

LEAF to tell Supreme Court that sex with a condom is different than sex without a condom

July 6, 2021 – When someone consents to sexual activity with a condom, that does not mean they also consent to sex without a condom, says the Women’s Legal Education and Action Fund (LEAF).

Last week, the Supreme Court of Canada determined that LEAF can make submissions to the Court as an intervener in *R. v. Kirkpatrick* when it is heard on November 3, 2021. This case deals with the boundaries of consent to sexual activity under Canadian criminal law. The complainant testified that she insisted the accused use a condom during sex. The first time he used one, but the second time he did not. This raises the question: if someone is asked to use a condom, but they do not comply, is the activity considered consensual? LEAF will submit to the Supreme Court that it is not.

“The right to insist on condom use during sex is fundamental to the equality and autonomy of women and gender-diverse people,” says Pam Hrick, LEAF’s Executive Director & General Counsel. “The Supreme Court’s decision in this case will impact marginalized individuals – including Black, Indigenous, and trans women – who are disproportionately the victims of sexual violence, and often denied the equal protection of the criminal law.”

The *Criminal Code* defines consent as “the voluntary agreement of the complainant to engage in the sexual activity in question.” LEAF will argue that including “sexual activity with a condom” in the definition of “sexual activity in question” promotes substantive equality for equity-seeking groups. Sexual activity with a condom and without a condom are separate acts that require separate consent. This interpretation is a principled approach that affirms and protects the dignity and autonomy of sexual assault complainants, while appropriately limiting the scope of the criminal law.

“We want to ensure that the criminal law develops consistently with principles of substantive equality, while protecting the security and dignity of sexual assault survivors,” says Hrick.

LEAF is grateful to its counsel, Frances Mahon and Kirat Khosa of Mahon & Company, for their *pro bono* representation in this matter, as well as to the members of LEAF’s case committee that are guiding, informing, and supporting this intervention: Andrea Krüsi (University of British Columbia), Joshua Sealy-Harrington (Lincoln Alexander School of Law), and Adriel Weaver (Goldblatt Partners).

Media Contacts

Pam Hrick
Executive Director & General Counsel, LEAF
416-627-9024
pam.h@leaf.ca

Frances Mahon
Mahon & Company
Counsel to LEAF
604-283-1188
frances@mahonlitigation.com

About the Women's Legal Education and Action Fund (LEAF)

The Women's Legal Education and Action Fund (LEAF) is a national not-for-profit that works to advance gender equality in Canada through litigation, law reform, and public legal education.

Since 1985, LEAF has intervened in more than 100 cases that have helped shape the *Canadian Charter of Rights and Freedoms*, responded to violence against women and gender diverse people, pushed back against discrimination in the workplace, allowed access to reproductive freedoms, and provided improved maternity benefits, spousal support, and the right to pay equity.

LEAF understands that women and gender diverse individuals in Canada experience discrimination in different ways, and builds partnerships across communities to inform our understanding of how race, gender identity, sexual orientation, (dis)ability, class, and other intersectional identities underlie legal structures that perpetuate inequality, discrimination, and harm.