SCC File No: 35758

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

**BETWEEN:**

**J[redacted] S[redacted]**

**Appellant**

**-and-**

**HER MAJESTY THE QUEEN**

**Respondent**

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**FACTUM OF THE INTERVENERS**

**(CANADIAN HIV/AIDS LEGAL NETWORK, HIV& AIDS LEGAL CLINIC ONTARIO AND COALITION DES ORGANISMES COMMUNAUTAIRES QUÉBÉCOIS DE LUTTE CONTRE LE SIDA)**

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## PART I: OVERVIEW

1. In *R. v Cuerrier*, this Honourable Court established the essential elements that must be proven by the Crown for the offence of aggravated sexual assault in cases of non-disclosure of HIV. Among the elements to be proven by the Crown is that the complainant would not have consented to the sexual activity in question had he/she known that the accused was HIV-positive.[1] The requirement on the Crown to prove this essential element was recently reaffirmed by this Court in *R. v. Mabior*.[2]

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[1] *R. v. Cuerrier*, [1998] 2 S.C.R. 371, at para. 130.
[2] [2012] 2 SCR 584 at para. 104.

2. In order to establish this element of the offence, the Crown merely asks the complainant during examination in chief whether he/she would have consented had he/she known that his/her partner was HIV-positive. The complainant typically says 'No' and the inquiry is considered complete. There is often little or no cross-examination on this issue, leaving only the untested assertion of the complainant. And triers of fact appear to routinely accept this claim at face value without further comment or consideration.

3. However, in *Cuerrier*, *supra*, this Court properly recognized that this issue is a live one and as such, the bald assertion should not be left unchallenged or blindly accepted:

> [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.[3]

4. Thus, in order to give meaningful effect to this element of the offence, it is critical that defence counsel be permitted to challenge such evidence and that trial judges properly examine the claim made by the complainant, *as they would examine any assertion by any witness* (Crown or defence) *in any other context*. Simply put, there is no other instance where a bald assertion is unchallengeable by the opposing party and unequivocally accepted by the trial court. This is the case regardless of the charge faced by the accused. And it is certainly the case where the allegation is one of sexual assault. In fact, it is in the context of sex assaults where courts often see the most vigorous defence challenge to an assertion by the key Crown witness (i.e. non consent).

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[3] *R. v. Cuerrier*, *supra*, at para. 130

5. It should, of course, be no different in cases of alleged HIV non-disclosure. The same fundamental principle of being able to challenge the evidence tendered by the Crown should remain, as should the requirement on the trial judge to properly examine and consider the credibility and reliability of the evidence. In fact, the need to observe these long held principles is even more acute in cases of HIV non-disclosure given this Court's recognition of the risk of the overextension of the criminal law against those in the HIV community who continue to face stigmatization and discrimination[4], based (at least in part) on misinformation about HIV and the risks of transmission. [5]

6. These misperceptions about HIV and people living with HIV can give rise to a false assumption that no person would reasonably take the risk of having sex with a partner they know has HIV. However, contrary to popular assumptions, there are many instances where people voluntarily choose to engage in sexual activity with partners who are living with HIV. For example, sexual activity often continues between long-term partners where one of the partners is living with HIV.[6] Others elect to engage in sexual activity with a new partner who discloses and all necessary precautions are taken.

7. Or, as in the case at bar, people may elect to engage in sexual activity without condoms even when they know their partner is living with HIV. This is particularly understandable

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[4] *R. v. Mabior*, *supra,* at para. 67

[5] EKOS Research Associates, 2012 HIV/AIDS Attitudinal Tracking Survey, prepared for the Public Health Agency of Canada (PHAC), 2012, p.66 (49% of Canadians say they would be very uncomfortable or somewhat uncomfortable if using a glass once used by someone living with HIV).

[6] See for instance, CATIE, *Insight into HIV transmission risk when the viral load is undetectable and no condom is used*, April 10, 2014, describing the preliminary results of the PARTNER study, a large study following more than a thousand gay and heterosexual serodiscordant couples engaging in condomless sex (the study found no HIV transmission despite more than 44,000 condomless sex acts) and PHAC, *M-Track: Enhanced Surveillance of HIV, Sexually Transmitted and Blood-borne Infections, and Associated Risk Behaviours among Men Who Have Sex with Men in Canada, Phase 1 Report*, 2011, p. 23.

given the current scientific understanding that the risk of transmission for even unprotected penetrative activity is negligible when the HIV-positive partner is on effective antiretroviral therapy. Notably, over 75 leading HIV researchers in Canada recently issued a consensus statement out of concern that the criminal justice system was failing to properly understand the science of HIV transmission. They concluded that penetrative sex with someone living with HIV who is on effective antiretroviral medications poses a "negligible" possibility of transmission, even in the absence of condom use.[7]

8. In many other instances, people voluntarily engage in various forms of sexual activity that demonstrate a willingness to take on some risk in their sexual life (e.g. unprotected sex with a partner of unknown status while fully aware of the risks of transmission of HIV or another sexually transmitted infection or pregnancy).[8] In cases where an accused is charged for not disclosing his/her HIV status, the accused may wish to challenge the complainant's claim that he/she would not have consented had he/she known his/her partner was HIV-positive. In order to challenge the assertion, the accused should be permitted to elicit evidence of other sexual behaviour of the complainant (including with the accused) that may demonstrate an acceptance of a risk of exposure to HIV. This typically requires an application under s. 276.(1) of the *Criminal Code* ('*Code*') although, as set out below, a proper reading of s. 276.(1) reveals that this type of evidence is not captured by the provision.

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[7] M. Loutfy et al, "Canadian consensus Statement on HIV and its transmission in the context of the criminal law," *Canadian Journal of Infectious Diseases & Medical Microbiology*, 25(3) (2014): pp. 135-140.

[8] EKOS Research Associates Inc., supra, p. 15, 30 and 40. This survey shows that 77% of sexually active Canadians did not use a condom the last time they had sex although Canadians know HIV can be transmitted through unsafe sex and some do see themselves at risk of contracting HIV especially with casual partners. See also, PHAC, supra, p. 24 and 26 (44.2% of self-reported HIV negative gay men reported inconsistent condom use during receptive anal sex with a regular partner of unknown status in the past six months), and Community-Based Research Center for Gay Men's Health, *Sex Now Across Canada. Highlights from the Sex Now survey by province,* 2014, p. 8 (30% of gay men at a national level reported condomless anal intercourse with a partner of unknown or opposite status in the last 12 months).

## PART II: INTERVENERS' POSITION ON THE ISSUES

9. The Quebec Court of Appeal erred in law by failing to appreciate the import of the complainant's post-disclosure sexual activity with the Appellant on its assessment of the complainant's credibility.

## PART III: ARGUMENT

10. As human rights organizations long supportive of sexual equality, autonomy and dignity, the Interveners strongly support s. 276 of the *Code* and its intended purpose of protecting complainants in cases of coercive sexual assaults from inappropriate cross-examination that engages the twin myths (i.e. that a complainant is less worthy of belief or more likely to have consented on the basis of other sexual activity). In such cases, s. 276. is a welcome protection against improper and harmful stereotypes about women and an appropriate safeguard against abusive and improper cross-examination.

11. However, s. 276 of the *Code* does not create a blanket prohibition on leading evidence of the complainant's prior sexual conduct. Rather, it provides that evidence that the complainant has engaged in sexual activity with the accused or with any other person is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant is more likely to have consented to the sexual activity in issue or that the complainant is less worthy of belief.[9]

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[9] *R. v. Darrach*, [2000] 2 SCR 443, at para. 32

12. The phrase in section 276.(1), "by reason of the sexual nature of the activity" is essential to understanding the scope of the rule. In *R. v. Darrach*, Gonthier J., on behalf of the Court, stated that it is inferences from the "sexual nature of the activity," as opposed to inferences from other potentially relevant features of the activity that are prohibited. Accordingly, if evidence of sexual activity is proffered for its relevant non-sexual features, such as to show a pattern of conduct, that evidence may be permitted.[10]

13. Thus, evidence of prior sexual activity of a complainant may be adduced *if its purpose is other than to invite the prohibited reasoning that lies behind the twin myths.*[11] It may also be adduced to show a pattern of conduct. By way of illustration only, the admission of evidence of other sexual conduct on the part of the complainant has been permitted to ground inferences relating to consent or an accused's honest belief in such, credibility, bias, motive to fabricate and the nature of the relationship between the parties.[12]

14. Similarly, in cases where the complainant has consented to the sexual act in question (defined by this Court in *Hutchinson* as "the basic physical act agreed to at the time, its sexual nature, and the identity of the partner"[13]) and the alleged sexual assault is on the basis of a fraud vitiating consent for non-disclosure of HIV, prior sexual activity of the complainant is properly admissible because *the purpose of the evidence is not to invite the prohibited reasoning that lies behind the twin myths*. The accused is not alleging that the complainant is less worthy of belief simply by virtue of having engaged in other sexual activity. Nor is the

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[10] *Ibid*, at para. 35
[11] *Ibid.* See also *R. v. Crosby*, [1995] 2 S.C.R. 912
[12] *R. v. H.(J.)*, *supra*, at para. 28
[13] *R. v. Hutchinson*, 2014 SCC 19 (at para. 22 and 55).

accused asserting that the complainant is more likely to have consented because he/she had other or multiple partners. Rather, the accused is seeking to examine the complainant's willingness to assume the risk of exposure to HIV in his/her sexual life. In other words, it is not the mere fact that the complainant has engaged in other sexual activity *per se* that is an issue, but rather the risks the complainant was willing to take that is the focus of the inquiry.[14]

15. Of course, the fact that a complainant has accepted some risk of exposure to HIV will not necessarily mean that he/she would have consented to sex with the accused in the specific sexual encounter in question. However, such evidence may be highly relevant to assessing credibility and could raise a reasonable doubt about the complainant's claim that his or her consent was predicated on the accused being HIV-negative. In other words, such evidence is not only highly probative[15], but necessary for the accused to make full answer and defence against such a charge. In fact, it may be the only available defence to such a charge.[16] Moreover, given the devastating consequences that flow from a possible conviction for aggravated sexual assault (e.g. life imprisonment, registration as a sex offender, societal stigma, etc.) it is entirely appropriate and proper that an accused be permitted to elicit such evidence in an effort to defend himself/herself.[17] For these reasons, even if this Honourable Court were to find that the evidence was captured by s. 276.(1), it is respectfully submitted that the evidence would still be admissible under s. 276.(2) and (3).

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[14] *R. v. B[redacted] and B[redacted]*, 2012 ONSC 441 (CanLII); *R. v. P[redacted]*, 2010 ONSC 5756 (CanLII)

[15] *R. v. Darrach, supra* at paras. 38 - 39

[16] *R. v. H.(J.)*, 2012 ONCJ 708 (CanLII), at para. 33

[17] There continues to be significant concern expressed by experts over the use of sexual assault law in cases of HIV non-disclosure as well as the over-criminalization of people in the HIV community. See for example I. Grant, "The Over-Criminalization of Persons Living with HIV," (2013) 63(3) *UTLJ* 475-484; A. Symington, "Injustice Amplified By HIV Non-Disclosure Ruling," (2013) 63(3) *UTLJ* 485-495; K. Buchanan, "When is HIV a Crime?" 99 *Minn. L. Rev.* (forthcoming 2015, cited with permission).

16. In Ontario, there have been at least two courts that have allowed the admission of evidence of previous sexual activity to assist in assessing complainants' assertions that they would not have engaged in acts of intercourse had they known about the accused's HIV status.

17. In *R. v. B[redacted] and B[redacted]*, Gordon J., held that the accused must be allowed to address the complainants' conduct in terms of their acceptance of the risks of unprotected sexual activity. The proposed evidence regarding the sexual activity of the complainants and their acceptance of the risks involved in unprotected sexual activity were highly probative. The evidence was relevant to the issues or essential elements of the crime, namely, whether the complainants' consent was vitiated by fraud. Gordon J. was clear that the evidence was necessary for a jury to render a fair verdict. The admitted evidence included evidence given by the complainants' at the preliminary hearing and text messages which suggested a pattern of casual sexual acts with each other and with strangers, including instances of group sex.[18]

18. In *R. v. P[redacted]* Bryant J., allowed the complainant to be cross-examined on sexual activity both before and after the subject incident. He held:

> The proffered evidence is relevant to the complainant's credibility as to whether he would not have engaged in unprotected sex with the accused if he had been told the accused was HIV positive. The evidence may be capable of raising a reasonable doubt about the complainant's evidence that he would not have engaged in unprotected sex with the accused.
>
> I find that the proffered cross-examination does not engage the prohibited reasoning barred by s. 276(1). The proffered evidence has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.[19]

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[18] *R. v. B[redacted] and B[redacted]*, *supra*, footnote 9
[19] *R. v. P[redacted]* *supra*, footnote 9

19. In fairness to this Honourable Court, sitting in its role as an appellate court and not adjudicating on a specific s. 276 application, it may very well be that this appeal can be determined on a strict and narrow analysis of whether the trial judge erred in his credibility assessment and the principles articulated in *R. v. W.(D.).*[20] However, given the relationship between the prior sexual history evidence relied on by the Appellant in this case and the trial judge's credibility assessment, this Honourable Court may elect to interpret the essential elements that must be proven in these cases and the appropriate role of the complainant's prior sexual activity at trial.

20. If so, it is the respectful position of the Interveners that this Honourable Court should give meaningful effect to the requirement that the Crown prove that the complainant would not have consented had he/she been aware of the accused's HIV status. Accordingly, this Court should reaffirm the following basic principles:

i) That the Crown must prove beyond a reasonable doubt, as an essential element of the offence, that the complainant would not have consented to sex with the accused had he/she been aware of the accused's HIV-positive status;

ii) That a mere assertion by the complainant that he/she would not have consented had he/she known his/her partner was living with HIV is a live issue at trial and should not be accepted uncritically by the trier of fact;

[20] [1991] 1 S.C.R. 742

iii) That the defence must be permitted to challenge such an assertion, including through the admission of evidence about:

a) the assumptions and knowledge of the complainant regarding HIV or other sexually transmitted infections;[21]
b) contextual factors such as the circumstances of the sexual encounter(s); and
c) evidence of other sexual conduct of the complainant involving the acceptance of a risk of being exposed to HIV because such evidence is highly relevant and probative;

iv) That the trier of fact must properly examine and consider the assertion of the complainant in light of such evidence; and

v) That evidence that the complainant has accepted the risk of possible exposure to HIV including (for example, condomless sex with partners of unknown HIV status) may give rise to a reasonable doubt about the claim that his/her consent was contingent on the accused being HIV negative. In such circumstances, an acquittal is mandated because the Crown has been unable to prove one of the essential elements of the offence.

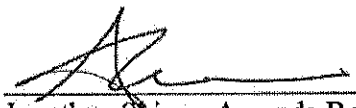
## PART IV: ORDER SOUGHT

21. The Interveners seeks an order granting them 15 minutes for oral submissions at the hearing of this case.

[21] The importance of careful attention to this element of the offence is illustrated by a recent case in which the complainant first testified that she would not have had sex with the accused had she known his HIV-positive status, but later testified that had she known that his risk of transmitting HIV was, in fact, virtually non-existent (because of his undetectable viral load) she would have consented. The trial judge therefore concluded that the Crown had not proved that her consent was vitiated by the accused not having disclosed his HIV-positive status: *R. v. JTC*, 2013 NSPC 105, at para 71 and 76.

Dated at Toronto, Ontario, this 20th day of October, 2014.

SIGNED BY (*signature of counsel or party or agent*):



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## PART V: TABLE OF AUTHORITIES

**Caselaw**

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

*R. v. Mabior*, [2012] 2 SCR 584

*R. v. H.(J.)*, 2012 ONCJ 708 (CanLII)

*R. v. Hutchinson*, 2014 SCC 19

*R. v. Darrach*, [2000] 2 SCR 443

*R. v. Crosby*, [1995] 2 S.C.R. 912

*R. v. B[redacted] and [redacted]*, 2012 ONSC 441 (CanLII)

*R. v. P[redacted]*, 2010 ONSC 5756 (CanLII)

*R. v. W.(D.)*, [1991] 1 S.C.R. 742

*R. v. JTC*, 2013 NSPC 105

**Research studies and academic articles**

EKOS Research Associates Inc., *2012 HIV/AIDS Attitudinal Tracking Survey. Final report,* prepared for the Public Health Agency of Canada (PHAC), 2012. The full document is available online at http://www.catie.ca/sites/default/files/2012-HIV-AIDS-attitudinal-tracking-survey-final-report.pdf

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Community-Based Research Center for Gay Men's Health, *Sex Now Across Canada. Highlights from the Sex Now survey by province,* 2014. The full survey is available at http://cbrc.net/sites/default/files/ProvReport_X4.pdf

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I. Grant, "The Over-Criminalization of Persons Living with HIV," (2013) 63(3) *UTLJ* 475-484

A. Symington, "Injustice Amplified By HIV Non-Disclosure Ruling," (2013) 63(3) *UTLJ* 485-495

K. Buchanan, "When is HIV a Crime?" 99 *Minn. L. Rev.* (forthcoming 2015, cited with permission, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2462343)

## PART VI: STATUTE, REGULATION, RULES, ETC...

276. (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
(b) is less worthy of belief.

(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence

(a) is of specific instances of sexual activity;
(b) is relevant to an issue at trial; and
(c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(a) the interests of justice, including the right of the accused to make a full answer and defence;
(b) society's interest in encouraging the reporting of sexual assault offences;
(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
(d) the need to remove from the fact-finding process any discriminatory belief or bias;
(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
(f) the potential prejudice to the complainant's personal dignity and right of privacy;
(g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
(h) any other factor that the judge, provincial court judge or justice considers relevant.

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