The accused was charged with two counts of aggravated assault pursuant to s. 268 of the *Criminal Code*. Even though he had been explicitly instructed, by a public health nurse, to inform all prospective sexual partners that he was HIV-positive and to use condoms every time he engaged in sexual intercourse, the accused had unprotected sexual relations with the two complainants without informing them he was HIV-positive. Both complainants had consented to unprotected sexual intercourse with the accused, but they testified at trial that if they had known that he was HIV-positive they would never have engaged in unprotected intercourse with him. At the time of trial, neither complainant had tested positive for the virus. The trial judge entered a directed verdict acquitting the accused. The Court of Appeal upheld the acquittals.

Held: The appeal should be allowed and a new trial ordered.

Per Cory, Major, Bastarache and Binnie JJ.: To prove the offence of aggravated assault, the Crown must establish (1) that the accused's acts "endanger[ed] the life of the complainant" (s. 268(1)) and (2) that he intentionally applied force without the consent of the complainant (s. 265(1)(*a*)). The first requirement is satisfied in this case by the significant risk to the lives of the complainants occasioned by the act of unprotected intercourse. It is unnecessary to establish that the complainants were in fact infected with the virus. With respect to the second requirement, it is no longer necessary, when examining whether consent in assault or sexual assault cases was vitiated by fraud under s. 265(3)(*c*), to consider whether the fraud is related to "the nature and quality of the act". The repeal in 1983 of statutory language imposing this requirement and its replacement by a reference simply to "fraud" indicates that

Parliament's intention was to provide a more flexible concept of fraud in assault and sexual assault cases. To that end, principles which have historically been applied in relation to fraud in criminal law can be used with appropriate modifications.

In the context of the wording of s. 265, an accused's failure to disclose that he is HIV-positive is a type of fraud which may vitiate consent to sexual intercourse. The essential elements of fraud in commercial criminal law are dishonesty, which can include non-disclosure of important facts, and deprivation or risk of deprivation. The dishonest action or behaviour must be related to the obtaining of consent to engage in sexual intercourse -- in this case unprotected intercourse. The accused's actions 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. Without disclosure of HIV status there cannot be a true consent. The consent cannot simply be to have sexual intercourse. Rather, it must be consent to have intercourse with a partner who is HIV-positive. The extent of the duty to disclose will increase with the risks attendant upon the act of intercourse. The failure to disclose HIV-positive status can lead to a devastating illness with fatal consequences and, in those circumstances, there exists a positive duty to disclose. 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. To establish that the dishonesty results in deprivation, which may consist of actual harm or simply a risk of harm, the Crown needs to prove that the dishonest act had the effect of exposing the person consenting to a significant risk of serious bodily harm. The risk of contracting AIDS as a result of engaging in unprotected intercourse meets that test. Further, in situations such as this, the Crown is still required to prove beyond a reasonable doubt that the complainant would have refused to engage in unprotected sex with the accused if she had been advised that he was HIV-positive. Therefore, a complainant's consent to sexual intercourse can properly

be found to be vitiated by fraud under s. 265 if the accused's failure to disclose his HIV-positive status is dishonest and results in deprivation by putting the complainant at a significant risk of suffering serious bodily harm.

An approach to the concept of fraud in s. 265(3)(*c*) of the *Code* that includes any deceit inducing consent to contact would bring within the sexual assault provisions of the *Code* behaviour which lacks the reprehensible character of criminal acts and would trivialize the criminal process by leading to a proliferation of petty prosecutions instituted without judicial guidelines or directions. Some limitations to the concept of fraud in that section are necessary. The fraud required to vitiate consent for sexual assault must carry with it the risk of serious harm. This standard is sufficient to encompass not only the risk of HIV infection but also other sexually transmitted diseases which constitute a significant risk of serious harm. However, the standard is not so broad as to trivialize a serious offence.

Where public health endeavours fail to provide adequate protection to individuals like the complainants, the criminal law can be effective. The criminal law has a role to play both in deterring those infected with HIV from putting the lives of others at risk and in protecting the public from irresponsible individuals who refuse to comply with public health orders to abstain from high-risk activities.

Per L'Heureux-Dubé J.: Parliament's intention in passing the 1983 amendments to the *Criminal Code* concerning sexual offences was both to include them within the general scheme of assault, and to modernize and sensitize the law's approach to them. These factors, as well as the specific redrafting of the consent provision support the conclusion that the intention of these amendments was to move away from the traditional approach to fraud as it relates to consent in sexual assault cases. The

objectives of the 1983 assault scheme are to protect people's physical integrity from unwanted physical contact, and to protect people's personal autonomy to decide under what conditions they will consent to be touched. Section 265(3) ensures that when consent is obtained, that consent is a true reflection of a person's autonomous will.

Fraud occurs therefore, when the dishonest act in question induced another to consent to the ensuing physical act, whether or not that act was particularly risky and dangerous. The focus of the inquiry into whether fraud vitiated consent so as to make certain physical contact non-consensual should be on whether the nature and execution of the deceit deprived the complainant of the ability to exercise his or her will in relation to his or her physical integrity with respect to the activity in question. There must be a causal connection between the fraud and the submission to the act. Where fraud is in issue, the impugned act is considered a non-consensual application of force if the Crown proves beyond a reasonable doubt that the accused acted dishonestly in a manner designed to induce the complainant to submit to a specific activity, and that absent the dishonesty, the complainant would not have submitted to the particular activity. The dishonesty of the submission-inducing act would be assessed based on the objective standard of the reasonable person. The Crown must also prove that the accused knew, or was aware, that his or her dishonest actions would induce the complainant to submit to the particular activity.

This interpretation of fraud as it relates to consent has the effect of maximizing the individual's right to determine with whom, and under what conditions, he or she will consent to physical contact with another. This approach is also respectful of the legislative context because it can be applied with equal consistency to all of the assault offences to which the fraud provision relates. An interpretation of fraud that focuses only on the sexual assault context, and which limits it to those situations where

a "significant risk of serious bodily harm" is evident, is unjustifiably restrictive. The *Criminal Code* contains no such differences between sexual assault and other assaults, and to maintain such distinctions would be contrary to the intention of the 1983 amendments.

Per Gonthier and McLachlin JJ.: Since the 1888 decision in *Clarence*, the law has been settled: fraud does not vitiate consent to assault unless the mistake goes to the nature of the act or the identity of the partner. Fraud as to collateral aspects of a consensual encounter, like the possibility of contracting serious venereal disease, does not vitiate consent. In amending the *Criminal Code* in 1983 and adopting a new definition of fraud for assault, including sexual assault, Parliament did not intend to remove the common law limitations. An intent to broaden the crime of assault radically cannot be inferred from Parliament's removal of the words "nature and quality of the act". Rather, Parliament must be supposed to have expected that the courts would continue to read the *Code* provisions on sexual assault against the background of the common law, unless it used language clearly indicating that it was altering the common law. There is nothing in s. 265 to indicate such an intention. This conclusion is supported by s. 45(2) of the *Interpretation Act*, which provides that an amending enactment shall not be deemed to involve a declaration of a change in the existing law. It is also supported by the rule of construction that where, as here, a criminal statute is ambiguous, the interpretation that favours the accused is preferred. As well, the jurisprudence, without exception, supports the view that Parliament intended to retain the common law definition of fraud for assault. Section 265(3) must, therefore, continue to be read in light of the common law.

It is an established rule that courts will effect changes to the common law only where those changes are incremental developments of existing principle and where

the consequences of the change are contained and predictable. Here, the broad changes proposed to the common law concept of fraud for assault do not fall within this test. Both the application of the commercial concept of fraud, limited by an *ad hoc* qualifier that there must be a "significant risk of serious bodily harm", and the application of an unqualified view of fraud which includes any deceit inducing consent to contact amount to abandoning the common law rule and substituting new principles in its place. Not only are the proposed extensions of the law sweeping, they are unprecedented. Moreover, the theoretical difficulties with both proposals are matched by the practical problems they would introduce. Parliament is better equipped than the courts to foresee the complex ramifications of such sweeping change and make the necessary value choices.

It is open, however, for courts to make incremental changes by extending the common law concepts of nature of the act and identity, provided the ramifications of the changes are not overly complex. It is the proper role of the courts to update the common law from time to time to bring it into harmony with the changing needs of society. This applies to the common law concept of fraud in relation to assault. In this case, the current state of the law does not reflect the values of Canadian society. It is unrealistic to think that consent given to sex on the basis that one's partner is HIV-free stands unaffected by blatant deception on that matter. Where a person represents that he or she is disease-free, and consent is given on that basis, deception on that matter goes to the very nature of the sexual act. To say that such a person commits fraud vitiating consent, thereby rendering the contact an assault, seems right and logical. A return to the pre-*Clarence* view of the common law that deception as to venereal disease may vitiate consent would catch the conduct here at issue, without permitting people to be convicted of assault for other inducements, and would draw a clear line between criminal and non-criminal conduct. This proposed extension of the law is relatively narrow, catching only deceit as to

venereal disease where it is established, beyond a reasonable doubt, that there was a high risk of infection and that the defendant knew or ought to have known that the fraud actually induced consent to unprotected sex. This limited change will not have far-reaching, unforeseeable or undesirable ramifications. The common law should thus be changed to permit deceit as to sexually transmitted disease that induces consent to be treated as fraud vitiating consent under s. 265 of the *Criminal Code*.

Cases Cited

By Cory J.

Not followed: *R. v. Clarence* (1888), 22 Q.B.D. 23; *R. v. Ssenyonga* (1993), 81 C.C.C. (3d) 257; *R. v. Petrozzi* (1987), 35 C.C.C. (3d) 528; **considered:** *State v. Lankford*, 102 A. 63 (1917); *Kathleen K. v. Robert B.*, 198 Cal.Rptr. 273 (1984); *R. v. Bennett* (1866), 4 F. & F. 1105, 176 E.R. 925; *R. v. Sinclair* (1867), 13 Cox C.C. 28; **referred to:** *R. v. Thornton*, [1993] 2 S.C.R. 445; *R. v. Jobidon*, [1991] 2 S.C.R. 714; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *Bolduc v. The Queen*, [1967] S.C.R. 677; *R. v. Maurantonio*, [1968] 1 O.R. 145; *In re London and Globe Finance Corp.*, [1903] 1 Ch. 728; *Scott v. Metropolitan Police Commissioner*, [1975] A.C. 819; *R. v. Olan*, [1978] 2 S.C.R. 1175; *R. v. Théroux*, [1993] 2 S.C.R. 5; *R. v. Brasso Datsun (Calgary) Ltd.* (1977), 39 C.R.N.S. 1; *R. v. Zlatic*, [1993] 2 S.C.R. 29; *R. v. Nikal*, [1996] 1 R.C.S. 1013.

By L'Heureux-Dubé J.

Referred to: *R. v. Jobidon*, [1991] 2 S.C.R. 714; *R. v. Burden* (1981), 25 C.R. (3d) 283; *R. v. Théroux*, [1993] 2 S.C.R. 5; *R. v. Hinchey*, [1996] 3 S.C.R. 1128.

By McLachlin J.

Applied: *R. v. Bennett* (1866), 4 F. & F. 1105, 176 E.R. 925; *R. v. Sinclair* (1867), 13 Cox C.C. 28; **not followed:** *R. v. Clarence* (1888), 22 Q.B.D. 23; **referred to:** *R. v. McIntosh*, [1995] 1 S.C.R. 686; *R. v. Deruelle*, [1992] 2 S.C.R. 663; *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108; *R. v. Jobidon*, [1991] 2 S.C.R. 714; *R. v. Petrozzi* (1987), 35 C.C.C. (3d) 528; *R. v. Ssenyonga* (1993), 81 C.C.C. (3d) 257; *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *R. v. Salituro*, [1991] 3 S.C.R. 654; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *R. v. Maurantonio*, [1968] 1 O.R. 145; *R. v. Dee* (1884), 14 L.R. Ir. 468; *R. v. Flattery* (1877), 2 Q.B.D. 410; *Hegarty v. Shine* (1878), 14 Cox C.C. 145; *R. v. Case* (1850), 1 Den. 580, 169 E.R. 381; *R. v. Linekar*, [1995] 3 All E.R. 69; *R. v. Mercer* (1993), 84 C.C.C. (3d) 41.

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Criminal Code, R.S.C., 1985, c. C-46, ss. 221, 265, 268, 273.2(*b*) [en. 1992, c. 38, s. 1], 274 to 278 [formerly R.S.C. 1970, c. C-34, ss. 246.4 to 246.8].

Criminal Code, S.C. 1892, c. 29, ss. 259, 266.

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APPEAL from a judgment of the British Columbia Court of Appeal (1996), 83 B.C.A.C. 295, 136 W.A.C. 295, 141 D.L.R. (4th) 503, 111 C.C.C. (3d) 261, 3 C.R. (5th) 330, [1996] B.C.J. No. 2229 (QL), dismissing the Crown's appeal from the accused's acquittal on two charges of aggravated assault (1995), 26 W.C.B. (2d) 378. Appeal allowed and new trial ordered.

William F. Ehrcke, Q.C., for the appellant.

Douglas J. Stewart and *Todd A. McKendrick*, for the respondent.

Renee M. Pomerance, for the intervener the Attorney General for Ontario.

John G. Dives and *Harbans K. Dhillon*, for the intervener the British Columbia Civil Liberties Association.

Marlys Edwardh and *Richard Elliott*, for the interveners Canadian AIDS Society, Persons with AIDS Society of British Columbia and Canadian HIV/AIDS Legal Network.

The following are the reasons delivered by

1 L'HEUREUX-DUBÉ J. -- This appeal must determine whether the accused's misrepresentation as to his HIV-positive status can nullify the complainants' apparent consent to sexual intercourse so as to bring the sexual activity in question within the

scope of the *Criminal Code* offence of aggravated assault. I have read the different reasons of my colleagues, Justices Cory and McLachlin, and although I agree with the result that they both reach, I disagree with the respective routes that they take to reach that result. In particular, I disagree with McLachlin J.'s conclusion that Parliament did not intend to move away from the strict common law approach to the vitiation of consent by fraud in the assault context. Likewise, although I share Cory J.'s conclusion that Parliament did intend such a change, I cannot agree with the new test that he articulates to determine the additional circumstances in which fraud will vitiate consent.

2 The central issue in this appeal is the interpretation to be given to the word "fraud" as it appears in s. 265(3)(*c*) of the *Criminal Code*, R.S.C., 1985, c. C-46. As "fraud" is not defined in the assault scheme in the *Criminal Code*, it is left to the courts to interpret its meaning as it relates to consent to the application of force. Consistent with established principles of statutory interpretation, the interpretation of "fraud" in s. 265(3)(*c*) must give effect to the intention of Parliament, and it must be informed by an appreciation of the context of the *Criminal Code*, its purposes, and the particular objectives of the assault scheme to which the fraud provision relates.

3 Contrary to McLachlin J.'s interpretation of legislative intent, I agree with Cory J.'s conclusion that the 1983 amendment to the *Criminal Code*, in which the rape and indecent assault provisions were reconstituted as the offence of sexual assault, and the words "false and fraudulent representations as to the nature and quality of the act" were removed, evidences Parliament's intention to move away from the unreasonably strict common law approach to the vitiation of consent by fraud.

4 In further support of Cory J.'s conclusion, it is important also to appreciate the more general objectives of the 1983 amendments. Public pressure, based on

dissatisfaction with the offences of indecent assault and rape, and the legal treatment of these issues, led to the 1983 amendments: C. Boyle, *Sexual Assault* (1984), at pp. 27-29. The amendments were not restricted to merely reclassifying indecent assault and rape as sexual assault, as McLachlin J. implies, but were aimed much more broadly at modernizing and sensitizing the law's approach to sexual offences, which are predominantly perpetrated by men against women. Included in the amendments was a provision abrogating the evidentiary rules relating to the doctrine of recent complaint in sexual assault cases (s. 275), a provision stating that corroboration of a complainant's testimony is no longer required in such cases in order to secure a conviction (s. 274), provisions restricting the evidentiary uses of a complainant's sexual history (s. 276) and sexual reputation (s. 277), and a provision repealing the marital exemption to sexual assault (s. 278).

5 The substantial overhaul that Parliament undertook with the 1983 amendments implies that it was dissatisfied with the traditional approach to sexual offences. This approach had been informed by the common law, as well as previous statutory codifications. In this context of discontent with the law's historical treatment of victims of sexual offences, and in light of the removal of the words "false and fraudulent representations as to the nature and quality of the act", it is clear that Parliament intended to move away from the traditional approach to fraud as it relates to consent in sexual assault offences.

6 The specific redrafting of the consent provision that occurred in 1983 lends further support to the conclusion that Parliament intended that a modified approach be taken to the issue of fraud and consent. Immediately prior to 1983, the general assault provision (R.S.C. 1970, c. C-34, s. 244) read as follows:

> **244.** A person commits an assault when
>
> (*a*) without the consent of another person or with consent, where it is obtained by fraud, he applies force intentionally to the person of the other, directly or indirectly;

The rape provision (s. 143) read as follows:

> **143.** A male person commits rape when he has sexual intercourse with a female person who is not his wife,
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> (*a*) without her consent, or
>
> (*b*) with her consent if the consent
>
> (i) is extorted by threats or fear of bodily harm,
>
> (ii) is obtained by personating her husband, or
>
> (iii) is obtained by false and fraudulent representations as to the nature and quality of the act.

The indecent assault provision (s. 149) read as follows:

> **149.** (1) Every one who indecently assaults a female person is guilty of an indictable offence and is liable to imprisonment for five years.
>
> (2) An accused who is charged with an offence under subsection (1) may be convicted if the evidence establishes that the accused did anything to the female person with her consent that, but for her consent, would have been an indecent assault, if her consent was obtained by false and fraudulent representations as to the nature and quality of the act.

The new general assault provision, which applies to all of the assault offences, has integrated the different means of vitiating consent that were a part of the provisions that it replaced. It reads as follows:

> **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;

. . .

> (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
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> (*a*) the application of force to the complainant or to a person other than the complainant;
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> (*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.

7 An examination of the content of s. 265(3) is particularly significant when compared to the provisions that it replaced. First, it is clear that Parliament intended to expand the circumstances in which consent would be vitiated. Henceforth in the *Criminal Code*'s treatment of assault or sexual offences, both the exercise of authority (s. 265(3)(*d*)), and the application of force, or the threat thereof, to a person other than the complainant (s. 265(3)(*a*) and (*b*)), were to be considered consent-vitiating factors. Implying that Parliament's intent was to permit a broader interpretation of the concept of "fraud" by enacting s. 265(3)(*c*) free of any qualifiers, is entirely consistent with the general thrust of s. 265(3).

8 Second, some significance must be attributed to the new way in which the vitiation of consent is conceived by s. 265(3). The old provisions state that an offence has still been committed even where consent was obtained, if that consent was obtained in a particular manner: i.e. through false and fraudulent representations as to the nature and quality of the act. But s. 265(3) does not state simply that actions are unlawful if consent was obtained under vitiating circumstances. Instead, s. 265(3) says that "no consent is obtained where the complainant submits or does not resist" because of the presence of one of the enumerated factors. (Emphasis added.) In their treatise *Mewett & Manning on Criminal Law* (3rd ed. 1994), at p. 789, A. W. Mewett and M. Manning

suggest that this change is crucial and entails "a fundamental shift in the scope of operative fraud", and is not just a perpetuation of the traditional approach to fraud in sexual assault contexts:

> [W]e should no longer be concerned with whether there is consent and worry about whether it has been vitiated, but whether there has been submission or no resistance and worry about whether the reason for that submission or lack of resistance is fraud. This indicates that the inquiry under the new provisions is not, as it was under the old legislation, into whether there is any factor that negatives any consent *to that act*, but into whether there has been any submission or failure to resist by reason of any fraud. . . . [W]hat is relevant is not whether there has been any fraud going to the nature and quality of the act but whether there has been any fraud by reason of which the victim submitted or failed to resist, and surely those two things are very different. [Emphasis in original.]

9 McLachlin J. dismisses these substantial legislative developments as an "absence of evidence that Parliament discussed or considered the matter" (par. 51), and claims therefore that any modification of the existing common law beyond an incremental change amounts to unwarranted judicial interference with Parliament's assigned role. On the contrary, there is ample evidence to justify the conclusion that Parliament changed the approach to be taken to fraud as it relates to consent in the assault context, thereby permitting the courts to perform their proper function of discerning Parliament's intent in order to interpret this new legislative provision. While Cory J. accepts to a certain extent that Parliament intended to unburden the notion of fraud by removing the qualification that it must relate to the nature and quality of the act, he refuses to consider that the change was as significant and principled as, for example, Mewett and Manning suggest. Accordingly, it is with what Cory J. proposes to do with this newly liberated fraud provision, that I disagree. A further examination of the assault scheme as a whole and the objectives of the *Criminal Code* assault provisions will, in my view, demonstrate the reasons for taking a different approach to the interpretation of s. 265(3)(*c*).

10 Section 265 of the *Criminal Code* describes the general elements that underlie all of the assault offences, including assault, assault causing bodily harm, aggravated assault, sexual assault and aggravated sexual assault. The essence of all forms of assault, as laid out in s. 265, is the intentional, non-consensual application of force, or the threat thereof. "Force" can include any touching, no matter the degree of strength or power applied, and therefore is not only those physical acts designed to maim or cause injury. Where the application of force is consensual, there is no assault (except in limited circumstances such as those explained in *R. v. Jobidon*, [1991] 2 S.C.R. 714, which does not apply to this case). However, in certain situations, s. 265(3) operates to determine when, superficial appearances to the contrary, no consent has been obtained, thus precluding any defence of consent.

11 As can be seen from an examination of the underlying elements of assault, which form the basis of all of the assault provisions, the *Criminal Code* prohibition against the intentional and non-consensual application of force is very broadly constructed. Any unwanted touching by another, no matter how minimal the force that is applied, is criminal. The physical acts prohibited by the assault scheme include not only a punch in the face, or forced sexual intercourse at knife-point, but also placing one's hand on the thigh of the person sitting adjacent on the bus: see *R. v. Burden* (1981), 25 C.R. (3d) 283 (B.C.C.A.). Clearly, the purpose of the assault scheme is much broader than just the protection of persons from serious physical harm. The assault scheme is aimed more generally at protecting people's physical integrity.

12 Relatedly, the assault scheme is also about protecting and promoting people's physical autonomy, by recognizing each individual's power to consent, or to withhold consent, to any touching. The meaningfulness of the right to consent, and thus of the right to stipulate under which conditions a person wishes to be touched, is further

protected by s. 265(3). In general, s. 265(3) lists factors that have the effect of making a person's consent to the application of force meaningless. Where those factors are present, a true expression of a complainant's autonomous will cannot be obtained. Parliament has recognized with s. 265(3), that in order to maximize the protection of physical integrity and personal autonomy, only consent obtained without negating the voluntary agency of the person being touched, is legally valid.

13 Given these objectives of the *Criminal Code* assault scheme, and the important protections inherent in the individual's power to consent or deny consent, how should "fraud" be interpreted in relation to consent in s. 265(3)(*c*)? When interpreting s. 265(3)(*c*), it is important to keep in mind that it applies to consent to all forms of assault, not, for example, just sexual assault, or assault where there is potential or actual serious physical injury. The interpretation of the fraud provision, therefore, should be based on principles that are consistent across the different assault contexts. In this respect, I must expressly disagree with the approach taken by my colleague, Cory J. In my view, his interpretation of the fraud provision is inconsistent with such a principled approach to statutory interpretation.

14 Cory J. states that, apart from the traditional common law approach where the fraud relates to "the nature and quality of the act", fraud will only vitiate consent in the sexual assault context where an accused's objectively dishonest act has "the effect of exposing the person consenting to a significant risk of serious bodily harm" (para. 128 (emphasis added)). Notwithstanding the fact that the accused in this appeal has been charged with aggravated assault and not sexual assault or aggravated sexual assault, in my view, my colleague's test has the effect of creating a different interpretation of "fraud" depending on the sexual nature of the particular offence with which an accused has been charged. In my view, my colleague's interpretation has the effect of undoing

what Parliament accomplished with its 1983 amendment of the *Criminal Code*: it re-introduces, in the sexual assault context, artificial limitations as to when fraud will negate consent to physical contact. With respect, I cannot accept the correctness of such limitations, nor support reverting, once again, to the singular and differential treatment of sexual assault.

15 As I have explained, the assault scheme is very broad in its objectives to protect people's physical integrity from unwanted physical contact, and to protect people's personal autonomy to decide under what conditions they will consent to be touched. Section 265(3) provides further protection to ensure that when consent is obtained, that consent is a true reflection of a person's autonomous will. Where fraud is concerned, Cory J. would limit its consent-vitiating effects to the traditional common law approach, and to those assault contexts where there is a "significant risk of serious bodily harm". But that which is integral to a principled interpretation of fraud is its causal effect on consent, and the objectives of the assault scheme. Accordingly, it is appropriate to define fraud in terms of its relationship to consent, as well as to any and all forms of assault, and not just in terms of the proximity and severity of the risks associated with the acts for which consent is being given.

16 In my view, considering the wording of s. 265(3)(*c*), as well as the objectives and context of the *Criminal Code* and the assault scheme, fraud is simply about whether the dishonest act in question induced another to consent to the ensuing physical act, whether or not that act was particularly risky and dangerous. The focus of the inquiry into whether fraud vitiated consent so as to make certain physical contact non-consensual should be on whether the nature and execution of the deceit deprived the complainant of the ability to exercise his or her will in relation to his or her physical integrity with respect to the activity in question. As Mewett and Manning, *supra*, explain at p. 789:

"There must be a causal connection between the fraud and the submission" to the act. Where fraud is in issue, the Crown would be required to prove beyond a reasonable doubt that the accused acted dishonestly in a manner designed to induce the complainant to submit to a specific activity, and that absent the dishonesty, the complainant would not have submitted to the particular activity, thus considering the impugned act to be a non-consensual application of force. See C. Boyle, "The Judicial Construction of Sexual Assault Offences", in J. V. Roberts and R. M. Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (1994), 136, at p. 146; and Great Britain, Law Commission Consultation Paper No. 134, *Criminal Law: Consent and Offences against the Person* (1994), at pp. 51-52. The dishonesty of the submission-inducing act would be assessed based on the objective standard of the reasonable person. The Crown also would be required to prove that the accused knew, or was aware, that his or her dishonest actions would induce the complainant to submit to the particular activity. For a similar articulation of the elements of fraud, see *R. v. Théroux*, [1993] 2 S.C.R. 5, at pp. 25-26.

17 In considering this case, the following facts would be sufficient to establish the objective dishonesty of the accused's actions, and to infer that the accused knew that his actions induced the complainants' submission to unprotected sex: the accused knew that he was HIV-positive, he was aware of the contagious and life-threatening nature of the disease, he was advised by public health nurses to always wear a condom and inform his partners of his HIV-positive status, he expressed fears that disclosure of his status to potential partners would end his sex-life, he lied about his HIV-positive status to one of the complainants, and he failed to disclose it to the other complainant in circumstances that called for its disclosure.

18 In my view, this interpretation of fraud as it relates to consent has the effect of maximizing the individual's right to determine by whom, and under what conditions, he or she will consent to physical contact by another. This approach is also respectful of the legislative context because it can be applied with equal consistency to all of the assault offences to which the fraud provision relates.

19 An interpretation of fraud that focuses only on the sexual assault context, and which limits it only to those situations where a "significant risk of serious bodily harm" is evident, is unjustifiably restrictive. Such a particularization and limitation is nowhere present in the assault scheme, because Parliament removed any qualifications to the fraud provision as it relates to sexual assault. It must be noted that where sexual assault is concerned, those receiving the protection of the *Criminal Code* are overwhelmingly women. Limiting the definition of fraud in the sexual assault context in the way that Cory J. proposes is to potentially fall into the same trap as those people who believe that rape in the absence of physical "violence", where the complainant just froze and did not fight back or was unconscious, is not a serious crime. The essence of the offence, as I have stated, is not the presence of physical violence or the potential for serious bodily harm, but the violation of the complainant's physical dignity in a manner contrary to her autonomous will. That violation of physical dignity and personal autonomy is what justifies criminal sanction, and always has, irrespective of the risk or degree of bodily harm involved. Why should fraud be defined more broadly in the commercial context, which is designed to protect property interests, than it is for sexual assault, which is one of the worst violations of human dignity?

20 Finally, my colleagues' examples of the types of trivial conduct that will be caught by this approach are grossly overstated. Cory J. downplays the limiting effect of the fact that a causal connection must be proven, to the imposing criminal standard,

between the accused's dishonest act and his intention to induce the submission of the complainant. For instance, a mere misrepresentation as to a man's professional status, without proof that the man was aware that the complainant was submitting to sexual intercourse with him by reason of his lie, would not constitute sexual assault. See Mewett and Manning, *supra*, at pp. 789-90. Whether a complainant actually submitted to sexual intercourse by reason of an accused's fraud will necessarily depend on an examination of all of the factors, and can only be decided on a case-by-case basis.

21 McLachlin J.'s predictions are even more cataclysmic. Contrary to her assertion in para. 52, it is not "any deception or dishonesty" that will be criminalized by this approach. McLachlin J. argues that based on the approach to fraud that I have explained, henceforward the "implied consent inherent in the social occasion -- the handshake or social buss -- are transformed by fiat of judicial pen into crimes". But my approach to fraud will in no way catch such innocent conduct. The very notion of implied consent to touching that is inherent in the social occasion, and indeed, inherent in so many aspects of day to day life, is based on an understanding of social realities and a need for tolerance of a reasonable degree of incidental and trivial contact. Whether or not a man is wearing a false moustache or a woman, alluring make-up, it is inconceivable that the Crown, were it foolish enough to prosecute a case of assault by handshake or social buss, would be capable of establishing beyond a reasonable doubt both that a complainant only consented to the physical contact by reason of the deception, and that the deception was employed with the knowledge and intention of inducing the submission of the complainant. In addition, the principle of *de minimis non curat lex*, that "the law does not concern itself with trifles" might apply in such a case: see *R. v. Hinchey*, [1996] 3 S.C.R. 1128, at para. 69, *per* L'Heureux-Dubé J. Furthermore, I cannot accept McLachlin J.'s criticism that the test suffers from imprecision and uncertainty due to the fact that the dishonesty of the act is to be assessed based on an

objective standard. A majority of this Court has already accepted such an approach to the assessment of the dishonesty of the act in the criminal fraud context: see *Théroux, supra,* at p. 16, *per* McLachlin J.

22 Since Parliament has, through the assault provisions, granted broad protection to individual autonomy and physical integrity in order to guard everyone's right to decide under what conditions another may touch them, it is not for this Court to narrow this protection because it is afraid that it may reach too far into the private lives of individuals. One of those private lives presumably belongs to a complainant, whose feeling of having been physically violated, and fraudulently deprived of the right to withhold consent, warrants the protection and condemnation provided by the *Criminal Code*.

23 Subject to these reasons, I agree with my colleagues' disposition to allow the appeal and order a new trial.

The reasons of Gonthier and McLachlin JJ. were delivered by

MCLACHLIN J. --

I. Introduction

24 The respondent Cuerrier stands charged with aggravated assault contrary to s. 268 of the *Criminal Code,* R.S.C., 1985, c. C-46. The charges were based on allegations that Cuerrier had unprotected sexual intercourse with two women whom he misled regarding his HIV- positive status. The Crown alleges that this constituted fraud

that vitiated the women's consent and converted consensual sexual intercourse into assault.

25 For more than a century, the law has been settled; fraud does not vitiate consent to assault unless the mistake goes to the nature of the act or the identity of the partner. Fraud as to collateral aspects of a consensual encounter, like the possibility of contracting serious venereal disease, does not vitiate consent. On this appeal the Crown asks us to change this settled law. We are asked to rule that deceiving one's partner about the fact that one has HIV vitiates consent, converting consensual sex into assault.

26 My colleagues L'Heureux-Dubé J. and Cory J. propose new rules which would criminalize dishonestly obtained sex in a wide variety of circumstances. I sympathize with their goals. The venereal disease of HIV and the AIDS it causes are the cause of terrible suffering and death. The wrong done to a person who is deceived into having unprotected sexual intercourse by a lie about HIV status can be inestimable. However, I respectfully find the approaches they advocate are too broad, falling outside the power of the courts to make incremental changes to the common law. I propose a narrower extension limited to failure to disclose venereal disease.

II. The Legislation

27 *Criminal Code*, R.S.C., 1985, c. C-46

> **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;
>
> . . .
>
> (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.

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.

III. The Issues

28 The first issue in this case is whether Parliament, in enacting s. 265(3) of the *Criminal Code*, intended to criminalize deceptive sexual conduct. If it did not, a second issue arises: whether the change sought is one the courts may properly make. I will consider each issue in turn.

IV. Analysis

1. *Did Parliament Intend to Change the Law of Fraud for Sexual Assault*?

29 My colleagues L'Heureux-Dubé J. and Cory J. conclude that Parliament intended to remove the common law limitations on fraud for assault by amending s. 265(3) of the *Criminal Code* in 1983. With respect, I cannot agree.

30 Until 1983, the *Criminal Code* provided that consent to sexual intercourse was vitiated where it was obtained "by false and fraudulent representations as to the

nature and quality of the act". This reflected the common law which confined fraud in assault to the nature of the act (i.e., was it sexual, or something else) and the identity of the partner: J. Smith and B. Hogan, *Criminal Law* (4th ed. 1978), at p. 355; *Halsbury's Laws of England* (4th ed. 1990), vol. 11(1), at para. 494; see also *R. v. Clarence* (1888), 22 Q.B.D. 23.

31 In 1983 Parliament amended the *Criminal Code*. The old offences of rape and indecent assault were redefined as sexual assault. A new consent provision, applying to all types of assault, sexual and non-sexual, was adopted.

32 The question is whether by making this change, Parliament intended to broaden the offence of assault to make it a crime for a person who has a serious venereal disease like HIV to engage in unprotected sexual intercourse without disclosing the disease to his or her partner.

33 In support of the argument that Parliament intended a radical departure from the traditional common law definition of fraud in assault offences, the appellant raises the wording of s. 265(3)(*c*) (fraud *simpliciter*) and the arbitrariness of limiting fraud to the nature and quality of the act. Against the argument, the respondent argues that the change in the wording is explained by the intent to group all assaults under one concept; that in the absence of clear words it cannot be presumed that Parliament intended to radically broaden the offence of assault; and that there are strong policy reasons, historically and today, for limiting fraud in the context of assault and sexual assault, making it highly improbable that Parliament would have changed the law without debating the issue.

34 I agree with the courts below (indeed all courts that have hitherto considered the issue since the adoption of the new definition of fraud), that the submission that Parliament intended to radically broaden the crime of assault by the 1983 amendments must be rejected. I approach the matter from the conviction that the criminalization of conduct is a serious matter. Clear language is required to create crimes. Crimes can be created by defining a new crime, or by redefining the elements of an old crime. When courts approach the definition of elements of old crimes, they must be cautious not to broaden them in a way that in effect creates a new crime. Only Parliament can create new crimes and turn lawful conduct into criminal conduct. It is permissible for courts to interpret old provisions in ways that reflect social changes, in order to ensure that Parliament's intent is carried out in the modern era. It is not permissible for courts to overrule the common law and create new crimes that Parliament never intended.

35 Against this background, I turn to what Parliament intended when it adopted a new definition of fraud for assault, including sexual assault, in 1983. Can the intent to radically broaden the crime of assault be inferred from the fact that Parliament omitted the old words "nature and quality of the act"? I think not.

36 First, the phrase "nature and quality of the act" did not state the law as it existed even before 1983. The criminal law of assault is an amalgam of the codified provisions of the *Criminal Code* and the uncodified common law. Prior to 1983, the *Code*'s reference to indecent assault described the relevant concept of fraud as fraud as to the "nature and quality of the act". It said nothing about "identity". Yet Canadian courts for over a hundred years accepted that fraud as to identity could negate consent, on the basis of the rule at common law. In 1983 Parliament removed the reference in the *Code* to the other case where the common law recognized fraud vitiating consent to sexual intercourse -- fraud as to the nature and quality of the act. The reasonable

inference is that Parliament supposed that just as the courts had read "identity" into the criminal law of sexual assault even though the *Code* did not mention it, so the courts would continue to read "nature and quality of the act" into the law even though it was not mentioned. To put it another way, Parliament must be supposed to have expected that the courts would continue to read the *Code* provisions on sexual assault against the background of the common law, unless it used language clearly indicating that it was altering the common law. There is nothing in s. 265 of the *Criminal Code* to indicate an intention to remove the common law limitations on fraud for assault.

37 This conclusion is supported by the *Interpretation Act*, R.S.C., 1985, c. I-21, s. 45(2), which provides that an amending enactment shall not be deemed to involve a declaration of a change in the existing law. Section 45(2) reads:

> **45.** . . .
>
> (2) The amendment of an enactment shall not be deemed to be or to involve a declaration that the law under that enactment was or was considered by Parliament or other body or person by whom the enactment was enacted to have been different from the law as it is under the enactment as amended.

As such, the 1983 amendment of the assault provisions, which removed the qualifier "nature and quality of the act" from the type of fraud sufficient to vitiate consent, should not, in the absence of evidence to the contrary, be taken as a change in the law of assault.

38 This conclusion is also supported by the rule that where a criminal statute is ambiguous, the interpretation that favours the accused is preferred: *R. v. McIntosh*, [1995] 1 S.C.R. 686, at paras. 29 and 60. If the intention of Parliament can be ascertained with reasonable precision, this rule has no place: *R. v. Deruelle*, [1992] 2 S.C.R. 663, at pp. 676-77. However, where, as in this case, real ambiguities are found,

or doubts of substance arise, this established rule of construction applies*: Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108, at p. 115.

39 The jurisprudence, without exception, supports the view that Parliament intended to retain the common law definition of fraud for assault. This Court had this to say on the new wording of the fraud provision in *R. v. Jobidon*, [1991] 2 S.C.R. 714, at p. 739:

> Parliament did not set foot into new territory when listing the four vitiating factors in s. 265(3). On the contrary it will be seen that, for the most part, that list merely concretized, and made more explicit, basic limits on the legal effectiveness of consent which had for centuries formed part of the criminal law in England and in Canada. Their expression in the *Code* did not reflect an intent to remove the existing body of common law which already described those limitations and their respective scope. The *Code* just spelled them out more clearly, in a general form. [Emphasis added.]

The issue in *Jobidon* was whether the courts could supplement the list of factors capable of vitiating consent in s. 265(3) on public policy grounds recognized at common law but not reflected in the wording of the *Code*. The Court held that s. 265(3) was not exhaustive and must be read together with the common law. *Jobidon* stands for the established proposition that the common law can supplement the provisions of the *Code*. It also stands for the proposition that the *Criminal Code*, s. 265(3), is a restatement of the common law and not an expansion of it. It does not support the view that the common law definition of fraud in the context of assault can be set aside in favour of the expansive definition of fraud used in the commercial context.

40 Other courts that have considered the meaning of "fraud" under s. 265(3) since the 1983 amendments have concluded that Parliament cannot be taken to have intended to change the existing law of fraud in assault: *R. v. Petrozzi* (1987), 35 C.C.C. (3d) 528 (B.C.C.A.); *R. v. Ssenyonga* (1993), 81 C.C.C. (3d) 257 (Ont. Ct. (Gen. Div.)).

All the judges in the courts below who considered this issue in this case were unanimous in the same view.

41 I conclude that the 1983 amendments to the *Criminal Code* did not oust the common law governing fraud in relation to assault. The common law continues to inform the concept of fraud in s. 265(3)(*c*) of the *Criminal Code.*

2. *Is it Appropriate for this Court to Change the Law*?

42 Parliament has not changed the common law definition of fraud in relation to assault. This leaves the question of whether this Court should do so.

43 This Court has established a rule for when it will effect changes to the common law. It will do so only where those changes are incremental developments of existing principle and where the consequences of the change are contained and predictable: *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *R. v. Salituro*, [1991] 3 S.C.R. 654; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210. As Iacobucci J. stated in *Salituro*, at p. 670:

> . . . in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

The question is whether the change to the common law sought in this case falls within this test.

(a) The Courts Should Not Make the Broad Extensions to the Law of Sexual Assault Proposed by L'Heureux-Dubé J. and Cory J.

44 In my respectful view, the broad changes proposed by L'Heureux-Dubé J. and Cory J. do not constitute an incremental development of this common law. Rather, they amount to abandoning the common law rule and substituting new principles in its place.

45 Both L'Heureux-Dubé J. and Cory J. start from the premise that Parliament in 1983 intended to repeal the common law definition of fraud for assault. They divide sharply, however, on what Parliament intended to put in its place. Cory J. says Parliament intended the definition of commercial fraud to apply, subject to limitations. L'Heureux-Dubé J., by contrast, says that Parliament intended any deceit inducing consent to suffice. This divergence illustrates that when judges depart from the rule of incremental change to the common law, they face not only the charge that they are stepping outside the proper constitutional role of the courts, but also the practical problem of finding a new principle to put in place of the existing common law rule. Often the new principle is difficult to find and when found, proves to be an ill fit. This leads to complex ramifications, both on the theoretical and practical level. This case is no exception.

46 The commercial concept of fraud endorsed by Cory J. in principle vitiates consent to contact whenever there is: (1) deception; resulting in, (2) deprivation. The

element of deception is satisfied by the failure to disclose. The element of deprivation is satisfied by exposure to the risk of harm.

47 The problem with this theory is that failure to disclose virtually any known risk of harm would potentially be capable of vitiating consent to sexual intercourse. The commercial fraud theory of consent offers no principled rationale for allowing some risks to vitiate consent to sex but excluding others. For example, pregnancy may be regarded as a deprivation in some circumstances, as may be the obligation to support a child. It follows that lying about sterility or the effectiveness of birth control may constitute fraud vitiating consent. To take another example, lies about the prospect of marriage or false declarations of affection inducing consent, carry the risk of psychological suffering, depression and other consequences readily characterized as deprivation. 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.

48 Cory J., recognizing the overbreadth of the theory upon which he founds his reasons, attempts to limit it by introducing an *ad hoc* qualifier: there must be a "significant risk of serious bodily harm" before consent is vitiated. This limitation, far from solving the problem, introduces new difficulties. First, it contradicts the general theory that deception coupled with risk of deprivation suffices to vitiate consent. A new theory is required to explain why some, but not all kinds of fraud, convert consensual sex into assault. Yet none is offered. Second, it 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"? Can a bright line be drawn between psychological harm and bodily harm, when the former may lead to depression, self-destructive behaviour and in extreme cases suicide? The criminal law must be certain. If it is uncertain, it cannot deter inappropriate conduct and loses its *raison d'être*. Equally serious, it becomes unfair. People who believe they are acting within the law may find themselves prosecuted, convicted, imprisoned and branded as criminals. Consequences as serious as these should not turn on the interpretation of vague terms like "significant" and "serious". Finally, Cory J.'s limitation of the new crime to significant and serious risk of harm amounts to making an *ad hoc* choice of where the line between lawful conduct and unlawful conduct should be drawn. This Court, *per* Lamer C.J., has warned that making *ad hoc* choices is properly the task of the legislatures, not the courts: *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 707.

49 Another cause for concern is that the extension of the criminal law of assault proposed by Cory J. represents a curtailment of individual liberty sufficient to require endorsement by Parliament. 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.

50 Another way of putting the same point is to say that Cory J.'s approach omits the requirement that the fraud must induce the consent. At common law, fraud as to the nature of the act vitiates consent only if it induces the consent. By saying that non-disclosure itself suffices to vitiate consent, the causal requirement is eliminated. The defendant is guilty even in cases where the complainant would have consented anyway. This leads to the further problem that there would appear to be no deprivation, as required for commercial fraud, on which Cory J.'s theory is supposedly founded. Criminal liability is generally imposed only for conduct which causes injury to others or puts them at risk of injury. Yet on Cory J.'s theory of criminal liability for sex without disclosure, criminal liability could be imposed for conduct that is causally unrelated to harm or risk of harm. This in turn creates problems with respect to *mens rea* and raises the possibility that the new crime may violate the *Canadian Charter of Rights and Freedoms*.

51 L'Heureux-Dubé J. correctly identifies the theoretical and practical indefensibility of introducing commercial notions of fraud and then limiting them on an *ad hoc* basis. Having concluded that Parliament intended to repeal the common law rule that fraud vitiating consent in assault is limited to the nature and quality of the act, she endorses a new, unqualified view of fraud as any deceit inducing consent to contact. This new definition of fraud is said to be based on the "objectives and context of . . . the assault scheme" under the *Criminal Code*, despite the absence of evidence that Parliament discussed or considered the matter. On the assumption that Parliament intended to broaden the provisions -- indeed to throw them wide open -- it is concluded that "fraud is simply about whether the dishonest act in question induced another to consent to the ensuing physical act" (para. 16).

52 The first difficulty with this position is that it involves an assumption of Parliamentary intent to change the common law of fraud for assault that is not, as I argue earlier, valid. The second difficulty is that this approach vastly extends the offence of assault. Henceforward, any deception or dishonesty intended to induce consent to touching, sexual or non-sexual, vitiates the consent and makes the touching a crime. Social touching hitherto rendered non-criminal by the implied consent inherent in the social occasion -- the handshake or social buss -- are transformed by fiat of judicial pen into crimes, provided it can be shown that the accused acted dishonestly in a manner designed to induce consent, and that the contact was, viewed objectively, induced by deception. No risk need be established, nor is there any qualifier on the nature of the deception. Will alluring make-up or a false moustache suffice to render the casual social act criminal? Will the false promise of a fur coat used to induce sexual intercourse render the resultant act a crime? The examples are not frivolous, given the absence of any qualifiers on deception. A third difficulty is that this approach, like that of Cory J., suffers from imprecision and uncertainty. The test is said to be objective. Yet what constitutes deception is by its very nature highly subjective. One person's blandishment is another person's deceit, and on this theory, crime.

53 Not only is the proposed extension of the law sweeping, it is unprecedented. We have been told of no courts or legislatures in this or other countries that have gone so far. To the extent that Canadian law has criminalized deception, it has done so only where the deception results in actual harm or a risk of harm. The rule proposed by L'Heureux-Dubé J. would eliminate the need to show risk of harm and make deception alone the condition of criminal responsibility for sexual contact. Overbreadth on this scale cannot be cured by administrative action. Prosecutorial deference cannot compensate for overextension of the criminal law; it merely replaces overbreadth and

uncertainty at the judicial level with overbreadth and uncertainty at both the prosecutorial level and the judicial level.

54 The theoretical difficulties with both proposals put forward by my colleagues are matched by the practical problems they would introduce. The changes proposed are of great consequence. The law does not presently make it an offence to engage in sexual contact without disclosing to one's partner possible risks, as Cory J. proposes. Nor does it make every deception inducing consent to physical contact a crime, as L'Heureux-Dubé J. proposes. What we know about the spread of HIV and other venereal diseases suggests that thousands of people engage in just such conduct every day. Henceforward, if the sweeping changes suggested are accepted, these people will be criminals, subject to investigation, prosecution and imprisonment. Literally millions of acts, which have not to date been regarded as criminal, will now be criminalized. Individual liberty will be curtailed. Police, prosecutors, the courts and the prisons will be dramatically affected. Such a change, if it is to be made, is best made by Parliament after full debate as to its ramifications and costs.

55 The broad extensions of the law proposed by my colleagues may also have an adverse impact on the fight to reduce the spread of HIV and other serious sexually transmitted diseases. Public health workers argue that encouraging people to come forward for testing and treatment is the key to preventing the spread of HIV and similar diseases, and that broad criminal sanctions are unlikely to be effective: J. D. McGinnis, "Law and the Leprosies of Lust: Regulating Syphilis and AIDS" (1990), 22 *Ottawa L. Rev.* 49, at p. 59. Criminalizing a broad range of HIV related conduct will only impair such efforts. Moreover, because homosexuals, intravenous drug users, sex trade workers, prisoners, and people with disabilities are those most at risk of contracting HIV, the burden of criminal sanctions will impact most heavily on members of these already

marginalized groups. The material before the Court suggests that a blanket duty to disclose may drive those with the disease underground: see, for example, R. Elliot, *Criminal Law and HIV/AIDS: Final Report* (March 1997); J. M. Dwyer, "Legislating AIDS Away: The Limited Role of Legal Persuasion in Minimizing the Spread of the Human Immunodeficiency Virus" (1993), 9 *J. Contemp. Health L. & Pol'y* 167; S. V. Kenney, "Criminalizing HIV Transmission: Lessons from History and a Model for the Future" (1992), 8 *J. Contemp. Health L. & Pol'y* 245; T. W. Tierney, "Criminalizing the Sexual Transmission of HIV: An International Analysis" (1992), 15 *Hastings Int'l & Comp. L. Rev.* 475.

56 These considerations suggest that the broad changes to the criminal law proposed by L'Heureux-Dubé J. and Cory J. 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.

57 I conclude that, attractive as the blanket criminalization of non-disclosure of risk or deceit inducing consent to contact may seem at first blush, the theoretical and practical difficulties involved in extensions of this magnitude are prohibitive of judicial action. The version of the new offence adopted by Cory J. violates the theory upon which it is erected; if consent is revoked by fraud in the commercial sense of deception producing risk of deprivation, there is no basis for limiting the vitiation of consent to significant risk of serious bodily harm, whatever that may mean. The version advocated by L'Heureux-Dubé J. avoids this logical pitfall, but at the price of overextension. Neither version, with respect, provides a satisfactory foundation for the attribution of

criminal responsibility, and both versions would introduce changes with serious ramifications for individuals, law enforcement agencies and those struggling in the war against HIV. Such changes fall outside the proper sphere of judicial law reform.

(b) A Smaller, Incremental Change Can Be Made

58 I have concluded that the broad-based proposals for changing the law put forward by my colleagues go much further than the incremental change to the common law permitted to courts. However, it does not follow that all change to the law of assault is barred. It is open to courts to make incremental changes by extending the common law concepts of nature of the act and identity, provided the ramifications of the changes are not overly complex. Before the appeal can be rejected, it is necessary to consider whether this can be done.

59 It is the proper role of the courts to update the common law from time to time to bring it into harmony with the changing needs and mores of society: *Salituro, supra*. This applies to the common law concept of fraud in relation to assault. In *R. v. Maurantonio*, [1968] 1 O.R. 145, a majority of the Ontario Court of Appeal held that a man who secured sexual contact by falsely holding himself out to be a doctor had committed a fraud as to the nature and quality of the act. In rejecting a strict interpretation of the phrase "nature and quality of the act" found in the *Criminal Code*, Hartt J. (*ad hoc*) stated, at p. 153:

> . . . the words "nature and quality of the act" . . . should not be so narrowly construed as to include only the physical action but rather must be interpreted to encompass those concomitant circumstances which give meaning to the particular physical activity in question.

60 In order to determine the ambit of the common law on consent to contact, and in particular sexual contact, it is necessary to consider the history of the common law on consent in the context of assault and the origin of the phrase "nature of the act".

61 Prior to *Clarence*, *supra*, the common law held that deceit as to the fact that one had a venereal disease was capable of vitiating consent to intercourse. *R. v. Bennett* (1866), 4 F. & F. 1105, 176 E.R. 925, and *R. v. Sinclair* (1867), 13 Cox C.C. 28, had established that consent to sexual intercourse could be vitiated by the failure to disclose infection with a venereal disease. In *Bennett*, at p. 925 E.R., Willes J. stated:

> But although the girl may have consented to sleep, and therefore to have connexion with her uncle, yet, if she did not consent to the aggravated circumstances, *i.e.*, to connexion with a diseased man, and a fraud was committed on her, the prisoner's act would be an assault by reason of such fraud. An assault is within the rule that fraud vitiates consent, and therefore, if the prisoner, knowing that he had a foul disease, induced his niece to sleep with him, intending to possess her, and infected her, she being ignorant of his condition, any consent, which she may have given, would be vitiated, and the prisoner would be guilty of an indecent assault.

In *Sinclair*, at p. 29, Shee J. applied *Bennett* and instructed the jury:

> If he knew that he had such a disease, and that the probable consequence would be its communication to the girl, and she in ignorance of it consented to the connection, and you are satisfied that she would not have consented if she had known the fact, then her consent is vitiated by the deceit practised upon her, and the prisoner would be guilty of assault. . . .

62 In addition to deceit as to venereal disease, the common law recognized deceit as to identity (*R. v. Dee* (1884), 14 L.R. Ir. 468) and deceit as to whether the act was a medical procedure as opposed to a sexual act, as being capable of vitiating consent to sexual intercourse (*R. v. Flattery* (1877), 2 Q.B.D. 410).

63 *Bennett* and *Sinclair* were disapproved of in *Hegarty v. Shine* (1878), 14 Cox C.C. 145. *Hegarty* involved a civil action for assault and breach of promise of marriage.

After having intercourse out of wedlock for a year and becoming pregnant, the plaintiff discovered she and her baby had contracted syphilis from the defendant, who had concealed his condition. The Court of Appeal dismissed the plaintiff's claim on the ground of *ex turpi causa* because they deemed the acts to be immoral and illegal. In particular, the judges held that there was no duty to disclose in such an immoral relation. Ball C. observed, at p. 147:

> We are not dealing with deceit as to the nature of the act to be done, such as occurred in the case cited in argument, of the innocent girl who was induced to believe that a surgical operation was being performed. There was here a lengthened cohabitation of the parties, deliberate consent to the act or acts out of which the cause of action has arisen. If deceit by one of them as to the condition of his health suffices to alter the whole relation in which they otherwise were to each other, so as to transform the intercourse between them into an assault on the part of the defendant, why should not any other deceit have the same effect? Suppose a woman to live with her paramour under and with a distinct and reiterated promise of marriage not fulfilled, nor, it may be, intended to be fulfilled, is every separate act of intercourse an assault? . . . No one, I think, would be prepared to answer these questions in the affirmative.

64 The majority in *Clarence*, *supra*, noting these comments in *Hegarty*, overruled the cases that had held that deceit as to venereal disease could vitiate consent. Venereal disease, in the majority's view, did not go to the nature of the act. That phrase was confined to whether the act was sexual or non-sexual, as in the "medical act" cases: *Flattery*, *supra*; *R. v. Case* (1850), 1 Den. 580, 169 E.R. 381. Stephen J. expressed concern that once the law ventured beyond the type of act (i.e., sexual or non-sexual) and the identity of the perpetrator, no clear line could be drawn between deceptions which should not properly engage the criminal law, and deceptions which could. In essence, the majority's view has stood as law ever since. When Parliament enacted the *Criminal Code* in 1892, the drafters added "quality" of the act to "nature" in describing the type of fraud capable of vitiating consent: *Criminal Code*, S.C. 1892, c. 29, ss. 259 and 266.

However, it is unclear what, if anything, that this added to the original common law phrase “nature of the act”.

65 Against this background, I return to the conditions for court-made change. The basic precondition of such change is that it is required to bring the law into step with the changing needs of society. This established, the change must meet the condition of being an incremental development of the common law that does not possess unforeseeable and complex ramifications.

66 In the case at bar, I am satisfied that the current state of the law does not reflect the values of Canadian society. It is unrealistic, indeed shocking, to think that consent given to sex on the basis that one’s partner is HIV-free stands unaffected by blatant deception on that matter. To put it another way, few would think the law should condone a person who has been asked whether he has HIV, lying about that fact in order to obtain consent. To say that such a person commits fraud vitiating consent, thereby rendering the contact an assault, seems right and logical.

67 Prior to *Clarence*, the common law recognized that deception as to sexually transmitted disease carrying a high risk of infection, constituted fraud vitiating consent to sexual intercourse. Returning the law to this position would represent an incremental change to the law. If it was an increment to reverse the previous common law rule that deceit as to venereal disease could vitiate consent, it is no greater increment to reverse that decision and return to the former state of the law. The change is, moreover, consistent with Parliament’s 1983 amendment of the *Criminal Code* to remove the phrase “nature and quality of the act”, which suggests that Parliament, while retaining the common law of fraud in relation to consent negativing assault, did not wish to freeze the restrictive mould of *Clarence.*

68 The final and most difficult question is whether the change would introduce complex and unforeseeable changes of the sort better left to Parliament. The first objection under this head is that made by Stephen J. in *Clarence*, that no clear line can be drawn between criminal and non-criminal conduct once the law leaves the certainty of the dual criteria of nature of the act in the sense of whether it was sexual or non-sexual, and the identity of the perpetrator. The argument is made that to go beyond these criteria would be to open the door to convictions for assault in the case, for example, where a man promises a woman a fur coat in return for sexual intercourse: *Fifteenth Report of the Criminal Law Revision Committee on Sexual Offences* (Cmnd 9213), cited with approval in *R. v. Linekar*, [1995] 3 All E.R. 69 (C.A.).

69 This difficulty is a serious one. The courts should not broaden the criminal law to catch conduct that society generally views as non-criminal. If that is to be done, Parliament must do it. Furthermore, the criminal law must be clear. I agree with the fundamental principle affirmed in the English cases that it is imperative that there be a clear line between criminal and non-criminal conduct. Absent this, the criminal law loses its deterrent effect and becomes unjust. For these reasons, I earlier argued against Cory J.'s imposition of criminal liability for non-disclosure in cases of "significant risk of serious harm", and L'Heureux-Dubé J.'s approach of finding fraud for every deception inducing consent.

70 The question is whether a narrower increment is feasible that catches only harm of the sort at issue in this appeal and draws the required bright line. In my view, it is. A return to the pre-*Clarence* view of the common law would draw a clear line between criminal conduct and non-criminal conduct. As I have explained, pre-*Clarence*, the law permitted fraud to vitiate consent to contact where there was (a) a deception as

to the sexual character of the act; (b) deception as to the identity of the perpetrator; or (c) deception as to the presence of a sexually transmitted disease giving rise to serious risk or probability of infecting the complainant (*Sinclair*, *supra*). This rule is clear and contained. It would catch the conduct here at issue, without permitting people to be convicted of assault for inducements like false promises of marriage or fur coats. The test for deception would be objective, focussing on whether the accused falsely represented to the complainant that he or she was disease-free when he knew or ought to have known that there was a high risk of infecting his partner. The test for inducement would be subjective, in the sense that the judge or jury must be satisfied beyond a reasonable doubt that the fraud actually induced the consent.

71 From a theoretical point of view, the proposed change follows the time-honoured methodology of making changes to the common law on an incremental basis. This, however, is not enough. The addition of a new common law category should reflect some underlying principle that ties it to the logic and policy underlying the existing rule and permits future developments, if any, to proceed on a reasoned, principled basis. If the underlying principle is so broad that it admits of extension into debateable or undesirable areas, then the proposed change should not be made. It was the inability to identify such a principle that seems to have lain behind the decision in *Clarence* to narrow the rule, and the recent decision of the English Court of Appeal in *Linekar* not to extend the rule to deceit as to payment for sexual services.

72 With the greatest of deference to the learned judges in these cases, an explanation may be suggested for why deceit as to venereal disease may vitiate consent while deceit as to other inducements, like promises of marriage or fur coats, does not. Consent to unprotected sexual intercourse is consent to sexual congress with a certain person and to the transmission of bodily fluids from that person. Where the person

represents that he or she is disease-free, and consent is given on that basis, deception on that matter goes to the very act of assault. The complainant does not consent to the transmission of diseased fluid into his or her body. This deception in a very real sense goes to the nature of the sexual act, changing it from an act that has certain natural consequences (whether pleasure, pain or pregnancy), to a potential sentence of disease or death. It differs fundamentally from deception as to the consideration that will be given for consent, like marriage, money or a fur coat, in that it relates to the physical act itself. It differs, moreover, in a profoundly serious way that merits the criminal sanction.

73 This suffices to justify the position of the common law pre-*Clarence* that deception as to venereal disease may vitiate consent. The question of whether other categories of fraud could be logically added on the basis that deceit as to them also fundamentally alters the nature of the physical act itself, is better left for another day. It is doubtful that natural consequences, like pregnancy, would qualify, as they are the natural concomitant of the sexual act, and do not fundamentally alter its nature. Similarly, as discussed, promises as to future conduct used to induce consent do not fundamentally change the nature of the physical act. Again, protected sex would not be caught; the common law pre-*Clarence* required that there be a high risk or probability of transmitting the disease: *Sinclair, supra.* These observations largely displace the fear of unprincipled overextension that motivated the majority in *Clarence* to exclude deceit as to sexually transmitted disease as a basis on which fraud could vitiate consent.

74 It remains to consider the argument that extending the law, even in this limited fashion, will have unforeseen, complex and undesirable ramifications. Regrettable as it is, it may be that criminalizing deceit as to sexually transmitted disease inducing consent may prevent some people from seeking testing and treatment, out of

fear that if they learn about their disease they will be forced to choose between abstaining from unprotected sexual relations and becoming criminals. On the other hand, it may foster greater disclosure. The message that people must be honest about their communicable diseases is an important one. Conduct like that in the case at bar shocks the conscience and should permit of a criminal remedy. In addition, the proposed extension of the law is relatively narrow, catching only deceit as to venereal disease where it is established, beyond a reasonable doubt, that there was a high risk of infection and that the defendant knew or ought to have known that the fraud actually induced consent to unprotected sex. Finally, I note that s. 221 of the *Criminal Code* (criminal negligence causing bodily harm) already makes it a crime to engage in unprotected sexual intercourse without disclosing HIV-positive status where the sexual partner contracts HIV as a result: *R. v. Mercer* (1993), 84 C.C.C. (3d) 41 (Nfld. C.A.). There is no evidence that the application of s. 221 has had an adverse effect on testing by extending criminal responsibility to cases where the defendant's partners are unfortunate enough to have been infected. The extension I propose represents only a modest step beyond this offence. Bearing in mind all of these considerations, I am satisfied that this limited change will not have far-reaching, unforeseeable or undesirable ramifications.

75 I conclude that the common law should be changed to permit deceit about sexually transmitted disease that induces consent to be treated as fraud vitiating consent under s. 265 of the *Criminal Code*.

V. Conclusion

76 I would allow the appeal and order that a new trial be directed.

The judgment of Cory, Major, Bastarache and Binnie JJ. was delivered by

77 CORY J. -- Is a complainant's consent to engage in unprotected sexual intercourse vitiated by fraud when her partner knows he is HIV-positive and either fails to disclose or deliberately deceives her about it? If the consent is fraudulently obtained in those circumstances can s. 268 (aggravated assault) of the *Criminal Code*, R.S.C., 1985, c. C-46, be applicable? Would the application of the *Criminal Code* endanger public health policies pertaining to the disease of AIDS? Those are the issues that must be considered on this appeal.

I. Factual Background

78 The respondent tested positive for HIV in August 1992. At that time a public health nurse explicitly instructed him to use condoms every time he engaged in sexual intercourse and to inform all prospective sexual partners that he was HIV-positive. The respondent angrily rejected this advice. He complained that he would never be able to have a sex life if he told anyone that he was HIV-positive.

79 Three weeks later, the respondent met the complainant KM and an 18-month relationship began. The couple had sexual intercourse, for the most part unprotected, at least 100 times. Near the beginning of the relationship, KM discussed sexually transmitted diseases with the respondent and although she did not specifically ask him about HIV or AIDS, he assured her that he had tested negative for HIV eight or nine months earlier. KM developed hepatitis and was advised to have an HIV test. Both she and the respondent were tested in January 1993. In February, a nurse informed KM that her test was negative but that the respondent had tested HIV-positive. KM was advised to undertake subsequent tests to determine whether she had developed the virus.

80 Once again, the respondent was told that he must use condoms and inform his sexual partners that he was HIV-positive. The respondent replied that in order to avoid using condoms he would wait and see if KM tested positive in a few months and, if not, he would leave her and start a relationship with an HIV-positive woman.

81 For several months KM continued to have unprotected sex with the respondent. This she did because she loved him and she did not want to put another woman at risk. Their relationship ended in May 1994. KM testified that if she had known that the respondent was HIV-positive she would never have engaged in unprotected sexual intercourse with him.

82 Upon hearing that the relationship between KM and the respondent had ended, a public health nurse delivered letters to the respondent ordering him to inform his future partners that he was HIV-positive and to use condoms. Shortly thereafter, the respondent formed a sexual relationship with BH. They had sex 10 times, on most occasions without a condom. Although BH told the respondent that she was afraid of diseases he did not inform her that he was HIV-positive. In late June BH discovered that the respondent had HIV. She confronted him and he apologized for lying. BH testified that if she had known the respondent had HIV she would never have engaged in unprotected sexual intercourse with him.

83 The respondent was charged with two counts of aggravated assault. At the time of trial, neither complainant had tested positive for the virus. The trial judge entered a directed verdict acquitting the respondent. The Court of Appeal refused to set aside the acquittals.

II. Judgments Below

A. *British Columbia Supreme Court*

84 The trial judge considered the wording of the relevant provisions of the *Code*. He concluded that the words "endangers the life of the complainant" in s. 268(1) are applicable if an accused exposes a person to danger, harm or risk (*R. v. Thornton*, [1993] 2 S.C.R. 445). It was clear that by engaging in unprotected sexual intercourse with the complainants knowing he was HIV-positive, the accused endangered the lives of the complainants within s. 268(1).

85 He observed that the issues in the case had already been considered in *R. v. Ssenyonga* (1993), 81 C.C.C. (3d) 257 (Ont. Ct. (Gen. Div.)). He noted that the Crown in *Ssenyonga* had argued as in this case that the complainants' consent to sexual intercourse was vitiated because the scope of consent had been exceeded as a result of fraud or by operation of public policy.

86 He agreed with the trial judge's reasoning in *Ssenyonga* that consent is exceeded only where the amount of force is beyond that which would normally be expected in the course of sexual relations. Here, however, there was no exceptional force applied. He also rejected the Crown's argument that the concept of informed consent should be imported into the criminal law.

87 The trial judge found that he could not accept the argument that the complainants consent was vitiated by fraud. It was his view that despite the change in the wording of the *Code*, the only type of fraud which will vitiate consent to sexual

intercourse is that which goes to the nature and quality of the act or the identity of the offender (*R. v. Petrozzi* (1987), 35 C.C.C. (3d) 528 (B.C.C.A.)).

88 Finally, he considered the Crown's argument that, because of the serious nature of the risk to which the complainants were exposed, public policy should intervene to vitiate their consent. This argument was based on *R. v. Jobidon*, [1991] 2 S.C.R. 714, which found that the vitiating factors listed in s. 265(3) were not exhaustive and that limited grounds exist upon which a court could base its conclusion that consent is vitiated on policy grounds. This same argument was advanced in *Ssenyonga*, *supra*, where it was found at p. 265 that the assault provisions of the *Code* were not designed to control the spread of AIDS, rather they were intended to "control the non-consensual direct or indirect application of force by one person to another".

89 The trial judge concluded that although the accused's actions were repugnant and deserving of punishment, it would overstretch the offence of assault or aggravated assault to apply them to this case. He therefore allowed the application for a directed verdict and acquitted the accused.

B. *British Columbia Court of Appeal* (1996), 141 D.L.R. (4th) 503

90 Prowse J.A. began by reviewing the legislative and jurisprudential history of the fraud provision and noted that prior to the removal of the words "nature and quality of the act", the case law had narrowly defined the types of fraud which could vitiate consent. Further, she concluded that the *Code* amendments were not intended to broaden the categories of fraud which would vitiate consent, and that the trial judge was correct in following the decision in *Petrozzi*, *supra*.

91 Prowse J.A. then considered whether a valid consent to sexual intercourse had to be an informed consent. She rejected the submission that the informed consent doctrine developed in *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, should be applied in this case for two reasons. First, she did not find that the inequality of information which existed between the complainants and the respondent resulted in the power imbalance or exploitation contemplated in *Norberg*. Second, she was reluctant to import informed consent principles from tort law into the realm of criminal law.

92 Prowse J.A. also rejected the Crown argument that the respondent's conduct exceeded the scope of the complainants' consent. She concluded that the sexual acts engaged in by the respondent and the complainants involved no more force than is naturally inherent in the sexual act.

93 Finally, Prowse J.A. considered whether the complainants' consent should be rendered ineffective on grounds of public policy. She found it significant that the complainants in this case did not suffer physical injuries but were only exposed to the risk of injury. This was very different from the position presented in *Jobidon*, *supra*, where this Court vitiated a complainant's consent to engage in a fist fight where the force applied caused serious harm. Prowse J.A. concluded that the criminal law of assault is not the proper legal mechanism for dealing with the problem of HIV/AIDS transmission and she refused to create another category of conduct which would vitiate consent.

III. Relevant Statutory Provisions

94 *Criminal Code*, R.S.C., 1985, c. C-46

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;

. . .

(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.

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.

IV. Analysis

95 The respondent was charged with two counts of aggravated assault. This charge requires the Crown to prove first that the accused's acts "endanger[ed] the life of the complainant" (s. 268(1)) and, second, that the accused intentionally applied force without the consent of the complainant (s. 265(1)(*a*)). Like the Court of Appeal and the trial judge I agree that the first requirement was satisfied. There can be no doubt the respondent endangered the lives of the complainants by exposing them to the risk of HIV infection through unprotected sexual intercourse. The potentially lethal consequences of infection permit no other conclusion. Further, it is not necessary to establish that the complainants were in fact infected with the virus. There is no prerequisite that any harm

must actually have resulted. This first requirement of s. 268(1) is satisfied by the significant risk to the lives of the complainants occasioned by the act of unprotected intercourse.

96 The second requirement of applied force without the consent of the complainants presents greater difficulties. Both complainants consented to engage in unprotected sexual intercourse with the respondent. This must include consent to the application of the force inherent in that activity. The Crown contends that the complainants' consent was not legally effective because it was obtained by fraud. The complainants testified that if they had been informed that the respondent was HIV-positive they would never have agreed to unprotected sexual intercourse with him.

A. *The Approach to Fraud Vitiating Consent After R. v. Clarence*

97 Up until 1983, the indecent assault provisions in the *Code* provided that consent was vitiated where it was obtained "by false and fraudulent representations as to the nature and quality of the act". The requirement that fraud relate to the "nature and quality of the act" reflected the approach to consent in sexual assault cases which has existed at common law since *R. v. Clarence* (1888), 22 Q.B.D. 23. There it was held by the majority that a husband's failure to disclose that he had gonorrhea did not vitiate his wife's consent to sexual intercourse. It was stated at p. 44 that

> the only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act.

98 *Clarence* was cited with approval in *Bolduc v. The Queen*, [1967] S.C.R. 677. In that case indecent assault charges arose from a medical examination conducted

by a properly qualified intern. The examination was witnessed by a friend of the intern. The complainant was led to believe that the friend was also an intern but he was actually a voyeur. The Court held that the complainant consented to the examination and that the fraud did not go to the nature and quality of the act.

99 In *R. v. Maurantonio*, [1968] 1 O.R. 145 (C.A.), a man falsely held himself out to be a doctor and purported to conduct gynaecological examinations of several women. It was found that the victims consented to a medical examination but received something which was altogether different. It was held that the fraud related to the nature and quality of the act and thus vitiated their consent. It was stated at p. 152, that

> [t]he general rule is that if deception causes a misunderstanding as to the nature of the act itself there is no legally recognized consent because what happened is not that for which consent was given. . . .

However, in *obiter* Hartt J. (*ad hoc*) sagely suggested that a broader interpretation of "nature and quality of the act" would be appropriate in certain cases. Thus, by 1968 there was some indication that the archaic strictures of the *Clarence* approach might be loosened.

100 In 1983, the *Criminal Code* was amended. The rape and indecent assault provisions were replaced by the offence of sexual assault. The s. 265 assault provision was enacted in its present form, and it, by the terms of s. 265(2), applies to all forms of assault, including sexual assault.

101 Section 265(3)(*c*) simply states that no consent is obtained where the complainant submits or does not resist by reason of "fraud". There are no limitations or qualifications on the term "fraud". Nonetheless, some controversy has arisen as to

whether the apparently clear language of the new section removed the requirement that fraud vitiating consent must relate to the "nature and quality of the act".

102 In *Petrozzi*, *supra*, the British Columbia Court of Appeal found that despite the new wording of s. 265(3)(*c*) (then s. 244(3)(*c*)), the old common law rule that the fraud must relate to the "nature and quality of the act" was still applicable. It held that there was no indication that by amending the *Code* provisions, Parliament intended to broaden the types of fraud which could vitiate consent. The accused had agreed to pay the complainant $100 for sexual services but did not intend to make that payment. The Court of Appeal held that this type of fraud could not be said to relate to the nature and quality of the act and was insufficient to vitiate the complainant's consent. In reaching its conclusion, the court relied heavily on the reasoning in *Clarence*, *supra*.

103 It cannot be forgotten that the decision in *Clarence* is based on a harsh and antiquated view of marriage. Specifically, that a husband could not be guilty of raping his wife since the marital relationship implied, in law, the wife's consent to all sexual relations. Further, the very narrow interpretation of fraud was based on the view that it would be undesirable to treat fraud in a case of assault or sexual assault in the same way that it is treated in criminal or commercial contexts.

104 Professor W. H. Holland's article, "HIV/AIDS and the Criminal Law" (1994), 36 *Crim. L.Q.* 279, at pp. 297-98, raises two important points with regard to the *Petrozzi* decision. First, neither the Crown nor the defence believed that the issue of fraud arose and both objected when the trial judge introduced it to the jury. The case had proceeded as if it were solely a question of deciding between the complainant's claim of rape and the accused's position that the act was consensual. It seems questionable whether *Petrozzi* was the appropriate case for determining the proper interpretation of

fraud as it is set out in s. 265(3)(*c*). Second, Craig J.A. in *Petrozzi* noted at p. 542 that there was no policy reason for restricting fraud in assault and sexual assault cases to a case involving the nature and quality of the act. Nonetheless, he concluded that Parliament intended to confirm the old constructions. However, he did not cite a particular authority for that proposition. He wrote:

> I fail to appreciate why, as a matter of policy, we should restrict fraud in so far as it relates to consent in common assault and sexual assault cases to a case involving the nature and quality of the act or to a case involving the identity of the offender. Notwithstanding this belief, I have concluded that in enacting the present s. 244, especially s. 244(3)(*c*), Parliament intended to confirm the construction which the courts have placed on the type of fraud which may vitiate consent in sexual cases or assault cases.

105 I respectfully disagree with this conclusion of Craig J.A. Similarly, I cannot accept the reasoning and conclusion of McDermid J. in *Ssenyonga*, *supra*, which was based on facts virtually identical to those at bar. In my opinion, both the legislative history and the plain language of the provision suggest that Parliament intended to move away from the rigidity of the common law requirement that fraud must relate to the nature and quality of the act. The repeal of statutory language imposing this requirement and its replacement by a reference simply to fraud indicates that Parliament's intention was to provide a more flexible concept of fraud in assault and sexual assault cases.

106 This view is consistent with that of several commentators. For example C. Boyle, *Sexual Assault* (1984), at p. 66, stated shortly after the amendments that:

> It appears that Parliament dropped the rape version and adopted the old assault approach across the board.
>
> . . . if it is now recognised that the decks have been cleared for a policy decision as to what is culpable in the context of fraud, then the law may be improved tremendously.

Similarly, A. W. Mewett and M. Manning, *Criminal Law* (2nd ed. 1985), at pp. 596-97, wrote:

> But the new provision refers only to "fraud" with no limitation as to the nature and quality of the act. This superficially slight change may actually have profound consequences. . . .
>
> All that the new provisions seem to require, however, is a fraud and a causal connection between that fraud and the submission or failure to resist.

(See also D. Watt, *The New Offences Against the Person* (1984), at pp. 216-20; and Holland, *supra*, at pp. 297-99.)

107 I am mindful of the careful comments of Gonthier J. in *Jobidon*, *supra*, that the enactment of s. 265(3) "did not reflect an intent to remove the existing body of common law which already described those limitations and their respective scope" (p. 739). However, the issue in *Jobidon* was whether factors not explicitly listed in s. 265(3), which had previously been held to vitiate consent at common law, were still applicable. Gonthier J. concluded that s. 265(3) was not exhaustive and that consent could be vitiated on public policy grounds in a limited number of circumstances. By way of contrast the case at bar requires an interpretation of the concept of fraud which is explicitly included in s. 265(3) in an unlimited manner. The issue thus is whether limitations which previously existed at common law and in the *Code* should continue to apply. The reasoning in *Jobidon* indicates that it would be appropriate to broadly interpret fraud in these circumstances where the limiting words were specifically removed from the section.

108 I would therefore conclude that it is no longer necessary when examining whether consent in assault or sexual assault cases was vitiated by fraud to consider

whether the fraud related to the nature and quality of the act. A principled approach consistent with the plain language of the section and an appropriate approach to consent in sexual assault matters is preferable. To that end, I see no reason why, with appropriate modifications, the principles which have historically been applied in relation to fraud in criminal law cannot be used.

109 It is now necessary to consider the nature of fraud and how it should be applied in the context of the wording of the present s. 265.

B. *How Has Fraud Been Defined*?

110 From its inception, the concept of criminal fraud has had two constituent elements. Stephen, *A History of the Criminal Law of England* (1883), vol. 2, described them in this way at pp. 121-22:

> . . . there is little danger in saying that whenever the words "fraud" or "intent to defraud" or "fraudulently" occur in the definition of a crime two elements at least are essential to the commission of the crime; namely, first, deceit or an intention to deceive or in some cases mere secrecy; and, secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy.

111 This was the approach adopted in *In re London and Globe Finance Corp.*, [1903] 1 Ch. 728. Buckley J. described the act of fraud as follows, at pp. 732-33:

> To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.

112 A broader definition of fraud was given in *Scott v. Metropolitan Police Commissioner,* [1975] A.C. 819 (H.L.). There, the definition of fraud which was adopted did not include deceit as an essential element. Rather, dishonesty and deprivation were held to be basic to the concept.

113 In *R. v. Olan,* [1978] 2 S.C.R. 1175, the reasoning in *Scott* was adopted and it was held that the two elements of fraud are dishonesty and deprivation. It was put in these words (at p. 1182):

> Courts, for good reason, have been loath to attempt anything in the nature of an exhaustive definition of "defraud" but one may safely say, upon the authorities, that two elements are essential, "dishonesty" and "deprivation". To succeed, the Crown must establish dishonest deprivation.

As well the requirement of deprivation was widened so that the risk of deprivation alone is sufficient. Thus, the defrauded party need not show actual harm or loss resulted from the actions of the accused (at p. 1182):

> The element of deprivation is satisfied on proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim. It is not essential that there be actual economic loss as the outcome of the fraud.

114 The *Olan* approach was endorsed in *R. v. Théroux,* [1993] 2 S.C.R. 5. There the importance of defining the offence of fraud in light of the underlying objective of promoting honesty in commercial dealings was emphasized. McLachlin J. described the requisite elements of criminal fraud in these words, at pp. 25-26:

> To establish the *actus reus* of fraud, the Crown must establish beyond a reasonable doubt that the accused practised deceit, lied, or committed some other fraudulent act. . . . [I]t will be necessary to show that the impugned act is one which a reasonable person would see as dishonest. Deprivation or the

> risk of deprivation must then be shown to have occurred as a matter of fact. To establish the *mens rea* of fraud the Crown must prove that the accused knowingly undertook the acts which constitute the falsehood, deceit or other fraudulent means, and that the accused was aware that deprivation could result from such conduct.

It was held that mere negligent misrepresentation would not amount to a fraudulent act. However, "deliberately practised fraudulent acts which, in the knowledge of the accused, actually put the property of others at risk" should be subject to criminal sanction (p. 26).

115 Next it must be determined whether non-disclosure can constitute fraud. Traditionally, courts were of the view that fraud does not include non-disclosure (*R. v. Brasso Datsun (Calgary) Ltd.* (1977), 39 C.R.N.S. 1 (Alta. S.C.T.D.)). However, *Olan, supra,* and *Théroux, supra*, have endorsed a wider interpretation of fraud which can include non-disclosure in circumstances where it would be viewed by the reasonable person as dishonest. This view was upheld in *R. v. Zlatic*, [1993] 2 S.C.R. 29. At p. 44 McLachlin J. speaking for the majority, held that if the means to the alleged fraud can be characterized objectively as dishonest they are fraudulent. This, it was observed, can include the non-disclosure of important facts.

116 In summary, it can be seen that the essential elements of fraud are dishonesty, which can include non-disclosure of important facts, and deprivation or risk of deprivation.

117 The principles which have been developed to address the problem of fraud in the commercial context can, with appropriate modifications, serve as a useful starting point in the search for the type of fraud which will vitiate consent to sexual intercourse in a prosecution for aggravated assault. It is now necessary to consider the type of fraud or fraudulent conduct which will vitiate consent in cases of sexual assault.

C. *What Is the Type of Fraud Which May Vitiate Consent in Cases of Sexual Assault*?

118 At the outset it can be accepted that fraud pertaining to the nature and quality of the act or the identity of the partner will still constitute fraud which can be found to vitiate consent. What other acts of dishonesty which give rise to the risk of deprivation can have the same effect?

119 As early as 1917 courts in the United States accepted that a woman's consent to sexual intercourse is vitiated by the man's fraudulent concealment of the risk of infection from venereal disease. See *State v. Lankford*, 102 A. 63 (Del. Ct. Gen. Sess. 1917). This principle was affirmed in *Kathleen K. v. Robert B.*, 198 Cal.Rptr. 273 (Ct. App. 1984). It was set out in these words at pp. 276-77:

> . . . a certain amount of trust and confidence exists in any intimate relationship, at least to the extent that one sexual partner represents to the other that he or she is free from venereal or other dangerous contagious disease. The basic premise underlying these old cases -- consent to sexual intercourse vitiated by one partner's fraudulent concealment of the risk of infection with venereal disease -- is equally applicable today, whether or not the partners involved are married to each other.

120 Prior to the decision in *Clarence*, *supra*, this was also the position adopted by courts in England. In *R. v. Bennett* (1866), 4 F. & F. 1105, 176 E.R. 925, a man indecently assaulted his 13-year-old niece who as a result contracted a venereal disease. Although the niece was found to have consented to sexual intercourse with her uncle, it was held that the accused's failure to disclose that he was infected with a venereal disease amounted to fraud which vitiated that consent. In his instruction to the jury, Willes J. noted (at p. 925 E.R.):

> An assault is within the rule that fraud vitiates consent, and therefore, if the prisoner, knowing that he had a foul disease, induced his niece to sleep with him, intending to possess her, and infected her, she being ignorant of his condition, any consent, which she may have given, would be vitiated, and the prisoner would be guilty of an indecent assault.

121 The *Bennett* principle that non-disclosure of a venereal disease is a type of fraud which will vitiate consent to sexual intercourse was applied in *R. v. Sinclair* (1867), 13 Cox C.C. 28. Sinclair had sexual intercourse with a 12-year-old girl who, as a result, contracted gonorrhea. He was charged with inflicting actual bodily harm. The court noted that if she consented, the accused's failure to communicate that he was afflicted with the venereal disease would vitiate that consent. Shee J. instructed the jury as follows, at p. 29:

> If he knew that he had such a disease, and that the probable consequence would be its communication to the girl, and she in ignorance of it consented to the connection, and you are satisfied that she would not have consented if she had known the fact, then her consent is vitiated by the deceit practised upon her, and the prisoner would be guilty of an assault. . . .

122 The *Clarence* decision rejected the broad approach to fraud set out in *Bennett* and *Sinclair*. There the court held that non-disclosure of a venereal infection was not related to the nature of the act of sexual intercourse and therefore the fraud did not vitiate the consent. For the reasons set out earlier neither the reasoning or conclusion reached in *Clarence* are acceptable.

123 The deadly consequences that non-disclosure of the risk of HIV infection can have on an unknowing victim, make it imperative that as a policy the broader view of fraud vitiating consent advocated in the pre-*Clarence* cases and in the U.S. decisions should be adopted. Neither can it be forgotten that the *Criminal Code* has been evolving to reflect society's attitude towards the true nature of the consent. The marital rape

exemption was repealed in Canada in 1983. The defence of mistaken belief in consent was narrowed in the 1992 amendments. Section 273.2(*b*) eliminated consent as a defence to sexual assault in situations where the accused did not take reasonable steps to ascertain that the complainant was consenting.

124 In my view, it should now be taken that for the accused to conceal or fail to disclose that he is HIV-positive can constitute fraud which may vitiate consent to sexual intercourse.

D. *Will There Be a Valid Consent in the Absence of Disclosure*?

125 Persons knowing that they are HIV-positive who engage in sexual intercourse without advising their partner of the disease may be found to fulfil the traditional requirements for fraud namely dishonesty and deprivation. That fraud may vitiate a partner's consent to engage in sexual intercourse.

126 The first requirement of fraud is proof of dishonesty. In light of the provisions of s. 265, the dishonest action or behaviour must be related to the obtaining of consent to engage in sexual intercourse, in this case unprotected intercourse. The 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. It cannot be forgotten that the act of intercourse is usually far more than the mere manifestation of the drive to reproduce. It can be the culminating demonstration of love, admiration and respect. It is the most intimate of physical relations and what actions and reactions led to mutual consent to undertake it will in retrospect be complex. It would be pointless to speculate whether consent would more readily follow deliberate falsehoods than failure to disclose.

The possible consequence of engaging in unprotected intercourse with an HIV-positive partner is death. In these circumstances there can be no basis for distinguishing between lies and a deliberate failure to disclose.

127 Without disclosure of HIV status there cannot be a true consent. The consent cannot simply be to have sexual intercourse. Rather it must be consent to have intercourse with a partner who is HIV-positive. True consent cannot be given if there has not been a disclosure by the accused of his HIV-positive status. A consent that is not based upon knowledge of the significant relevant factors is not a valid consent. The extent of the duty to disclose will increase with the risks attendant upon the act of intercourse. To put it in the context of fraud the greater the risk of deprivation the higher the duty of disclosure. The failure to disclose HIV-positive status can lead to a devastating illness with fatal consequences. In those circumstances, there exists a positive duty to disclose. 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.

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

imagine a more significant risk or a more grievous bodily harm. As Holland, *supra*, at p. 283, wrote:

> The consequences of transmission are grave: at the moment there is no "cure", a person infected with HIV is considered to be infected for life. The most pessimistic view is that without a cure all people infected with the virus will eventually develop AIDS and die prematurely.

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

130 In situations such as that presented in this case it must be emphasized that the Crown will still be required to prove beyond a reasonable doubt that the complainant would have refused to engage in unprotected sex with the accused if she had been advised that he was HIV-positive. As unlikely as that may appear it remains a real possibility. In the words of other decisions it remains a live issue.

131 Since writing I have had the opportunity of reading the reasons of L'Heureux-Dubé J. written with her customary clarity. It is her position (at para. 16) that any fraud that is "designed to induce the complainant to submit" to the act will vitiate consent and constitute an assault. In her view to do anything less would set a separate standard for fraud in cases of sexual assaults. With respect, this appears to add an additional *mens rea* requirement for fraud, but more importantly this position could

give rise to unfortunate consequences. It would trivialize the criminal process by leading to a proliferation of petty prosecutions instituted without judicial guidelines or directions.

132 It must be remembered that what is being considered is a consensual sexual activity which would not constitute assault were it not for the effect of fraud. Obviously if the act of intercourse or other sexual activity was consensual it could not be an assault. It is only because the consent was obtained by fraud that it is vitiated. Aggravated assault is a very serious offence. Indeed, a conviction for any sexual assault has grave consequences. The gravity of those offences makes it essential that the conduct merit the consequences of conviction.

133 In the case at bar, the failure to disclose the presence of HIV put the victims at a significant risk of serious bodily harm. The assault provisions of the *Criminal Code* are applicable and appropriately framed to deter and punish this dangerous and deplorable behaviour. To say that any fraud which induces consent will vitiate consent would bring within the sexual assault provisions of the *Code* behaviour which lacks the reprehensible character of criminal acts. Let us consider some of the situations which would become criminal if this approach were followed.

134 In these examples I will assume that it will more often be the man who lies but the resulting conviction and its consequences would be the same if it were the woman. Let us assume that the man lied about his age and consensual sexual act or acts then took place. The complainant testifies and establishes that her consent would never have been given were it not for this lie and that detriment in the form of mental distress, had been suffered. Fraud would then be established as a result of the dishonesty and

detriment and although there had been no serious risk of significant bodily harm a conviction would ensure.

135 The same result would necessarily follow if the man lied as to the position of responsibility held by him in a company; or the level of his salary; or the degree of his wealth; or that he would never look at or consider another sexual partner; or as to the extent of his affection for the other party; or as to his sexual prowess. The evidence of the complainant would establish that in each case the sexual act took place as a result of the lie and detriment was suffered. In each case consent would have been obtained by fraud and a conviction would necessarily follow. The lies were immoral and reprehensible but should they result in a conviction for a serious criminal offence? I trust not. It is no doubt because of this potential trivialization that the former provisions of the *Code* required the fraud to be related to the nature and quality of the act. This was too restrictive. Yet some limitations on the concept of fraud as it applies to s. 265(3)(*c*) are clearly necessary or the courts would be overwhelmed and convictions under the sections would defy common sense. The existence of fraud should not vitiate consent unless there is a significant risk of serious harm. Fraud which leads to consent to a sexual act but which does not have that significant risk might ground a civil action. However, it should not provide the foundation for a conviction for sexual assault. The fraud required to vitiate consent for that offence must carry with it the risk of serious harm. This is the standard which I think is appropriate and provides a reasonable balance between a position which would deny that the section could be applied in cases of fraud vitiating consent and that which would proliferate petty prosecutions by providing that any fraud which induces consent will vitiate that consent.

136 Nor can prosecutorial discretion be used or considered as a means of restraining these prosecutions. In *R. v. Nikal*, [1996] 1 S.C.R. 1013, it was held that "the

holder of a constitutional right need not rely upon the exercise of prosecutorial discretion and restraint for the protection of [that] right" (p. 1063). This same principle is applicable in this situation. There is a healthy reluctance to endorse the exercise of prosecutorial discretion as a legitimate means of narrowing the applicability of a criminal section.

137 It follows that in circumstances such as those presented in this case there must be a significant risk of serious harm if the fraud resulting from non-disclosure is to vitiate the consent to the act of intercourse. For the purposes of this case, it is not necessary to consider every set of circumstances which might come within the proposed guidelines. The standard is sufficient to encompass not only the risk of HIV infection but also other sexually transmitted diseases which constitute a significant risk of serious harm. However, the test is not so broad as to trivialize a serious offence.

138 In summary, on facts presented in this case, it would be open to the trier of fact to conclude that the respondent's failure to disclose his HIV-positive status was dishonest; that it resulted in deprivation by putting the complainants at a significant risk of suffering serious bodily harm. If that conclusion is reached, the complainants' consent to sexual intercourse could properly be found to have been vitiated by fraud. It can be seen that applying the proposed standard effectively resolves the issue in this case. However, it is said that the test is too vague. Yet, it cannot be forgotten that all tests or definitions are based on words. They are the building blocks of the law.

139 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. Obviously consent can and should, in appropriate circumstances, be vitiated. Yet this should not be too readily undertaken. 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. It is difficult to draw clear bright lines in defining human relations particularly those of a consenting sexual nature. There must be some flexibility in the application of a test to determine if the consent to sexual acts should be vitiated. The proposed test may be helpful to courts in achieving a proper balance when considering whether on the facts presented, the consent given to the sexual act should be vitiated.

E. *Does Public Policy Require that the Provisions of Public Health Acts and Regulations Be Used to the Exclusion of the Criminal Code*?

140 Interveners submitted that the criminal law is not the most effective tool for dealing with HIV transmission. They argued that public health initiatives are more appropriately employed to control the spread of HIV and AIDS. They submitted that provinces have established a wide network of testing, education, counselling and support services for people infected by HIV/AIDS. Additionally, it was argued that all Canadian provinces have in place comprehensive public health legislation which gives public health authorities broad powers which can be exercised for the protection of public health. These Acts also provide for the monitoring of the spread of HIV/AIDS and other diseases, the imposition of reporting obligations and mandatory treatment or testing of those suspected of being infected with a transmissible disease.

141 It was forcefully contended that these endeavours may well prove more effective in controlling the disease than any criminal sanctions which can be devised. However, the criminal law does have a role to play both in deterring those infected with HIV from putting the lives of others at risk and in protecting the public from irresponsible individuals who refuse to comply with public health orders to abstain from

high-risk activities. This case provides a classic example of the ineffectiveness of the health scheme. The respondent was advised that he was HIV-positive and on three occasions he was instructed to advise his partner of this and not to have unprotected sex. Nevertheless, he blithely ignored these instructions and endangered the lives of two partners.

142 Where public health endeavours fail to provide adequate protection to individuals like the complainants, the criminal law can be effective. It provides a needed measure of protection in the form of deterrence and reflects society's abhorrence of the self-centered recklessness and the callous insensitivity of the actions of the respondent and those who have acted in a similar manner. The risk of infection and death of partners of HIV-positive individuals is a cruel and ever present reality. Indeed the potentially fatal consequences are far more invidious and graver than many other actions prohibited by the *Criminal Code*. The risks of infection are so devastating that there is a real and urgent need to provide a measure of protection for those in the position of the complainants. If ever there was a place for the deterrence provided by criminal sanctions it is present in these circumstances. It may well have the desired effect of ensuring that there is disclosure of the risk and that appropriate precautions are taken.

143 One of the arguments put forward against criminalization was that it will deter those in high-risk groups or marginalized communities from seeking testing. I cannot accept this argument. It is unlikely that individuals would be deterred from seeking testing because of the possibility of criminal sanctions arising later. Those who seek testing basically seek treatment. It is unlikely that they will forego testing because of the possibility of facing criminal charges should they ignore the instructions of public health workers. Although some contrary opinions were referred to, I prefer that of Holland, *supra*, who wrote at p. 288:

> Individuals will not be deterred from testing just because of the possibility that at some future stage they may face criminal liability. . . . People want to know whether they are infected or not and whether any treatment is available. Fear of possible future prosecution for something which has not yet occurred is most unlikely to deter anyone from being tested.

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

145 It was also contended that criminalization would further stigmatize all persons with HIV/AIDS. However it cannot be forgotten that the further stigmatization arises as a result of a sexual assault and not because of the disease. Just as an HIV-positive individual convicted of armed robbery will be further stigmatized but it will not be related to the status of his health. To proceed by way of a criminal charge for assault is not to "criminalize" the respondent's activities. Rather, it is simply to

apply the provisions of the *Code* to conduct which could constitute the crime of assault and thereby infringe s. 265.

146 As Benjamin Disraeli so aptly put it, there are lies, damn lies and statistics. Yet statistics may be useful in certain circumstances. No doubt both sides can gain comfort from statistics when the public policy issue is considered. The following statistics may in any event be important. First, it is significant that the percentage of persons using condoms in the U.S. and Canada, despite the threat of HIV/AIDS, remains alarmingly low. According to U.S. Department of Health and Human Services, Centers for Disease Control and Prevention in 1995 only 13.1 percent of women between the ages of 15-44 used condoms (National Center for Health Statistics, *Vital and Health Statistics: Fertility, Family Planning, and Women's Health -- New Data From the 1995 National Survey of Family Growth*, Series 23, No. 19 (May 1997)). In Canada, regular condom use prior to 1990 was reported only in 24.8 percent of men and 15.6 percent of women in college or university (Health Canada, "Oral Contraceptive and Condom Use", in *STD Epi Update* (November 1997)). Perhaps most distressing is the fact that the rate of new HIV infections in Canada continues to rise steadily. In 1996 there were between 3,000 and 5,000 estimated new infections up from 2,500-3,000 per year in the period 1989-1994 (Health Canada, "AIDS and HIV in Canada", in *HIV/AIDS Epi Update* (November 1997)). This appears to indicate that public education alone has not been successful in modifying the behaviour of individuals at risk of contracting AIDS. It follows that if the deterrence of criminal law is applicable it may well assist in the protection of individuals and it should be utilized.

147 In summary, an individual who knows he is HIV-positive and has unprotected sexual intercourse without disclosing this condition to his partner may be found guilty of contravening the provisions of s. 265 of the *Criminal Code*. The section

provides protection by way of deterrence for those in the position of the complainants. This section like so many provisions of the *Code* is designed to protect society and this protective role must be recognized and enforced. It is right and proper for Public Health authorities to be concerned that their struggles against AIDS should not be impaired. Yet the *Criminal Code* does have a role to play. Through deterrence it will protect and serve to encourage honesty, frankness and safer sexual practices. If the application of the *Criminal Code* really does impede the control of AIDS it will be for Parliament to determine whether the protection afforded by the *Code* should be curtailed in the interests of controlling the plague solely by public health measures.

V. Disposition

148 In the result the appeal is allowed, the orders of the Court of Appeal and of the trial judge are set aside and a new trial is directed.

Appeal allowed and new trial ordered.

Solicitor for the appellant: The Ministry of the Attorney General, Vancouver.

Solicitor for the respondent: Douglas J. Stewart, Vancouver.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Bull, Housser & Tupper, Vancouver.

Solicitors for the interveners Canadian AIDS Society, Persons with AIDS Society of British Columbia and Canadian HIV/AIDS Legal Network: Goodman & Carr, Toronto; Iler, Campbell, Klippenstein, Toronto.