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Court File No: 35176

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

BETWEEN:

CRAIG JARET HUTCHINSON

APPELLANT
(Appellant)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

-and-

CANADIAN HIV/AIDS LEGAL NETWORK AND HIV & AIDS LEGAL CLINIC ONTARIO

INTERVENER

FACTUM OF THE INTERVENER CANADIAN HIV/AIDS LEGAL NETWORK AND HIV & AIDS LEGAL CLINIC ONTARIO

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW

1. While the facts of this case are relatively simple, determining the appropriate legal prism through which the Appellant's conduct should be analyzed is complex and raises important legal and policy considerations. This Honourable Court's analysis of the interpretation of ss. 273.1 and 265(3)(c) of the *Criminal Code* (the '*Code*') will have serious implications for the law of sexual assault and the concepts of consent and fraud vitiating consent. This is of particular concern for those charged with sexual offences for not disclosing a sexually transmitted infection (STI), including HIV, to their sexual partners.

2. This Court has long recognized two vital propositions that must guide its analysis. First, the criminal law must be narrowly circumscribed so as not to improperly impinge on individual liberty. Second, the appropriate framework for cases involving the non-disclosure of STIs is a 'fraud vitiating consent' analysis under s. 265(3)(c). While the facts here are quite distinct from such non-disclosure prosecutions, this case must be analyzed in accordance with those well-recognized propositions given the potential ramifications. Should this Court fail to affirm these two propositions, it would not only create a contradiction with the Court's settled jurisprudence, but would open the door to an even wider over-criminalization of people living with HIV than is currently the case.

PART II: INTERVENERS' POSITION ON THE ISSUES

3. The Interveners respectfully submit that the Nova Scotia Court of Appeal (NSCA) erred in law in its interpretation and application of section 273.1 of the *Code*. The correct approach is to apply s. 265(3)(c) of the *Code* and the analytical framework already established by this Court

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in determining when fraud may vitiate consent to sex because it relates to a matter that may pose a significant risk of serious bodily harm.

4. Even if this Court upholds the decision below on the application of s. 273.1, it should also affirm its jurisprudence over the last 15 years that the appropriate model for those charged with sexual offences for not disclosing a STI is the 'fraud vitiating consent' analysis established by this Court in *R. v. Cuerrier*[1] and affirmed in *R. v. Mabior*.[2]

PART III: ARGUMENT

5. This appeal turns on the proper interpretation of ss. 273.1 and 265(3)(c) of the *Code*. As with all issues of statutory interpretation, the basic question is what Parliament intended. That intention is discovered by looking at the words of the provision, informed by its history, context and purpose.[3]

6. The definition of consent for the purposes of sexual assault is found in s. 273.1(1). In order to clarify this broad definition, Parliament provides a non-exhaustive list of circumstances in which no consent is obtained in s. 273.1(2). Section 273.1(3) authorizes the courts to identify additional cases in which no consent is obtained in a manner consistent with the policies underlying the provisions of the *Code*.[4]

7. Of course, s. 273.1 cannot be read in isolation. It must be interpreted according to a textual, contextual and purposive analysis, and in a manner that is harmonious with the *Code* as a

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[1] [1998] 2 S.C.R. 371 [Appellant's Book of Authorities "ABA" Tab 3]
[2] [2012] 2 S.C.R. 584 [ABA Tab 9]
[3] *Ibid.*, at para. 20
[4] *R. v. J.A.*, [2011] 2 S.C.R. 440, at para. 29 [ABA Tab 8]

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whole.[5] Section 273.1(1) provides that the definition of consent is subject to s. 265(3) of the *Code*, which (a) states that it applies to *all* forms of assault (including sexual assault), and (b) specifies that no consent is obtained where the complainant submits or does not resist by reason of force, threats of force, ***fraud*** or the exercise of authority.[6]

8. Here, the NSCA incorrectly disregarded these limitations by interpreting the phrase "voluntary agreement to engage in the sexual activity in question" in s. 273.1 as being the agreement of the complainant to engage in sexual intercourse with a condom without a hole in it as opposed to simply the act of sexual intercourse. With respect, there is nothing in the language of 273.1, its evolution or its legislative history that permits such an interpretation. The plain, ordinary meaning of the words do not reveal any suggestion that Parliament intended the definition of consent in s. 273.1 to take on this far broader scope - namely treating qualifying conditions of the sexual act as a component of consent. If Parliament had intended to do so, it had ample opportunity. Instead, Parliament chose straightforward language that only speaks of a voluntary agreement to engage in the sexual activity in question, which in this case is correctly understood simply as consent to sexual intercourse.[7]

9. Moreover, other portions of s. 273.1 militate against the expansive interpretation adopted by the NSCA and advocated by the Respondent. Section 273.1(2) sets out five specific circumstances where consent cannot be obtained. Fraud vitiating consent is not one of the enumerated circumstances. Rather, Parliament drafted s. 273.1 with an explicit reference to s. 265(3) as a separate and distinct limitation on the definition of consent. It is only in s. 265(3)(c) where Parliament clearly set out that consent cannot be obtained through fraudulent means.

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[5] *Ibid.*, at para. 32 [ABA Tab 8]
[6] *Ibid.,* at paras. 98-99 [ABA Tab 8]
[7] *R. v. Hutchinson,* 2010 NSCA 3, at para. 109 (dissent) [*Hutchinson* #1] [ABA Tab 7]

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10. The NSCA's interpretation of s. 273.1 effectively renders s. 265(3)(c) obsolete. This contradicts Parliament's clear intent and violates the principle that the provisions of the *Code* be read harmoniously. If every deceit about something that might be considered an "essential feature" of the sexual act (which, according to the NSCA and the Respondent would all be determined by the subjective standard of the complainant) makes consent void *ab initio* pursuant to s. 273.1, then s. 265(3)(c) becomes redundant. This would have the worrying effect of extending the criminal law far beyond what this Court deemed appropriate in *Cuerrier, supra,* and *Mabior*, *supra*.

11. Simply put, the decision of the NSCA raises a very real concern that in cases of dishonesty in sexual matters (other than dishonesty related to the identity of the accused), criminal liability could attach *regardless of the level of risk* of harm. For example, as pointed out by the Appellant and conceded by the Respondent below, a woman who told her partner she was using birth control pills when she was not would be convicted of sexual assault and stigmatized as a sex offender, *even though there was no significant risk of serious bodily harm* to the partner. Similarly, a person who is HIV-positive but uses a condom and has a low or undetectable viral load would be deemed criminally liable *even though there is no significant risk of serious bodily harm*. The test established by this Court in *Cuerrier*, *supra*, and upheld less than a year ago in *Mabior*, *supra*, would be effectively dismantled.

Additional interpretive tools

12. The determination of when fraud vitiates consent to sex is informed by other considerations, including: (a) the purposes of the criminal law; (b) the common law and statutory

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history of the concept of fraud; and (c) *Charter* values, particularly equality, autonomy, liberty, privacy and human dignity.[8]

The purposes of the criminal law

13. The interpretation of fraud vitiating consent should further the purposes of the criminal law, notably identifying, deterring and punishing criminal conduct, defined by a wrongful act and guilty mind. But, as this Court reaffirmed in *Mabior*, *supra*, the law does not seek to criminalize all immorality and draws a sharp distinction between civil wrongdoing and criminal wrongdoing. If every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy. Such an approach risks violating the principle of fundamental justice that the morally innocent not be deprived of liberty.[9]

14. It was for this reason, *inter alia*, that this Honourable Court rejected the absolutist approach proposed by various Attorneys General in *Mabior*, *supra*, pursuant to which any non-disclosure of HIV status would be treated as an aggravated sexual assault even in the absence of any risk of harm. As stated by the Court, such an approach casts the net of criminal culpability too widely. People who act responsibly and whose conduct causes no harm and indeed may pose no risk of harm, could find themselves criminalized and imprisoned for lengthy periods. Moreover, this approach would expand fraud vitiating consent in s. 265(3)(c) by defining it as simple dishonesty and effectively eliminating the deprivation element.[10] Unfortunately, the approach of the NSCA does exactly that.

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[8] *Mabior, supra,* at para. 22 [ABA Tab 9]
[9] *Ibid.,* at paras. 23-24 [ABA Tab 9]
[10] *Ibid.*, at para. 67 [ABA Tab 9]

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The common law and statutory history of the concept of fraud vitiating consent

15. The common law and statutory history of the concept of fraud vitiating consent was set out in detail by this Court in *Mabior*, *supra*, and need not be repeated here.[11] Notably, on three separate occasions over the last 15 years this Court has concluded that s. 265.3(c) is the appropriate framework through which the law should analyze cases of non-disclosure of STIs.[12] Here, the NSCA adopted an alternative route, pursuant to s. 273.1, for establishing criminal liability for sexual assaults by fraud. The Court constructed the concept of "voluntary agreement … to engage in the sexual activity in question" as requiring consent to the "essential feature[s] of the sexual activity."

16. The NSCA placed considerable weight on this Court's decision in *J.A.*, *supra*. In this regard, the Interveners adopt the dissenting reasons of Justice Farrer below. *J.A.*, *supra*, was a case about an unconscious complainant and hence the application of s. 273.1(2)(b) in a circumstance where there was *no conscious mind capable of giving consent to the sexual activity at the time it occurred*. This case is completely different. It involves a *conscious complainant who agreed to have sex at the time it occurred*. It was only much later, after the appellant confessed, that she 'revoked' that consent.[13] Such a fact pattern is more appropriately considered under s. 265(3)(c).

17. This Court had the benefit of its own decision in *J.A. supra*, when it decided *Mabior*, *supra*. This Court could have interpreted *J.A.* in a similar fashion as the NSCA by adopting the approach urged upon it by various Attorneys General in that case – i.e., non-disclosure of HIV is

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[11] *Ibid.,* at paras. 25-43 [ABA Tab 9]
[12] *Cuerrier*, *supra*, at para. 137 [ABA Tab 3]; *R. v. Williams*, [2003] S.C.R. 134, at para. 40 [ABA Tab 10]; *Mabior*, *supra,* at para. 57 [ABA Tab 9]
[13] *R. v. Hutchinson*, 2013 NSCA 1, at paras. 130-151 [*Hutchinson* #2] [Appellant's Record ("AR") Tab 2b]

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fraud that vitiates consent *regardless* of the level of risk of harm or the moment "any" risk exists. This Court correctly rejected such an approach because it recognized that the use of s. 265(3)(c) and the 'significant risk of serious bodily harm' threshold was a necessary safeguard against over-extending the criminal law, particularly against an already vulnerable and stigmatized community. In essence, the NSCA now adopts the position that was rejected by this Court in *Mabior, supra*.

18. The NSCA also placed significant weight on the Ontario Court of Appeal (OCA) decision in *R. v. Crangle*[14], while failing to consider that same Court's later interpretation of *Crangle* by the majority in *R. v. Boone.*[15] In *Boone*, *supra*, the majority recognized the qualitative difference between a feature of sexual act that the law treats as fundamental to consent (i.e. the physical act—the how—and the person who performs the act—the who), and subjective conditions on consent that pertain to the possible consequences of the act.[16] The majority correctly concluded, "[W]here dishonesty is said to vitiate consent, the Crown must prove dishonesty amounting to fraud, and that, ***except for fraud with respect to the long-established category of identity of the partner, the Cuerrier test applies***."[17]

19. Accordingly, the decision of the NSCA is not supported by the jurisprudence. Rather, it stands in stark contrast with this Court's decisions in *Cuerrier, supra*, *Mabior, supra*, and the OCA's latest interpretation of *Crangle*, *supra*.[18] On the NSCA's reasoning, one's HIV status, even in the absence of any risk of harm or a significant risk of serious bodily harm, could be

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[14] [2010] O.J. 2587 (CA) [ABA Tab 2]
[15] 2012 ONCA 539 [ABA Tab 1]
[16] *Boone*, *supra*, at para. 115 – 119 [ABA Tab 1]; see also *R. v. Ewanchuck*, [1999] 1 S.C.R. 330, at para. 28 [Respondent's Book of Authorities ("RBA") Tab 5]
[17] *Boone, supra,* at para. 122 [ABA Tab 1]
[18] See also *R. v. Felix,* 2013 ONCA 415 [Book of Authorities ("BA") Tab 1], and *R. v. Mekonnen*, 2013 ONCA 414 [BA Tab 2], where the OCA confirmed the significant risk of serious bodily harm test established in *Cuerrier*.

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considered (in the complainant's entirely subjective assessment) an essential condition of the sexual activity and the failure to disclose could attract liability under s. 273.1. Crown prosecutors in Ontario have already attempted to prosecute a case of HIV non-disclosure using s. 273.1 where there was no significant risk of HIV transmission. Their attempt to do so was rejected by the OCA in *Boone, supra*. This Court must also guard against such a misuse of the criminal law as it would directly contradict limitations on the criminalization of people living with HIV that this Court has repeatedly indicated are critical and necessary.

20. Moreover while the NSCA may have tried to circumscribe the inappropriate use of s. 273.1 by adopting a requirement of a serious risk of serious consequences,[19] the Respondent now seeks to remove that requirement.[20] Under the Respondent's interpretation, where a complainant turns their mind to the HIV status of a potential partner and would not consent if the partner were HIV-positive, the HIV status would become an essential feature of the consent. That would be the case even if a condom was used and the partner had an undetectable viral load. In other words, the mere HIV status of the accused (regardless of whether any activity posed any risk of transmission) or the existence of *any risk* of transmission, however infinitesimal, would be sufficient to attract liability, as long as it were accepted that this was a subjectively "essential" consideration *in the mind of the complainant*. This absolutist approach not only violates the prior rulings of this Court, but is also unfair and stigmatizing to people with HIV, an already vulnerable group. Such an approach would put people with HIV, even in circumstances where

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[19] *Hutchinson* # 2*,* at paras. 54 and 65 [AR Tab 2b]
[20] Factum of the Respondent, para. 64

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there is no significant risk of transmission, of having to choose between disclosing their status (with all the potential adverse consequences that can follow) or face criminalization.[21]

21. The consequences of being charged and prosecuted for HIV non-disclosure are extremely serious for people living with HIV. Their identity is made public via police releases and media reports. Rates of conviction in cases of HIV non-disclosure are high and the penal consequences severe. If convicted, they are registered as sexual offenders even though they engaged in otherwise consensual sexual intercourse and, in most cases, did not transmit HIV. Removing the remaining safeguards by opening the door to prosecutions outside the framework of *Cuerrier, supra,* would aggravate this phenomenon and result in even more people with HIV being put in jail.

Charter values of equality, autonomy, liberty, privacy and human dignity

22. In *Mabior*, *supra*, this Court recognized that *Charter* values of equality, autonomy, liberty, privacy and human dignity are particularly relevant to the interpretation of fraud that vitiates consent to sexual relations. The formerly narrow view of consent has been replaced by a view that respects each sexual partner as an autonomous, equal and free person. Fraud in s. 265(3)*(c)* of the *Criminal Code* must be interpreted in light of these values.[22]

23. Having identified these *Charter* values, this Court went on to reject the ‘any risk’ approach that effectively results from the decision of the NSCA. Rather, this Court unanimously held that criminal liability attached only where the Crown had proven a significant risk of serious bodily harm. This test was deemed to properly reflect the *Charter* values of autonomy, liberty, equality and human dignity by according consent meaningful scope while ensuring that not every

[21] *Mabior*, *supra*, at para. 67 [ABA Tab 9]
[22] *Mabior*, at para. 45 [ABA Tab 9]

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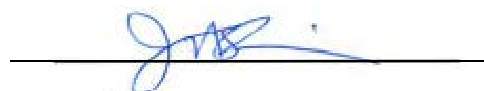
deception that leads to sexual intercourse is criminalized.[23] That balance has now been jeopardized by the decision of the NSCA.

24. Moreover, the improper importation of the 'fraud vitiating consent' analysis into s. 273.1 creates a confusion that is completely unnecessary. Section 265(3)(c) is more than sufficient to address the factual issues in this case without doing violence to the statutory regime or undermining this Court's holdings in *Cuerrier*, *supra,* and *Mabior, supra*.[24]

PART V: REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT

25. The Interveners requests that they be granted 15 minutes to present oral argument to the Court upon the hearing of this matter.

All of which is respectfully submitted,
Dated this 30th day of September, 2013.



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[23] *Mabior*, at para. 58 [ABA Tab 9]
[24] *Hutchinson* #2, *supra*, paras. 220 – 223 (dissent) [AR Tab 2b]

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PART VI – TABLE OF AUTHORITIES

Jurisprudence **Cited at Para.**

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R. v. Cuerrier, [1998] 2 S.C.R. 371 4

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1. *R. v. Felix,* 2013 ONCA 415 19

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R. v. Mabior, [2012] 2 S.C.R. 584 ..... 4, 5, 15, 20-23

2. *R. v. Mekonnen*, 2013 ONCA 414 19

R. v. Williams, [2003] S.C.R. 134 15

PART VII – STATUTORY PROVISIONS

Criminal Code, R.S.C., 195, c. C-46, ss. 265(3), 273.1

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***Criminal Code*, R.S.C., 195, c. C-46, ss. 265(3), 273.1**

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

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

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

(*c*) fraud; or

(*d*) the exercise of authority.

273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

(2) No consent is obtained, for the purposes of sections 271, 272 and 273, where

(*a*) the agreement is expressed by the words or conduct of a person other than the complainant;

(*b*) the complainant is incapable of consenting to the activity;

(*c*) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

(*d*) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(*e*) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

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***Code criminel*, L.R.C.(1985), ch. C-46, ss. 265(3), 273.1**

265 (3) Pour l’application du présent article, ne constitue pas un consentement le fait pour le plaignant de se soumettre ou de ne pas résister en raison :

a) soit de l’emploi de la force envers le plaignant ou une autre personne;

b) soit des menaces d’emploi de la force ou de la crainte de cet emploi envers le plaignant ou une autre personne;

c) soit de la fraude;

d) soit de l’exercice de l’autorité.

273.1 (1) Sous réserve du paragraphe (2) et du paragraphe 265(3), le consentement consiste, pour l’application des articles 271, 272 et 273, en l’accord volontaire du plaignant à l’activité sexuelle.

(2) Le consentement du plaignant ne se déduit pas, pour l’application des articles 271, 272 et 273, des cas où :

a) l’accord est manifesté par des paroles ou par le comportement d’un tiers;

b) il est incapable de le former;

c) l’accusé l’incite à l’activité par abus de confiance ou de pouvoir;

d) il manifeste, par ses paroles ou son comportement, l’absence d’accord à l’activité;

e) après avoir consenti à l’activité, il manifeste, par ses paroles ou son comportement, l’absence d’accord à la poursuite de celle-ci.

(3) Le paragraphe (2) n’a pas pour effet de limiter les circonstances dans lesquelles le consentement ne peut se déduire.