"Alluring Make-Up or a False Moustache": *Cuerrier* and Sexual Fraud Outside of HIV Non-Disclosure

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ABSTRACT

The *Criminal Code of Canada* identifies "fraud" as one of several circumstances capable of vitiating consent to sexual activity. Where fraud does not go to identity or the "nature and quality" of the sexual act, consent will be invalid only where the fraud results in a "significant risk of serious bodily harm." Since this standard was settled in the Supreme Court of Canada's decision in *R v Cuerrier* in 1998, consideration of its effects has focused almost exclusively on non-disclosure of an individual's HIV-status. This article considers the application of the *Cuerrier* standards to cases not involving the non-disclosure of HIV. It concludes that the standard is not operating as intended, shielding those who have committed reprehensible acts from criminal liability, and undermining sexual autonomy.

Keywords: *Cuerrier*; HIV non-disclosure; fraud; sexual fraud; consent; *Mabior*; *Hutchinson*

I. INTRODUCTION

Section 265(3)(c) of the *Criminal Code of Canada* identifies "fraud" as a circumstance that may vitiate consent to sexual activity. The Supreme Court of Canada considered the meaning of fraud in this context twenty years ago in *R v Cuerrier*,[1] in which the accused failed to disclose his

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1 *R v Cuerrier*, [1998] 2 SCR 371, [1998] SCJ No 64 (QL).

HIV-positive status to his sexual partners. In *Cuerrier*, the majority held that fraud will vitiate consent in the sexual context only where the deception constituting the fraud results in "a significant risk of serious bodily harm."[2]

In the two decades that have followed, significant academic and judicial attention has been paid to the application of the test established in that case in the HIV non-disclosure context. Comparatively little attention has been paid to how the test is applied in other circumstances where deception or non-disclosure may have impacted an individual's decision to consent to sexual activity. While the law's treatment of those who fail to disclose their HIV-positive status to their sexual partners is an important issue, *Cuerrier* established a broadly applicable standard with wide-reaching implications, and consideration of other contexts is essential to a critical evaluation of that standard.

This article seeks to contribute to the extensive body of commentary on the *Cuerrier* standard through an examination of judicial consideration of cases in which fraud is alleged to vitiate consent where the deception at issue is something other than HIV non-disclosure. It begins with an overview of the current state of the law in this area, followed by a discussion of past criticism of the *Cuerrier* standard which, as noted above, is focused predominantly on its operation in the HIV non-disclosure context. This discussion will lead into a review of lower court decisions in which *Cuerrier* has been applied or considered in cases not involving HIV non-disclosure. The article will conclude with a discussion of what these cases can add to the existing understanding of *Cuerrier*, and a proposal for a new standard.

This analysis reveals that the current standard is overly focused on physical harm, and is inconsistent with the focus of the modern law of sexual offences on sexual autonomy. The result is a standard that is too narrow, and which excludes highly harmful and morally culpable acts from criminal liability. By abandoning *Cuerrier*'s focus on physical harm and considering more broadly the circumstances surrounding a sexual encounter, the law can better protect the right of individuals to decide whether, when, and with whom to engage in sexual activity.

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2 *Ibid* at para 128.

II. The Current State Of The Law

A. Sexual Fraud in the Criminal Code

The *Criminal Code* identifies the offence of sexual assault as a variant of the broader offence of assault. Assault *simpliciter* is defined in s. 265 of the *Code* to include the intentional application of force to another person without that person's consent.

The term "sexual" is not defined in the *Code*, but the question of what qualifies an assault as "sexual" was considered by the Supreme Court of Canada in *R v Chase*.[3] In *Chase*, Justice McIntyre, writing for a unanimous Court, explained:

> Sexual assault is an assault within any one of the definitions of that concept in s. 244(1) [now 265(1)] of the *Criminal Code* which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer". The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.[4]

Section 265 of the *Code*, also includes a list of circumstances in which no consent is obtained. Among these, section 265(3)(c) provides that "no consent is obtained where the complainant submits or does not resist by reason of... fraud." This provision was enacted in 1983. Prior to this time, the *Code* provided that consent to sexual activity could be vitiated by fraud only where consent was obtained through deception regarding the identity of the accused, or "false and fraudulent representations as to the nature and quality of the act."[5]

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3 *R v Chase*, [1987] 2 SCR 293, [1987] SCJ No 57 (QL).

4 *Ibid* at para 11 [footnotes omitted].

5 Christine Boyle, "The Judicial Construction of Sexual Assault Offences" in Julian Roberts and Renate Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social*

B. *R v Cuerrier*

The new fraud provision was first considered by the Supreme Court of Canada in *R v Cuerrier*. In *Cuerrier*, the accused was charged with aggravated sexual assault for failing to disclose his HIV-positive status to two sexual partners, the two complainants, both of whom gave evidence that they would not have consented had he disclosed his status in advance.[6] The accused was acquitted at trial because non-disclosure in this case did not meet the traditional standard for fraud in sexual offences, which required that the fraud go to identity or "the nature and quality of the act."[7] The acquittal was upheld on appeal.[8]

The majority reasons in *Cuerrier*, written by Justice Cory, affirmed that fraud as to the identity of the accused, or the nature and quality of the sexual act, would continue to be sufficient to vitiate consent. However, the majority also held that the 1983 amendments had the effect of expanding the definition of fraud in this context such that fraud would also be sufficient to vitiate consent where two conditions are satisfied. First, there must be a deception, which could be the result of either deliberate deceit or non-disclosure, which is to be assessed objectively based on whether a reasonable person would find the accused's conduct dishonest. Secondly, the deception must result in a deprivation. The deprivation can consist of actual harm or the risk of harm but, at a minimum, the deception must expose the complainant to "a significant risk of serious bodily harm."[9]

Two sets of concurring reasons advocated for significantly different approaches to fraud in the sexual context. Justice McLachlin took the position that the legislative amendments were not intended to create a substantive change in the law, and that only an incremental change was open to the Court.[10] She took the position that the law ought to be extended only such that, in addition to fraud as to identity and the nature and quality of the act, deception regarding sexually transmitted infections would be sufficient to vitiate consent.[11] Justice L'Heureux-Dubé's concurring judgment proposed an expansive interpretation of the law aimed at

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Change (Toronto: University of Toronto Press, 1994) 136 at 143-144.

6 *Cuerrier*, *supra* note 1 at paras 78-83.

7 *Ibid* at para 87.

8 *R v Cuerrier* (1996), 141 DLR (4th) 503 (BC CA), [1996] BCJ No 2229 (QL).

9 *Cuerrier*, *supra* note 1 at paras 126-129.

10 *Ibid* at paras 43-44.

11 *Ibid* at paras 66-75.

protecting physical integrity and autonomy. In her reasons, Justice L'Heureux-Dubé opined that the focus of the fraud analysis should be "whether the dishonest act in question induced another to consent to the ensuing physical act."[12]

C. *R v Mabior*[13] and *R v Hutchinson*[14]

The Court has revisited the issue of sexual fraud on multiple occasions since *Cuerrier*.[15] In *R v Mabior*, the Court affirmed the *Cuerrier* test and provided additional detail as to when the obligation to disclose HIV-infection will arise. According to *Mabior*, individuals with HIV must always disclose their status to sexual partners unless they have a low viral load and use a condom.[16]

In *Hutchinson*, the Court considered sexual fraud not involving HIV non-disclosure. The accused had intercourse with the complainant using a condom that he had intentionally damaged so as to render it ineffective for the purpose of contraception.[17] The complainant gave evidence that she would not have consented had she been aware that the condom had been compromised.[18] The majority in *Hutchinson* upheld the conviction entered at trial, again affirming the *Cuerrier* test, and concluding that "the sorts of profound changes in a woman's body… resulting from pregnancy"[19] qualify as "serious bodily harm," meeting the standard set in *Cuerrier*.[20]

III. Criticism Of *Cuerrier*

While the decision in *Cuerrier* was not without its supporters, it has been widely criticized since it was decided. Much of this criticism has focused on HIV non-disclosure. Specifically, critics have argued that the decision undermines public health efforts to combat HIV; that the standard set in the case is arbitrary, uncertain, and lacking foundation in science; and that

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12 *Ibid* at para 16.
13 *R v Mabior*, 2012 SCC 47.
14 *R v Hutchinson*, 2014 SCC 19.
15 See also *R v Williams*, 2003 SCC 41; *R v DC*, 2012 SCC 48.
16 *Mabior supra* note 13 at para 103.
17 *Hutchinson, supra* note 14 at para 2.
18 *Ibid* at para 44.
19 *Ibid* at para 70.
20 *Ibid* at para 75.

it subjects marginalized groups to unequal treatment. Beyond the HIV context, criticism of *Cuerrier* has focused on the incongruity between the decision and the focus of the modern law of sexual offences on sexual autonomy. These issues are addressed below, following a brief discussion of the limited praise received by the decision.

A. Support for *Cuerrier*

Much of the commentary on *Cuerrier* has been critical, but it did receive some degree of support following its release. This support was grounded largely in the view that the decision represented a clear improvement on the status quo.[21] As noted above, the accused in *Cuerrier* had been acquitted at trial, and his acquittal upheld by the BC Court of Appeal. The accused was well aware that he was HIV-positive, and had been clearly warned of the importance of advising his prospective sexual partners of his status. The decision in *Cuerrier* has been praised for creating a tool of "last resort" which offers some recourse for those who "show knowing disregard for the well-being of others."[22] The decision has also been recognized for advancing the interest of sexual autonomy to some degree. Implicit in *Cuerrier* is the recognition, previously absent from Canadian law, that valid consent requires accurate information about possible physical harm that may result from sexual activity.[23]

B. *Cuerrier* and HIV/AIDS as a Public Health Issue

Critics of the criminalization of HIV non-disclosure have argued that it undermines public health efforts to contain the virus in several ways. Criminalization can create a disincentive to HIV testing, increasing the likelihood that those carrying the virus will be unaware of their status, undermining their own health and increasing the likelihood they will pass the virus on to others.[24] It has also been shown to make those with HIV less likely to connect with public health resources and less likely to inform health providers about their sexual practices or difficulties they face in

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21 Diana Ginn, "Can Failure to Disclose HIV Positivity to Sexual Partners Vitiate Consent? *R. v. Cuerrier*" (2000) 12:1 CJWL 235 at 241.

22 *Ibid* at 242.

23 *Ibid* at 245.

24 Kim Shayo Buchanan, "When is HIV a Crime? Sexuality, Gender and Consent" (2015) 99 Minn L Rev 1231 at 1245-1246.

disclosing their status to their sexual partners.[25] *Cuerrier* has also been criticized for creating an uncertain legal landscape around disclosure, making it difficult to give accurate and useful guidance to those living with HIV.[26] As a result of these dynamics, individuals with HIV are less likely to be aware that they carry the virus, less likely to seek treatment, and less likely to obtain assistance in understanding how to avoid passing the virus on to others, posing a serious challenge for society's efforts to slow the spread of HIV.

C. Arbitrariness and Uncertainty

In *Mabior*, the Court sought to resolve concerns that the *Cuerrier* standard was too uncertain to offer meaningful guidance to individuals living with HIV. *Mabior* not only did little to address this uncertainty, but set an arbitrary and unworkable standard that lower courts have struggled to apply.

In *Mabior*, the Court held that individuals will not be obliged to disclose their HIV-positive status to their sexual partners only where they have both a low viral load and use a condom. This standard has been criticized for its lack of foundation in science as either of these measures alone would normally be sufficient to render the risk of transmission negligible.[27] Treatment alone has been demonstrated to reduce viral load to undetectable levels, eliminating any meaningful risk of transmission.[28]

This inconsistency between science and law has created challenges for Courts confronted with evidence that contradicts *Mabior*. For example, the trial judge in *R v JTC*,[29] a decision of the Provincial Court of Nova Scotia, in which the accused was acquitted despite his failure to use a condom, described the difficult position in which lower courts find themselves when trying to apply *Mabior*:

> It would be a strange outcome indeed if the law required that there be a significant risk of bodily harm established by the realistic possibility of transmission of HIV and the unchallenged and accepted expert testimony in the case confirmed that

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25 Eric Mykhalovskiy, "The Problem of 'Significant Risk': Exploring the Public Health Impact of Criminalizing HIV Non-Disclosure" (2011) 73:5 Soc Science & Medicine 668 at 671-673.

26 *Ibid* at 671-673.

27 Isabel Grant, "The Over-Criminalization of Persons with HIV" (2013) 63 UTLJ 475 at 480.

28 Buchanan, *supra* note 24 at 1243-1244.

29 *R v JTC*, 2011 NSPC 105.

> such a realistic possibility was not present, yet a conviction was entered because the accused was not wearing a condom. That would be particularly the case when, as here, the accepted expert evidence is that the use of a condom would provide virtually nothing by way of incremental protection against the transmission of HIV. The only way that that could logically happen would be if the Supreme Court of Canada decisions were to be seen as imposing a factual finding on a trial court that would apply almost as a deemed finding of fact to apply notwithstanding the actual evidence. It would be even more unusual if the result would be to impose criminal sanctions for aggravated sexual assault on an already marginalized group as a penalty for deceit in the absence of a significant risk of harm, when deceit in the same context by others does not attract those sanctions.[30]

Lower courts have also struggled to apply *Mabior* when confronted with factors affecting the risk of transmission not considered in that case. Martha Shaffer describes this challenge in criticizing the *Mabior* standard for addressing only heterosexual, vaginal intercourse:

> [I]t is not clear how this 'realistic possibility' test applies to sexual activities other than vaginal intercourse. For oral sex, the risk of transmission is so low that studies have not been able to obtain an accurate measure. Must a person with HIV have a low viral load and use condoms during oral sex to avoid liability on the basis of non-disclosure? On the flip side, anal intercourse has a higher rate of transmission than vaginal intercourse, particularly where the insertive partner is HIV-positive. Will low viral load and condom use negate the existence of 'realistic possibility' of transmission in these circumstances?[31]

The case law and academic literature reveal a number of other variables on which *Mabior* is silent, but which affect the risk of transmission. These include the occurrence of ejaculation;[32] whether the HIV-positive partner is the insertive or receptive partner;[33] whether the HIV-negative partner is taking pre-exposure prophylaxis medication;[34] age;[35] and circumcision.[36] In addressing only viral load and condom use in the context of heterosexual, vaginal intercourse, *Mabior* offers lower courts, and those living with HIV, little guidance on the legal significance of these factors.

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30 *Ibid* at para 100.

31 Martha Shaffer, "Sex, Lies, and HIV: Mabior and the Concept of Sexual Fraud" (2013) 63 UTLJ 466 at 473.

32 *R v CB*, 2017 ONCJ 545

33 *R v JAT*, 2010 BCSC 766 at para 29.

34 Jack Vidler, "Ostensible Consent and the Limits of Sexual Autonomy" (2017) 17 Macquarie LJ 104 at 120.

35 *R v JU*, 2011 ONCJ 457 at para 86.

36 *Ibid.*

D. Stigma and Unequal Treatment

Cuerrier and *Mabior* have been criticized for contributing to the stigma already faced by those living with HIV and for the differential impact they have on members of already marginalized groups. Following the release of *Mabior*, Isabel Grant criticized the decision for its failure to recognize the "difficulty of disclosing HIV in a society where people who are HIV-positive have been discriminated against in numerous ways and where disclosure can trigger a domino effect of negative repercussions."[37] Criminalizing the transmission of HIV exacerbates this stigma by signaling that those living with the disease are "potentially criminal or dangerous."[38]

The stigma associated with HIV is well-documented, and has been demonstrated to have significant adverse effects on the health outcomes of those living with HIV.[39] As in other parts of the world, however, HIV in Canada disproportionately affects those who are already members of stigmatized and marginalized groups, including sex workers, drug users, individuals who are incarcerated and members of racial, cultural and sexual minorities.[40] The stigma and discrimination faced by these groups increase the likelihood of HIV-infection and create barriers to access to services following infection.[41]

As a result, a policy of criminalization, such as that established by *Cuerrier*, has a disproportionate effect on already marginalized members of society. The standard set in *Cuerrier* and *Mabior*, for example, assumes a level of access to treatment and testing, as it requires effective treatment to achieve a low viral load, and testing to ensure an individual knows his or her viral load. [42] Members of marginalized groups are less likely to have this

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37 Grant, *supra* note 27 at 476.

38 Aziza Ahmed et al, "Criminalising Consensual Sexual Behaviour in the Context of HIV: Consequences, Evidence, and Leadership" (2011) 6:S3 Global Public Health S357 at S361.

39 Anne C Wagner et al, "HIV-Related Stigma and Overlapping Stigmas Towards People Living with HIV Among Health Care Trainees in Canada" (2017) 29:4 AIDS Education & Prevention 364 at 365.

40 *Ibid*; Carmen H Logie et al, "HIV, Gender, Race, Sexual Orientation, and Sex Work: A Qualitative Study of Intersectional Stigma Experienced by HIV-Positive Women in Ontario, Canada" (2011) 8:11 PLoS Medicine 1 at 2; Isabel Grant, "The Boundaries of the Criminal Law: the Criminalization of the Non-disclosure of HIV" (2008) 31:1 Dal LJ 123 at 160-161.

41 Wagner et al, *supra* note 39; Ahmed et al, *supra* note 38 at S361-S362.

42 Grant, *supra* note 27 at 476.

level of access to health care, and therefore less likely to be in a position to take advantage of the exception to the obligation to disclose created by *Mabior*.[43] Similarly, the law ignores power imbalances that may make disclosure more difficult, or more dangerous. Whereas men who have sex with women may be in a position to unilaterally decide to use a condom, eliminating the need for disclosure (if they also have a low viral load), women and men who have sex with men may need to negotiate condom use with a partner, forcing disclosure and further increasing their already heightened risk of sexual and domestic violence.[44]

E. *Cuerrier* and Sexual Autonomy

While much of the criticism levied at *Cuerrier* focuses on its impact on people living with HIV, some commentators have taken a broader approach. Specifically, these critiques have focused on the poor fit between this standard and a legal environment that, in the realm of sexual offences, has become increasingly focused on sexual autonomy rather than physical harm.[45]

Renu Mandhane argues that reforms to the sexual offences in the *Criminal Code* made in 1983 and the Supreme Court of Canada's decision in *R v Ewanchuk*[46] mark an important shift in the law toward recognizing sexual autonomy as a fundamental principle underlying the law of sexual offences.[47] Similar shifts in the focus of the law have been identified in the United States,[48] and the United Kingdom.[49] Lucinda Vandervort argues that the *Cuerrier* standard is antithetical to this approach as it provides that the violation of autonomy inherent in obtaining consent by fraud is insufficient to warrant criminalization, and that some additional, physical harm is necessary to render sexual deception worthy of prosecution:

> The reasons in *Mabior* appear to leave open the possibility that there is a distinction between some violations of sexual autonomy, human dignity, and sexual integrity,

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43 Logie et al, *supra* note 40 at 2.

44 Richard Elliott, *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper* (Geneva: UNAIDS, 2002) at 24; Grant, *supra* note 27 at 159.

45 Ben A McJunkin, "Deconstructing Rape by Fraud" (2014) 28:1 Colum J Gender & L 1 at 6.

46 *R v Ewanchuk*, [1999] 1 SCR 330, [1999] SCJ No 10 (QL) [*Ewanchuk*].

47 Renu Mandhane, "Efficiency or Autonomy: Economic and Feminist Legal Theory in the Context of Sexual Assault" (2001) 59:2 UT Fac L Rev 173 at 208-211.

48 McJunkin, *supra* note 45.

49 Vidler, *supra* note 34.

> and others; those that threaten public health by creating a "realistic" risk of transmission, constitute criminal harms, while those which "merely" violate individual human dignity and sexual autonomy do not. Such a view is not in accord with contemporary values or *Charter* protections for the personal rights of individuals.[50]

Others have identified a connection between the reluctance to criminalize sexual fraud and traditional notions of masculinity. Kim Shayo Buchanan argues that "[r]ape law's *caveat emptor* approach to sexual deception condones a heterosexist expectation that men, as sexual initiators, will press reticent women for sex - and that the law should not punish men for using deception to get it."[51] Similarly, Ben McJunkin, suggests that this reluctance is based on a misguided attempt to preserve space for "seduction," in which "men are responsible for initiating and pursuing sexual relationships while women either resist men's overtures or, if all goes right, relent to them,"[52] illustrating the point with the following passage from *People v Evans:*[53]

> So bachelors, and other men on the make, fear not. It is still not illegal to feed a girl a line, to continue the attempt, not to take no for a final answer, at least not the first time....It is not criminal conduct for a male ... to assure any trusting female that, as in the ancient fairy tale, the ugly frog is really the handsome prince. Every man is free, under the law, to be a gentleman or a cad.[54]

While both of these authors are writing from an American perspective, a similar insistence on preserving some scope of 'seduction by deception' is apparent in the Canadian authorities.[55] In *Cuerrier*, for example, both Justice Cory and Justice McLachlin reject the broad approach proposed by Justice L'Heureux-Dubé for just this reason. Justice Cory defends the importance of ensuring that a man who lies about his age, salary, or fidelity to a sexual partner not be placed at risk of prosecution,[56] while Justice McLachlin expresses concern at the prospect that "alluring make-up or a false moustache" might "render the casual social act criminal."[57] Aside from an

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50 Lucinda Vandervort, "HIV, Fraud, Non-Disclosure, Consent and a Stark Choice: Mabior or Sexual Autonomy?" (2013) 60:2 Crim LQ 301 at 316-317.

51 Buchanan, *supra* note 24 at 1274.

52 McJunkin, *supra* note 45 at 25.

53 *People v Evans*, 85 Misc 2d 1088, 379 NYS 2d 912 (Sup Ct 1975).

54 *Ibid* at 1099.

55 Boyle, *supra* note 5 at 145-146.

56 *Cuerrier*, *supra* note 1 at paras 134-135.

57 *Ibid* at para 52.

apparent intuitive sense that these deceptions are trivial, neither provides a compelling explanation for why these forms of fraud are undeserving of condemnation regardless of their significance to or impact on the person deceived.

F. Tension Within the Criticism of *Cuerrier*

While these perspectives share a clear skepticism of *Cuerrier* and *Mabior*, they also reveal a tension in this opposition. The critiques focused on HIV non-disclosure argue that the law should retreat, so as to further limit the criminalization of HIV non-disclosure, but in doing so, expand the scope of permissible sexual deception. Conversely, the broader autonomy-focused critics argue in favour of an expansion of the test that would limit or do away with entirely the risk of harm requirement in order to better protect the right to make an informed decision as to whether to consent to sexual activity. In doing so, this approach would criminalize a much broader range of sexual deception. This tension poses a challenge to any attempt to reform the *Cuerrier* standard in a way that is responsive to its shortcomings.

IV. *CUERRIER* OUTSIDE OF HIV NON-DISCLOSURE

As discussed above, much of the attention devoted to the *Cuerrier* standard focuses on cases in which the deception at issue is the failure to disclose HIV status. However, as the Supreme Court made clear in *Hutchinson*, fraud capable of vitiating consent to sexual activity is not limited to non-disclosure of HIV. The standard set by the Supreme Court of Canada allows for the vitiation of consent by fraud in any case where there is "a significant risk of serious bodily harm." This restrictive standard is often justified by the purported danger of over-reach outside of HIV cases.[58]

Aside from the broad consideration of the relationship between the *Cuerrier* standard and sexual autonomy discussed above, there has been little attention paid to the application of the *Cuerrier* standard where the "risk of serious bodily harm" is something other than infection with HIV. As the majority in *Cuerrier* specifically rejected an expansion of the law targeted only at the non-disclosure of sexually transmitted infections, the impact of the *Cuerrier* standard cannot be properly evaluated without an understanding of its application where other forms of harm are at issue.

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58 *Ibid* at paras 52, 134-135.

This analysis is all the more important in light of the persistent fear that the removal of the harm requirement would lead to the criminalization of 'harmless' deceptions in the course of 'courtship.'

A review of lower court decisions since *Cuerrier* reveals that its application remains largely limited to HIV non-disclosure cases. The small number of cases in which another form of deception is considered can be categorized into four groups: non-disclosure of a sexually transmitted infection other than HIV; deceptions resulting in financial deprivation; deceptions causing psychological harm; and those in which the deception relates to professional status. Pregnancy, the harm found in *Hutchinson*, is notably absent from this list. It appears that pregnancy has not been alleged to constitute harm arising from sexual fraud in any reported case since *Hutchinson*.

A. Sexually Transmitted Infections Other Than HIV

On several occasions, Canadian courts have considered whether non-disclosure of sexually transmitted infections other than HIV, including genital herpes and hepatitis, is sufficient to vitiate consent to sexual activity.

Courts have been willing to entertain the possibility that sexually transmitted infections other than HIV may amount to "serious bodily harm" sufficient to vitiate consent. These cases, however, suggest a more forgiving attitude from the Courts than is typically observed in the HIV context. In *R* v *JH*, the Ontario Court of Justice accepted a guilty plea for sexual assault associated with the non-disclosure of genital herpes, but granted the accused a conditional discharge,[59] a significant departure from the multi-year custodial sentences that are the norm in HIV non-disclosure cases.[60]

This distinct approach is more apparent in cases not resulting in convictions. In *R v JJT*, another Ontario Court of Justice case, the Court acquitted the accused in part on the basis that he knew that he had been infected with genital herpes for over a decade but did not believe he could transmit the disease to others because he did not think he had ever done

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[59] *R v JH*, 2012 ONCJ 753; this case can also be distinguished in part by the fact that the conviction in *JH* was for assault *simpliciter*, a less serious form of assault than aggravated assault, the typical charge in HIV non-disclosure cases.

[60] See *R v Nduwayo*, 2010 BCSC 1467 at paras 25-37; *R v Bruneau*, [2010] OJ No 4600 (Ont CJ) at para 26.

so.[61] In HIV non-disclosure cases, the Courts rarely seem to seriously engage with the question of whether the accused knew that he could infect others, and there appear to be no cases in which an accused has been acquitted on this basis.

Similarly, in *R v Jones*, which involved non-disclosure of Hepatitis C, the New Brunswick Court of Queen's Bench found that the *Cuerrier* standard was not met, as the risk of transmission was less than 1%.[62] In *Mabior* (decided after *Jones*), however, despite evidence that the risk of transmission ranges between 0.05% and 0.26% in cases of unprotected sex with an infected partner with an unreduced viral load,[63] the Court held that non-disclosure should lead to conviction unless the risk was further reduced by both condom use and a low viral load.[64]

While the number of these cases is very small, they lend credence to the argument that the legal treatment of HIV non-disclosure is grounded in stigma. The fact that prosecutions for non-disclosure of other sexually transmitted infections seem to be rare suggests that, unlike HIV non-disclosure, the Crown does not view these cases to be sufficiently serious to prosecute in large numbers. The approach to these cases taken by the Courts suggests that this view is shared by the judiciary. These attitudes seem to be a reflection of *Cuerrier*'s emphasis on the harm caused, which may differ significantly between infections, rather than the impact on sexual autonomy, which would focus attention on the impact on the complainant's right to make an informed decision about consent.

B. Financial Deprivation

At least three cases decided since *Cuerrier* have addressed the issue of whether fraud resulting in financial deprivation is sufficient to vitiate consent. Each involved an agreement to pay for sex, followed by a failure to provide the promised payment.

In *R v Gartner*,[65] the earliest of these three cases, Justice Turpel-Lafond of the Saskatchewan Provincial Court ultimately found that there had been no consent at all to the sexual activity in question, but expressed concern

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61 *R v JJT*, 2017 ONCJ 255.

62 *R v Jones*, 2002 NBQB 340.

63 *Mabior*, *supra* note 13 at para 97.

64 *Ibid* at para 104.

65 *R v Gartner*, 2003 SKPC 178.

about excluding deceptions about payment from the definition of fraud in the sexual context generally:

> The Court does not accept that [*Cuerrier*] stands for a general proposition that sex for money where money is not exchanged is fraud but not assault. The Cuerrier precedent can be distinguished from the case at bar on the facts. Moreover, if this position were accepted generally in sexual assault cases, then a "rape myth" would be resurrected. This myth or stereotype is that a prostitute's consent to sex is less worthy of protection at criminal law than is that of other woman. In other words, the Court would then have to endorse the view that women working in the sex trade are not harmed when they do not consent because they are engaged in sex for money anyway and hence sexually available on different terms than other women.[66]

Justice Turpel-Lafond does not engage directly with the question of whether financial deprivation qualifies as "serious bodily harm."

After *Gartner*, but prior to the two cases discussed below, the Supreme Court of Canada released its decision in *Hutchinson*. While the harm in *Hutchinson* was not financial, the reasons of the majority clearly indicate that deception resulting in financial loss is not sufficient to vitiate consent:

> To establish fraud, the dishonest act must result in a deprivation that is equally serious as the deprivation recognized in *Cuerrier* and in this case. For example, financial deprivations or mere sadness or stress from being lied to will not be sufficient.[67]

In each of the two cases decided after *Hutchinson*, the Court concluded that financial deprivation does not satisfy the "significant risk of bodily harm" test. In *R v ROS*,[68] an Ontario Court of Justice decision, the accused were two of four men alleged to have engaged in sexual activity with the complainant with the promise of payment. Two of the four paid the complainant before she was beaten and robbed by the same four men. While the accused were convicted of robbery, the trial judge held that obtaining sex with no intention of payment does not quality as a "significant risk of serious bodily harm."[69]

In *R v Wilson*,[70] in the Ontario Superior Court of Justice, the accused was committed to trial for the first-degree murder of a sex trade worker it was alleged he had not intended to pay. On the application to quash the

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66 *Ibid* at para 30.

67 *Hutchinson*, *supra* note 14 at para 72.

68 *R v ROS*, 2014 ONCJ 274.

69 *Ibid* at para 89.

70 *R v Wilson*, 2015 ONSC 7224.

committal the application judge concluded that there was no evidence supporting the allegation that the accused caused the death of the deceased while committing the illegal act of sexual assault. This was based in part on the conclusion that even if the accused had no intention to pay the deceased for sex, it would not have amounted to sexual assault, as non-payment would not vitiate consent to sexual activity.[71]

Despite the concerns raised in *Gartner* it seems clear that financial deprivation will not satisfy the "significant risk of serious bodily harm" test.[72] This is so even where, as in *ROS* and *Wilson*, the financial deprivation is associated with acts of significant violence to which the complainant did not consent.[73] It is curious that a standard based on fraud in commercial settings,[74] which commonly seeks to protect against financial loss, would discount the significance of just such a deprivation in this context. Nevertheless, it seems clear that this form of harm falls outside of that which will give rise to fraud capable of vitiating consent to sexual activity.

C. Psychological Harm

Whether 'psychological harm' satisfies the "serious bodily harm" requirement has been considered in *R v Chen*,[75] in British Columbia and *R v Thompson*,[76] in Nova Scotia. In *Chen*, the accused falsely held himself out to be a doctor of Chinese medicine, and administered treatment to the complainants that involved touching their breasts and genitals. As there was no evidence at trial this would not have been legitimate treatment had the accused been properly qualified, the deception did not amount to fraud as to the nature and quality of the act. Instead, the Crown sought to establish fraud vitiating consent on the basis of a significant risk of serious bodily harm.[77]

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71 *Ibid* at at para 71.

72 This conclusion is also consistent with the BC Court of Appeal's decision in *R v Petrozzi* (1987), 58 CR (3d) 320, which predated *Cuerrier*.

73 Withholding agreed upon payment from a sex worker has itself been described as a "systemically violent act", even in the absence of the use of additional physical force: Elizabeth Manning and Vicky Bungay, "'Business before Pleasure': The Golden Rule of Sex Work, Payment Schedules and Gendered Experiences of Violence" (2017) 19:3 Culture, Health & Sexuality 338 at 339.

74 *Cuerrier*, *supra* note 1 at para 117.

75 *R v Chen*, 2003 BCSC 1363 [*Chen*].

76 *R v Thompson*, 2018 NSCA 13 [*Thompson*].

77 *Chen*, *supra* note 75 at para 86.

In a ruling on a *voir dire*, the Court held that psychological harm could qualify as "serious bodily harm," relying on *R v McCraw*,[78] which defined "serious bodily harm" as "any hurt or injury, whether physical or psychological, that interferes in a substantial way with physical or psychological integrity, health or well-being of the complainant."[79] The Court reconciled *McCraw* with *Cuerrier* by concluding that psychological harm would be sufficient only where it rose above "mental distress," which was held to be insufficient in *Cuerrier*. The accused's conviction did not turn on this issue, but the Court appeared to affirm this conclusion in the reasons for conviction.[80]

The Nova Scotia Court of Appeal reached the opposite conclusion in *Thompson*. At trial, the accused was acquitted of aggravated sexual assault because the Crown failed to prove that there existed a realistic possibility of transmission of HIV. However, he was convicted of sexual assault causing bodily harm as the trial judge found that the deception had caused "serious psychological harm" to the complainants.[81] The Court of Appeal overturned the conviction, rejecting the trial judge's reasoning based on the statement in *Hutchinson* that "mere sadness or stress from being lied to will not be sufficient" to establish a significant risk of serious bodily harm.[82]

While *Chen* is not entirely unpersuasive, the reasoning in *Thompson* is more compelling given that "serious bodily harm" seems to plainly require some physical injury, and that there is no indication in *Cuerrier* that "mental distress" was intended to reflect a level of suffering lower than "psychological harm." Further, *Cuerrier* requires only a risk of harm to vitiate consent. It seems that there would be at least a risk of psychological harm in any case of HIV non-disclosure, making the requirement in *Cuerrier* and *Mabior* that there be a risk of actual transmission unnecessary.

That the *Cuerrier* standard excludes these cases should cause concern. The deceptions perpetrated here were found to have caused suffering, albeit not physical, and the deceptions are a far cry from the "alluring make-up or…false moustache" of concern to Justice McLachlin. There seems to be

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78 *R v McCraw*, [1991] 3 SCR 72, [1991] SCJ No 69 (QL).

79 *R v Chen*, 2003 BCSC 984 at para 31.

80 *Chen*, *supra* note 75 at para 36. The conviction was affirmed by the Court of Appeal, which did not consider this issue: 2008 BCCA 523.

81 *R v Thompson*, 2016 NSSC 134 at paras 141, 143.

82 *Thompson*, *supra* note 76 at para 35.

little public interest in protecting this behaviour, and good reason to question any legal standard that does so.

D. Deception Regarding Professional Status

In two very different cases, Courts have suggested that deceptions relating to the professional status of the accused are insufficient to vitiate consent. In neither case is the alleged "significant risk of serious bodily harm" clearly identified and, perhaps predictably, in neither case is the fraud found to be sufficient to vitiate consent. Cases involving medical practitioners in which fraud as to the "nature and quality of the act" is alleged to vitiate consent are not addressed here as they do not engage the "significant risk of serious bodily harm" standard.

In *R v Dadmand*,[83] the accused held himself out to be a modelling agent, and engaged in sexual activity with the multiple complainants under the guise of a modelling audition. While several of the allegations were found to have been non-consensual, two of the complainants were found to have consented to the sexual activity, but only because they believed it to be part of an audition. The trial judge, noting that the Crown had not raised the issue of fraud vitiating consent, suggested that the evidence would be insufficient to satisfy the *Cuerrier* test in any event:

> The accused deceived the complainant by claiming to be a modelling agent, thereby inducing her to have sex with him and to permit their activity to be video recorded. However, again, the Crown has not argued fraud negating consent contrary to s. 265(3)(c) of the Code, and has not led evidence to meet the second requirement for fraud of the significant risk of serious bodily harm to the complainant.[84]

A similar issue arose in a very different context in *R v NMP*.[85] The accused, charged with communicating for the purposes of prostitution, argued that the charge ought to be stayed because an undercover police officer had touched her pubic hair at her request in order to prove that he was not a police officer. The accused argued on appeal that the officer had sexually assaulted her as he had obtained her consent by fraud, and that this action amounted to a violation of her section 7 and 15 *Charter* rights. The Court held:

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83 *R v Dadmand*, 2016 BCSC 1565.

84 *Ibid* at para 168 [emphasis added].

85 *R v NMP*, 2000 NSCA 46.

> Clearly, in determining whether consent was obtained by fraud, the nature and extent of the duty to disclose if any must be considered in the context of the particular case. The interests intended to be protected by the provisions of the *Criminal Code* relating to sexual assault are the dignity, bodily integrity and safety of the person. The legislation is not designed to make it easier for law breakers to circumvent legitimate undercover police operations. The type of harm to which the appellant was exposed by the deceit practiced here (i.e., apprehension by police for criminal behaviour) is not, in my view, the serious harm envisaged by the majority opinions of the Supreme Court of Canada in Cuerrier, *supra*.[86]

While the facts of these cases are very different, both reveal the centrality of the issue of "serious bodily harm." In each of these cases, the complainants consented to sexual contact as a result of active deception that was central to the decision to consent. Both illustrate how far the *Cuerrier* standard has removed Canadian law from an autonomy-centred concept of consent in the context of sexual fraud. Despite the obviously reprehensible conduct in *Dadmand*, it is clear that the criminal law is unable to intervene unless the deception in that case had also resulted in physical harm, giving reason to question whether *Cuerrier* has appropriately drawn the line between criminal and non-criminal conduct.

E. Conclusion: Fraud Outside of HIV Non-Disclosure

The cases discussed above reveal several shortcomings in the *Cuerrier* test. First, it is clear that Justice Cory was unsuccessful in crafting a test that goes beyond the narrow extension of the law suggested by Justice McLachlin. Justice McLachlin proposed extending the law to specifically criminalize non-disclosure of sexually transmitted infections. Arguably, Justice Cory's test has failed to do even that, as convictions arising from sexual fraud continue to come almost exclusively for non-disclosure of HIV. While there has been at least one conviction for non-disclosure of genital herpes, there is very little reason to believe that the *Cuerrier* test is having the intended effect of extending protection from sexual fraud beyond non-disclosure of sexually transmitted infections.

Secondly, it is clear that the law is failing to capture truly reprehensible and morally blameworthy conduct that goes well beyond the type of "seduction" described by Ben McJunkin. A man lying to a sex worker about his intention to pay, or deceiving an unsophisticated aspiring model into believing that intercourse is a necessary part of an audition is a far cry from

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86 *Ibid* at para 39.

the embellishments about one's wealth, profession, or accomplishments so often cited as being at risk from a more expansive notion of sexual fraud. Even if it is accepted that there is a need to preserve some scope for exaggeration in the course of courtship, it is clear that the current standard is protecting a right to deception that goes far beyond harmless hyperbole.

Thirdly, these cases suggest that the Court has failed to provide certainty in this area. There is at least some disagreement with respect to whether serious bodily harm can be found in either financial loss or psychological harm, while the low rate of conviction in these cases suggests a difficulty on the part of the Crown in predicting what will be sufficient to vitiate consent. Add to this the uncertainty discussed above that remains even with respect to HIV non-disclosure, a subject the Supreme Court of Canada has addressed at least four times since 1998, and it becomes clear that the Court has done little to provide predictability to the Courts or the public.

Finally, these decisions offer a clear indication of how far out-of-step with an autonomy-centred approach the law is in this respect. In virtually all of the case discussed above, there is no question that the complainant would not have consented to the sexual activity in question had she been aware of the deception. Yet, because fraud is in issue, the Court focuses instead on whether that decision would have been objectively defensible - imposing its own assessment of the decision the complainant should have made had she been aware of the deception rather than considering how the deception would actually have affected her decision to consent had she been given the opportunity to make her own choice with complete information.[87] If autonomy is truly the central focus of the modern law of sexual offences, the analysis should respect the absolute right of the complainant to decide whether or not to consent for any reason, and not examine whether the complainant would have had a 'valid' basis for withholding consent.

V. REFORMULATING THE *CUERRIER* TEST

The discussion above reveals a number of significant problems with the *Cuerrier* test. Within the HIV non-disclosure context, it undermines public health, creates uncertainty and arbitrary outcomes, disadvantages

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87 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.

marginalized groups, and is out of step with sexual autonomy. The law fares little better when applied in cases not involving HIV non-disclosure. Here, it fails to capture clearly blameworthy conduct, and again fails to provide certainty and promote sexual autonomy. In light of these problems, it is evident that a new approach should be considered.

A. Proposed Alternatives to the *Cuerrier* Test

In addition to the alternative tests proposed by Justices L'Heureux-Dubé and McLachlin in their concurring judgments in *Cuerrier*, several commentators have taken on the task of re-formulating the *Cuerrier* test for sexual fraud.

Hamish Stewart, writing in 2004, proposed eliminating the "significant risk of serious bodily harm" test, and replacing it with a "mixed subjective-objective test." Under Stewart's test, fraud would vitiate consent where three conditions are met: first, there must be a deception that induces consent; secondly, the accused must have intended that the deception induce consent; and, finally, the deception must be such that the reasonable person would have realized the deception was important to the decision to consent.[88]

Similarly, Kevin Rawluk advocates for a standard that would vitiate consent in any case in which dishonesty induces physical contact to which the complainant would not otherwise have consented. In place of an automatic, unilateral disclosure obligation, Rawluk proposes a shared responsibility for disclosure in which the obligation to disclose is triggered by a reciprocal obligation to inquire. He argues that this standard would better emphasize personal autonomy by requiring all parties to exercise their agency to protect their sexual health, and would reduce stigma by normalizing shared responsibility to prevent infection. Rawluk acknowledges that there may be circumstances in which it would not be reasonable to expect a party to inquire or to disclose and that where, for example, there is a reasonable fear of violence, these obligations would not be enforced.[89]

Lucinda Vandervort likewise advocates for the elimination of the bodily harm requirement. She argues that "non-disclosure or deception with

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88 Hamish Stewart, "When Does Fraud Vitiate Consent? A Comment on *R v Williams*" (2004) 49 Crim LQ 144.

89 Kevin Rawluk, "HIV and Shared Responsibility: A Critical Evaluation of *Mabior* and *DC*" (2013) 22 Dal J Leg Stud 21.

respect to any circumstance that is an essential aspect of the sexual activity, including its possible reproductive or health consequences, renders sexual consent…impossible." Vandervort suggests that the different classes of sexual assault could be applied such that less consequential deceptions could be charged as sexual assault *simpliciter* to ensure that the offence and punishment are commensurate with the seriousness of the offence, while more harmful deceptions could be prosecuted as sexual assault causing bodily harm, or aggravated sexual assault. She does not engage at length with the issue of what would qualify as the "essential aspects" of the sexual activity.[90]

While each of these proposals would represent an improvement over the current state of the law, a superior solution can be achieved by combining elements of each. Such a standard is outlined below.

B. A New Test

To replace the current test, I propose a two-step analysis. As in the three proposed standards discussed above, this alternative test would eliminate the "significant risk of serious bodily harm" requirement.

In assessing whether consent was vitiated by fraud, the Court should first ask whether the complainant was deprived of information material to her decision to consent. If so, the second stage of the analysis would consider whether, in all the circumstances, the accused had a duty to disclose that information to the complainant.[91] This second stage would require the Court to ask three questions: Did the accused have the information of which the complainant was deprived? Did the accused know that the information was material to the complainant's decision to consent, or was he reckless or willfully blind to that fact? Is there any reason why a duty to disclose the information should not be imposed in the circumstances?

Consistent with the standards proposed by Stewart, Rawluk, and Vandervort, the first step places the complainant's sexual autonomy at the forefront of the analysis by recognizing that it is the complainant that should

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90 Vandervort, *supra* note 50.

91 Of the three commentators discussed above, only Rawluk, *supra* note 89, uses the word "duty" in formulating his proposed standard. I believe this is important, as it acknowledges that the law is imposing an obligation to act, and potentially criminalizing omissions. Acknowledging the creation of a "duty" forces consideration of the circumstances in which the duty to act arises.

determine what information is significant to her decision to consent. It requires the Court to consider whether the complainant had the information she required to exercise her right to provide or withhold consent.[92] This inquiry is a logical extension of the formulation of consent in *Ewanchuk*, which affirms that the core of the issue is whether an individual is choosing to engage in sexual activity.[93] The proposed standard recognizes that this choice is meaningless unless the complainant is assured an accurate understanding of the decision she is making.[94]

The second step in the analysis examines whether the accused can reasonably have been expected to disclose the information in the circumstances. It first requires that the accused have the information at issue. Regardless of the significance of the information to the complainant, the accused cannot be faulted for failing to share information he did not have. Where, for example, an individual with a sexually-transmitted infection, including HIV, is genuinely unaware of the infection, failure to disclose could not be sufficient to ground a criminal conviction.

Secondly, it requires that the accused be aware of (or reckless or willfully blind as to) the significance of the information to the complainant. Again, this question is central to the blameworthiness of the accused as the accused cannot be faulted for failing to disclose information if he was oblivious to its significance to the complainant. A test that takes into account the complainant's subjective state of mind is essential to the creation of a truly autonomy-centred standard. An objective standard will always have the effect of deciding for a complainant whether the decision she would have made to engage in or decline sexual activity, if she had the benefit of full information, would have been justified or legitimate. This is antithetical to the modern law of consent which protects the right to decide whether to consent to sexual activity for any reason, no matter how arbitrary, misinformed, or offensive it may seem to others. [95]

It is at this stage that active deception could be differentiated from passive failure to disclose. It seems likely that an accused that intentionally

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92 See Boyle, *supra* note 5 at 146.

93 *Ewanchuk*, *supra* note 46 at paras 26-28.

94 Here, the proposed test differs from that proposed by Lucinda Vandervort, who would retain some level of objectivity by requiring that the deception relate to an "essential aspects" of the sexual activity.

95 See *R v ADH*, 2013 SCC 28 at para 23; Here the proposed test differs from the standard formulated by Hamish Stewart, which includes an objective element.

provides false information in advance of a sexual encounter, or who lies in response to an inquiry from a prospective partner,[96] would be found to have understood the significance of the active deception. An accused who simply fails to disclose may more plausibly deny awareness of the importance of the information in issue, but the failure to disclose information of obvious significance, such as a serious sexually transmitted infection, could still be capable of supporting a conviction.

The final question offers relief for those cases in which there is a compelling reason for the failure to disclose. Where disclosure would expose the accused to a risk of sexual or physical abuse, for example, or where there is a compelling privacy interest that requires protection, [97] the court may find that there was a valid reason not to disclose the information. This inquiry would need to take all of the surrounding circumstances into account. Failure to disclose highly significant information would demand a more compelling explanation than failure to disclose more trivial matters.[98]

C. Assessing the Proposed Standard

While I argue that the proposed standard would represent an improvement over the current law, it does not address all of the identified shortcomings in the *Cuerrier* standard, and may cause new challenges. This change in the law would address the inequality resulting from the *Cuerrier* test, emphasize sexual autonomy, and expand the reach of the law. It would do little, however, to create space for a public-health centred approach to HIV, and may exacerbate the existing uncertainty in the law. It may also

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96 Rawluk, *supra* note 89, would require a complainant make inquiries before an obligation to disclose would arise. I argue that such a standard would be too limiting, and would fail to recognize the realities of relationships in which a partner may reasonably expect disclosure of important information even without an inquiry.

97 While the right to give or withhold consent for any reason is worthy of protection, it should not create an absolute right to disclosure of every intimate detail about a prospective partner's personal life and history. While in many cases privacy interests can be served by refusing to provide information, there may be instances in which declining to respond to an inquiry from a prospective partner, for example, regarding sexual history or gender identity, may reveal personal details in which there is a compelling privacy interest. In such cases, the courts may conclude that deception is justifiable.

98 This element addresses what I respectfully argue is a key shortcoming in Hamish Stewart's proposed standard, which does not address circumstances in which disclosure may expose an individual to serious risks of harm, such as physical or sexual abuse: *supra* note 91.

criminalize behaviour that a portion of the population would view as morally suspect, but not deserving of criminal sanction.

The proposed standard would make progress towards addressing some of the problems caused by *Cuerrier*. Whereas *Cuerrier* is out of touch with an autonomy-centred approach to sexual offences, the proposed test places autonomy at the centre of the analysis. Further, by requiring Courts to consider whether circumstances justifying non-disclosure are present, the proposed test offers the flexibility needed to accommodate those for whom disclosure may create a risk of harm or cause undue hardship. Finally, whereas *Cuerrier* failed to formulate a standard that effectively captured deceptions outside of the non-disclosure of sexually-transmitted infections, the proposed standard is broad enough to capture the sorts of reprehensible conduct seen in cases such as *ROS* and *Dadmand* but appropriately limited by capturing only deceptions which the accused knows to be material to the complainant's decision to consent. In doing so, it focuses on the real wrongfulness of fraud in the sexual context - deliberate deprivation of the complainant's right to make a fully informed choice as to whether to engage in sexual activity.

The two identified shortcomings with the *Cuerrier* standard not addressed by the proposed test are the criminalization of HIV, and the uncertainty inherent in the current law. As discussed above, *Cuerrier* has been criticized for being too broad, criminalizing HIV in a manner that is discriminatory and undermines public health.[99] While it is conceivable that the negative impact of criminalizing HIV non-disclosure on public health efforts may be identified as a compelling reason not to impose a duty to disclose, this reasoning seems inconsistent with the proposed standard's emphasis on autonomy. Accordingly, it would likely do little to resolve this issue, and may exacerbate it by extending the criminalization of HIV by creating a risk of conviction even where there is no possibility of transmission.

Secondly, the proposed test would not provide the certainty that has proved elusive following *Cuerrier*. Its focus on the significance of information to the particular complainant makes it virtually impossible to provide reliable guidance as to what information must be disclosed. While it does little to improve the law in this respect, it may be that predictability in this area of the criminal law is impossible. Even in the HIV non-

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[99] Buchanan, *supra* note 24 at 1245-1246; Mykhalovsky, *supra* note 25 at 671-673.

disclosure context, there are too many variables for even the clear standard articulated in *Mabior* to provide the certainty intended by the Court. When expanded to the entirety of potential sexual frauds, it seems implausible that any standard could provide certainty in all situations. The proposed standard does, however, at least offer the accused some measure of control in that it will generally protect an individual that provides a prospective sexual partner with the information that he believes she would want to know.

Finally, it is important to acknowledge that the proposed test also poses a risk of criminalizing behaviour that may be seen by many not to merit criminal sanction. In their reasons in *Cuerrier*, both Justice Cory and Justice McLachlin clearly took the position that there should be some permissible scope for deception in the course of "courtship." It seems likely that there remain many in Canadian society who share this view, even if they view such lies as unsavoury. In this way, a purely subjective test may be viewed as radical and overly oppressive and may struggle to achieve broad societal acceptance.

VI. CONCLUSION

The Supreme Court of Canada's decisions in *Cuerrier*, *Mabior* and *Hutchinson* represent a significant shift in the law of sexual consent in Canada. In these decisions, the Court expanded the circumstances in which fraud will vitiate consent to sexual activity to include deceptions resulting in a "significant risk of serious bodily harm." While *Cuerrier* has received limited praise for expanding protection for sexual autonomy, it has been widely criticized for undermining public health efforts to combat HIV, for setting an arbitrary and uncertain standard, and for contributing to HIV-related stigma and having a disproportionate effect on members of already marginalized groups. The standard set in *Cuerrier* has also been criticized for failing to go far enough in protecting sexual autonomy by offering protection only where fraud results in a significant risk of serious bodily harm.

While much of the analysis of *Cuerrier* has focused on cases in which the fraud at issue is non-disclosure of HIV, it is clear that the standard set in that case and those that followed was intended to apply well beyond this context. The purpose of this article is to examine the application of *Cuerrier* in cases involving deception other than non-disclosure of HIV. Cases

involving sexual fraud since *Cuerrier* can be divided into four categories: those involving non-disclosure of sexually transmitted infections other than HIV, deception resulting in financial deprivation, deception resulting in alleged psychological harm, and deception relating to professional status.

This analysis revealed several shortcomings in the *Cuerrier* standard. It is clear that the test set by Justice Cory is not having its intended effect of regulating sexual fraud beyond the HIV non-disclosure context, and is failing to capture behaviour that is truly morally reprehensible and not worthy of legal protection. The standard has also failed to provide the clarity and certainty needed by members of Canadian society to understand their legal obligations, and by lower Courts trying to faithfully apply the standard set by the Supreme Court. Finally, the standard set in *Cuerrier* is increasingly out-of-step with the modern focus of the law of consent in the sexual context on autonomy, failing to provide adequate protection of the right of individuals to decide whether, when, and with whom to consent to sexual activity.

In order to rectify these shortcomings, this article proposes a new standard. This standard would eliminate the requirement that fraud result in a "significant risk of serious bodily harm." The proposed test would require two inquiries. First, the Court would be required to consider whether the complainant was deprived of information material to her decision to consent to sexual activity. If so, the Court would then consider whether, in all the circumstances, the accused had a duty to disclose the information in question by asking three questions: Did the accused have the information of which the complainant was deprived? Did the accused know that the information was material to the complainant's decision to consent? Is there any reason why a duty to disclose should not be imposed in the circumstances of the case before the Court?

By asking at the outset of the inquiry whether the complainant had the information she required to make a decision as to whether to consent, the proposed standard appropriately puts sexual autonomy at the centre of the analysis. The second stage turns the focus of the analysis to the actions of the accused, ensuring that the accused can fairly be said to have had an obligation to provide the information in question, and that the decision not to do so is morally blameworthy and deserving of criminal sanction.

Despite these advantages, the proposed test is not without its shortcomings. It would do little to rectify the problems associated with *Cuerrier's* criminalization of HIV, and while it would eliminate the

confusion that has resulted from *Mabior*, may itself prove challenging for members of the public to understand, and Courts to apply. Additionally, it may set a standard not in accordance with public opinion and which may not enjoy widespread public support.

Whether or not the proposed standard strikes the right balance, it is clear that reform is needed in this area of the law. In recent decades, Canadian criminal law has moved significantly towards a focus on sexual autonomy, as represented in the absolute right guaranteed in *Ewanchuk* to decide whether, when, and with whom to consent to sexual activity. The ability to meaningfully exercise this right is dependent on having complete and accurate information about the issues that are material to that decision. Whereas the *Cuerrier* standard decides for a complainant the bases upon which she could reasonably have declined sexual activity, the proposed standard recognizes that the decision to consent to sex is intensely personal, and that individuals should be entitled to decide for themselves the factors that will inform that decision, no matter how arbitrary or unreasonable they may seem to others.