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## 25. HIV Exposure as Assault: Progressive Development or Misplaced Focus?

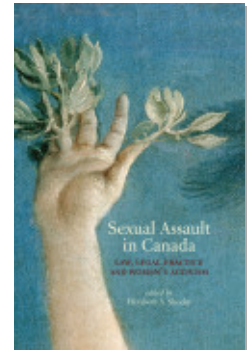
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25.

## HIV Exposure as Assault: Progressive Development or Misplaced Focus?

Alison Symington<sup>1</sup>

*Alison Symington's contribution to this section raises a fundamental question: should those who fail to disclose their HIV status to their sexual partners be placed in the ranks of perpetrators of sex crimes? Her concerns about whether the criminalization strategy will in fact protect women or enhance their equality and autonomy interests as equal partners in sexual matters echoes those expressed by Julie Desrosiers with respect to the new age of consent. Alison uses the available data regarding successful prosecutions for aggravated assault and aggravated sexual assault based on non-disclosure to draw a sharp contrast with the abysmal prosecution of most other sexual assaults, as previously reviewed by Holly Johnson. She suggests that these prosecutions may be fuelled by AIDS panic rather than women's safety concerns, and she demonstrates many problems in these prosecutions, including the reinforcement of racist ideologies regarding African men. Her analysis points away from a criminal law solution and towards other strategies based in health education.*

In 1998, the development of the law of assault in Canada took an intriguing turn. In this year, the Supreme Court of Canada ruled that disclosure of HIV-positive status is required by the criminal law before a person living with HIV/AIDS (hereinafter “PHA”) engages in sexual activity that poses a “significant risk” of transmitting HIV.<sup>2</sup> With this decision, *otherwise consensual* sexual encounters between PHAs and those who were not aware of the person's HIV-positive status became *criminal assaults*.

While every HIV infection is regrettable, and it is always desirable to avoid exposing others to the risk of HIV infection if possible, wheth-

1 Special thanks to Celeste Shankland for her research assistance, to Glenn Betteridge, Sandra Ka Hon Chu, and Patricia Allard for their comments on an earlier draft of this paper, and to Richard Elliott for sharing his many insights and extensive experience on this issue. All errors are the responsibility of the author alone.

2 *R v Cuerrier*, [1998] 2 SCR 371.

er the criminal law of assault (including both aggravated assault and aggravated sexual assault) can appropriately be applied to the issue of HIV exposure is a live question. Many aspects of this challenging and complex (both legally and emotionally) issue merit further consideration. Is it helpful to categorize otherwise consensual sexual activities as assaults when disclosure does not take place? How is this area of law being employed and further elaborated? Moreover, what impact does the criminalization of HIV exposure have on PHAs and on HIV prevention, treatment, care, and support? How does the criminalization of HIV non-disclosure potentially impact on sexual assault jurisprudence and on police and prosecutorial practice? Does the criminalization of HIV exposure protect women from harm? Is the trend to criminalize HIV exposure an appropriate response or an extreme manifestation of “AIDS panic”?

This paper provides an overview of the use of criminal assault law with respect to HIV exposure in Canada since 1998 and raises a number of concerns and considerations with respect to this development in the interpretation and application of sexual assault law. Many of my conclusions are necessarily preliminary given the novelty of the developments and the lack of comprehensive social science evidence on the impacts. However, I believe that reflection on the criminalization of HIV non-disclosure has much to contribute to our understanding of both how the criminal justice system responds to sexual assault within our society, and how our responses to the HIV epidemic are too often ineffective and misdirected. In addition, as this area of law continues to develop, reflection on the broader impacts is critical to devising appropriate responses and recommendations.

### **THE STARTING POINT: *R v CUERRIER***

In its 1998 judgment in the case of *R v Cuerrier*, the Supreme Court of Canada unanimously decided that a PHA may be guilty of a crime of assault if they do not disclose their HIV-positive status before engaging in unprotected sexual activity. *Cuerrier* was the first time that any country’s highest court had addressed the issue of criminal prosecutions for HIV exposure and the first decision in Canada that recognized that a PHA could be convicted of *aggravated assault* for not disclosing his or her HIV-positive status.<sup>3</sup> At trial, the defence had successfully moved

3 Richard Elliott, *After Cuerrier: Canadian Criminal Law and the Non-Disclosure of HIV-Positive Status* (Toronto: Canadian HIV/AIDS Legal Network, 1999) at 6. Trial and appellate level courts in several countries (including Canada, the US, the UK,

for a directed verdict of acquittal, on the ground that the Crown had not made out the offence of assault because the complainants had consented to the sexual activity. The British Columbia Court of Appeal unanimously upheld this ruling.<sup>4</sup> The justices of the Supreme Court, however, saw the issue in a different light.

The case arose because two women were exposed to the risk of HIV infection through sexual relations with Cuerrier, a man diagnosed as HIV-positive in August of 1992. He had been counselled by a public health nurse to use condoms for sex and tell his sexual partners about his HIV-positive status; he rejected this advice. Shortly after his diagnosis, he met KM and began an eighteen-month relationship that included unprotected intercourse. Near the beginning of the relationship, they discussed sexually transmitted infections and Cuerrier told her he had tested negative for HIV eight or nine months earlier; he did not mention his recent positive test result. Both KM and the respondent were tested in January of 1993. KM was informed that her test was negative, but that his was positive for HIV. Cuerrier and KM continued having unprotected sex for several months. Their relationship ended in May of 1994. KM testified that had she known at the outset that Cuerrier was HIV-positive she would never have engaged in unprotected sex with him.<sup>5</sup>

Shortly thereafter Cuerrier began a sexual relationship with another woman, BH. They had sex about ten times, mostly without the use of condoms. He did not inform her that he was HIV-positive. In late June, she discovered that he had HIV and confronted him. She also testified that she would never have engaged in unprotected sexual intercourse with him had she known that he was HIV-positive.<sup>6</sup> He was charged with two counts of aggravated assault. Neither complainant tested positive for HIV.<sup>7</sup>

Mr Justice Cory wrote the majority judgment (for Justices Cory, Major, Bastarache, and Binnie). As defined in the *Criminal Code*, to make out a charge of assault, the Crown needed to prove that the accused in-

Australia, Switzerland, Finland, and France) had previously heard cases in which HIV-positive persons faced charges under various public health or criminal laws for engaging in activities that transmitted or risked transmitting HIV.

4 *Ibid* at 11.

5 *Cuerrier, supra* note 2 at para 78–81.

6 *Ibid* at para 82.

7 *Ibid* at para 83.

tentionally applied force without the consent of the complainant.<sup>8</sup> For the charge of aggravated assault, the Crown also needed to demonstrate that the assault endangered the life of the complainant.<sup>9</sup> Cory J readily concluded that the second element 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. The 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.<sup>10</sup>

The issue of whether the accused applied force without the consent of the complainants was not so easily resolved. The Crown contended that the complainants' consent was not legally effective because it was obtained by fraud. Section 265(3)(c) states that no consent is obtained where the complainant submits or does not resist by reason of "fraud." Up until 1983, the indecent assault provisions of the *Criminal Code* had provided that consent was vitiated where it was obtained "by false and fraudulent representations as to the nature and quality of the act," reflecting the approach to consent in sexual assault cases that had existed at common law.<sup>11</sup> The key question therefore was whether the 1983

8 *Criminal Code*, RSC 1985, c C-46, s 265(1)(a).

9 *Ibid* at s 268(1).

10 *Cuerrier*, *supra* note 2 at para 95. Note that in a recent decision, Steel JA of the Manitoba Court of Appeal questions in *obiter* whether it necessarily follows that there is endangerment of life because there is a finding of risk of serious bodily harm. She notes that the advent of HIV treatment has changed the course of HIV disease progression considerably since the *Cuerrier* decision such that death from AIDS is no longer inevitable: *R v Mabior*, 2010 MBCA 93 at paras 138–46. The Supreme Court of Canada heard the appeal of this case on February 8, 2012. At the time of this writing, a decision had not yet been issued.

11 An example of the type of fraud captured under this definition is a person who falsely held him or herself out as a doctor and purported to conduct a gynaecological examination. See, for example, *R v Marantonio*, [1968] 1 OR 145 (CA). The 1983 amendments to the indecent assault provisions of the *Criminal Code* were aimed at protecting women by improving the deterrent effect of the criminal law with respect to sexual violence and redefining sexual offences in order to focus on violations of the integrity of the person rather than the sexual element of the crime. See Duncan Chappell, *Law Reform, Social Policy, and Criminal Sexual Violence: Current Canadian Responses* (Annals New York Academy of Science, 1988) at 379–87.

revisions to the indecent assault provisions changed the definition of “fraud” such that HIV non-disclosure in cases of otherwise consensual sex would be captured.

Cory J concluded that yes, the legislative history and the plain language of the new provision suggested 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.”<sup>12</sup> He concluded that Parliament intended a more flexible concept of fraud in assault and sexual assault cases.<sup>13</sup>

He further explained that the concept of criminal fraud, which should be applied to consent in sexual assault cases as well, has two constituent elements: dishonesty, which can include non-disclosure of important facts, and deprivation or risk of deprivation.<sup>14</sup> He concluded that PHAs who engage in sexual intercourse without advising their partner of their infection may be found to fulfil these traditional requirements of fraud. This conclusion forms the basis for the criminalization of HIV non-disclosure related to sexual HIV exposure in Canada.<sup>15</sup> Notably, the cases he referred to in relation to the concept of fraud are commercial cases, looking at economic losses or risk — not at physical risks to people.<sup>16</sup>

Applying the fraud elements to HIV non-disclosure, he noted that the dishonest action or behaviour must be related to obtaining consent to engage in the alleged sexual intercourse and can take the form of either deliberate deceit respecting HIV status or non-disclosure (silence) as to that status. A key paragraph of the judgment is as follows:

Without disclosure of HIV status there cannot be a true consent. The consent cannot simply be to have sexual intercourse. Rather it must be to have intercourse with a partner who is HIV-positive. True consent cannot be

12 *Cuerrier*, *supra* note 2 at para 105.

13 *Ibid.*

14 “Deprivation” in this context refers to a harm or injury.

15 Hereinafter, the terminology of “HIV non-disclosure” will be used to refer to having sexual contact without disclosing HIV-positive status to the sexual partner(s). It should be noted that there is no general obligation to disclose HIV-positive status in Canada and the discussion in this paper is limited to the sexual context.

16 Eg, *R v Olan*, [1978] 2 SCR 1175, *R v Théroux*, [1993] 2 SCR 5, and *R v Zlatic*, [1993] 2 SCR 29. See *Cuerrier*, *supra* note 2 at para 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.”

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.<sup>17</sup>

With respect to the second requirement of fraud — that the dishonesty result in some form of deprivation — he noted that:

[I]t 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 falsehood or failure to disclosure) 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.<sup>18</sup>

And with that, arguably, the interpretation and application of sexual assault law in Canada was significantly transformed. “Significant risk of serious bodily harm” became a new standard, extending the law that criminalizes a rape or brutal beating to the otherwise consensual act of sex where there was no disclosure of HIV-positive status. HIV non-disclosure could now result in up to fourteen years imprisonment for an HIV-positive person if convicted of aggravated assault, or to a maximum of life imprisonment if convicted of aggravated sexual assault.<sup>19</sup>

There were two minority judgments in the case. Madame Justice L’Heureux-Dubé agreed with Cory J that the 1983 amendment to the

17 *Cuerrier*, *supra* note 2 at para 127.

18 *Ibid* at para 128.

19 *Criminal Code*, *supra* note 8 at ss 268(2) and 273(2)(b).

*Criminal Code* indicated Parliament's intention to move away from the strict common law approach to the vitiating of consent by fraud. She noted that the assault scheme laid out in the *Criminal Code* is very broadly constructed, aimed not only at protecting people from serious physical harm, but also at protecting and promoting people's physical integrity by recognizing their power to consent or to withhold consent to any touching.<sup>20</sup> Therefore, only consent obtained without negating the voluntary agency of the person being touched is legally valid, according to L'Heureux-Dubé J.<sup>21</sup>

In response to Cory J's "significant risk of serious bodily harm" test, she states that:

my colleague's test has the effect of creating a different interpretation of "fraud" depending on the sexual nature of the particular offense 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 reintroduces, in the sexual assault context, artificial limitations as to when fraud will negate consent to physical contact.<sup>22</sup>

She argued that in the context of the assault scheme in the *Criminal Code*, the issue is whether the dishonest act induced another person to consent to the ensuing physical act, irrespective of the risk or danger associated with that act.<sup>23</sup> Furthermore, the dishonesty of the consent-inducing act would be assessed based on the objective standard of the reasonable person. The Crown would also be required to prove that the accused was aware that his or her dishonest actions would induce the complainant to submit to the particular activity.<sup>24</sup> Her formulation is inherently broader than that put forth by Cory J, not requiring that the complainant be exposed to any significant physical harm, consistent with her focus on protecting the complainant's autonomous will.

Madame Justice McLachlin also wrote a dissenting opinion (on behalf of herself and Gonthier J). In contrast to L'Heureux-Dubé J's broader formulation of what would constitute fraud, McLachlin J proposed a more modest reconsideration. She explained that:

I agree with the courts below (indeed all courts that have hitherto con-

<sup>20</sup> *Cuerrier, supra* note 2 at paras 11–12.

<sup>21</sup> *Ibid* at para 12.

<sup>22</sup> *Ibid* at para 14.

<sup>23</sup> *Ibid* at para 16.

<sup>24</sup> *Ibid*.



sidered 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. ... 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.<sup>25</sup>

She concluded that the 1983 amendments did not oust the common law governing fraud in relation to sexual assault. She further concluded that it would be inappropriate for the courts to make broad extensions to the law of sexual assault, such as those proposed by Justices Cory and L'Heureux-Dubé. Recognizing that the proposed rules had the potential to criminalize a vast array of sexual conduct, she remarked that:

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.<sup>26</sup>

In terms of Cory J's introduction of the qualifier — that there must be a significant risk of serious bodily harm before consent is vitiated — McLachlin J pointed out that it introduces uncertainty into the law and that consequences as serious as criminal prosecutions should not turn on the interpretation of vague terms like “significant” and “serious.”<sup>27</sup> Moreover, she recognized that the equation of non-disclosure with lack of consent oversimplifies the complex and diverse nature of consent in sexual situations.<sup>28</sup>

Finally, she noted that criminal liability is generally imposed only for conduct that causes injury to others or puts them at risk of injury. She argued that Cory and L'Heureux-Dubé J's theories of criminal liability for sex without disclosure would impose liability for conduct that

<sup>25</sup> *Ibid* at para 34.

<sup>26</sup> *Ibid* at para 47.

<sup>27</sup> *Ibid* at para 48.

<sup>28</sup> *Ibid* at para 49.

is causally unrelated to harm or risk of harm, creating problems with *mens rea* and raising the possibility of *Charter* violations.<sup>29</sup> Based on these concerns, amongst others, she concluded that the theoretical and practical difficulties involved in extending the law around non-disclosure of HIV-positive status as proposed preclude such an action on the part of the court.<sup>30</sup>

McLachlin J did, however, agree that non-disclosure of HIV-positive status to sexual partners should attract criminal liability. In her words:

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. The 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 criminal sanction.<sup>31</sup>

As such, McLachlin J's analysis also leads to the conclusion that deceit about sexually transmitted disease that induces consent to unprotected sex should be treated as fraud vitiating consent under s 265 of the *Criminal Code*, but without redefining consent as Cory J's judgment dictated.

### **THE SUBSEQUENT APPLICATION OF *CUERRIER***

In the little more than a decade since the Supreme Court issued its judgment in the *Cuerrier* case, at least 140 persons in Canada have been charged in relation to non-disclosure of HIV-positive status with respect to sexual activities.<sup>32</sup> Of these charges, the vast majority were

<sup>29</sup> *Ibid* at paras 50, 53.

<sup>30</sup> *Ibid* at para 57.

<sup>31</sup> *Ibid* at para 72.

<sup>32</sup> This estimate is based on tracking of the cases conducted by the Canadian HIV/AIDS Legal Network. The tracking is based on reported cases, media reports, and personal communications from lawyers, community-based organizations, and those individuals facing prosecution. As of February 2012, the Legal Network was aware of

laid against men having sex with women.<sup>33</sup> The majority of the cases involved *Cuerrier*-like situations — unprotected vaginal or anal intercourse without disclosure — but some cases have included charges in relation to non-disclosure and oral sex and/or protected intercourse.<sup>34</sup> In some of the cases, the sexual relationships went on for many months, while in others the allegations relate to brief encounters.<sup>35</sup>

From the mid-2000s onwards, there has been a marked escalation in the use of criminal law with respect to HIV non-disclosure. For example, of those charged to date, more than 70 were charged from 2006 through 2011.<sup>36</sup> In addition, several high-profile cases involving multiple complainants and violent or exploitative circumstances have gone to trial (and received prolific media coverage) since 2007.

Furthermore, an increasing number of accused are facing charges of *aggravated sexual assault* as opposed to the lesser charges of aggravated assault or criminal negligence causing bodily harm.<sup>37</sup> There are no

148 cases of HIV exposure without disclosure (with several individuals having been charged more than once). Of course, there may be others of which the Legal Network is not aware. See also, Eric Mykhalovskiy, Glenn Betteridge & David McLay, “HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario,” a report funded by a grant from the Ontario HIV Treatment Network (Toronto, 2010) at 8. Mykhalovskiy *et al* identified a total of 104 cases in which ninety-eight individuals had been charged with criminal offences related to HIV non-disclosure from 1989 to 2009.

- 33 According to the Legal Network’s tracking, only 13 women have faced charges in Canada (one of them was charged on two separate occasions), and approximately 22 of the prosecutions have involved men having sex with men. For some of the cases, however, the sex of the complainant(s) is not known; therefore, it is possible that there may be a few more men charged in relation to sexual activities with other men.
- 34 *Ibid.* In Canada, aggravated assault charges have also been laid in cases of spitting, biting, and scratching, and one woman has been charged in relation to vertical HIV transmission (that is, from a mother to her infant). These cases are not discussed in this paper, which focuses on the sexual exposure cases.
- 35 *Ibid.*
- 36 *Ibid.* Mykhalovskiy *et al*, *supra* note 32 at 9 found that approximately 65 percent of cases for which the year of charge is known have occurred in the five-year period between 2004–09.
- 37 It should also be noted that Johnson Aziga was found guilty of two counts of first degree murder and eleven counts of aggravated sexual assault in 2009 in relation to HIV exposure without disclosure. Two of the female complainants died of AIDS-related cancers: *R v Aziga*, 4 April 2009, Court File No CR-08-1735. Subsequent to the *Aziga* verdict, three men in Ontario have been charged with attempted murder in relation to HIV non-disclosure allegations. It is assumed that the escalation from charges of aggravated sexual assault to attempted murder was solely in reaction to the precedent set by the *Aziga* verdict. There appear to be no factual or legal distinctions that would result in different charges.

clear factual differences in terms of who is charged with aggravated assault and who is charged with aggravated sexual assault, and no judicial decision indicating that aggravated sexual assault is more appropriate in certain circumstances. The trend towards aggravated sexual assault charges seems to be based solely on police and prosecutorial discretion. The implications of being charged with aggravated sexual assault, rather than aggravated assault, however, are quite significant. In addition to longer potential jail terms, those convicted of aggravated sexual assault are considered sex offenders, which means that their names will be included in the sex offender registries and that, with this label, they might receive harsher treatment in prison and from their communities. In addition, classifying these crimes as serious sexual offences may contribute to the construction of PHA offenders as sexually deviant and invite myths and stereotypes about rape and sexuality into the public understanding of HIV transmission.

In the cases since *Cuerrier*, few courts have interrogated the legal reasoning or test established in that case. Often, the trials primarily focus on the factual determination of whether or not disclosure took place before the sexual relations and other related factual questions. These factual determinations, however, can at times be quite problematic.

To take one example, a woman originally from Thailand was found guilty of criminal negligence causing bodily harm and aggravated assault in January of 2007 for not disclosing her HIV-positive status to her then husband who became infected with HIV.<sup>38</sup> The woman admitted that she did not reveal her HIV-positive status to her husband, but explained that she did not do so because she did not believe she was HIV-positive. While she had previously tested positive to HIV at a clinic in Hong Kong, she believed that she had subsequently tested HIV-negative through her immigration medical exam when she came to Canada and therefore believed herself to be HIV-negative. The judge found that her “simple story does not correspond with common sense.”<sup>39</sup> Basing his conclusions on his own expectations of an ordinary person, he stated that he would have expected her to seek out a second test as soon as she arrived in Canada, especially given her doubts about the reliability of the Hong Kong clinic and its testing. He also rejec-

38 *R v Iamkhong* (16 January 2007), Toronto, Ontario (Ont Sup Ct J) (unreported).

39 *Ibid* at 15.

ted her assertion that she genuinely thought the medical test required by Citizenship and Immigration Canada included an HIV test, and found that even if she thought that a second test indicated that she was HIV-negative, he would have expected her to make greater efforts to clarify the conflicting result rather than relying on incomplete information provided by her employer.<sup>40</sup> Because the judge decided that the woman knew she was HIV-positive, a guilty verdict easily followed because she admitted that she had not told her husband that she was HIV-positive.

Consider that this woman grew up in a small village in Thailand, has only a fourth-grade education, and speaks limited English. She had undergone her first HIV test at a small clinic in Hong Kong in 1994 (presumably without adequate pre- and post-test counselling or understanding about the illness, at a time when treatment was not yet available). She immigrated to Canada to work as an exotic dancer. In these circumstances, is it so unreasonable that she would have been misinformed regarding the content of the immigration medical exam? Is it so unreasonable that she would have accepted that she could be HIV-negative despite the previous positive test result? Is it so unreasonable that she would not have told her new Canadian husband or Canadian health care providers about the previous test result, believing that the result was incorrect? Surely when an intersectional gender, race, and class analysis is applied, recognizing her dependant, vulnerable position in Canada, the judge's factual determination is open to challenge.<sup>41</sup>

With most of the cases turning on questions of fact, many of the questions emanating from the majority reasoning in *Cuerrier* have remained unresolved and significant uncertainty remains regarding the precise scope of the legal obligation on PHAs. The current state of the criminal law with respect to HIV disclosure in Canada, as laid out by a national HIV/AIDS legal organization, is as follows:

- A person has a legal duty to disclose his or her HIV-positive status to sexual partners before having sex that poses a “significant risk” of HIV transmission.
- A person can be convicted of a crime for not disclosing his or her HIV-positive status before having sex that poses a significant risk of transmission even if the other person does not actually become infected. The crime is exposure without disclosure.
- A person may have a legal duty to disclose his or her HIV-positive status before having sex that poses a significant risk of transmission

<sup>40</sup> *Ibid* at 15–17.

<sup>41</sup> The decision was unsuccessfully appealed: *R v Lamkhong*, 2009 ONCA 478.

even if he or she knows that a sexual partner also has HIV.

- A person who knows there is a risk that he or she has HIV (but has not received an actual HIV-positive diagnosis) may have a legal duty to tell sexual partners about this risk before having unprotected sex.<sup>42</sup>

A central concern to the HIV community<sup>43</sup> is whether the legal obligation to disclose applies with respect to protected sex and lower risk sexual activities (ie, when condoms or latex barriers are used, performing oral sex), or only to unprotected intercourse. The *Cuerrier* decision is only explicit with respect to unprotected intercourse, suggesting that “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,” leaving a clear ruling on this issue for another day.<sup>44</sup>

This uncertainty around a so-called “condom defence” has caused considerable anxiety amongst PHAs and the HIV community. Every person taking responsibility for his or her own sexual health and always practising safer sex is central to public health messaging about prevention of sexually transmitted infections. A legal rule that penalizes PHAs even if they are responsibly practising safer sex seems unjust, disproportionate, and unwarranted. At the same time, most people would want to know that their partner is HIV-positive (or of other possible risks related to intercourse with that partner) and respect for bodily integrity might favour a legal standard that requires disclosure in order that each partner is entitled to decide which risks they will undertake.

In several cases, trial courts have considered whether a “significant risk” of HIV transmission existed in circumstances where condoms were used. In at least four of these cases, it is suggested that there is no legal duty to disclose HIV-positive status when a condom is used during sexual intercourse.<sup>45</sup> A recent decision of the Manitoba Court of

42 Canadian HIV/AIDS Legal Network, “Criminal Law and HIV – Info Sheet 1: Criminalization of HIV Non-Disclosure: Current Canadian Law” (2011), online: <<http://www.aidslaw.ca/criminallaw>>.

43 The term “HIV community” is being used in this paper to refer to the community-based organizations, health care providers, HIV-focused advocacy organizations, and PHAs who are involved in such organizations or related advocacy activities.

44 *Supra* note 2 at para 129.

45 *R v Nduwayo*, 2006 BCSC 1972 at paras 7–8; *R v Smith*, [2007] SJ No 166 (Sask PC) at para 59; *R v Charron*, [2008] Longueuil 765-01-010423-024 (CQ) at para 40; *R v*

Appeal is the first decision from a court at the appeal level on this issue. After considering the scientific evidence on the efficacy of condoms in reducing HIV transmission, Steel JA held that the “consistent and careful use of condoms can reduce the risk of transmission, not to zero, but below the level of significance.”<sup>46</sup> By this reasoning, there would be no legal obligation to disclose HIV status when using condoms carefully and consistently. Whether this decision will be appealed and/or the reasoning adopted in other jurisdictions remains to be seen.

Related concerns about uncertainty in the law arise in respect to lower risk sexual activities (such as oral sex) where we know the risk of transmission to be lower than that associated with unprotected vaginal or anal intercourse. A recent decision of the Supreme Court of British Columbia grappled directly with these tricky questions of transmission risk levels and what is a legally “significant risk.” Taking into consideration various factors, the medical expert put the risk of transmission to the complainant in the case at four in 10,000 per incident of intercourse.<sup>47</sup> As there were three occurrences, the judge took the risk to be twelve in 10,000 and found that “a risk of transmission of HIV of 0.12 percent is not material enough to establish deprivation invalidating the consent of the complainant.”<sup>48</sup> She further stated:

In reaching this conclusion, I should not be taken to condone the behaviour of the accused. He had a moral obligation to disclose his HIV-positive status to his partner and to give the complainant the opportunity to assume or reject the risk involved in sexual activity with the accused, no matter how small. But not every immoral or reprehensible act engages the heavy hand of the law. Aggravated sexual assault is a most serious offence — a person convicted of this charge is liable to imprisonment for life, the harshest penalty provided for in law. Only behaviour that puts a complainant at significant risk of serious bodily harm will suffice to turn what would otherwise be a consensual activity into an aggravated sexual assault. In my view, a risk of transmission of HIV of 0.12% falls short of that standard.<sup>49</sup>

Whether other courts will follow this approach remains to be seen.

Another area of uncertainty and concern relates to issues of vir-

*Imona-Russel*, [2009] Toronto (Ont Sup Ct J) at paras 28, 50, 68.

<sup>46</sup> *Mabior*, *supra* note 10 at para 87.

<sup>47</sup> *R v JAT*, [2010] BCSC 766 at para 29.

<sup>48</sup> *Ibid* at para 88.

<sup>49</sup> *Ibid* at para 89.

al load and treatment.<sup>50</sup> In the years that have passed since *Cuerrier*, our understanding of HIV disease and transmission has advanced considerably. Moreover, the advent of highly-active antiretroviral treatment (HAART) has transformed HIV and AIDS from a fatal illness to a manageable, episodic disability for most people living with HIV.<sup>51</sup> Newer research also demonstrates that successful treatment with HAART not only improves the health of people living with HIV, but considerably reduces the infectivity of PHAs.<sup>52</sup> Given these developments, can we continue to accept that, as a result of the *Cuerrier* decision, unprotected vaginal or anal intercourse *always* poses a “significant risk of serious bodily harm” for the purposes of the criminal law? The above mentioned Manitoba Court of Appeal decision also addressed this issue and was the first Canadian court to acquit an accused based on his low viral load at the time of the sexual encounters.<sup>53</sup> With respect to the testimony of the accused’s doctor that there was a high probability that he was not infectious during the period of time under consideration, Steel JA remarked:

I do not see how that evidence can support a finding with respect to these complainants that the Crown has proven beyond a reasonable doubt the lack of consent arising from the presence of a significant risk of serious bodily harm. “Significant” means something other than an ordinary risk. It means an important, serious, substantial risk. It is the opposite of evidence of a “high probability” of no infectiousness, especially given the statistical percentages referred to earlier.<sup>54</sup>

### **IS CRIMINALIZATION OF HIV EXPOSURE A PROGRESSIVE DEVELOPMENT IN CANADIAN LAW?**

The majority decision in *Cuerrier*, as discussed above, posits criminal liability for HIV non-disclosure as an appropriate HIV prevention tool as well as a proper application of Canada’s assault laws in line with the

50 Viral load refers to the amount of HIV virus in a PHA’s blood. The best viral load test result is “undetectable.” This does not mean that there is no virus present, but that there is so little that the test can not register it. The HIV viral load is used as a measurement of how active the HIV disease is and also indicates whether the medication regimen is working.

51 HAART was developed in the mid-1990s and is now widely available in developed countries.

52 See Susana Attia, “Sexual transmission of HIV according to viral load and antiretroviral therapy: systematic review and meta-analysis” (2009) 23 AIDS 1.

53 *Mabior*, *supra* note 10 at paras 130, 133, 137.

54 *Ibid* at para 127.



1983 amendments. Arguably, however, the criminalization of HIV exposure is failing on both fronts.

### **Criminalization of HIV Non-Disclosure as an HIV Prevention Tool**

With respect to HIV, my starting point is that any use of coercive legal powers by the state (whether within the criminal justice or public health systems) must be evaluated on its ability to prevent further HIV infections and/or promote care, treatment, and support for PHAs, in line with the best available evidence and human rights standards. In fact, the majority decision in *Cuerrier* addressed some of the public policy concerns commonly raised with respect to the criminalization of HIV non-disclosure, which were raised by *amicus curiae* at the time.<sup>55</sup> Cory J stated:

[T]he 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. ...<sup>56</sup>

...The risks of infection are so devastating that there is a real and urgent need to provide a measure of protection for this 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.<sup>57</sup>

Fourteen years on from *Cuerrier*, however, there remains little, if any,

55 The British Columbia Civil Liberties Association, the Canadian AIDS Society, Persons with AIDS Society of British Columbia, and the Canadian HIV/AIDS Legal Network intervened in *R v Cuerrier* at the Supreme Court. On the public policy arguments against the criminalization of HIV non-disclosure see: Canadian HIV/AIDS Legal Network, "Criminal Law and HIV — Info Sheet 3: Does Criminalizing HIV Exposure Make Sense?" (2008), online: <<http://www.aidslaw.ca/criminallaw>>; Scott Burris & Edwin Cameron, "The Case Against Criminalization of HIV Transmission" (2008) 300 JAMA 578; and Ralf Jürgen *et al*, "10 Reasons to Oppose Criminalization of HIV Exposure or Transmission" (2008) Open Society Institute, online: <[http://www.soros.org/initiatives/health/focus/law/articles\\_publications/publications/10reasons\\_20080918](http://www.soros.org/initiatives/health/focus/law/articles_publications/publications/10reasons_20080918)>.

56 *Supra* note 2 at para 141.

57 *Ibid* at para 142.

evidence to support the proposition that criminal charges for HIV non-disclosure contribute to HIV prevention aims by deterring PHAs from not disclosing their status or practicing unprotected sex.<sup>58</sup>

Any preventative effect that a criminal prosecution can have is minimal. Charges are brought after exposure has taken place and often after the relationship has ended. Therefore, with respect to the particular accused, retribution, not prevention, may be the motivation for criminal charges. The only realistic possibility of some prevention benefit from criminal prosecutions — and one of the primary arguments put forth in favour of criminalization — is through *deterrence*. That is, the fact that non-disclosure is criminal where there is a significant risk of transmission will cause PHAs, who otherwise might have had sex without disclosing, to instead disclose their HIV-positive status (or in the absence of disclosure, take steps to ensure they do not put their partners at a significant risk of HIV infection). But embedded is an assumption that disclosure of HIV status will lead sexual partners to change their sexual practices and either engage only in lower risk sexual activities, consistently use protection, or refrain from sexual activity altogether.

What little evidence exists suggests that people are guided in their decision making about sexual or other risks more by their sense of what is right and wrong than by what the law actually says.<sup>59</sup> It is questionable whether legal provisions could ever be a significant factor in decision making about safer sex “in the heat of the moment,” particularly if alcohol, drugs, or domestic violence are involved. Moreover, a review of the empirical literature on HIV disclosure and subsequent sexual risk taking found that significant barriers and disincentives to revealing one’s HIV diagnosis persist, including fears of abandonment, discrimination in housing and employment, violence, and other forms of abuse. They found that criminal charges against PHAs who are sexually active are another impetus to remain silent about one’s HIV-positive status, concluding that “[t]hese psychological, practical and legal barriers may contribute to the refusal of many individuals with

58 Note that Cory J specifically mentions encouraging safer sex as a probable outcome of the decision: “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” (*supra* note 2 at para 147).

59 See, for example, Scott Burriss *et al*, “Do Criminal Laws Influence HIV Risk Behaviour? An Empirical Trial” (2007) 39 *Ariz St LJ* 467. It is important to note that Cory J’s reasoning about deterrence and behaviour changes are directed only at PHAs, in keeping with the fact that the legal duty rests solely with PHAs.

HIV to divulge their serostatus to sexual partners.”<sup>60</sup> The deterrence aim of the criminalization of HIV non-disclosure therefore merits reconsideration.

Another important limitation to the deterrence objective is the fact that approximately one-quarter of the people in Canada who are infected with HIV are unaware of this fact.<sup>61</sup> If people are unaware of their infection, then they have nothing to disclose and therefore the disclosure requirement can have no prevention benefit. At the same time, scientific studies reveal that those in the early stages of HIV infection, who are least likely to be aware that they are HIV-positive, are the most infectious and are responsible for a high percentage of onward HIV transmission.<sup>62</sup>

Thus, emphasizing disclosure, as the Canadian criminal law currently does, is not necessarily associated with higher rates of protected sex or lower rates of HIV infection.<sup>63</sup> Even if disclosure can be effective as an HIV prevention tool in certain circumstances, uniformly requiring disclosure does not take into consideration the realities of dis-

60 Jane M Simoni & David W Pantalone, “Secrets and Safety in the Age of AIDS: Does HIV Disclosure Lead to Safer Sex?” (2004) 12:4 Topics in HIV Medicine 110.

61 Public Health Agency of Canada, *HIV/AIDS Epi Updates — July 2010* (Ottawa: PHAC, 2010). Note that according to the judgment in *R v Williams*, a person who has reason to believe that they may be infected (for example, they have been contacted by public health as a contact of a PHA and advised to be tested) may have a duty to disclose that risk (*R v Williams*, [2003] 2 SCR 134).

62 See, for example, Maria Wawer *et al.*, “Rates of HIV-1 Transmission per Coital Act, by Stage of HIV-1 Infection, in Rakai, Uganda” (2005) 191 J Infectious Diseases 1403, demonstrating that the rate of sexual infection is more than tenfold higher during acute infection. See also Bluma G Brenner *et al.*, “High Rates of Forward Transmission Events After Acute/Early HIV-1 Infection” (2007) 195 J Infectious Diseases 951, estimating that approximately half of all new HIV infections could be attributed to those who are only recently infected themselves and likely in the period of early, acute infection where they have not yet been diagnosed with HIV but their viral load is very high during the process of seroconversion.

63 Barry Adam, “What Effect is the Criminal Justice System Having in HIV Prevention?” presented at: From Evidence and Principle to Policy and Practice, Symposium on HIV, Law and Human Rights (Toronto, 12–13 June 2009) [unpublished]. Adam reported that studies looking at sexual practices of gay and bisexual men found that the consistent practice of safer sex usually proceeds without discussion, and it is those who decide from encounter to encounter whether to disclose or not who have higher rates of unprotected sex. See Benny Henriksson & Sven Axel Månsson, “Sexual Negotiations” in Han ten Brummelhuis & Gilbert Herdt, eds, *Culture and Sexual Risk* (London: Routledge, 1995) at 170. Trevor Hart *et al.*, “Partner Awareness of the Serostatus of HIV-Seropositive Men Who Have Sex with Men” (2005) 9 AIDS and Behaviour 163; Limin Mao *et al.*, “Serosorting’ in Casual Anal Sex of HIV-Negative Gay Men is Noteworthy and is Increasing in Sydney, Australia” (2006) 20 AIDS 1204.

closure, which is a difficult and often complex act frequently associated with deep trust and intimacy. For example, many women experience great difficulty in disclosing to men on whom they are dependent, and disclosure can be particularly challenging for those who feel disadvantaged by their age, attractiveness, or ethnocultural background.<sup>64</sup> HIV disclosure can also be a prelude to violence. HIV prevention initiatives that promote safer sex and empower individuals to take control of their sexuality and sexual health are therefore more effective than focusing on disclosure.<sup>65</sup>

Not only is criminalizing HIV non-disclosure likely to have limited prevention benefits at best, but a number of legitimate concerns have been raised about its potential to be *counterproductive* to this aim. First, people may hesitate to seek HIV testing and related counselling and support if they fear that providing information to service providers could lead to breaches of confidentiality, condemnation, and possible criminal charges. As a result, people may engage in further risk activities without the benefit of harm reduction materials and counselling, or miss out on available treatment and support services.<sup>66</sup> Second, expansive use of criminal law can contribute to the already substantial public misunderstanding of transmission risk. In Canada, criminal charges have been laid against PHAs in relation to biting, scratching, and spitting, despite the extremely low or non-existent risk of HIV transmission in these circumstances. Media coverage of these cases — together with coverage of sexual exposure cases in which the risks of transmission, the “window period” during which infection may not yet show up on standard lab tests, and the negative impacts of living with HIV are misstated or exaggerated — undermine efforts to educate the public about HIV and PHAs.<sup>67</sup> Third, criminal prosecutions for HIV exposure, and the sensational media coverage they often generate, can contribute to stigma and discrimination against people living with HIV. Such cases place the responsibility for preventing HIV transmission entirely on PHAs and they risk portraying all PHAs as vectors of

64 Karolynn Siegel, Helen-Maria Lekas & Eric Schrimshaw, “Serostatus Disclosure to Sexual Partners by HIV-Infected Women Before and After the Advent of HAART” (2005) 41 *Women and Health* 63.

65 See, for example, the Centres for Disease Control and Prevention’s 2008 *Compendium of Evidence-based HIV Prevention Interventions* for examples of what sorts of interventions work and why, online: <<http://www.cdc.gov/hiv/topics/research/prs/evidence-based-interventions.htm>>.

66 Info Sheet 3, *supra* note 55.

67 *Ibid.*

disease and potential criminals. Increasing stigma and discrimination is counterproductive to HIV prevention efforts and to the well-being of PHAs.<sup>68</sup>

### **Criminalization of HIV Non-Disclosure as Sexual Assault Law**

While increasing numbers within the HIV community are now paying attention to the criminalization of HIV non-disclosure — seeking information about their rights and responsibilities as PHAs or service providers, researching the impacts of HIV non-disclosure charges on PHAs and HIV prevention efforts, or advocating for changes in applicable laws and practices — the issue has received less attention from the academics, service providers, and activists focused on violence against women. It is therefore worth exploring the question: are prosecutions for non-disclosure a misuse of (sexual) assault laws?

A preliminary question to consider may be, “when is HIV non-disclosure properly understood as an assault, and in particular an aggravated sexual assault?” In one sense, HIV non-disclosure can be characterized as a “crime of knowledge.” The offence is not one of using force against someone or physically harming them.<sup>69</sup> The essence of the crime is knowingly exposing your sexual partner to a risk, when the partner does not specifically know that they are accepting that risk (although most sexually active adults in our society today have some degree of knowledge of the general risks of engaging in unprotected sex, including pregnancy and sexually transmitted infections). Is it consistent with the underlying motivation for criminalizing sexual assault (and classifying some assaults as “aggravated”) to apply those sanctions to this “crime of knowledge”?

In some ways, the question begs an exploration of the crime of fraudulent sexual assault. Traditionally, the definition of “fraud” in such cases was narrow, relating only to the nature and quality of the act. The classic example is someone misrepresenting themselves as a doctor in order to secure consent to do a gynaecological examination. The majority judgement in *Cuerrier* developed a specialized rule for sexual assault cases that centres around a risk assessment, creating the situation where courts today are having to grapple with medical and scientific evidence about HIV transmission risks rather than focus on what the complainant’s assessment of the risk would have been, an inquiry more consistent with sexual autonomy and the court’s understanding of con-

68 *Ibid.*

69 Recall that the essence of the crime is HIV exposure without disclosure. Charges can (and have) been laid where no transmission takes place.

sent as a subjective matter in *Ewanchuk*.<sup>70</sup> On the other hand, if the definition of fraud vitiating consent was opened up, people could find themselves facing long terms of imprisonment for objectively inconsequential omissions or deceptions. In the case of HIV non-disclosure, it could be seen as state-sponsored AIDS-panic to find someone guilty of the serious crime of aggravated assault or aggravated sexual assault because the complainant would not have consented in circumstances where he or she had an exaggerated sense of the risk of HIV transmission. Perhaps it is because of the immense stigma and discrimination surrounding HIV, the abundant misinformation about HIV that exists in our society, and the inherent complexity of sexual risk taking that this issue is particularly challenging. It does not fit easily within the rubric of sexual assault law and determining where to draw the line between criminal and non-criminal deceptions is a fraught exercise.

Another element of these offences to consider is that both partners to the sexual acts are active participants, and both partners may exchange bodily fluids in the course of the sexual acts. In otherwise consensual sex (ie, consensual other than the HIV non-disclosure), there is no reason to assume an active (male PHA) actor and a passive (female) recipient. Is this active interaction and mutual consent to have sex consistent with the crime of assault, which is defined as one person applying force to another person?<sup>71</sup>

The 1983 revisions to the sexual violence provisions in the *Criminal Code* move the focus away from the sexual element of the crime to concentrate on the violations of the integrity of the person that result from an assault. Exposing someone to HIV without disclosure — either by remaining silent about the risk he or she is accepting by engaging in unprotected sex, dropping some hints about HIV status but falling short of unambiguously disclosing, or by explicitly concealing one's HIV status — surely is experienced by many as a violation of their integrity, an affront to their sexual agency, and exposure to a risk that is quite terrifying to them. In terms of how the complainant understands and experiences the event(s), is “sexual assault” the appropriate name for a sexual encounter with a PHA who does not disclose?

70 Elizabeth Sheehy & Christine Boyle, “Justice L’Heureux-Dubé and Canadian Sexual Assault Law: Resisting the Privatization of Rape” in Elizabeth Sheehy, ed, *Adding Feminism to Law: The Contributions of Justice Claire L’Heureux-Dubé* (Toronto: Irwin Law, 2004) 247 at 265.

71 To be clear, this paper is not addressing cases of rape or sexual exploitation. The focus is on cases of otherwise consensual sex between adults, where non-disclosure of HIV-positive status is the only criminal element.

One objection raised to the criminalization of HIV disclosure is that it places the exclusive responsibility for HIV prevention on PHAs, as opposed to the mutual responsibility messages that are more common from sexual and public health promotion agencies. While problematic from a prevention perspective, perhaps from a criminal law perspective this assignment of responsibility is appropriate. In sexual assault prosecutions, the focus should not be on the behaviour of the complainant — her sexual history, her actions, whether she resisted (or inquired) — but on the behaviour of the accused and whether he was certain that his partner was fully consenting.

But does such a characterization oversimplify the complexity, ambiguity, fluidity, and uncertainties inherent in sexual interactions and disclosure of personal information, such as HIV status? Denying agency to women is powerful in constructing them as damaged “victims” — in the media and in the courtroom — but does it reflect reality, or lead towards equality and the eradication of violence? In “real-life” sexual encounters, arguably facts are not quite as definitive as criminal courts would make things seem. Whether purposely or inadvertently, sexual encounters often involve certain assumptions, “leaps of faith,” and elements of mystery.<sup>72</sup> If we want to recognize women’s full rights and agency as active sexual partners, is it logically coherent to assign full responsibility for disclosure and prevention to only one partner? Is it appropriate to only consider the actions and motivations of one partner in determining possible criminality?<sup>73</sup> Surely, the criminal law can

72 As noted by two leading commentators on criminal law and HIV Burns & Cameron, *supra* note 55 at 579:

Risk assessments are heavily influenced by psychological and social biases. The riskiness (and blameworthiness) of sexual behaviour depends on the observer’s perceptions of the value of sex, the responsibilities of the sex partner for self-protection, and the applicable norms of sexual behaviour. Every day, millions of individuals have unprotected sex with partners they must assume might be infected. They evidently rate the risks and benefits of sex differently than people who retrospectively judge sexual behaviour in legal proceedings. Thus conduct that seems normal to many — ie, sex without protection despite the presence of risk — exposes those who have HIV to severe criminal penalties, including life imprisonment.

73 Note that the complainant does have to testify that he or she would not have had sex with the accused if he or she was aware of the accused’s HIV-positive status. This requirement does not seem to figure prominently into many of the cases, however, and thus is hardly addressed in the literature and activism on the criminalization of HIV exposure. This requirement could also be seen as playing into a characterization of the complainant as “good” and the accused as “bad” (ie, she would not have been exposed but for his deceit) at trial, more so than contributing to a rational assignment of mutual responsibility around sexual health.

be a useful component in society's arsenal against sexual violence and exploitation, but perhaps this one-sided responsibility and exclusive focus on whether disclosure took place does not fit well with furthering women's empowerment and eradicating gender-based violence.

I ask these questions with full awareness that being exposed to HIV, and potentially becoming infected with this very serious medical condition, is a devastating and life-altering occurrence for most people. To know that your sexual partner had the knowledge and ability to prevent this occurrence, and that you were denied that opportunity, is without doubt shocking and unconscionable to many who have been exposed to HIV. Nonetheless, I would argue that the appropriateness of assault charges, and in particular aggravated sexual assault charges, based on one-sided responsibility, is not necessarily empowering or respectful to consenting adults, at least not in the full breadth of circumstances in which criminal charges are being laid (including where protection is used and therefore the risk of HIV transmission is negligible).

To improve upon these laws, we need to talk to women who have been infected through sex to understand their experiences and how non-disclosure is or is not experienced as a form of violence. As these women are now themselves part of the PHA community, including being subject to legal obligations to disclose their status and also to all of the stigma and discrimination that can come with an HIV-positive diagnosis, what do they see as the appropriate role for the law?<sup>74</sup>

If we really want to protect and empower women, we should honestly reflect on whether prosecuting PHAs for aggravated assault or aggravated sexual assault when they allegedly do not disclose their HIV-positive status contributes to our objectives. While it may provide some sense of justice to women who legitimately feel that they have been deceived and wronged by malicious men, what message does it send to women and the public generally about their role in sexual relationships, about sexual assault and violence against women, about dependency and agency and the root causes of women's vulnerability to both viol-

74 I know of no studies that have been published to date about women PHAs or the female complaints in these cases. Some research studies have looked at HIV disclosure and gay men and further research is ongoing with PHAs in Ontario. See, for example, Barry Adam *et al.*, "Effects of the Criminalization of HIV Transmission in *Cuerrier* on Men Reporting Unprotected Sex with Men" (2008) 23 CJLS 137; and Barry Adam, "Drawing the Line: Views of HIV-Positive People on the Criminalization of HIV Transmission in Canada" presented at: "From Evidence and Principle to Policy and Practice: Symposium on HIV, Law and Human Rights" (Toronto, 11 June 2010) [unpublished].



ence and HIV, including poverty, discrimination, and myths about women's sexuality?

In considering whether these prosecutions offer any protection to women, examining the different circumstances in which prosecutions have taken place provides fodder for thought. For example, a Montreal woman was found guilty of aggravated assault for non-disclosure to her partner with respect to sexual encounters at the onset of their relationship. Both admitted that she had disclosed her status to him once the relationship became more serious; they continued in a sexual relationship for several years following her disclosure. In her case, the partner allegedly became violent towards her and her son. He reportedly received an absolute discharge while she was convicted of aggravated assault.<sup>75</sup> The case has attracted a significant amount of attention from people who feel it is patently unjust for her to have been convicted of such a serious crime, considering that the partner ultimately accepted the risk by continuing in a sexual relationship with her for several years knowing that she was HIV-positive, and he did not become infected. In contrast to his treatment at the hands of the justice system — an absolute discharge for committing physical violence against a woman and child — justice does not appear to have been done. This woman did not receive any protection from the law.

In a very different case, a Winnipeg man was found guilty of six aggravated sexual assault charges in relation to HIV non-disclosure (plus additional charges of invitation to sexual touching and sexual interference); on appeal, four of the aggravated assault charges were overturned because the presence of a significant risk of HIV transmission had not been proven beyond a reasonable doubt.<sup>76</sup> One of the complainants was only twelve years old at the time of their sexual encounters, and media accounts report that he offered alcohol and drugs to teenagers in vulnerable situations to lure them into sexual relationships.<sup>77</sup> As these two examples demonstrate, the range of situations covered by these cases makes a simple “yes” or “no” answer to the question of whether and how these prosecutions may protect women impossible.

75 *R c DC*, [2008] Montreal 505-01-058007-051 (CQ), [2008] JQ 994. The woman was acquitted on appeal on the basis that a significant risk of serious bodily harm had not been proven: *R c DC*, 2010 QCCA 2289. The Supreme Court of Canada heard the appeal of this case on February 8, 2012, together with the appeal of *R v Mabior*. At the time of this writing, a decision had not yet been issued.

76 *R v Mabior*, [2008] MBQB 201; *Mabior*, *supra* note 10.

77 Mike McIntyre, “HIV Positive Man Convicted” *Winnipeg Free Press* (16 July 2008) A4; Dean Pritchard, “Tainted Sex on Trial; Teenager Testifies Against HIV Carrier” *Winnipeg Sun* (13 May 2008) 4.

Advocacy work on the criminalization of HIV at the international level, and with particular reference to African countries, has drawn attention to the tenuous claims of “protecting women” that are often behind pushes to prosecute those who are unwilling or unable to disclose. For example, one article notes that:

Criminalization [of HIV transmission] is also not an effective way of protecting vulnerable populations from coercive or violent behaviour, such as rape, that can transmit HIV. Sexual violence is already criminalized. Criminal laws [on HIV transmission] do nothing to address women’s subordinate socioeconomic position, which makes it more difficult for women to insist upon safer sex with nonmonogamous partners, particularly husbands, and may make it dangerous for them to disclose their own infection. Criminalization [of HIV transmission] is a poor substitute for improving women’s status and offering serious protection of women’s rights to sexual decision making and physical safety. Indeed, criminalization [of HIV transmission] may fall unfairly and disproportionately on women.<sup>78</sup>

Within Canada, however, the argument that criminalizing HIV exposure protects women has yet to be interrogated in any depth. Beyond the question of whether prosecuting an individual protects other “potential victims,” there are important questions about the broader implications of classifying non-disclosure as aggravated sexual assault. If non-disclosure is an aggravated sexual assault, what is it to rape and sexually torture a woman? Should these two very distinct actions be prosecuted under the same provisions? If our definitions of sexual assault are to truly capture affronts to women’s sexuality and autonomy, perhaps aggravated sexual assault is the correct label for HIV non-disclosure. Or perhaps they are too distinct and the label of aggravated sexual assault is not appropriate.

Moreover, what does it mean for the investigation and prosecution of rape if the sexual assault squad’s resources are directed towards HIV non-disclosure cases? And likewise, are other key issues for women living with HIV being adequately addressed when HIV/AIDS designated resources are being directed to dealing with criminal law and disclosure issues? How are people controlled and manipulated when police issue warnings that a “non-discloser” (as opposed to a rapist) is on the loose in one’s community? How is a subclass of sexual beings being cre-

78 Burns & Cameron, *supra* note 55 at 580. See also Jürgens *et al*, *supra* at note 55 at 12–14. Reason #5 is: “Instead of providing justice to women, applying criminal law to HIV exposure or transmission endangers and further oppresses them.”

ated through the application of sexual assault laws to behaviours that relate exclusively to HIV-status? In other words, in practice, does this legal development protect women, or does it limit their options, activities, and agency? Does it protect women, or undermine programs, relationships, and understanding that could support true gender and sexual equality? Are these policies empowering, just, and fair, or paternalistic and protectionist?

In considering these questions, it is revealing to consider *who* is being prosecuted for non-disclosure of HIV status. As mentioned above, the vast majority of the accused are men and the majority of the complainants are women. Given that women represent an increasing proportion of those living with HIV in Canada (approximately 22 percent at the end of 2008), and men who have sex with men continue to have the highest HIV prevalence in Canada (48 percent of PHAs at the end of 2008), one must question why the trend in prosecutions is as it is.<sup>79</sup> Possible factors may include those who look to the police and criminal justice system for protection in a complaints-driven process (more likely to be women than men) and gendered sexual ethics and practices. For example, while much of the gay community holds that everyone is responsible to protect themselves because anyone could be infected, this ethic may not apply equally in heterosexual communities.

Moreover, while it is impossible to know the precise racial breakdown of those charged, based on media coverage, public warnings issued by the police, and other available information on the cases, it would seem that at least 35 people who have faced charges are men of colour, including numerous immigrants from Africa (and in many of the cases the race of the accused is not publicly known and therefore the number of people of colour prosecuted could potentially be considerably higher).<sup>80</sup> Furthermore, much of the sensational media coverage about these trials has centred on cases against immigrants from Africa.<sup>81</sup> We know that systemic racism is a problem in the Ca-

79 *HIV/AIDS Epi Updates, July 2010, supra* note 61 at 28, 60.

80 This estimate is derived from the tracking of cases by the Canadian HIV/AIDS Legal Network. Mykhalovskiy *et al, supra* note 32 at 10–11, further note that when attention is focused on heterosexual men who have been charged since 2004 (that is, on the group most represented in criminal cases during the most intensive period of criminal law application), black men account for a full 50 percent of all cases, a higher proportion than white heterosexual men. Official statistical data on the race of those charged and complainants is not kept. As explained by Professor Scott Wortley, there is little data available in Canada on the relationship between race and crime in the criminal justice system. See “A Northern Taboo: Research on Race, Crime and Criminal Justice in Canada” (July 2003) 41 *Can J Crim Just* 263.

81 E Mykhalovskiy & C Sanders, “Racialization, HIV and Crime: An Analysis of the

nadian criminal justice system, and that racial and sexual stereotypes have long played a role in sexual assault law.<sup>82</sup> To what extent do racism, myths about black sexuality, and barriers that limit access to appropriate, culturally sensitive support and health services and information play into this trend? To what extent do these cases (and the media coverage about them) feed myths that HIV is an “African disease,” and black men are sexually aggressive, dishonest, and dangerous (particularly to white Canadian women)? Anything that fuels stigma and discrimination is likely to have a negative impact on HIV prevention, make disclosure more difficult for people living with HIV, and impact negatively on the well-being of PHAs. Therefore, the criminalization of HIV exposure is necessarily becoming an issue of increasing concern to black communities in Canada.

While the same provisions of the *Criminal Code* are used to prosecute reported rapes and HIV non-disclosure cases, there are some glaring differences between the two types of cases. For example, the conviction rate in rape cases is extremely low (5 percent according to the Ontario Women’s Directorate and Ontario Women’s Justice Network), yet in the HIV non-disclosure cases well over half of those accused plead guilty or are found guilty at trial.<sup>83</sup> And while women who have experienced rape report not being believed unless there is sufficient independent evidence of an attack, forceful penetration by a stranger, or physical injury to a victim who is seen as morally upright,<sup>84</sup> a review of judgments in the non-disclosure cases demonstrates a much higher level of belief of complainants — without the need for independent evidence, penetration, physical injury, or even that the complainant made attempts to use protection or determine the partner’s health status. In terms of sentencing, while just over 40 percent of those convicted of sexual assault are sentenced to a prison term, almost all of

Representation of HIV Non-Disclosure Criminal Cases in Canadian Print Media” (MS in progress) [on file with the author].

82 See, for example, Toni Williams, “Sentencing Black Offenders in the Ontario Criminal Justice System” in Julian V Roberts & David P Cole, eds, *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) 200; Commission on Systemic Racism in the Ontario Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Queen’s Printer for Ontario, 1995); Jeane Gregory & Sue Lees, *Policing Sexual Assault* (New York: Routledge, 1999).

83 Based on the tracking of cases conducted by the Canadian HIV/AIDS Legal Network.

84 Nora Currie & Kara Gillies, “Bound by Law: How Canada’s Protectionist Public Policies in the Areas of Both Rape and Prostitution Limit Women’s Choices, Agency and Activities” at 88 [unpublished manuscript on file with the author].

those convicted in relation to non-disclosure serve time in prison.<sup>85</sup> Clearly, while rape and HIV non-disclosure are both considered sexual assaults, there are some very different dynamics at play in these cases. It is worthy of pause to consider why HIV non-disclosure is seemingly considered more grave, and whether so-called “AIDS-panic” is a factor.

It is also important to note that police warnings, as used to warn women about stranger rapists, are now commonly used in HIV non-disclosure cases. Typical public safety alerts include identifying information about the accused (ie, name, age, hometown, and photograph), the charges, and the circumstances, which will include the accused’s HIV-positive status and the sex of his or her sexual partners. It will then encourage anyone who has had sexual contact with the accused to seek medical advice and contact police. Given the sensationalism surrounding these cases, the media tend to report on all such warnings and publish the photographs.

Members of the HIV community have expressed concern about these warnings because they publicly reveal the accused’s identity and HIV status, often based only on an allegation. The warnings may also reinforce the myths that PHAs are deceitful, that sex with them is dangerous, and that disclosure is simple and to be expected. Warnings may also contribute to misinformation and panic about HIV, advising people to seek medical advice with no regard for the actual risks of HIV transmission in different circumstances. In analyzing the interconnections between police practice with respect to cases of HIV non-disclosure and sexual violence, the role of public safety alerts is an important component. There are no policies governing how and when such warnings are used.<sup>86</sup> There is also little communication between the two communities with respect to advocacy concerning how and when they should appropriately be used. Developments with respect to one set of crimes may potentially influence practice with respect to the other. More coordinated analysis and action is clearly warranted.

Finally, it is worth considering how legal developments with respect to assault charges for HIV non-disclosure may influence the use of criminal law to address rape and sexual violence in Canada. For ex-

85 For example, a man in Ontario was sentenced in 2008 to a twelve-month conditional sentence to be served in the community for failure to disclose to his then girlfriend (who did not seroconvert). On appeal, a one-year prison term was substituted for the conditional sentence because the appeal judge deemed the conditional sentence unfit with respect to deterrence and denunciation objectives, and not proportionate to the gravity of the offence: *R v McGregor* (2008), 94 OR (3d) 500 (CA).

86 *Supra* note 84 at 8–9.

ample, how might the redefinition of fraud in the *Cuerrier* decision be applied to situations other than HIV non-disclosure? A first glimpse at the possibilities here is provided by the *Hutchinson* case. In this case, a man poked holes in his girlfriend's condoms resulting in her pregnancy and an abortion. The Crown argued that the complainant was not consenting to *unprotected sex*, and if there was consent it was vitiated by the fraud committed by Mr Hutchinson when he sabotaged the condoms.

Applying the *Cuerrier* test of "significant risk of serious bodily harm," the trial judge acquitted with a directed verdict.<sup>87</sup> On appeal, a new trial was ordered.<sup>88</sup> Two of the three judges concurred that a properly instructed jury could conclude that there was no voluntary agreement to take part in unprotected sexual intercourse, and therefore no consent to the sexual intercourse. Alternatively, in line with *R v Cuerrier*, a properly instructed jury could find that there was consent but that it was vitiated by fraud, there was evidence of actual serious bodily harm as a result of the accused's deceit, and there was evidence of endangerment of life as required for a conviction of aggravated sexual assault. A challenging question in the reasoning is whether pregnancy can be considered a "serious bodily harm." This decision is exemplary of the sort of convoluted reasoning that may result from trying to apply the *Cuerrier* test to the multitude of different frauds and harms that occur in relation to sex. What the focus on consent with respect to full disclosure of relevant information may mean in the longer term for the development of sexual assault law and practice remains to be seen. These issues have yet to be analyzed in either the literature or in court decisions, but following the *Hutchinson* example, further tests to the limits of sexual assault jurisprudence may be just around the corner.

## CONCLUSION

With each charge that is laid, this area of criminal law continues to develop and escalate. Where it will go next, and the implications for sexual assault law and practice, remain to be seen. The need for further research, informed policy dialogue, and strategic advocacy work on this issue are, however, patently clear.

Addressing the questions of when criminal charges are appropriate with respect to HIV non-disclosure and what charges should be applied is central to the work that needs to be done. If the current application of the criminal law with respect to HIV non-disclosure is overly broad,

87 *R v Hutchinson*, 2009 NSSC 51.

88 *R v Hutchinson*, [2010] NSJ No 16 (CCA).

where should the lines be drawn between criminal and non-criminal conduct? Most would accept that there may be isolated circumstances in which a PHA's conduct is so egregious that criminal charges are appropriate, but what are those circumstances?

Many within the global HIV community, including international bodies such as UNAIDS, advocate for a restricted use of criminal law with respect to HIV such that charges would only be laid where the accused is aware of his or her own HIV-positive status, intends to transmit HIV, and is successful in doing so.<sup>89</sup> Many Canadian advocates actively working on the issue of criminal law and HIV non-disclosure accept that criminal charges are appropriate in the rare circumstances where there is an intention to transmit HIV (so-called "wilful transmission") and perhaps in some situations of reckless behaviour. A campaign to develop prosecutorial guidelines on HIV non-disclosure is underway in Ontario, aimed at providing guidelines as to when charges are appropriate in order to ensure the law is applied fairly, consistently, and in compliance with broader scientific, medical, public health, and community efforts to prevent the spread of HIV and to provide care, treatment, and support to people living with HIV.<sup>90</sup> Simultaneously, numerous cases remain before the court with the potential to shift the trajectory of this jurisprudence.

As poignantly stated by the dissenting judge in the *Hutchinson* appeal, "The described conduct by the respondent would amount to a gross violation of trust. While morally reprehensible, it does not amount to the offence of sexual assault. Not all morally repugnant behaviour amounts to an offence."<sup>91</sup> Defining and redefining what does amount to the offence of sexual assault may continually be an unfolding process, and HIV has certainly added another complicating factor to this exercise. As we look to future developments, forging strategic linkages between the analysis and advocacy work on HIV and on violence against women may be a critical next step in advancing the criminal law in a more logical and effective direction.

89 See UNAIDS, Policy Brief: Criminalization of HIV Transmission (Geneva: UNAIDS, 2008).

90 See Ontario Working Group on Criminal Law and HIV Exposure, "Sign the Call," online: <<http://www.ontarioaidsnetwork.on.ca/clhe/>>.

91 *Supra* note 87 at para 161.