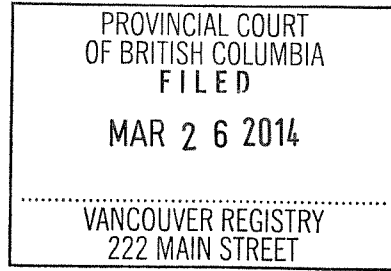


Citation: ☼



Date: ☼  
File No: 230034-1  
Registry: Vancouver

**IN THE PROVINCIAL COURT OF BRITISH COLUMBIA**  
IN THE MATTER OF THE PRODUCTION ORDER GRANTED DECEMBER 5, 2013  
BY A JUDICIAL JUSTICE PURSUANT TO SECTION 487.012 OF THE  
CRIMINAL CODE OF CANADA

BETWEEN:

Detective Stephanie Cullingworth, Vancouver Police Department

RESPONDENT

AND:

BC CENTRE FOR EXCELLENCE IN HIV/AIDS

APPLICANT

**REASONS FOR JUDGMENT  
OF THE  
HONOURABLE JUDGE H. K. DHILLON**

Counsel for Applicant BC Centre for Excellence in HIV/Aids:

A. Nathanson,  
G. Cameron

Counsel for Vancouver Police Depart & Det. Stephanie Cullingworth:

B. Toy

Date of Hearing:

March 3, 2014

Place of Hearing:

Vancouver, B.C.

Date of Judgment:

March 26, 2014

## Introduction

[1] The Applicant British Columbia Centre for Excellence in HIV/AIDS (the "Centre" or "BC-CFE" ) is an internationally renowned provincial agency based at St. Paul's Hospital in Vancouver, B.C. The Centre has a long history of research in and treatment of British Columbians living with HIV/AIDS. It generates and retains comprehensive records relating to persons diagnosed with or being treated for HIV or AIDS.

[2] The Centre applies under section 487.015(1) of the **Criminal Code** for an order of exemption from a production order obtained by the Vancouver Police Department under s. s. 487.012 of the **Criminal Code** (the "Production Order").

[3] The Production Order is directed to obtaining disclosure of certain HIV-related medical records from the Centre in connection with a police investigation of an aggravated sexual assault arising from a person's alleged failure to disclose her HIV-positive status to her sexual partner.

[4] The Centre resists the Production Order on the basis that the information is privileged. It submits that compelled disclosure of confidential information would undermine the ability of the Centre in its pursuit of effective treatment of HIV and endanger the lives of HIV-positive persons, thereby placing at risk the health interests of the population as a whole. It seeks an order exempting it from the requirement to produce any document, data or information referred to in the order.

[5] In support of its position, the Centre has tendered affidavit evidence of Dr. Julio Montaner, Dr. Thomas Kerr and Dr. Paul Richard Harrigan, all highly qualified and

respected medical or social scientists in their field. The comprehensive material filed collectively outlines the history of the Centre, the scientific research in and development of the treatment of HIV-AIDS, and related socio-medical facts. Their evidence is unchallenged.

### **Issue**

[6] The central question for the court on this application is whether the public interest in confidentiality of the records held by BC-CFE outweighs the public interest in disclosure for purposes of facilitating a criminal investigation of a serious offence.

### **The Production Order**

[7] On December 5, 2013 Detective Constable Stephanie Cullingworth of the Vancouver Police Department obtained a Production Order pursuant to section 497.012 of the *Criminal Code* .

[8] A production order is used to compel third parties in possession of information relevant to a criminal investigation to produce documents or data for delivery to police or to other law enforcement agencies.

[9] The Production Order was served on the Centre on December 6, 2013. It requires disclosure of:

Certified copies of records held by the BC Centre for Excellence in HIV/AIDS (CFE), for [ named patient ] born [date of birth] with Provincial Health Number (PHN) \*\*\* from June 1, 2010 to December 31, 2010 that include results from viral load testing, Therapeutic Drug Monitoring (TDM), and CD4 trend and Genotyping test results.

(the "Documents")

[10] The Production Order states that the Documents are relevant to the investigation of an alleged aggravated sexual assault committed in Vancouver, British Columbia between August 1, 2010 and October 21, 2010. The Information to Obtain (“ITO”) which underlies this Production Order sets out that the alleged offence relates to a failure by a named person (the “Suspect”) to disclose her HIV-positive status to a sexual partner (the “Complainant”), contrary to s. 273(1) of the *Criminal Code*.

[11] The records and data sought from BC-CFE fall within the following categories:

- (a) Results from viral load testing;
- (b) Therapeutic Drug Monitoring (“TDM”) records;
- (c) CD4 trend test results; and
- (d) Genotyping test results

[12] D/Cst. Cullingworth deposes in the ITO that she verily believes the requested BC-CFE records would afford evidence as to the following, which would assist in police investigation of the alleged offence:

- information to “confirm or refute” the Complainant’s allegation that he contracted HIV during the time period he was in a sexual relationship with the Suspect.
- information that the Suspect was aware of her positive HIV status during her sexual relationship with the Complainant over the relevant time period;
- whether the Suspect’s viral load was at “highly contagious levels” during her sexual relationship the Complainant; or
- information on where to locate records that would afford evidence with respect to the forgoing information.

**Other Related Production Orders**

[13] Under the same ITO, D/Cst. Cullingworth sought production orders directed to documents or data held by three other third-party record holders including, in addition to the Applicant BC-CFE, the B.C. Centre for Disease Control ("CDC"). CDC has produced or is willing to produce records pursuant to the order.

[14] Past authorizations for production of records relating to the Suspect were obtained by police for records held by the Ministry of Children and Family Development ("MCFD") relating to, *inter alia*, "health history (including ...appointment schedules, medication prescribed, medical diagnoses and testing results, and counselling notes), sexual and/or romantic relationships and grounds for placement in foster care." It is not clear on the record if MCFD has produced any records.

[15] In addition, in August 2013 D/Cst. Cullingworth obtained a Production Order for all records held by a primary care medical clinic for women and children living with HIV/AIDS affiliated with B.C. Women's Hospital. It was a term of the Production Order that any relevant records held by the clinic be forwarded in a sealed envelope for review by a judicial officer, on notice to the Suspect, to determine the extent to which they should be disclosed having regard to the privacy interests of the Suspect and the public interest in the investigation of an alleged offence. The review of the sealed documents has not yet taken place.

**Position of the Applicant**

[16] BC-CFE contends that the Documents it holds are protected under a common law privilege which attaches to highly confidential HIV and AIDS research and treatment records. The information contained in the Documents is obtained on the basis that it will be kept and used confidentially. While it is likely that some documents might assist police in their investigation of the offence, the harm caused by the loss of confidentially in the information contained in the documents would be irreparable to the work of BC-CFE and detrimental to the detection, treatment and containment of HIV-AIDS.

**Position of the Respondent**

[17] The Respondent contends that aggravated sexual assault is a serious criminal offence. Police and society must be able to bring to justice offenders who do not disclose their HIV-positive status to their sexual partners. The information sought from BC-CFE is conceded to be confidential but producible. At a minimum, the Suspect's viral load test results and therapeutic drug monitoring data is central to investigate the complaint and to determine, on the whole of the information secured, if charges should be recommended. The Respondent opposes the exemption.

**The *Criminal Code* Provisions**

[18] BC-CFE relies on s. 487.015(4) of the Criminal Code which provides that a judge may grant the exemption from production if satisfied that

- (a) the document, data or information would disclose information that is privileged or otherwise protected from disclosure by law;

- (b) it is unreasonable to require the applicant to produce the document, data or information; or
- (c) the document, data or information is not in the possession or control of the applicant.

[19] Section 487.015(4) (a) exempts from disclosure information that is privileged at common law or is expressly protected from disclosure by statute. BC-CFE relies on a common law privilege for the exemptions it seeks. The onus is on BC-CFE to satisfy the court on a balance of probabilities that a common law privilege exists over the Documents and protection of the interests at stake warrants an exemption from production.

### **Common Law Privilege**

[20] At common law, privilege may arise if the communication falls within a recognized class or category, such as solicitor and client privilege or informer privilege. Privilege may also be asserted over documents and information on a “case-by-case” basis if, in the particular case before the court, the prerequisites for privilege have been established.

[21] For case-by-case privilege to be found, the party alleging privilege must satisfy the four-part *Wigmore* test for privilege as discussed in *M. (A.) v. Ryan*, [1997] 1

S.C.R. 157:

- (a) First, the communication must originate in a confidence.
- (b) Second, the confidence must be essential to the relationship in which the communication arises.

- (c) Third, the relationship must be one which should be "sedulously fostered" in the public good.
- (d) Finally, if all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation.

[22] The common law remains flexible and permits a claim of privilege to be recognized in new situations having regard to the "social and legal realities of our time", the competing interests in issue, the circumstances of the case and the nature of documents and information over which privilege is asserted: **M.(A.)** at 20-23, 39 and **R. v. National Post** 2010 SCC 16 at 50-52 and 55.

[23] As regards the first **Wigmore** criterion, it is not contested that the common law has long recognized confidentiality in the doctor/patient relationship and over health care information: **Logan v. Hong** 2013 BCCA 249. The affidavit evidence establishes that the Documents at issue originated in confidence that they would not be disclosed by BC-CFE to third parties. The Centre promises prospective and current users of its services that their personal health information will be collected and retained in confidence.

[24] As to the second **Wigmore** factor, I accept that the promise of confidentiality is essential to the proper functioning of the Centre and its relationship with its client base. Dr. Montaner deposes that in his many years of working with persons who suffer from HIV or AIDS, he has dealt with patients "who would not participate in testing or pursue life-saving treatment" unless he could provide them with a "guarantee of confidentiality



and anonymity". Fear of being identified as suffering from HIV-AIDS, and the near certain resulting stigmatization and social isolation remain at the forefront of such patients in seeking to protect their privacy. The BC-CFE notes that knowledge by patients that HIV records may be producible to the police by compulsion of a production order risks the loss of some who would not participate in testing and treatment of HIV and related disorders.

[25] Third, in considering whether the relationship must be one which should be "sedulously fostered" in the public good, I accept that HIV-AIDS research is best supported by a full, frank and unfettered access to patient data that comes from voluntary disclosure by individuals of highly personal confidential information. The gains achieved through research into the disease, and implementation of life-saving health care for patients in need of treatment is critical. I am satisfied that confidential information provided by willing and consenting patients to the Centre gives rise to a form of relationship which ought to be sedulously fostered.

[26] For the forgoing reasons I find that the first 3 criteria under the *Wigmore* test have been established. The disposition of this application turns on the balancing of interests under the fourth criterion.

[27] In order to obtain the exemption on the grounds of privilege, BC-CFE must show on a balance of probabilities that the public interest weighs in favour of protecting the information it holds from disclosure, having regard to the totality of the circumstances including the countervailing public interest in the detection and prosecution of serious crimes: *M. (A.) v. Ryan* at 37. The scope of the privilege is "shaped by the public

interest that calls the privilege into existence in the first place” depending on the circumstances of each case, and may be total or partial (at para. 52): ***R. v. National Post***, 2010 SCC 16.

[28] The burden remains on BC-CFE to show by a preponderance of the evidence that the discretion should be exercised to exempt it from production of the sought records.

#### **The Fourth Wigmore Criterion: Evidence and Analysis**

[29] The materials filed by BC-CFE are comprehensive. I accept that BC-CFE is a world leader in HIV-AIDS research conducted by an inter-disciplinary team of professionals. It has designed and implemented an internationally recognized standard of care for treatment of persons infected with HIV, and its protocols have been adopted and applied by international health organizations in the fight against HIV-AIDS, including the World Health Organization and the United Nations Programme on HIV-AIDS.

#### **An Brief Overview the HIV-Aids Epidemic**

[30] HIV infects the cells of the immune system, compromising the body’s ability to protect itself from opportunistic infections, which degradation over time can prove to be debilitating and eventually fatal.

[31] Around 65,000 Canadians and 13,000 British Columbians were HIV-positive by 2008 estimates and about one-third of those persons were unaware of their HIV status. B.C. has 13% of Canada’s population but 20% of HIV/AIDS cases. BC-CFE points out that “[a]s recently as 2007, the UN Population Fund emphasized that HIV prevalence in

[Vancouver's Downtown Eastside neighbourhood] is as high as in Botswana, one of the countries hardest hit by HIV worldwide."

[32] There is no known cure for HIV-AIDS and despite advances in treatment the spread of HIV-AIDS remains a pressing public health concern.

[33] Since its inception in 1992 BC-CFE has dedicated its work to improving the health of British Columbians living with HIV through clinical research into the disease and related demographic trends, development of treatment protocols, ongoing monitoring of patients under treatment, and dissemination of comprehensive research and treatment best-practices for HIV and related diseases throughout the world.

[34] Advances in research, development of highly effective treatment protocols and testing have prolonged the lives of those already infected with HIV, and reduced the risk of new HIV cases arising from transmission to other individuals.

[35] The gold standard for HIV treatment - "Highly Active Antiretroviral Therapy" ("HAART") - reduces HIV levels to nearly undetectable in blood and sexual fluids in the vast majority of treated patients. Two benefits flow from a rigorously followed treatment regimen – one is that the immune system regenerates to the point of being capable of fighting infections, and the second is that presence of the virus is reduced to nearly undetectable levels and the risk of transmission of the virus through sexual contact or other risky behaviour is almost completely eliminated.

[36] BC-CFE manages the procurement and distribution of antiretroviral drugs; monitors clinical, laboratory and epidemiological impacts of HAART; and generates

HIV/AIDS therapeutic guidelines. Its research is published in recognized medical and academic journals.

[37] BC-CFE submits that HAART is “only effective if it is (a) broadly utilized, and (b) strictly adhered to by the patient who is receiving treatment. Compliance to 95% adherence, as measured by pharmacy refill measures, is needed to ensure viral suppression and survival. Suboptimal adherence can also result in the development of HIV resistance, rendering classes of antiretroviral medications ineffective for the individual involved, and this resistance can then be transmitted to others and thereby limit their treatment options.”

[38] The disclosure of a person’s HIV-positive status is linked to discrimination and ostracization. The profound harms caused by stigma associated with HIV-AIDS can have adverse implications for HIV prevention and treatment. Fear of being shunned if their name is linked to HIV reduces an individual’s willingness to be tested for HIV, to disclose their HIV status, or to access health care. A guarantee by BC-CFE that their clients’ personal health information will be kept privileged and confidential is an important element of the trust reposed in the Centre by its clientele, and necessary for the discharge of its research and treatment objectives.

[39] The evidence advanced by BC-CFE is unchallenged and establishes that maintaining confidentiality of a patient’s HIV status, and protecting their privacy in treatment and medical records gathered or generated by BC-CFE under a promise of confidentiality and given in confidence, is necessary to promote testing and efficacious treatment of HIV-positive persons.

## Drug Treatment Program Database

[40] The evidence also establishes that essentially all of the known HIV positive persons in British Columbia participate in BC-CFE's Drug Treatment Program ("DTP"). The participation is tantamount to compulsion since there is no other way for an HIV-positive person to have access to the very costly state-funded drugs required to maintain their health and functioning. The Program gathers personal, demographic, medication, drug resistance, and genetic information about each and every person with HIV or AIDS in British Columbia who is receiving treatment for the virus. This information, including the information sought in the production order, is contained in the DTP.

[41] The BC-CFE submissions succinctly describe the importance of the Centre's Drug Treatment Program.

"DTP is essential to the BC-CFE's work. The information derived from it allows the Centre to analyse drug effectiveness and toxicity and to adjust HAART in what Dr. Harrigan describes as the "cat and mouse game" with this constantly mutating virus. It enables the BC-CFE to conduct clinical and outcome studies. It alerts governments to the trajectory of the disease, supplies the data to perform population studies to enhance the reach of testing and treatment and provides data for informed policy-making, both in British Columbia and internationally."  
[footnotes references omitted]

[42] The importance of a comprehensive and reliable DTP database cannot be overstated, according to the BC-CFE. The affidavit evidence of Dr. Thomas Kerr is impressive in its content and clarity. Dr. Kerr deposes:

"In my opinion, it is access to the DTP which has led to the remarkable progress made in tackling the HIV epidemic in British Columbia, as treatment has been integrated with monitoring, allowing for targeted

interventions and a co-ordinated response to combat the spread of the virus.”

“Without access to the information contained in the DTP, and other confidential information provided by individuals who use the BC-CfE’s services, our ability to conduct effective research and deliver treatment to save lives would be impaired. In turn, this would compromise the Centre’s ability to create and implement novel strategies to reduce HIV infection rates within British Columbia, Canada, and internationally.”

[43] Dr. Thomas Kerr states at para. 4 that:

It is my opinion that requiring the production of the Documents would pose a real and substantial risk to life and safety, both to individuals who are HIV positive and those who are not, by (a) deterring members of the public from seeking out testing and effective treatment for HIV, (b) hindering the provision of effective health care to those infected with the virus, and (c) undermining the ability of the BC-CFE to undertake population-level monitoring and research of HIV, which is essential for an effective response to the HIV epidemic locally, provincially, nationally and internationally.

[44] This brief summary does not encapsulate the scope and breadth of the work of BC-CFE as set out in the affidavit evidence. I accept Dr. Kerr’s opinion that if privilege over the Documents held by BC-CFE is lifted, there is a real concern that at-risk individuals may be deterred from seeking testing or treatment for HIV, and this will pose a danger to the health and safety of persons who are infected with the virus because undertaking effective antiretroviral treatment is the best course for reducing the risk of virus transmission. Erosion of patient confidence in BC-CFE’s ability to preserve their privacy in their personal health information will risk their health and will risk jeopardizing public health.

[45] I now turn to the Production Order and the Respondent’s position that disclosure is necessary to properly investigate the allegation of aggravated sexual assault.

### **Public Interest in Securing Evidence through the Production Order**

[46] The Respondent obtained an *ex parte* Production Order for specified categories of documents to assist in its investigation of an offence. S. 487.012(3)(b) notes that targeted “documents or data will afford evidence respecting the commission of the offence”. The phrase on its plain reading is a broad statement encompassing discovery of all materials which might shed light on circumstances that would appear to constitute an offence. Therefore, anything relevant or rationally connected to the incident under investigation, the parties involved, or their potential culpability falls within the scope of the documents or data producible under the order.

[47] The public interest at stake is the “prompt and thorough investigation” of potential offences which is necessary for a “fair and expeditious administration of justice” and the maintenance of a peaceful and safe society: ***Canadianoxy Chemicals Ltd. v. Canada*** (A.G.) [1999] 1 SCR 743 at 752, para. 20. The central focus of the police investigative process is to gather all relevant evidence to assist in making “a responsible and informed decision” as to whether charges should be laid.

[48] The Supreme Court of Canada in ***Canadianoxy Chemicals Ltd.*** notes that “it is not the role of the police to investigate and decide whether the essential elements of the offence are made out”: p. 752, para.22. Investigators are not required to assess the facts and law in the gathering of evidence, as these issues should properly be dealt with during the trial process. Rather, their task is to gather and present by lawful means the relevant investigative materials and facts to the prosecutorial authorities.

[49] The courts caution against investigative tunnel vision in searching only for inculpatory documents or facts. A search for information relevant to a potential defence remains within the ambit of a Production Order in order to reduce the risk of an unjustified or wrongful prosecution. As noted in *Canadianoxy Chemicals Ltd.*, an unwarranted restriction of the ability of the Crown to gather evidence, including evidence in anticipation of a defence, would have serious consequences on the functioning of our justice system.

[50] Accordingly, I accept that there is a rational, well-founded public interest in pursuing all reasonable avenues of investigation to secure evidence of a crime and, where discoverable, evidence of a potential defence. To properly determine the weight to place on this important public interest having regard to the circumstances in this particular case, the legal standards for proving the offence of aggravated sexual assault are relevant. The current state of aggravated sexual assault law defines the scope of the information needed to properly investigate the crime.

#### **Investigation of Aggravated Sexual Assault for Non-disclosure of HIV**

[51] The Respondent notes, correctly, that aggravated sexual assault is a serious offence. HIV infection is described as an “epidemic” which can be transmitted to sexual partners through an exchange of blood or bodily fluids. If not detected and properly managed through treatment, the disease can result in death or serious debilitating illnesses.

[52] The criminal law seeks to bring to justice those who create a realistic possibility of transmission of HIV infection to their sexual partners through unprotected and non-



consensual sexual intercourse. Under the criminal case law developed from *R. v. Cuerrier* [1998] 2 S.C.R. 371 through to *R. v Mabior* 2012 SCC 47 and *R. v. C (D.)* 2012 SCC 48, consent to sexual intercourse is vitiated by fraud if a person knowingly fails to disclose his or her HIV-positive health condition to a sexual partner prior to intercourse, creating a “significant risk of serious bodily harm”. Under the law as it presently stands, a “significant risk of serious bodily harm” is established where there is a “realistic possibility of transmission of HIV”: *Mabior*.

[53] The focus of the Supreme Court in *Mabior* was to enunciate a set of principles which would outline with greater certainty the reach of the criminal law in cases of unprotected sex by HIV-positive persons. I turn to paras. 104 and 105 of *Mabior* for guidance:

To summarize, to obtain a conviction under ss. 265(3)(c) and 273, the Crown must show that the complainant's consent to sexual intercourse was vitiated by the accused's fraud as to his HIV status. Failure to disclose (*the dishonest act*) amounts to fraud where the complainant would not have consented had he or she known the accused was HIV-positive, and where sexual contact poses a significant risk of or causes actual serious bodily harm (*deprivation*). A significant risk of serious bodily harm is established by a realistic possibility of transmission of HIV. On the evidence before us, a realistic possibility of transmission is negated by evidence that the accused's viral load was low at the time of intercourse and that condom protection was used.

The usual rules of evidence and proof apply. The Crown bears the burden of establishing the elements of the offence - a dishonest act and deprivation - beyond a reasonable doubt. Where the Crown has made a *prima facie* case of deception and deprivation as described in these reasons, a tactical burden may fall on the accused to raise a reasonable doubt, by calling evidence that he had a low viral load at the time and that condom protection was used.

[54] To properly investigate a crime, some regard must be had to what is required for the Crown to prove the offence under investigation. To establish a *prima facie* case of guilt to a charge of aggravated sexual assault under s. 273(1) of the **Criminal Code**, the investigator must uncover facts that would be sufficient on their own, or through the drawing of logical inferences by a trier of fact, to establish beyond a reasonable doubt a significant risk of serious bodily harm because of a “realistic possibility of HIV transmission”. This entails acquiring evidence that:

- a) the person under investigation was HIV-positive;
- b) the person did not disclose the HIV status before engaging in sexual acts with his or her partner;
- c) the partner would not have consented to sex had the HIV status been disclosed; and
- d) as a result the partner has suffered serious bodily harm (i.e. became infected with HIV as alleged in this case) or has been exposed to a significant risk of serious bodily harm because of a “realistic possibility of HIV transmission”.

[55] In **Mabior**, the Supreme Court noted that it is a mixed question of fact and law whether the sexual acts entailed a “realistic possibility of HIV transmission”. Three factors were relevant in **Mabior** to assessing the risk of a realistic possibility of HIV transmission:

- a) Proof of baseline risk of transmission associated with the particular sexual activity engaged in by an HIV-positive suspect with the complainant: this requires testimonial evidence from the complainant and expert evidence of baseline risk related to such activity.

- b) Absence of Condom use: this requires testimonial evidence, typically from the complainant.
- c) Evidence relating to viral load: the transmissibility of HIV is proportional to the amount of virus in the blood, and a low viral load managed through antiretroviral therapy combined with condom use would preclude a realistic possibility of transmission of HIV.

[56] In *R. v. D.C.*, 2012 SCC 48, the companion case to *Mabior*, the court held that even where there is no detectable HIV in the accused's blood stream, failure to use a condom during intercourse when one is HIV positive makes the sex act a crime.

[57] In *R. v. Felix*, 2013 ONCA 415, the Ontario Court of Appeal summarized the *Mabior* test:

[57] It follows, in my opinion, that once it was established in this case that: (1) the appellant was HIV-positive; (2) the appellant did not disclose his HIV-positive status prior to intercourse with the appellants; (3) the complainants would not have engaged in sexual activity with the appellant had they known of his HIV-positive status, and (4) the appellant failed to use a condom on the relevant occasions of intercourse, the Crown had established a prima facie case of a realistic possibility of HIV transmission. On the *Mabior* standard, even if the evidence had established that the appellant had a low viral load at the time of intercourse with N.S. and M.F., a realistic possibility of HIV transmission would not have been negated.

### **The Offence Disclosed in the Information to Obtain**

[58] The redacted ITO indicates that the male complainant alleges he engaged in unprotected sexual intercourse with the female Suspect without knowing she was HIV-

positive. She is alleged to have failed to disclose her HIV-positive status to him. Moreover, the complainant alleges that he contracted HIV as a result of unprotected sex with her. All elements summarized above, except the allegation that the Suspect was knowingly HIV-positive at the time of sexual intercourse, can be established through the evidence of the complainant.

[59] I am satisfied that investigation into the offence of aggravated sexual assault in this case requires access to two categories of documents, the first being documents as to the suspect's HIV status during the relevant time frame and the second relating to proof of knowledge or *mens rea*. To establish evidence of *mens rea*, I accept that disclosure is required of documents likely to show that the Suspect knew of her medical status and was advised, at a time prior to the alleged sexual acts, against having unprotected sex.

[60] I agree that police investigators would need to ascertain through credible sources the fact of the Suspect's knowledge of her HIV-positive status at the relevant time, and moreover, they would require some evidence that she was told of the importance of disclosing her HIV-positive status to her sexual partners before engaging in sexual activities, or told how to minimize risk of transmission of HIV during sex.

[61] I acknowledge that investigators are not required to weigh the ultimate cogency of the materials discovered in the gathering of evidence, and issues of mixed fact and law should properly be dealt with at the charge approval stage or during the trial process. However, where a common law, case-by-case privilege is asserted, I find that the legal standards to be applied to prove the offence are material and inform the scope

of the production reasonably required from the record-holder to properly investigate an alleged crime.

[62] The categories of documents sought by police under the Production Order, and BC-CFE's response, is summarized as follows:

(a) Results from viral load testing

- BC-CFE notes that a viral load confirms the presence of HIV in the person's blood, and it is relevant to assessing whether there is a risk of transmitting HIV to others through sexual activity. Evidence of a low viral load could be used by the defence to negate the risk of transmission where a condom is also used;

(b) Therapeutic Drug Monitoring ("TDM") records

- BC-CFE states that these records monitor the level of drugs in a person's bloodstream and are not directly relevant to calibrating the risk of transmission of HIV;

(c) CD4 trend test results

- As the viral load increases and HIV destroys the CD4 cells (T-cells), the cell count helps guide the anti-viral treatment. This data is not directly related to assessing risk of transmission ; and

(d) Genotyping test results - These test results are used to determine which combination of drugs provides optimal anti-viral therapy for that person's virus. Genotyping test results are not directly relevant to assessing the risk of HIV transmission. The genetic information related to the RNA is capable of being used to map each person's virus and identify similar strains of virus in others in order to suggest a causal link for infection. BC-CFE states this would be a highly intrusive of a person's privacy and security and not within the scope of any

consent granted by the client. Disclosure would be an “unintended, undisclosed and unconsented to use of a person’s genetic information”.

[63] The above categories of documents sought under the Production Order are all contained in BC-CFE’s Drug Treatment Program (“DTP”). DTP documents would likely contain information confirming the suspect’s HIV status, treatment recommended or followed during relevant period under investigation, and information conveyed about risk of transmission through certain sexual or other activity.

[64] I accept the evidence of BC-CFE as to the more limited relevance of three of the four categories of documents to the investigation of aggravated sexual assault in this case. Only one category, viral load testing, may be relevant but is not directly necessary to support allegation.

[65] That is, on the facts alleged of unprotected sexual intercourse by the Suspect without disclosure of her HIV-positive status, viral load test results are not required to make out the offence. They remain relevant to a defence if viral load results can show that there was a negligible risk of HIV transmission during the period of sexual contact. Genotyping test results may become relevant if the Suspect raises an affirmative defence that the complainant did not contract the HIV in his blood from unprotected sex with her. To refer again to *Mabior*:

105. The usual rules of evidence and proof apply. The Crown bears the burden of establishing the elements of the offence - a dishonest act and deprivation - beyond a reasonable doubt. Where the Crown has made a *prima facie* case of deception and deprivation as described in these reasons, a tactical burden may fall on the accused to raise a reasonable doubt, by calling evidence that he had a low viral load at the time and that condom protection was used. [emphasis added]

[66] In this case, the ITO indicates that some of the information is being sought to “confirm or refute [the complainant’s] allegation”. The issue is whether precluding police access to records that might afford a defence poses “an unwarranted restriction” of the ability of the Crown to gather relevant evidence and whether this “would have serious consequences on the functioning of our justice system.” : ***Canadianoxy Chemicals Ltd.***

[67] I do not disagree that it is preferable for police to have access to all relevant and material evidence, going not only to establishing the offence but indicating potential defences as well. This helps cull weaker cases or unsustainable charges at an early stage and a suspect is not faced with charges that result in a Crown directed stay of proceedings or dismissal at the end of the day.

[68] I also agree that there is an important societal interest in proceeding expeditiously and fairly to a determination of the likelihood of a successful prosecution for HIV-transmission cases. However, for the reasons that follow, the state interest in accessing BC-CFE records to investigate a serious allegation of criminality must give way to the greater need to preserve confidentiality of BC-CFE records and data for the greater public good.

[69] First, where there is a compelling case for maintaining confidentiality, the privilege should only be lifted if there is no other reasonable source for information for the documents sought: ***Parent v. R.*** [2014] QJ No. 65 at 152.

**152** One of the elements a court must consider in the weighing up is whether the information for which a privilege claim exists is available by

any other means. One must exhaust possibilities of obtaining the information before requiring a researcher to break his or her promise of confidentiality.

[70] Police have obtained production orders for medical-clinical records and other records which are likely to provide relevant information as to the Suspect's HIV status and evidence of advice or counselling to reduce the risk of transmission through sexual contact. Accordingly, I am not persuaded there is a "clear, compelling, demonstrated necessity to obtain the information" from BC-CFE: **Canadian Broadcasting Corp. v. Manitoba (Attorney General)**, 2009 MBCA 122 at 74.

[71] Secondly, in weighing the importance of the privilege asserted by BC-CFE I rely on the analysis **Parent v. R.** [2014] QJ No. 65 which grappled with the essential question of whether it had been shown that "the injury that would inure to the researcher-participant relationship by the disclosure of the communications in this particular case is greater than the benefit gained for the correct disposal of the litigation" (at para. 18).

[72] The core reasoning of **Parent** is that society is advanced when academic freedom, including freedom to conduct research, is protected from interference by the state. I would distinguish **Parent** only to the extent that the information sought in **Parent** was found to be of marginal utility. In this case, I accept and find that information sought from BC-CFE is of greater relevance and utility in the investigative process.

[73] Nonetheless, I am satisfied on the evidence adduced in this case that state-compelled disclosure of information under the Production Order risks undermining the



important work of the BC-CFE. In reaching this conclusion, I place significant weight on the fact that BC-CFE is an internationally respected medical and research centre in HIV-AIDS whose ability to excel would be placed at risk by the erosion of confidentiality in its Drug Treatment Program records. A belief by its program participants that patient and research information can be accessed in a criminal investigation will erode the Centre's ability to maintain a comprehensive program for HIV-Aids research and treatment. The benefits to society from that research are immeasurable. There is a high societal value in protecting researchers' ability to develop effective drugs and drug treatment therapies through policies and strategies designed to attract the greatest cohort of subjects for purposes of academic and medical research.

[74] Harm from disclosure is cogently set out at paragraphs 120-25 of Dr. Kerr's affidavit. As Dr. Kerr emphasizes in the concluding paragraph of his affidavit:

It is my firm opinion, based on all the available evidence and my professional experience, that compliance with the Production Order by the BC-CFE would have a significant negative impact on health care outcomes for individuals who presently suffer from HIV or AIDS, those who are not but will become infected with HIV or AIDS in the future, and those who never would have been infected if the BC-CFE is able to move forward with its vision to stop HIV/AIDS, saving lives and reducing costs and the burden on the healthcare system.

[75] I find that the Applicant BC-CFE has established that the research it conducts from the information gathered from its program participants is central to eradicating the spread of HIV-AIDS and vital to developing cutting-edge treatment protocols. I accept that the interests in maintaining the privilege are significant.

[76] The unavailability of potential relevant evidence from BC-CFE at the investigative state is not enough to displace the compelling state interest in protecting public health by ensuring the maximum effectiveness of the BC-CFE's programs. Relevant documents as to the Suspect's HIV status and advice about preventing risk of HIV transmission are likely obtainable from the primary care medical clinic attended by the Suspect or from other collateral sources such as MCFD records. There is no clearly demonstrated necessity at this time to seek production of information relating to the offence from BC-CFE.

[77] As for documents affording a potential defence, if charges are brought it remains open for the Suspect to voluntarily produce defence medical evidence, including her viral load results to demonstrate that there is no significant likelihood of conviction. Such a disclosure would occur with the knowing consent of the Suspect or accused as to the defence benefits to be attained by the voluntary release of such records and would not be compelled directly from BC-CFE.

[78] In weighing the interests at stake, I have considered that section 487.012 of the **Criminal Code** by which a Production Order can be obtained has been found, in *dicta*, to meet constitutional standards: **R. v. Middeljans** 2009 CanLII 64824 (Ont. S.C.). **Charter** values remain relevant in providing a backdrop against which the conflicting interests of a fair and balanced investigative process and a right to privacy in privileged and confidential records may be assessed.

[79] For victims of aggravated sexual assault, **Charter** values of equality, autonomy, liberty, privacy and human dignity require full recognition of the right to consent or to

withhold consent to sexual relations for a complainant: *Mabior* at para. 43. For the public, protection and safety of the community is engaged in pursuing a full and fair investigation of serious crimes in accordance with **Charter** standards.

[80] For a suspect under criminal investigation, s. 7 interests in life, liberty and security of the person are at stake, as is a s. 8 interest in privacy and protection of confidential information from unwarranted disclosure. There is as well the right to protection against self-incrimination arising from any statements made to BC-CFE if provided under a belief that they are a compulsory prerequisite to receiving state-funded life-saving medical treatment.

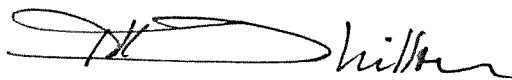
[81] I find the **Charter** values to be of equal importance as between the state interest in investigating crimes and protecting the public from the risk of transmission of a serious disease (including protecting the victim's right to be fully informed of risks prior to granting consent) and the legal rights of a suspect under investigation. I conclude that the *Charter* values arising in this case are important but neutral in determining this application for exemption.

### **Summary**

[82] On the facts of this case, having regard to the particular allegations being pursued in the police investigation, I find that the BC-CFE Documents are subject to a common law case-by-case privilege which attaches to highly confidential HIV and AIDS records. Such a privilege and concomitant exemption from production is necessary to advance the research of BC-CFE in the development of effective programs and policies for the treatment and eventual eradication of HIV-AIDS. The public interest in

maintaining privilege over the files of BC-CFE, and in particular in its data bases, is exceptionally high.

[83] In particular, I conclude that the public health benefits bestowed through protecting the medical/ researcher and patient /subject relationship requires maintaining confidentiality of BC-CFE records and data. Protecting the vital and necessary link between effective research and optimal delivery of HIV-AIDS treatment significantly outweighs the public interest in providing police access to BC-CFE's records in furtherance of their investigation. Accordingly, I grant the Applicant BC-CFE an exemption from the Production Order on the basis of a case-by-case common law privilege.



The Honourable Judge H.K. Dhillon  
Provincial Court of British Columbia