

count each of invitation to sexual touching and sexual interference. These charges involved nine different complainants who lived in the City of Winnipeg and the City of Brandon, in Manitoba. The time parameters with respect to the offences range from January 1, 2004 until March 31, 2006.

II. BACKGROUND

[2] HIV is a virus that attacks an individual's immune system. It is the immune system which helps ward off many potentially fatal infections within the body. Consequently, when HIV infiltrates the immune system, it lowers the body's ability to defend against possible infection. This eventually results in an enhanced exposure to a number of potentially lethal illnesses. Medication is utilized by the medical profession to control or suppress the progression of the virus.

HIV is a member of the Retrovirus family. On entering the cell it is infecting, its own enzyme Reverse Transcriptase enables it to replicate its RNA genome in a DNA version of itself thus permitting it to enter the cells genome. Viruses copy their genetic material into the genetic material of the cell they have infected and remain there for the rest of the cell's life. Some of the cells HIV infect (immune system memory cells) are extremely long lived. This results in a lifelong chronic infection.

HIV can infect many different cells in the body. HIV's most harmful effects result from its predilection for infecting a type of white blood cell called the CD4 lymphocyte (CD4 cell) and neurons (nerve cells). Infection of neurons is one of the mechanisms by which HIV can cause damage to the brain, spinal chord, or peripheral nervous system. CD4 lymphocytes are the co-coordinators of the immune system's response to infections. In untreated HIV infection, the number of CD4 lymphocytes progressively decline ... [Dr. Smith's Report, p. 1]

[3] HIV is the cause of Acquired Immune Deficiency Syndrome ("AIDS"), particularly when left medically untreated. AIDS represents a progression of HIV and is evident when certain diseases have developed and are present in the

body. The following was stated by Dr. Richard Smith in his report prepared for trial purposes (page 2):

Before the advent of highly effective antiretroviral therapy (HAART), which is able to suppress HIV to viral loads 'below the level of detection' ... a diagnosis of AIDS was considered akin to an inevitable death sentence. This is no longer the case.

[4] Dr. Richard Smith, who provided expert testimony during the course of the trial, furnished a number of insights into both HIV and AIDS. Certain aspects of his testimony, related to the medical issue of HIV, constituted appropriate background material for this decision. A number of the points made by Dr. Smith were as follows:

- "The amount of HIV in the blood peaks at around 6 weeks and after it is brought under control by the body's immune system and falls by around 12 weeks after initial infection. This initial phase is the period of greatest infectivity." (p. 2);
- The quantity of HIV in the blood system is known as the viral load;
- The extent of immune system damage is referred to as the CD4 cell count – the higher the count, the greater the damage;
- There are many highly effective antiretroviral medications which may be utilized to prevent HIV from reproducing itself or entering a cell to infect it;
- The predominant method of HIV transmission is male to female sexual intercourse.

[5] In this case, the evidence has shown that the accused was infected with HIV. He was medically diagnosed as HIV-positive on January 14, 2004. The diagnosis was relayed to him later in the same month. The Crown submitted that the accused, with knowledge of his condition and despite being in possession of the appropriate safe sex protective information, repeatedly and without proper care engaged in sexual relations with a number of unsuspecting women. Those women were exposed to HIV through sexual relationships with the accused, albeit certain of the women were “protected” through the use of condoms. None of the complainants have to date been diagnosed as HIV-positive. Further, only one of the complainants engaged in a sexual relationship with him after learning of his HIV-positive status. The other eight complainants all testified that they would not have engaged in sexual intercourse with the accused if they had been apprised of his condition.

[6] This case will describe the accused’s relationship with each of the complainants and determine whether the charges are founded based upon the evidence and the law.

III. THE LAW

(A) Aggravated Sexual Assault (s. 273(1) of the *Criminal Code*

R.S.C. 1985, c. C-46)

[7] Section 273(1) states that:

273. (1) Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.

(emphasis added)

[8] The elements of the crime of aggravated sexual assault are essentially the same as sexual assault as are outlined in s. 268(1) of the *Criminal Code* with the “aggravation” enhancement. The “aggravation” enhancement requires the Crown to prove, beyond a reasonable doubt, that the sexual assault served to maim, wound, disfigure, or endanger the life of the complainant. In these circumstances, the Crown alleges that the accused’s willing exposure of his sexual partners to HIV was tantamount to endangering their lives.

[9] The Crown must prove each of the essential elements of aggravated sexual assault beyond a reasonable doubt. Those elements are:

- (1) That the accused intentionally applied force to the complainants;
- (2) That the force intentionally endangered the lives of the complainants;
- (3) That the force that the accused applied took place in the circumstances of a sexual nature;
- (4) That the complainants did not consent to the force that the accused intentionally applied;
- (5) That the accused knew that the complainants did not consent to the force intentionally applied.

[10] In this case, six of the complainants testified that they had consented to sexual intercourse with the accused. However, they were, at the time, unaware of his HIV-positive status. Three of the complainants allege that their

relationship with the accused included instances of non-consensual sexual relations.

[11] The issue of consent will prove to be particularly important in the determination of the charges of aggravated sexual assault against the accused. Consent is defined as a complainant's voluntary agreement to take part in sexual activity. However, there cannot be a voluntary agreement or consent unless a complainant is capable of agreeing. For instance, a complainant must not be so intoxicated or in any other mental state that would render him/her unable to understand the sexual nature of an accused's conduct. Further, an individual must be able to realize that he/she has a right to choose not to participate in sexual activity.

[12] The law also holds that no consent is established if someone has deliberately deceived a person about the nature and the quality of the act and by doing so, has put that person at a risk of harm. Deception involves dishonesty, either by saying something that is deceitful, or by failing to tell a person something that would be important to know in deciding whether or not to agree to engage in sexual intercourse. Fraud can serve to vitiate consent and may be proven if the elements of dishonesty and deprivation are established.

[13] The case law with respect to these issues has largely been formed over the last 15 years with the helpful guidance of the Supreme Court of Canada in a trilogy of cases. Those cases are:

- (1) ***R. v. Thornton*** (1991), 1 O.R. (3d) 480, [1991] O.J. No. 25 (Ont. C.A.) (QL); affirmed at (1993), 82 C.C.C. (3d) 530, [1993] S.C.J. No. 62 (S.C.C.) (QL);
- (2) ***R. v. Cuerrier*** (1998), 127 C.C.C. (3d) 1, [1998] S.C.J. No. 64 (S.C.C.) (QL);
- (3) ***R. v. Williams*** 2003 SCC 41, (2003), 176 C.C.C. (3d) 449, S.C.J. No. 41 (S.C.C.) (QL).

[14] In ***Thornton***, the accused was convicted of a charge of nuisance for knowingly donating his HIV-contaminated blood to the Red Cross. Then Chief Justice Lamer stated that Mr. Thornton had a duty of care when providing his blood to the Red Cross.

1. ... This duty of care was breached by not disclosing that his blood contained HIV antibodies. This common nuisance obviously endangered the life, safety and health of the public.

[15] In ***Cuerrier***, the accused was charged with two counts of aggravated assault pursuant to s. 268 of the ***Criminal Code***. Mr. Cuerrier was aware that he was HIV-positive and had been told by a public health nurse to inform any prospective sexual partners that he was HIV-positive prior to engaging in intercourse. Further, he was to use protection on each occasion in which he participated in sexual relations. The accused had unprotected sexual contact with two complainants without providing the necessary information. During the course of trial, both complainants testified that they had consented to unprotected intercourse. However, if they had known the true HIV status of Mr.

Cuerrier, neither would have engaged in unprotected intercourse. At the time of the trial, neither complainant had tested positive for HIV. Mr. Justice Cory, speaking for the majority of the Court, found that:

95. ... There can be no doubt the respondent endangered the lives of the complainants by exposing them to the risk of HIV infection through unprotected sexual intercourse. The potentially lethal consequences of infection permit no other conclusion. Further, it is not necessary to establish that the complainants were in fact infected with the virus. There is no prerequisite that any harm must actually have resulted. This first requirement of s. 268(1) [now 273(1)] is satisfied by the significant risk to the lives of the complainants occasioned by the act of unprotected intercourse.

[16] At para. 96, Mr. Justice Cory considered the second requirement as follows:

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

[17] The Court outlined the relevant law with respect to the "consent" and "fraud" issues as follows:

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

126. The first requirement of fraud is proof of dishonesty. In light of the provisions of s. 265, the dishonest action or behaviour must be related to the obtaining of consent to engage in sexual intercourse, in this case unprotected intercourse. The actions of the accused must be assessed objectively to determine whether a reasonable person would find them to be dishonest. The dishonest act consists of either deliberate deceit respecting HIV status or non-disclosure of that status. ... possible

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

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

128. The second requirement of fraud is that the dishonesty result in deprivation, which may consist of actual harm or simply a risk of harm. Yet it cannot be any trivial harm or risk of harm that will satisfy this requirement in sexual assault cases where the activity would have been consensual if the consent had not been obtained by fraud. ... In my view, the Crown will have to establish that the dishonest act (either falsehoods or failure to disclose) had the effect of exposing the person consenting to a significant risk of serious bodily harm. ...

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

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

...

135. ... The existence of fraud should not vitiate consent unless there is a significant risk of serious harm. Fraud which leads to consent to a sexual act but which does not have that significant risk might ground a

civil action. However, it should not provide the foundation for a conviction for sexual assault. The fraud required to vitiate consent for that offence must carry with it the risk of serious harm. This is the standard which I think is appropriate and provides a reasonable balance between a position which would deny that the section could be applied in cases of fraud vitiating consent and that which would proliferate petty prosecutions by providing that any fraud which induces consent will vitiate that consent.

. . .

138. In summary, on facts presented in this case, it would be open to the trier of fact to conclude that the respondent's failure to disclose his HIV-positive status was dishonest; that it resulted in deprivation by putting the complainants at a significant risk of suffering serious bodily harm. If that conclusion is reached, the complainants' consent to sexual intercourse could properly be found to have been vitiated by fraud. ...

[18] In *Williams*, the accused was charged with aggravated assault, criminal negligence causing bodily harm and nuisance. He had an 18-month relationship with the complainant which had included instances of unprotected sexual relations. The facts demonstrated that five months into the relationship, the accused learned that he was HIV-positive. He failed to disclose that fact to the complainant. The Court found that the complainant was likely infected before the accused disclosed that he was HIV-positive. This placed in issue the Crown's ability to prove an essential element of the charge, being the endangerment of the complainant's life, beyond a reasonable doubt. In the circumstances, Mr. Williams was convicted of attempted aggravated assault.

[19] The complainant had testified that she would never have had sexual relations with anyone who was HIV-positive. The accused likely was the individual who infected the complainant, however, the possibility remained that

he may have done so before he learned of his own HIV status. In *Williams*, Justice Binnie spoke for the Court and stated as follows:

28. Once an individual becomes aware of a risk that he or she has contracted HIV, and hence that his or her partner's consent has become an issue, but nevertheless persists in unprotected sex that creates a risk of further HIV transmission without disclosure to his or her partner, recklessness is established.

[20] The Supreme Court determined that the Crown must establish, for the crime of attempted aggravated assault to be proven, that the accused intended to commit the crime in question. In *Williams*:

62. ... The requisite intent is established here for the period after November 15, 1991. The respondent, knowing at that time that he was HIV-positive, engaged in unprotected sex with the complainant intending her thereby to be exposed to the lethal consequences of HIV. The evidence showed that he had been fully counselled by two doctors and a nurse on all relevant aspects of the potential result of unprotected sex.

63. With regard to the actus reus, the Crown established beyond a reasonable doubt every element of a sexual assault. There was (i) physical contact inflicted by the respondent on the complainant (ii) of a sexual nature (iii) without valid consent: ...

64. Failure to prove endangerment of life was fatal to the prosecution in this case of aggravated assault but it is not fatal to a conviction for attempted aggravated assault. ...

The Court also concluded that the accused's failure to disclose his infection to the complainant served to vitiate her consent.

[21] There have been many cases decided in the Canadian courts which have dealt with this particular issue and have considered the tests set out in *Cuerrier*. Those cases have discussed areas such as consent, disclosure and the failure to utilize protection. They include:

- (1) ***R. v. Mercer*** (1993), 84 C.C.C. (3d) 41, [1993] N.J. No. 198 (C.A.) (QL);
- (2) ***R. v. Miron*** (2000), 174 Man.R. (2d) 52, [2000] M.J. No. 500 (Man. P.C.) (QL);
- (3) ***R. v. Smith***, 2008 SKCA 61, 2008 S.J. No. 283 (QL);
- (4) ***R. v. Williams***, 2006 ONCJ 484, [2006] O.J. No. 5037 (QL);
- (5) ***R. v. Nduwayo***, 2006 BCSC 1972, [2006] B.C.J. No. 3418 (QL);
- (6) ***R. v. Lamirande***, 2006 MBCA 71, [2006] M.J. No. 223 (QL);
- (7) ***R. v. Walkem*** (2007), 73 W.C.B. (2d) 145, [2007] O.J. No. 186 (Ont. S.C.) (QL).

[22] The case of ***R. v. Edwards***, 2001 NSSC 80, [2001] N.S.J. No. 221 (QL) was relied upon particularly by defence counsel in the circumstances of this case. Mr. Edwards was HIV-positive and engaged in unprotected anal intercourse with an individual he met in a bar. Mr. Edwards was aware of his HIV status. In ***Edwards***, the Court found that the Crown had not established, beyond a reasonable doubt, that unprotected intercourse had taken place. The trial judge held:

22. Consensual sexual activity would not be criminal conduct, ie. assault, unless it is in fact non consensual due to the consent being obtained by fraud. Additionally, does the failure to disclose the presence of HIV where safe sex is practised put the victim at a significant risk of serious bodily harm? The evidence before me suggests that the possibility of becoming HIV positive in unprotected sex varies depending upon the type of activity. Indeed, the expression of likelihood given by Dr. Schlech was with respect to oral intercourse one in ten thousand, vaginal intercourse one in one thousand and anal intercourse one in five hundred but he also expressed the view that the risk is lower if there is no ejaculation. ... He indicated that the proper use of a condom reduces or

renders the risk low, however, no statistical information or in depth assistance was given to the Court that would provide specific scientific or medical conclusions as to the degree of risk that remains when protected sex is engaged in. It seems to me that the Crown has the obligation to establish conduct is criminal in that it creates significant risk.

[23] The Crown had also failed beyond a reasonable doubt to establish that a significant risk was present and that the life of the complainant had been endangered.

(B) Invitation to Sexual Touching (s. 152 of the *Criminal Code*)

[24] The accused is charged with invitation to sexual touching with respect to D.C.S. She was a person under the age of 14 years at the time of the alleged offence. Indeed, at the time, D.C.S. was 12 years of age. The Crown must prove the essential elements of this offence beyond a reasonable doubt. Those elements are:

- (a) That the complainant was under 14 years old at the time;
- (b) That the accused invited, counselled or incited the complainant to touch his penis; and
- (c) That the touching that the accused invited, counselled or incited was for a sexual purpose.

(C) Sexual Interference (s. 151 of the *Criminal Code*)

[25] This count also relates to the complainant D.C.S. wherein it is alleged that the accused, for a sexual purpose, touched her person with a part of his body. Again, Crown counsel must prove the essential elements beyond a reasonable doubt. Those elements are:

- (a) That the complainant was under 14 years of age at the time;

- (b) That the accused touched D.C.S.; and
- (c) That the touching was for a sexual purpose.

(D) Forcible Confinement (s. 279(2) of the *Criminal Code*)

[26] The count of forcible confinement arises with respect to the complainant, J.L.L. To prove forcible confinement, the Crown must prove beyond a reasonable doubt the essential elements of the offence as follows:

- (a) That the accused intentionally confined the complainant; and
- (b) That the confinement was without lawful authority.

IV. THE EVIDENCE

(A) Complainants' Evidence

[27] Each of the complainants provided testimony before the Court by way of the utilization of a testimonial aid, being a screen. I will first deal with those complainants who "consented" to engaging in sexual relations with the accused. It should be noted that he was referred to by all of the complainants by virtue of his nickname – "K Dog". Additionally, all the complainants for whom identity was not conceded by the defence were able to identify the accused after the removal of the screen. The complainants' evidence may be summarized as follows:

(i) "Consensual" Intercourse

(1) K.G.

[28] K.G. met the accused in Brandon, Manitoba. She had sexual relations with him on one occasion after consuming 10 to 15 "paralyzer" drinks at a Brandon drinking establishment. She was intoxicated, however, "pretty sure"

that a condom was utilized during the course of their contact. At the time of the encounter, K.G. testified that she normally required the use of a condom when sexually involved. She also testified that she would not have engaged in intercourse of any kind, with or without a condom, if she had been advised of the accused's HIV status.

(2) D.H.

[29] D.H., and many other young women, frequently drank with the accused and his friends, primarily at his home on Sherbrook Street. Many of the girls in question were underage and all were supplied with both alcohol and drugs by the accused and other men who either lived at the Sherbrook address or were regularly on the premises.

[30] The accused and D.H. engaged in intercourse several times when she was 17 years of age. She testified that a condom was normally used at her request. D.H. said, however, that on at least one encounter she recognized that "semen was coming out of her" after a trip to the "bathroom". On that occasion, she saw a condom on the floor beside the bed which had not previously been there. She also testified that while she never saw the accused take off the condom, they had "stopped" intercourse for a few seconds. At the time, she was intoxicated.

[31] D.H. had no idea that the accused was HIV-positive. She had been told by one of the other girls who frequented the Sherbrook address that the accused was HIV-positive, but did not believe that individual. This occurred after she had

engaged in sexual relations with the accused. She also testified that after they had ended their relationship, "K Dog" had jokingly said he was HIV-positive.

[32] D.H. testified that she would not have engaged in a sexual relationship with the accused if she had known of his true medical status. D.H. said that she felt ashamed and embarrassed as a result of the incidents. She was living in a group home at the time, but was often absent, by choice, from that facility.

(3) M.P.

[33] M.P. engaged in sexual relations with the accused on 10 to 15 occasions. They had met at a Brandon bar. She testified that they always drank when they were together and she remembered only "bits and parts" of their encounters. She felt angry, betrayed and hurt when she was apprised by a media release in March, 2006 that the accused was HIV-positive.

[34] On direct examination, M.P. testified that they had used condoms twice during their contact. However, on cross-examination, she admitted that her recollection of condom use may have been impacted by her consumption of alcohol. Consequently, she said she honestly did not remember and could not say whether condoms were used during any of their contacts. There were definitely no conversations between the two with respect to the accused's HIV status.

(4) S.H.

[35] S.H. had a number of sexual encounters with the accused and, for a short period of time, appeared to be in a girlfriend/boyfriend type of relationship. She

was 17 years old at the time. Alcohol or drugs were not always utilized as a precursor to their engaging in sexual relations. They "dated" for approximately one month and engaged in intercourse on each day. A condom was used during the first week of their relationship, after which S.H. had asked if the accused had any "STDs" (sexually transmitted diseases) or "anything else", to which he replied "no". After that time, and for an approximate three-week period, they engaged in unprotected intercourse. On each occasion, the accused would ejaculate inside of her. S.H. testified that she would not have engaged in a sexual relationship if she had known of the accused's true medical status. She was angry upon learning of his HIV condition through a media report.

[36] S.H. acknowledged that she saw the accused take medication each day. He told her that the medication was for a liver condition. S.H. denied any conversations with the accused with respect to a disclosure of his HIV status. A female, "L.", told S.H. about the accused's HIV status. This advice came approximately one week prior to their breakup, albeit they had one further sexual encounter in April, 2005. S.H. did not believe what "L." had told her.

(5) K.R.

[37] K.R. met the accused at a Brandon bar on January 2, 2004. Initially, the relationship was that of a friendship. However, by April, 2004, they had become sexual partners with the accused eventually moving in with her. They sometimes drank together or utilized drugs. K.R. testified that protection was always used during their relationship as she would not engage in sexual contacts without it.

However, on three to four occasions, the condom had broken during sexual intercourse. This resulted in the sexual activity between them stopping or a new condom being applied.

[38] K.R. remained in a relationship with the accused until November, 2004. She had no idea of his HIV status and, indeed, would not have had sex with him, even with a condom, if she had known. She had no knowledge that he had been seeing physicians during the period of time that they were involved or any details about his medication.

(6) C.B.

[39] C.B. engaged in one sexual encounter with the accused in 2005 when she was 17 years old. This occurred at the residence of a friend of the accused who also lived on Sherbrook Street, in the City of Winnipeg. His name was "S.G". C.B. had drank less than 10 "Bud" beer over a period of a few hours. She testified that her recall was "good", albeit she was "a little buzzed". A condom was used during their encounter. Again, C.B. had no knowledge of the accused's HIV status. She testified that she would not have engaged in a sexual relationship if she had known. She later saw the media reports of the accused's HIV status and said that she was "grossed out" by it.

(ii) "Non-Consensual" Intercourse

[40] D.C.S., F.L. and J.L.L. all testified to incidents of non-consensual intercourse with the accused. These complainants all engaged in intercourse

with the accused on a number of occasions and all were intoxicated or impaired at the time of these encounters.

[41] The testimony with respect to these three individuals on the issue of whether they were forced by the accused to have sexual contact was unsatisfactory in many respects. Most importantly their trial evidence demonstrated certain inconsistencies with their police and preliminary inquiry statements. Further, they testified that they were intoxicated, never forced to have sex, nor were they held down or in any way threatened. These complainants also never advised anyone that they had been forced to engage in sexual contact with the accused. I found their evidence on the specific issue of non-consensual intercourse to be unreliable. While I am not persuaded that the sexual relations between the accused and these complainants was non-consensual after a careful review of the circumstances, I am satisfied that there was sexual contact. These complainants, for the purposes of the final analysis, will be considered in the same manner as the six "consensual" complainants. The primary consideration will be whether "disclosed" consent was given and whether fraud served to vitiate the consent.

(7) D.C.S.

[42] D.C.S. is now 15 years of age, but was 12 at the time of her contact with the accused in 2005. She testified that alcohol was always supplied at the premises occupied by the accused. Often, it was "Black Ice" beer which has a 6.1% alcohol content. D.C.S. had stayed at the accused's residence and that of

his friend, "S.G.", who also lived on Sherbrook Street. She stated that she had sex with the accused without "okaying it" and without a condom. That being said, she returned to his residence on a number of occasions over the ensuing weeks.

[43] D.C.S. testified that a female by the name of S.A. had advised her of the accused's HIV status in January, 2006. He had never told her at any time of his condition. That being said, this complainant continued to have sexual relations with the accused after learning of his HIV status. A condom was sometimes used.

[44] On cross-examination, D.C.S. testified that the intercourse with the accused "hurt a lot". However, she did not cry, yell or make any noise so as to alert others on the premises as to what was transpiring. Further, she did nothing to indicate that she did not want a sexual relationship with the accused. She told no one about the "rape" and initially had stayed at the accused's home for four days. On the fourth day of that stay, members of the Winnipeg Police Service and her social worker arrived to take her back to a CFS group home. At that time, she failed to advise the authorities that she had been "raped". On the day the authorities came to return her to the group home, it was confirmed in front of the accused that D.C.S. was 12 years of age. She had previously informed him that she was 16 years old.

[45] D.C.S. testified that she had sexual relations with the accused on 10 to 15 occasions over the next few months. She said that she never wanted such a

relationship. However, she never told anyone about it, nor was she forced or threatened to continue it. Instead, she repeatedly returned to the residence as it was a place to party. D.C.S. denied making up the allegations against the accused and acknowledged that there was some discrepancy between her trial testimony and her statements made to the police and at the preliminary inquiry.

[46] D.C.S. was without question a young and vulnerable witness. In considering her evidence, I have reviewed cases such as *R. v. B.(G.)*, [1990] 2 S.C.R. 30, *R. v. N.(P.L.F.)* (1999), 138 Man.R. (2d) 205 (C.A.), and *R. v. R.W.*, [1992] 2 S.C.R. 122. Those cases have established that a common sense approach must be adopted when considering the credibility of young witnesses. The standard to be utilized is one which is less exacting than that required of an adult witness. Therefore, inconsistencies in testimony are not to be afforded the same significance as exists with respect to adult testimony. That being said D.C.S. made several admissions during cross-examination, such as the fact that she told the police what she anticipated they wanted to hear. This type of testimony served to lessen her credibility, albeit she was a believable witness when her evidence was considered in its totality. This witness was "street-wise" beyond her years and no doubt had experienced a very difficult life. While I am satisfied that she engaged in sexual contact with the accused, I am not prepared to find that the relationship was of a forced or non-consensual nature.

(8) F.L.

[47] F.L. was in custody for assault and mischief offences at the time of her testimony. F.L., a friend of D.H., testified that she stayed at the accused's Sherbrook residence on many occasions and, in fact, stayed for two weeks in January, 2006. She acknowledged that the accused's residence was a place to party as there was always "Black Ice" beer and drugs. The first occasion on which she and the accused had unprotected sexual relations was in January, 2006. F.L. testified that she told the accused "no" and after four or five minutes of intercourse, was able to "push him off" whereupon she went to the window of the bedroom crying. The accused then requested oral sex which she accommodated so he "would leave her alone". There was no ejaculation. After these events occurred, she went downstairs and continued to drink, but never told anyone of the "unwanted" encounter. She was 17 years old at the time.

[48] F.L. contended that she and the accused had sex on a few more occasions, albeit she never consented to it. She repeatedly returned to the residence because she had friends who were often there and it was a place to party.

[49] In February, 2006 she learned of the accused's HIV-positive status from another individual by the name of "B.B.". She did not believe it, but later acknowledged that the information was confirmed for her when she saw it in the newspapers.

[50] F.L. testified that had she known, she would not have gone to the Sherbrook residence or had sex with the accused. She also confirmed that she lied about portions of her evidence which had been provided to the police because she was "mad" at the accused.

[51] F.L. could not recall if condoms were used after the first encounter with the accused. On cross-examination, F.L. testified that condoms could have been used. She also stated she was trying to forget the incidents and was "choosing not to remember" them during the course of her testimony. She testified that she did not fabricate the sexual encounters. F.L. also confirmed that she never called for help, was never threatened nor was she physically hurt. She said that she was at the accused's residence as she had nowhere else to go.

[52] F.L. was also a vulnerable witness whose testimony was difficult to evaluate in that she did not want to remember what transpired and, indeed, at one point refused to return to the courtroom to testify. Further, during the course of cross-examination by counsel she virtually "shut down" her testimony. F.L. was, of course, also a "child" witness in the circumstances. F.L. admitted to lying during her statement to the police, not only because she was angry with the accused, but also because she wanted to keep him "locked up".

(9) J.L.L.

[53] J.L.L., at the time of her court appearance, was in custody for armed robbery, utter threats, forcible confinement and several breaches of court orders. She testified to being a regular at the accused's Sherbrook residence in 2006. At

that location, drugs and alcohol were always supplied. J.L.L. testified that she had nowhere else to stay and these encounters occurred after drinking.

[54] The testimony of J.L.L. was that at the time of the first sexual encounter the accused had asked her up to his room. This was not an unusual circumstance. Previously, she had gone to his room to simply talk. However, on this occasion, the accused locked the door and was said to have advised her that she could not leave without engaging in sexual relations. She testified that she was scared and gave in to his demands. However, if she had known of the accused's HIV status, she would have "jumped out the window" rather than engaging in sexual intercourse. She said that she felt hurt, betrayed and "gross". On the first occasion, a condom was not used, albeit she testified that the accused did not ejaculate.

[55] There was alleged to be one further encounter where J.L.L. "let it happen again" while intoxicated. On this occasion no condom was utilized. J.L.L., later on the day of the second encounter, discovered that the accused was HIV-positive. When she learned of that fact, she slapped him and testified that he laughed in response. This event occurred during police involvement in the accused's home. J.L.L. was in the Portage la Prairie Jail at the time of seeing the reporting of the accused's HIV status on the television news. She contacted the police as a result.

[56] J.L.L. confirmed, on cross-examination, that the accused usually locked the door to his room as he was afraid of thefts. She also testified that she did

not, at any time, make any noise or yell in order to alert the other occupants of the dwelling as to what was transpiring. This was because no one would have paid attention in any event. She also testified that she made no attempts to leave or push the accused. Further, he made no threats nor did she fight back. Certainly, at the time of the second encounter, J.L.L. testified that she "let it happen". Further, she did not advise the police that anything untoward had happened during their attendance at the accused's premises. J.L.L. could not be certain with respect to condom use. She denied making up the story with respect to this matter and testified that she received no benefit by virtue of providing the information to the authorities as regards any charges against her.

(B) Police Evidence

[57] Detective Sergeant Wally Antoniuk was involved along with his partner, Detective Valerie Scott, in investigating the charges as against the accused. Initially, he was involved in the statement with respect to J.S. taken on March 19, 2006 (charges stayed at trial). He later became involved with a media release on March 21, 2006 which provided the details of the arrest of the accused, along with his picture. In response to the media release, a number of calls were received which resulted in 49 names coming to the attention of the Winnipeg Police Service. Of that number, approximately 30 were interviewed. Detective Sergeant Antoniuk was involved in the investigation of the complaints made by S.H., K.G., J.L.L., D.H., D.C.S., F.L. and C.B. He was also involved in the arrest warrant related to the complainants D.C.S., K.G., K.R., F.L., C.B., J.C.

(charge stayed at trial), D.H. and M.P. Antoniuk was instrumental in other media releases which updated the public on the charges as against the accused.

(C) Medical Evidence

(1) Evidence of Public Health Nurses

(a) Darlene McDonald

[58] Ms McDonald holds the title of coordinator of the sexually transmitted diseases unit for the Public Health Department of the Brandon Regional Health Authority. The duties of a public health nurse include client contact and follow-up with respect to sexually transmitted diseases, testing and treatment. Her partner in the unit at the relevant time was Jaime Wray (now Bourgoyne) who worked on a half-time basis. She and Ms Bourgoyne shared the workload in the unit and endeavoured to communicate with one another both verbally and through the use of notes which were kept on each client's files.

[59] Ms McDonald's practice was to write notes in the file after an "event" such as a client visit or telephone contact. The purpose of the notes was to ensure a record was being kept of what had transpired and to provide a communicative tool with Ms Bourgoyne to update her. The notes were not on a verbatim basis, but instead were effectively a summary of what had occurred. If Bourgoyne and McDonald interviewed a client together, it was the individual who took the lead during the course of the interview who later would write the notes on file. It was acknowledged that notes were not always recorded on the file after each client

visit. This lack of recording would usually signal that the visit was relatively routine and that the unit's protocols had been followed.

[60] Ms McDonald's first contact with the accused occurred on December 15, 2003. Further, on January 19, 2004, Ms McDonald was endeavouring to reach the accused to advise him to speak with his doctor with respect to his HIV test results. The plan for the accused, which had been worked out with the infectious disease physician, Dr. Paphitou, was for the public health unit to provide the accused with information on HIV, safe sex, as well as to determine any contacts with sexual partners.

[61] On March 29, 2004, Ms McDonald and Ms Bourgoyne both met with the accused. There had been numerous visits with him by that time wherein he had been advised to tell his sexual partners before engaging in contact that he was HIV-positive. He was also told that he should always use protection when engaging in sexual relations. The legal ramifications of failing to follow those guidelines were emphasized to him.

[62] The last contact Ms McDonald had with the accused was on December 7, 2004. During the course of her evidence, she emphasized that not all of her conversations with him had been documented in the notes. She also said that during their visits or discussions, which were numerous, she had no difficulties in understanding the accused, nor did he appear to have any difficulties understanding her.

[63] There were many matters discussed with the accused during the course of his meetings with the public health nurses. Those matters included medication, safety, support, sexuality and legal implications. In terms of sexual practice, the accused was told that a diagnosis of HIV did not mean that an individual could not engage in sexual contacts. However, it was emphasized by McDonald that there was an obligation to inform partners of his HIV status prior to sexual contact, and that protection must be used at all times. He was also advised that condoms were not 100% reliable. These issues were discussed with the accused in some fashion on virtually every visit, as it was part of the unit's protocol. This was also done because he had a sexually transmitted disease at the time of his first contact with public health, as well as subsequent STD diagnoses. These circumstances indicated that condom use was not his practice, albeit he was frequently supplied with protection free of charge.

[64] Ms McDonald was cross-examined as to why the advice with respect to condom use and disclosure of his HIV status was not documented in her file notes. Ms McDonald responded that such advice was a standard of practice or protocol within the public health discipline and was discussed with all HIV clients. Therefore, a note was not necessitated with respect to something that was consistently done.

[65] There was some discussion of the accused's "viral loads" and CD4 counts contained in the notes. Once on medication, there exists a positive potential that the viral load will be reduced and the CD4s raised in an individual. Ms McDonald

testified that even if the viral loads were down, the public health nurses still counselled clients to take all of the prescribed precautions. Further, she testified that research had indicated that even if the viral load was decreased, the risk was not necessarily also decreased. Ms McDonald also commented on a 2007 study which had indicated that condom use resulted in an 80% risk reduction of the transmission of HIV.

[66] I found Ms McDonald to be a reliable witness who gave her evidence in a careful and thoughtful manner.

(b) Jaime Bourgoyne

[67] Ms Bourgoyne was also involved in the counselling of the accused in her capacity as a public health nurse who specialized in sexually transmitted infections. Her notes were in the accused's records and were written after most visits or telephone contacts if a significant event had occurred. Bourgoyne testified that there was an attempt to place significant information in the notes, albeit they were not verbatim. She also acknowledged that on occasion no notes were made of a client contact.

[68] Ms Bourgoyne met with the accused between 10 and 20 times. She testified that occasionally she had problems understanding him, albeit he did not seem to have any problems understanding her.

[69] Mr. Bourgoyne's advice to the accused included education with respect to sexually transmitted diseases and HIV. The advice included an outline of his options, which were:

- (1) to abstain from sexual contact;
- (2) to always use a condom; and
- (3) to advise his sexual partners of his HIV status.

[70] The motive of the public health nurse was described as “harm reduction”, as well as the following of established protocols. Indeed, Ms Bourgoyne emphasized that the focus was on education. She testified that she told the accused on 90% of his visits with her that he should tell all of his partners that he was HIV-positive, as well as exercising constant utilization of protection. This was particularly so since her department was aware that the accused was not compliant with condom use as demonstrated by the fact that he had contracted STDs on three occasions. She also stated in her notes of March 29, 2004 that “he should tell all partners his status before sex and reminded him that he could be held legally accountable if she contacts the virus from him”.

[71] Ms Bourgoyne was a credible witness who testified in a forthright and complete manner.

(2) Evidence of Dr. John Richard Middleton Smith

[72] As earlier indicated, Dr. Smith testified during the course of the trial and provided a medical report which included a discussion of HIV/AIDS, as well as a review of the accused’s medical and public health records. He at no time treated the accused. Dr. Smith’s qualifications as an expert in HIV/AIDS were accepted by the Court. Dr. Smith’s testimony is summarized as follows:

- The optimal benefit of condom use is clear with respect to the prevention of transmission of HIV;
- Condom failures often are a result of human error, particularly with respect to the correct application of the protection. Further, the use of drugs or alcohol could serve to impair the ability to follow correct condom application procedures;
- The success rate with respect to condoms, even if properly used, is 80%;
- Condoms must be used at all times by those infected with HIV to minimize the risk and should be put on before any contact transpires;
- A 2008 statement on HIV has recently been authored by the Swiss Federal Commission for HIV/AIDS. The statement was described as the first consensus statement to say that “an HIV-infected person on antiretroviral therapy with a completely suppressed viremia is not sexually infectious, i.e. cannot transmit HIV through sexual contact.”

The statement goes on to say that this position is valid only as long as the following criteria are satisfied:

- “The person adheres to antiretroviral therapy, the effects of which must be monitored regularly by the treating physician, and
- The viral load has been suppressed for at least six months, and
- There are no other sexually transmitted diseases.” (Dr. Smith’s Report, p. 5).

- The Swiss Commission has also stipulated that the position outlined was applicable only to those couples who were in a stable relationship. As well, if all of the criteria were satisfied, unprotected sex should only be undertaken if that was the choice of an informed and uninfected partner;
- The Swiss statement has proven to be controversial and, indeed, contrary to positions outlined by the World Health Organization (“WHO”) and the Centres for Disease Control (“CDC”). Those bodies, and others, do not endorse the Swiss statement, even for those involved in stable relationships who have met the stipulated criteria. This contrary position is based upon the fact that HIV-positive individuals “... cannot be entirely certain that they meet these criteria or that the criteria themselves are an indication of safety. The San Francisco AIDS Foundation and Department of Public Health advise everyone to continue to use appropriate, evidence-based measures to prevent sexual HIV transmission.” (SFAF/SFDPH Statement – Exhibit 9);
 - The WHO/UNAIDS has continued to emphasize the importance of effective and proven HIV transmission prevention methods. The WHO/UNAIDS statement opined:

People living with HIV who are following an effective antiretroviral therapy regime can achieve undetectable viral loads (the amount of virus in a body fluid such as blood, semen or vaginal secretions) at certain stages of their treatment. Research suggests that when the viral load is undetectable in blood the risk of HIV transmission is significantly reduced.

However, it has not been proven to completely eliminate the risk of transmitting the virus. More research is needed to determine the

degree to which the viral load in blood predicts the risk of HIV transmission and to determine the association between the viral load in blood and the viral load in semen and vaginal secretions. Research also needs to consider other related factors that contribute to HIV transmission including comorbidity with other sexually transmitted diseases. (Exhibit 8);

- A further article authored by Reg Domingo emphasized that it was difficult to know one's viral load at any particular time, particularly as it is influenced by such areas as infections, treatment, STDs and other relevant factors (Exhibit 6);

- The CDC stated in response to the Swiss statement that:

The Commission acknowledges that there are no scientific data that the risk of transmission in these circumstances is zero. The Centres for Disease Control and Prevention (CDC) underscores its recommendation that people living with HIV who are sexually active use condoms consistently and correctly with all sex partners. (Exhibit 7);

- Dr. Smith opined that it was highly advisable to unfailingly use condoms, even if an undetectable viral load was in existence;
- The controversy centred on the impact of the Swiss statement was not meant to address those HIV-infected individuals who were involved in casual sexual relationships;
- In reviewing the accused's medical records, Dr. Smith noted that he had tested positive for gonorrhoea on December 19, 2003. It was at that time that the HIV test was requisitioned;
- He was again treated for gonorrhoea on February 13, 2004;
- The accused was named as a Chlamydia contact on October 22, 2004;

- These instances of STDs were, in Dr. Smith's opinion, evidence of improper condom use by the accused;
- The accused's viral load in February, 2004 was stated as "These remarkably low viral load levels would be consistent with probably low but possible infectivity." (p. 11);
- From October 6, 2004 to December 28, 2005, the accused's HIV viral load was below the level of detection. In Dr. Smith's opinion, there was "... a very high probability that the accused was not infectious, i.e. could not have transmitted HIV throughout this period (October 6, 2004 to December 28, 2005)." (p. 11);
- It is medically routine to advise a patient whether their viral load is detectable, as well as the level of their CD4 count. This issue was not, however, specifically discussed in the accused's charts, albeit there was documentation which would suggest that the accused was aware that his viral load was controlled;
- The accused would have had no reason to believe that he could not transmit HIV at the time of the alleged offences. His medical situation or the understanding of his condition was not impacted by the Swiss statement which was issued approximately two to four years after these incidents transpired. Consequently, the applicable standard of care, as promoted by the public health unit, was to ensure that patients were

- aware that an undetectable viral load did not mean that they were not infectious and could refrain from using protection;
- This accused should in any event have continued to utilize protection as he did not meet the Swiss study criteria. He was a person with multiple partners, who engaged in casual sex. Further, the evidence was that he had not disclosed his HIV status to his sexual partners so as to facilitate possible informed consent by them. There was no indication of an informed consent by his sexual partners on the medical charts. He also did not always wear a condom as evidenced by the existence of multiple STD infections;
 - There are other instances demonstrated in the clinical charts where the accused was shown to have failed to utilize condoms, failed to take medication, as well as the documentation related to the existence of STDs;
 - Dr. Smith stated at p. 13 of his report:

There is no scientific justification to require HIV status disclosure if a condom is always used. There is a mutual responsibility for casual sex partners to be aware of the innate risks of non-monogamy and to ensure their own safety by adhering to consistent and correct condom use. A person who knows they are HIV-infected has two additional responsibilities to decline sex when a casual partner wishes to have unprotected sex, and if there is condom failure with possible sexual secretion or blood exposure, to advise their partner at that point to seek immediate evaluation for possible HIV post-exposure prophylaxis ... The rationale for requiring disclosure and the offer to accompany the casual partner for assessment for any possible (though unlikely) need for HIV post-exposure prophylaxis in this situation is to protect the interests of both persons.;

- If no ejaculation occurs, the risk of transmission is low or negligible;
- There are certain factors such as the utilization of oral contraceptives by the female which increase the risk and make an individual more vulnerable to infection.

V. **POSITION OF THE PARTIES**

(A) **Crown**

[73] The Crown submits that all charges against the accused have been proven beyond a reasonable doubt. The complainants, in the circumstances, provided their testimony in a consistent and credible fashion. It was also argued that fraud served to vitiate the complainants' consent to sexual relations with the accused. The Crown relied upon the evidence as well as the tests and discussions of the elements of the offence as outlined in *Cuerrier*. The applicable tests in issue included whether:

- (1) the sexual acts endangered the life of the complainants;
- (2) the accused intentionally applied force without the consent of the complainants.

[74] In *Cuerrier*, it was decided that:

95. ... There can be no doubt the respondent endangered the lives of the complainants by exposing them to the risk of HIV infection through unprotected sexual intercourse. The potentially lethal consequences of infection permit no other conclusion. Further, it is not necessary to establish that the complainants were in fact infected with the virus. There is no prerequisite that any harm must actually have resulted. ...

The Crown submitted that each and every complainant was exposed to the risk of HIV infection through the accused's acts. Such "exposures", accordingly,

endangered their lives whether protection was utilized or not. The Crown argued that those complainants who engaged in unprotected sexual relations with the accused meet the *Cuerrier* criteria. Additionally, both D.H. and K.R. also meet the unprotected criteria as they were the victims of broken or discarded condoms. The Crown further submitted that those who were “protected” were also endangered because of the “unreliability” of condoms. This was particularly so if the protection was not put on properly or handled in an appropriate manner. The Crown submitted that any chance of HIV transmission endangered the life of these complainants and no tolerance of such a risk was appropriate.

[75] With respect to the issue of intentional application of force without the consent of the complainants, the Crown submitted that in these circumstances fraud vitiated consent. The evidence at trial demonstrated that only D.C.S. was aware of the accused’s HIV status during the course of their sexual contacts. The other complainants all testified that if they had been informed that the accused was HIV-positive, they would not have agreed to engage in sexual relations with him.

[76] In considering the consent issue, the Crown submitted that the complainants’ consent was not legally effective because it was obtained by fraud. It was argued to be necessary to consider the definition and application of fraud on the basis of the two elements, being:

- (1) deceit or an intention to deceive or, in some cases, secrecy – in essence, dishonesty; and

(2) deprivation or a risk of deprivation.

[77] Firstly, with respect to dishonesty, the Crown argued that the accused knew of his HIV status, but systematically concealed it from his sexual partners. This was despite being advised by the public health nurses of a positive duty to disclose that he was HIV-positive. The fraud or dishonesty was argued to be proven in this context with respect to all of the complainants.

[78] Secondly, with respect to deprivation, there must be a significant risk of serious bodily harm to the complainant to substantiate this element. The Crown argued that, without question, such a risk was evident and proven in this case for those who engaged in unprotected sexual intercourse with the accused.

[79] *Cuerrier*, by way of *obiter*, discussed those that engaged in protected sexual practices:

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

The Crown argued that Dr. Smith dealt with issues such as the proper handling and use of protection. He testified that condoms must be handled carefully, stored in a cool place, utilized before the expiry date, not sat upon, as well as correctly applied and carefully removed. The Crown submitted that there was no evidence with respect to issues such as the proper utilization of protection by the accused. Indeed, the evidence of K.R. was that condoms had broken on three or

four occasions while she was engaged in intercourse with the accused. Such occurrences were argued to be indicative of improper condom usage. Dr. Smith also testified that condom use was not always appropriately undertaken when an individual was in an impaired state. The doctor testified, as did Ms MacDonald, that studies demonstrated that there exists a 20% condom failure rate.

[80] The Crown submitted that Dr. Smith testified that the accused would not have met the criteria as set out by the Swiss Commission. Therefore, he was not a candidate for either unprotected or undisclosed sexual intercourse with uninformed partners.

[81] The evidence of the accused's undetectable viral load and its relationship to HIV transmission was also considered by the Crown. The Crown submitted that there was no evidence to suggest that a significant risk of serious bodily harm did not exist when viral loads were undetectable. There was argued to be a continuing risk that HIV could be passed through sexual intercourse in such circumstances. The issue was not related to a percentage of risk, but instead concerned the potential consequences of transmission, which were described as lethal. If there was any chance of transmission, there was an intolerable risk. The *Thornton* case was argued to evidence such a finding.

[82] It was further argued that despite evidence of an undetectable or decreased viral load, this accused had no knowledge that a suppressed viral load could equate to a reduced risk of transmission. Indeed, even if he had been told

that his viral load was low, that did not mean that he was not at risk for possible transmission.

[83] It was also submitted by the Crown that even if it had failed to prove deprivation in certain of the counts, that this accused could still be convicted of attempted aggravated sexual assault. This contention was based upon the findings in the *Williams* case.

[84] The Crown also considered and commented on the evidence of each of the complainants. It was submitted that the complainants' evidence was credible and proved the guilt on the part of the accused beyond a reasonable doubt. The *Cuerrier* tests were established with respect to all of the complainants based upon the evidence revealed before the Court.

(B) Defence

[85] The defence submitted that cases relied upon by the Crown such as *Cuerrier* were decided many years ago. The cases were from a timeframe in which it was taken for granted that sexual relations with an HIV-positive individual would result in a significant risk of serious bodily harm. This is not the case today because of the advent of new medications which have resulted in a much improved life expectancy for those infected with the virus. The lethal consequences are significantly less and those infected can have children and lead close to full and normal lives. It was argued that significant scientific progress has been made over the past 12 years which has greatly enhanced the treatment and understanding of the HIV virus, including issues involving its transmission.

[86] The medical evidence in this case was argued to establish that there was a high probability that the accused could not have transmitted the virus over the period of time in question because of either a low or undetectable viral load. As a consequence, there was no significant risk of transmission by this accused to any of the complainants, nor was there an endangerment of life. Further, the duty to disclose was argued to arise only in the event of a significant risk of serious bodily harm. In this case, there was at best only a low or negligible risk of harm. Consequently, the duty to inform did not exist.

[87] The defence submitted that even when the accused's viral load tested at the 6,000 to 6,500 level, any risk of transmission was low. Additionally, there was no documented proof of improper utilization of a condom by the accused. Indeed, it was argued that K.R.'s evidence substantiated appropriate use of protection as she testified that on those occasions where the condom had broken, that the couple had either stopped engaging in intercourse or a new condom had been applied. Further, many of the sexual encounters involved no ejaculation. Dr. Smith's evidence was that, in such circumstances, the risk of transmission was low. Consequently, the Crown, based upon the scientific or medical evidence, had failed to prove beyond a reasonable doubt, the guilt of the accused. There was at no time a significant risk of serious bodily harm to these complainants as was required by the Supreme Court of Canada in *Cuerrier*.

[88] The evidence in this case demonstrated that the accused made regular requests for condoms from the public health nurses and was, except for one

early instance, compliant with his medication regime. Further, it was argued that the evidence of Dr. Smith showed that condom use would result in no transmission of the disease because it would constitute an appropriate barrier. Indeed, the accused was taught and instructed in the proper use and application of protection by the public health nurses who testified in this case.

[89] It was argued that the accused was aware of his viral loads and that they were controlled as he had been told of same by the public health nurses, as well as possibly by his physicians. As a result, it was submitted that the accused knew that there would be little or no risk of transmission. As well, the accused normally utilized safe sex practices. There was no *mens rea* to commit the offences as charged as in the circumstances there must be objective foresight of the risk.

[90] The defence also considered the evidence provided by each of the complainants. With respect to D.C.S., F.L. and J.L.L., it was submitted that their evidence should not be trusted or relied upon in any respect. Their evidence was exaggerated, unbelievable and dishonest. The testimony of these complainants was marked by the telling of various versions of events to the authorities and then to the courts. Further, F.L. and J.L.L. testified that they had wanted the accused to be placed in custody. There were inconsistencies in all of their testimony and a startling lack of detail. It was submitted that the evidence of these three complainants should be completely disregarded and all charges based upon their testimony dismissed.

[91] With respect to the complainants D.H. and S.H., consensual sexual intercourse had transpired. The risk of serious bodily harm was low because of the accused's undetectable viral loads, even though unprotected intercourse may have occurred. There was no substantial or significant risk of serious bodily harm to either complainant.

[92] The complainants C.B., K.R. and K.G. were argued to have been exposed to only a minimal risk as safe sex was practised with respect to each of their encounters. There was no *mens rea*, nor was there an *actus rea* as they were never exposed to HIV. The defence relied upon the ***Edwards*** case in support of its position that the Crown had failed to prove these charges against the accused beyond a reasonable doubt.

[93] The defence argued with respect to M.P. that her memory was significantly impacted because of excessive alcohol consumption. M.P. could not say conclusively whether condoms were utilized. Her evidence was unreliable and, in any event, there would have existed a low risk of transmission and resultantly, no significant risk of serious bodily harm.

[94] The defence submitted that with respect to all of the complainants, that there was no significant risk of serious bodily harm to them. It was argued that there was a high probability that the accused could not have transmitted HIV during the relevant time period. The fact that no one has been infected demonstrated conclusively that no risk was present in the circumstances of the case.

VI. ANALYSIS

(A) Aggravated Sexual Assault Counts

[95] It is necessary to consider whether the Crown has proven the accused committed aggravated sexual assault, beyond a reasonable doubt, with respect to each of the complainants. Within this context, I must consider the circumstances of the accused's interactions with all of the complainants. As well, matters of credibility must be examined, as must consent issues and areas such as whether a substantial risk of serious bodily harm existed. Before commencing a detailed analysis, I am satisfied that:

- (1) The accused was aware that he was infected with HIV by January 27, 2004;
- (2) The accused engaged in sexual intercourse with each of the complainants without disclosing that he was HIV-positive;
- (3) The accused engaged in acts of both protected and unprotected sexual intercourse with the complainants subsequent to learning of his condition;
- (4) The complainants would not have engaged in sexual relations with the accused if they had been told by him that he was HIV-positive. The one exception to this was D.C.S. who learned of his medical condition during the course of their sexual relationship;
- (5) The accused had viral loads that were consistent with "... probably low but possible infectivity until October 5, 2004";

- (6) From October 6, 2004 to December 28, 2005, there was a very high probability that the accused was not infectious and could not have transmitted HIV throughout that period. (Dr. Smith);
- (7) There is some suggestion the accused was aware that his viral load was controlled during the period of time under consideration;
- (8) The accused was never advised by any medical professional that he could not infect a sexual partner during the relevant time period and should not utilize condoms;
- (9) The accused was told by the public health nurses that he should use safe sex practices and disclose to his sexual partners that he was HIV-positive;
- (10) The accused did not in any way meet the criteria established by the Swiss Commission, nor were the findings of that Commission relevant to this decision in that the statement was put forward less than six months ago;
- (11) The accused tested positive for gonorrhoea on December 19, 2003 and on February 13, 2004. He was also named as a Chlamydia contact on October 22, 2004;
- (12) On June 20, 2005, he told the doctor that he had had a sexual encounter and was not certain if a condom was utilized because he had passed out;

- (13) All the complainants were “agreeable” to sexual contact with the accused. This includes F.L., J.L.L. and D.C.S. for those reasons previously stipulated;
- (14) While I reject the rape “myths” of the past and accept the directions of the Supreme Court of Canada in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, which encompass the fact that consent must be considered from the subjective viewpoint of the complainant, I find that F.L., J.L.L. and D.C.S. have failed to satisfy me that non-consensual contact had occurred. This was particularly so given the fact that they provided varied accounts of what transpired to the authorities and to the courts.

[96] One of the primary issues in this case is whether “consent” was fraudulently obtained. Consent is defined pursuant to s. 273.1(1) of the *Criminal Code* as “the voluntary agreement of the complainant to engage in the sexual activity in question.” The absence of consent is determined subjectively.

[97] The offence of aggravated sexual assault and its implications for each of the complainants will be examined pursuant to a model which incorporates the various elements of the offence. The elements of the offence were outlined in paragraph 9 of this decision and for the purposes of this analysis, I find with respect to all complainants that:

- (1) The accused intentionally applied force to the complainants;

- (2) The force that the accused applied took place in the circumstances of a sexual nature;
- (3) The accused made no effort to disclose his HIV-positive status to the complainants and determine whether they would consent to sexual relations with that knowledge.

[98] The elements that will require analysis are:

- (1) Whether the force intentionally applied, endangered the life of the complainants;
- (2) Whether the complainants consented to the force applied.

(i) **Endangerment of Life**

[99] The Supreme Court in *Cuerrier* held that for cases of unprotected sexual intercourse there can "... be no doubt that the accused endangered the lives of the complainants by exposing them to the risk of HIV infection through unprotected sexual intercourse. The potentially lethal consequences of infection permit no other conclusion." (para. 95) There is no requirement that any of the complainants must have suffered any harm or injury to arrive at this conclusion.

[100] At this stage of the analysis, I am not prepared to consider factors involving the possible implications of the viral load of the accused. Instead, I am prepared to follow the Supreme Court in holding that the potentially lethal consequences of unprotected sexual contact leave room for no other conclusion than that endangerment of life has been substantiated. As was held by the Ontario Court of Appeal in *Thornton*:

26. ... Among the ordinary meanings of that word are the concepts of exposing someone to danger, harm or risk or of putting someone in danger of something untoward occurring. ...

27. When the gravity of the potential harm is great, in this case "catastrophic", the public is endangered even where the risk of harm actually occurring is slight, indeed even if it is minimal. ...

[101] The statements of the CDC and WHO express very well the continuing risks of the transmission of this disease.

[102] In *Thornton*, the accused had donated blood to the Red Cross while knowing that he was HIV-positive. The Red Cross screening process was able to detect the contaminated blood and ensured that it did not become part of the blood supply utilized in assisting those in need. The Red Cross screening process was considered good, but not perfect. Indeed, the screening process was determined, on the basis of evidence, to be 99.3% accurate in filtering contaminated blood. The reason for the .7% inaccuracy included human failure or the failure of the material used in the screening process. The Ontario Court of Appeal held:

36. ... there can be no doubt that this appellant had personal knowledge that he should not donate his blood, that it was possible for it to get through the testing screen and that it could cause serious damage to the life and health of members of the public. ...

Clearly, endangerment was established.

[103] In those circumstances where the condom may have broken or was discarded during sex, I find that the *Cuerrier* standard applies and that endangerment of life has been proven for what essentially equates to unprotected intercourse.

[104] I am also persuaded that endangerment of life has been proven in those circumstances where protection was utilized. This finding is supported by the evidence of Dr. Smith that condoms are considered to be only 80% reliable. Further, he testified that there are instances where condoms may not be properly utilized, which include those situations where an accused is inebriated or impaired by some type of intoxicant. There was evidence provided at trial with respect to significant use of drugs and alcohol by all involved.

[105] This finding of endangerment of life includes those complainants who were exposed while the accused's viral load was considered to be low, suppressed or undetectable. I have found the medical and scientific evidence to be very persuasive that even with an undetectable viral load, there remains a risk of transmission of HIV with resultant endangerment of life. This is particularly so given the medical evidence that other influences or factors such as STDs or the use of female contraception can affect or "spike" a viral load.

[106] There was a continuing risk that HIV could be passed upon sexual intercourse in all of the circumstances. I find from the evidence that there was endangerment to life for each of the complainants in this case.

(ii) Consent

(a) Dishonesty

[107] I find with respect to the issue of consent that the accused failed to disclose that he was HIV-positive. I acknowledge the argument of the defence that because of a "low" risk, there was also an equally "low" requirement to

disclose. However, I do not accept the appropriateness of such a conclusion in that regard. The case law and, indeed, the medical evidence substantiates that there is a duty to disclose an HIV-positive status before engaging in sexual intercourse. Indeed, even the Swiss Commission concluded for those partners in a stable relationship, who have met all of the criteria, that a requirement for the informed consent of the uninfected partner before engaging in unprotected sexual relations exists.

[108] In cases such as these, without disclosure of HIV status, *Cuerrier* has held that there cannot be true consent. The consent cannot simply be to have sexual relations, it must be consent to have intercourse with a partner who is HIV-positive.

[109] The accused had no reason to believe that he could not transmit the disease at the material time. He intended and acted upon his impulses to have sexual relations with all of the complainants despite knowledge of his HIV status and without disclosure to them.

[110] With respect to all complainants, therefore, I find that the dishonesty element of the vitiation of consent has been proven.

(b) Deprivation

[111] The element of deprivation or risk of deprivation will require in-depth consideration with respect to each complainant.

[112] In reviewing this area, the risk of deprivation alone is sufficient to constitute this element. There is no necessity to show that actual harm or loss

resulted from the actions of the accused. There must be proof of detriment, prejudice or risk of prejudice. However, the harm or risk of harm cannot be trivial in nature. The Crown must prove that there was, in all of the circumstances, a significant risk of serious bodily harm.

The phrase “significant risk of serious bodily harm” must be applied to the facts of each case in order to determine if the consent given in the particular circumstances was vitiated. Obviously consent can and should, in appropriate circumstances, be vitiated. Yet this should not be too readily undertaken. The phrase should be interpreted in light of the gravity of the consequences of a conviction for sexual assault and with the aim of avoiding the trivialization of the offence. It is difficult to draw clear bright lines in defining human relations, particularly those of a consenting sexual nature. There must be some flexibility in the application of a test to determine if the consent to sexual acts should be vitiated. ... [*Cuerrier*, para. 139.]

[113] Where unprotected sexual intercourse transpired, the risk of contracting HIV meets the test of significant risk of serious bodily harm in accordance with *Cuerrier*. The question which must be answered is whether there is proof of deprivation in those circumstances where the accused had an undetectable viral load and/or protection was utilized.

[114] As was said in *Cuerrier*:

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

[115] In *Edwards*, the Court acquitted the accused based upon the fact that the Crown was required to prove, beyond a reasonable doubt, that the

complainant would have refused to engage in protected sex with Edwards if he had been advised of his HIV-positive status (para. 21). The Court held:

22. Consensual sexual activity would not be criminal conduct, ie. assault, unless it is in fact non consensual due to the consent being obtained by fraud. Additionally, does the failure to disclose the presence of HIV where safe sex is practised put the victim at a significant risk of serious bodily harm? The evidence before me suggests that the possibility of becoming HIV positive in unprotected sex varies depending upon the type of activity. Indeed, the expression of likelihood given by Dr. Schlech was with respect to oral intercourse one in ten thousand, vaginal intercourse one in one thousand and anal intercourse one in five hundred but he also expressed the view that the risk is lower if there is no ejaculation. He stated anal intercourse is more dangerous because the rectum is not designed for intercourse and presents a greater risk of trauma. He indicated that the proper use of a condom reduces or renders the risk low, however, no statistical information or in depth assistance was given to the Court that would provide specific scientific or medical conclusions as to the degree of risk that remains when protected sex is engaged in. It seems to me that the Crown has the obligation to establish conduct is criminal in that it creates significant risk.

[116] I am not prepared to follow the decision in *Edwards* with respect to the issue of protected intercourse based upon the medical evidence which was presented in this case and the “reliability” factor related to condom use. In this context, it is important to recall the evidence of Dr. Smith which stated that condoms are only 80% reliable and constitute an 80% reduction in HIV incidence. (Report, p. 6). Further, cases such as *Thornton* have demonstrated that a 99.3% screening safety rate was still considered to be too significant a risk in those circumstances. I am persuaded that in those circumstances where protection was used and the accused was regarded as infectious by the medical evidence, that a significant risk of serious bodily harm existed.

[117] The standard of care and the protocols followed and instructed by the public health nurses were to ensure that their clients were aware that an

undetectable viral load did not mean they were not infectious. The use of a condom was stressed. (Dr. Smith's Report, p. 12) That being said, Dr. Smith opined that the accused could not have transmitted the disease at least between October 22, 2004 and December 28, 2005. The latter date was the last reading of a viral load on the accused's files. The issue of infectivity and possible transmission, even with a condom, must be considered. With respect to the condom there can, of course, be failure, breakage or improper utilization. That being said, there was "a lower risk" when protection was utilized according to medical and scientific evidence. I am persuaded that the combination of an undetectable viral load and the use of a condom would serve to reduce the risk below what would be considered a significant risk of serious bodily harm. The facts and medical evidence in this case have brought me to the conclusion that consent would not, in this particular circumstance, be vitiated.

(1) **M.P.**

[118] M.P. engaged in sexual intercourse with the accused on 10 to 11 occasions. She testified that a condom was used twice. Her memory was impacted by virtue of intoxication. Her encounters with the accused commenced in February, 2004 and ended in March or April, 2004.

[119] I am satisfied that M.P. provided her testimony in a credible fashion, albeit many details were long forgotten by her. In the circumstances, it was not surprising that details would be lost given that she had no idea that there would be any reason to recall the intricacies of their brief relationship. Further, she had

consumed a significant amount of alcohol at the time. The consent issue is also a factor when significant alcohol use has been proven as was evident with respect to M.P. and most, if not all, of the other complainants.

[120] The accused's viral load at the time of his contact with M.P. was consistent with possible infectivity.

[121] I am satisfied that there was condom use on at least two occasions. I am also satisfied that unprotected relations occurred on numerous other occasions. Accordingly, a significant risk of serious bodily harm has been established as there were instances of unprotected sexual intercourse.

[122] I find, in all the circumstances, that with respect to M.P. the charge of aggravated sexual assault against the accused has been established beyond a reasonable doubt.

(2) K.R.

[123] K.R. provided her evidence to the Court in a straightforward and credible manner. She and the accused had engaged in a "protected" sexual relationship of an extended nature. This relationship commenced in April, 2004 and continued until November of the same year. She testified that on at least three occasions while engaging in intercourse with the accused, the condom had broken. This resulted in the couple stopping their activity or replacing the condom. This was described as the appropriate safe sex conduct which was recommended by Dr. Smith during his testimony.

[124] I am satisfied that there was a significant risk of serious bodily harm in these circumstances. During most of their relationship, the accused's viral load was sufficient for possible infectivity. Further, Dr. Smith testified with respect to the proper utilization of protection. Several of the factors he discussed included utilizing the condom before the expiry date, careful handling of the condom, storage in a cool environment and correct application and removal. In K.R.'s case, there was testimony that on at least three different occasions the condom broke while the couple was engaged in sexual intercourse. This breakage may have resulted from improper application or utilization, or simple condom failure. Further, there was also testimony that intoxication could well make it difficult to comply with the correct application instructions.

[125] The fact that the accused's viral load was sufficient for possible infectivity, combined with only 80% of reduction in HIV incidence with condom use, satisfies me that a significant risk of serious bodily harm existed. I have also considered the fact that sexual relations were halted at the time of condom breakage or soon thereafter in reaching this conclusion.

[126] I find the accused to be guilty of aggravated sexual assault with respect to K.R.

(3) K.G.

[127] K.G. had one sexual encounter with the accused during which protection was utilized. The sexual contact occurred in June, 2004. K.G. was a nervous witness who could not recall all of the details of her one contact with the accused

which had transpired many years earlier. I did not consider that to be unusual in the circumstances, particularly when accompanied by significant alcohol intake.

[128] The viral load of the accused was not suppressed during their contact. I am satisfied that a significant risk of serious bodily harm existed despite the utilization of protection. Indeed, K.G. testified that she would not have engaged in any sexual contact with the accused if she had known that he was HIV-positive as condoms were not considered by her to be 100% safe. In these circumstances, K.G. clearly had not subjectively consented to have sexual intercourse with an HIV-positive individual.

[129] I find that there was a significant risk of serious bodily harm. This determination is made on the basis of the evidence that the accused's viral loads at the time allowed for possible infectivity, accompanied by the only 80% effectiveness rate of condoms.

[130] I find, in the circumstances, that the charge of aggravated sexual assault is proven beyond a reasonable doubt with respect to K.G.

(4) S.H.

[131] S.H. was a very credible individual who engaged in a relatively speaking long-term relationship with the accused. That relationship commenced in February, 2005 and continued until April of the same year. S.H. engaged in unprotected sexual intercourse with the accused over a period of several weeks. She was never advised by him of his HIV-positive status.

[132] At the time of their contact, the evidence showed that the accused's viral load was suppressed. Dr. Smith's evidence was that the accused's risk level of infectivity was low during the timeframe when he and S.H. were involved. He stated that there was a high probability that the accused could not have transmitted the virus.

[133] The accused may also have been aware that his viral load was low during his contact with S.H. However, even if the accused had been told that his viral load was under control, that does not translate to knowledge that his ability to transmit the disease was low. Indeed, based upon the medical advice he had been supplied with, the accused knew or ought to have known that condom use was necessary as was the need to disclose his condition to his partners. The accused did not know that he could not transmit the virus during this timeframe. Indeed, Dr. Smith testified that the risk was not eliminated even during those times in which the viral load was undetectable. The evidence of the CDC and WHO made a similar finding based upon the existing scientific research.

[134] The testing of a viral load serves to provide only a "snapshot" in time. The evidence demonstrated that other illnesses, STDs, female contraceptives and other factors could affect or "spike" a viral load. Such an occurrence would not be detected unless viral load testing was performed at the time the relevant factor was affecting an HIV-positive individual. During those times when the viral load is undetectable in the blood, the risk of HIV transmission is reduced. However, the research has not proven that such a situation completely

eliminates the risk of transmitting the virus. In such circumstances, I find that the risk constituted a significant risk of serious bodily harm.

[135] At the time of his relationship with S.H., the accused would have had no reason to believe that he could not transmit HIV. I make this finding with respect to S.H. and all of the other complainants with whom the accused had unprotected contact during the time period in which he had an undetectable viral load. By engaging in sexual contact he not only endangered their lives, but his actions constituted a significant risk of serious bodily harm.

[136] The guidance provided in *Cuerrier* (para. 139) as to what constituted a significant risk of serious bodily harm was of assistance in making this determination. Further, in *Thornton*, the Red Cross screening resulted in the detection of viruses such as HIV at a rate of 99.3%. The Ontario Court of Appeal, whose decision was affirmed by the Supreme Court of Canada, found, in the circumstances, that a 99.3% risk constituted a significant risk of harm. The defence countered that indeed, in the circumstances of the Red Cross, a .7% risk could well be a significant risk given how far blood may be broken down and distributed. Such a small percentage could have resulted in a risk of epidemic proportions. It was submitted that such a risk was not in existence in this case.

[137] I am satisfied, based upon the evidence before me, that there was a significant risk of serious bodily harm in that HIV could have been passed to S.H. in those circumstances when the accused had an undetectable viral load and engaged in unprotected sexual contact.

[138] I find the accused, in these circumstances, to be guilty of aggravated sexual assault because a significant risk was present.

(5) **D.C.S.**

[139] D.C.S. had a sexual relationship with the accused on numerous occasions. I have previously commented that her credibility was in some respects at issue, albeit she was a young witness. I am satisfied that she engaged in a sexual relationship with the accused and that her evidence was sufficiently reliable to establish the charge against the accused beyond a reasonable doubt. Initially, she was unaware that he was HIV-positive, but became acquainted with knowledge of his status as the relationship continued. In the circumstances of their contact, a condom was sometimes utilized. I am satisfied that instances of unprotected intercourse transpired and even though the accused's viral load was undetectable, there was a significant risk of serious bodily harm.

[140] D.C.S. was 12 years old at the time of her involvement with the accused. He took no reasonable steps to ascertain her age. Further, he had knowledge of her age soon after the commencement of their relationship in August, 2005. Pursuant to ss. 150.1(1) and 150.1(4) of the *Criminal Code*, D.C.S. could not consent to a sexual relationship because of her age. As with all of the complainants, significant alcohol consumption also served to undermine the consent issue.

[141] I find, in the circumstances, that the accused is guilty of aggravated sexual assault with respect to D.C.S.

(6) C.B.

[142] C.B. engaged in one act of protected intercourse with the accused. This event occurred in 2005 when the accused's viral load was undetectable. C.B. was a credible witness who endeavoured to testify as best she could with respect to her limited recall of the details of this one sexual encounter.

[143] In these circumstances, I find that there was no significant risk of serious bodily harm because of the utilization of protection accompanied by the accused's undetectable viral load. The risk of harm was so reduced that it could not be established that there was either deprivation or a risk of deprivation.

[144] Accordingly, I acquit the accused of this charge of aggravated sexual assault. I am not prepared to consider a finding of attempted aggravated sexual assault in these circumstances.

(7) D.H.

[145] D.H. had a primarily "protected" sexual relationship with the accused commencing before Christmas, 2005. The viral load of the accused at that point would have been undetectable. However, on one occasion during their contact, the condom was either removed or had broken. D.H. was aware of the discharge of semen. I found D.H. to be a credible and forthcoming witness.

[146] I am satisfied, based upon the evidence, that for the most part there would not have been a significant risk of serious bodily harm accorded to D.H. during her sexual relationship with the accused. This conclusion is based upon

the fact that there was ordinarily condom use accompanied by the undetectable viral load of the accused.

[147] However, I am persuaded that on one occasion the condom was removed which resulted in unprotected ejaculation. While I am prepared to find that the combination of condom use and a suppressed viral load are sufficient to eliminate a finding of significant risk of serious bodily harm, I am not so satisfied where there is an instance of unprotected sexual intercourse. In those circumstances, there remains a significant risk of serious bodily harm which is not in any way circumvented by a barrier.

[148] Accordingly, I am persuaded that the accused is guilty of aggravated sexual assault with respect to D.H.

(8) F.L.

[149] F.L. engaged in a sexual relationship with the accused on several occasions commencing in January, 2006. There were alleged to be instances of unprotected sexual intercourse.

[150] At the time of F.L.'s contact with the accused, his viral load was undetectable. I am satisfied, in the circumstances, that the accused may have utilized condoms during his contact with F.L. Her evidence was equivocal on that point during cross-examination. Accordingly, I find the combination of condom use and the undetectable viral load to be sufficient to eliminate the finding of a significant risk of serious bodily harm. Also, F.L.'s evidence was too unreliable, in all of the circumstances, to prove the charge beyond a reasonable doubt.

[151] The accused is acquitted of the charge of aggravated sexual assault with respect to F.L.

(9) J.L.L.

[152] J.L.L. engaged in unprotected sexual relations with the accused on two occasions in 2005. I have found her credibility to be of concern, albeit I am satisfied that she did have a sexual relationship with the accused. Her direct testimony was that condoms were not used. With respect to her first contact with the accused, J.L.L. testified that ejaculation did not occur. At the time of her contact with the accused, his viral load was undetectable. On cross-examination, J.L.L. was uncertain with respect to condom use.

[153] As with F.L., I find that in those circumstances where I was not satisfied on the issue of whether a condom had been utilized, combined with the accused's viral load being undetectable and no ejaculation on the first contact, that a significant risk of serious bodily harm has not been proven. J.L.L.'s evidence also was not sufficiently reliable to substantiate this charge beyond a reasonable doubt.

[154] In the circumstances, I find the accused not guilty of aggravated sexual assault with respect to this count of the indictment.

(B) Charge of Invitation to Sexual Touching

[155] The accused is charged with invitation to sexual touching with respect to the complainant D.C.S. At the time of the contact between this complainant and the accused, D.C.S. was 12 years of age. I find in the circumstances:

- (1) That D.C.S. was under 14 years of age;
- (2) That the accused invited, counselled or incited the complainant to touch his penis; and
- (3) That the touching that the accused invited, counselled or incited was for a sexual purpose.

[156] D.C.S. and the accused engaged in sexual contact on a number of occasions. While her evidence was not, in all the circumstances, consistent or in some respects satisfactory, I have no hesitation in finding that sexual contact occurred. Further, I am satisfied that the accused was aware of her age at the time of much of the sexual interaction between them.

[157] I find the accused guilty of the charge of invitation to sexual touching.

(C) Charge of Sexual Interference

[158] The comments made with respect to the sexual touching section are applicable with respect to this offence. D.C.S. was under the age of 14 years, the accused touched D.C.S. and the touching was for a sexual purpose. Further, the accused was aware of her age. I find the accused guilty of the charge of sexual interference.

(D) Charge of Forcible Confinement

[159] The count of forcible confinement arises with respect to the complainant J.L.L. I am not satisfied, based upon the evidence, that the essential elements of the offence have been proven. The accused and J.L.L. often were in his bedroom with the door locked. This was not an unusual circumstance. Further,

I do not find that J.L.L. objected to the situation, nor was the confinement without lawful authority proven. As I previously stated, I did not find J.L.L. to be a reliable witness.

[160] I acquit the accused of the charge of forcible confinement.

VII. CONCLUSION

[161] I am satisfied that the accused was an individual who was well aware of his HIV-positive status. He knowingly withheld that information from his sexual partners on the basis that in all likelihood they would not have engaged in sexual contact with him. Further, despite medical warnings to the contrary, he engaged in unprotected sexual intercourse with many of these complainants. Even in those circumstances where protection was used, these women remained at risk.

[162] The accused preyed upon these vulnerable women, many of whom were underage and came from significantly compromised circumstances. Further, these women were supplied with alcohol and/or drugs and lured into a sexual relationship by a sexual predator.

[163] The accused's conduct was deplorable and despicable in all of the circumstances and must be condemned in the strongest possible terms. Those that are infected with HIV cannot inappropriately and indiscriminately engage in sexual relationships for their own pleasure without regard to the consequences to others.

[164] I find that the accused is guilty of aggravated sexual assault with respect to the complainants M.P., K.R., K.G., D.C.S., D.H., and S.H.

[165] I also find the accused guilty of the charges of invitation to sexual touching and sexual interference.

[166] I find the accused is not guilty of aggravated sexual assault with respect to the complainants F.L., C.B. and J.L.L.

[167] I also acquit the accused with respect to the charge of forcible confinement.

McKelvey, J.