

## ***R. v. Kirkpatrick* – Factsheet**

### **What is this case about?**

This case, which will be heard by the Supreme Court of Canada in November 2021, deals with the boundaries of consent to sexual activity under Canadian criminal law.

This case involves a woman who requested that the accused use a condom during sex. The first time he complied, but the second time he did not.

This raises the question: if someone is asked to use a condom but they don't comply, is the activity considered consensual?

### **What does the *Criminal Code* say about consent?**

Section 273.1(1) of the *Criminal Code* defines consent as the “voluntary agreement of the complainant to engage in the sexual activity in question”.

Section 265(3)(c) of the *Criminal Code* states that consent is vitiated if it was obtained by fraud, meaning that even if there was objective consent, it will be considered null in court. In order to prove that consent was vitiated by fraud, the Crown (the prosecution) must prove beyond reasonable doubt two things: a) the accused deceived the complainant; and b) this deception led to a significant risk of serious bodily harm to the complainant.

The question in this case is whether failure to respect a complainant's communicated request about condom use should lead to a finding under s. 273.1 that there was no consent to the “sexual activity in question”, or that there was consent, but it was vitiated by fraud at s. 265(3)(c).

The result of this case will determine how the courts should interpret the phrase “sexual activity in question” in section 273.1 of the *Code* – specifically, whether it should include condom use.

### **How have the courts interpreted the *Criminal Code* provisions on consent?**

There has been uncertainty about how the consent provisions apply to condom use, and courts have taken inconsistent approaches in factoring condom use in the consent provisions.

This is because the Supreme Court of Canada (SCC) released a split judgment in a case called *R. v. Hutchinson* in 2014, where the Court agreed on the outcome, but disagreed on how to interpret the consent provisions. In *Hutchinson*, the accused secretly pricked holes in the condoms he used to have sex with his partner, the complainant; the complainant got pregnant. The complainant testified that she only consented to sex with a condom.

The majority of the SCC in *Hutchinson* interpreted the “sexual activity in question” in section 273.1(1) *Criminal Code* in a restrictive manner to only include the “physical sex act itself”, and ruled that the phrase “does not include conditions or qualities of the physical act, such as birth control measures or the presence of sexually transmitted diseases” (para 54).

The majority’s rationale was that including birth control in the definition of “sexual activity in question” may broaden the scope of criminal liability too much and lead to uncertainty. As a result, the majority ruled that the accused committed sexual assault because condom sabotage qualifies as deception that results in a significant risk of harm, which vitiated the complainant’s consent.

In contrast, the concurring justices in *Hutchinson* disagreed with the majority’s narrow interpretation of “sexual activity in question”. Citing a leading case on consent called *R. v. Ewanchuk* - which established that consent must include agreement on not just *what* the sexual activity is, but also *how* the sexual activity occurs, the concurring justices in *Hutchinson* found that condom use was a component of *how* the sexual activity unfolds and must form a part of the definition of “sexual activity in question” in s. 273.1 of the *Criminal Code*.

Consequently, the concurring judgment ruled that the complainant did not consent to the sexual activity in question under s. 273.1, since the complainant had only consented to sex with a condom and the sexual activity that had occurred – sex with a compromised condom – was a different one for which there was no consent. There was therefore no need to move to the fraud analysis to determine whether consent was vitiated.

### **What were the lower courts’ decisions on this case?**

At trial, the trial judge acquitted the accused, because he found there was no evidence that the complainant had not consented to the sexual activity in question under s. 273.1 of the *Criminal Code*, or that the accused had deceived the complainant into thinking that he was wearing a condom under s. 265(3)(c) of the *Criminal Code*. The Crown appealed.

The Court of Appeal for British Columbia allowed the appeal and ordered a new trial. However, the Court’s reasons were divided as to why the appeal should be allowed, because the justices disagreed on how to interpret the Supreme Court of Canada’s judgment in *Hutchinson*.

### **Why is LEAF concerned about this case?**

LEAF believes that the right to request condom use during sex is fundamental to the equality and autonomy of women and gender-diverse people.

The exclusion of condom use from the definition of “sexual activity in question” has the potential to create a gap in the law and limit the sexual autonomy of those who experience particular and

intersecting forms of marginalization and gendered power imbalances in negotiating sexual activities, including trans and cisgender women and girls, other trans, non-binary, and Two Spirit people, and, in particular, Black, Indigenous and/or racialized members of those communities.

That is why LEAF is intervening in this case to discuss how excluding condom use from the consent analysis will disparately impact not only women and girls, but also Indigenous, Black, and/or racialized person, and/or members of the 2SLGBTQ+ communities.

### **What happens next?**

LEAF has been granted intervener status, and submitted its written arguments on August 11, 2021.

The Supreme Court of Canada will hear this case at 9:30am EST on November 3, 2021, which will be [webcast](#) live.

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