SCC File No. 39287

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

BETWEEN:

ROSS McKENZIE KIRKPATRICK

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

-and-

WOMEN'S LEGAL EDUCATION AND ACTION FUND

Proposed Intervener

FACTUM OF THE INTERVENER, WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. ("LEAF")

(Pursuant to Rule 37 of the *Rules of the Supreme Court of Canada*, S.O.R./2006-203, s. 15; S.O.R./2011-74, s. 19; S.O.R./2016-271, s. 24)

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PART I – OVERVIEW

1. This case is about the right of an individual to set limits on who may touch them, and how. Voluntary consent may include the use of a condom. Interpreting "sexual activity in question" in section 273.1(1) of the *Criminal Code* to include the activity of sex with a condom recognizes and safeguards the autonomy, equality, and dignity of complainants, and promotes substantive equality and access to justice for marginalized individuals.

PART II – LEAF'S POSITION ON THE QUESTION IN ISSUE

2. This appeal concerns the relationship between condom use and consent, including whether condom use is part of the "sexual activity in question" to which subjective consent must be given. LEAF addresses the following questions arising in this appeal:

a. Can the phrase "sexual activity in question" in section 273.1(1) include the use of a condom?

b. Does excluding condom use from the "sexual activity in question" lead to unfair results and decreased access to justice for complainants?

c. If a person consents only to sexual activity with a condom in one instance, does this limited scope of consent to sexual activity apply to subsequent sexual encounters?

PART III – STATEMENT OF ARGUMENT

A. Consent to the "sexual activity in question" can include the use of a condom

3. A person demonstrates autonomy over their physical person by requiring the use of a condom during sex. As held by the majority of this Court in *Ewanchuk*, "[h]aving control over who touches one's body, and how, lies at the core of human dignity and autonomy".[1] LEAF intervenes in this appeal to argue that requiring a condom as a condition of consent forms part of the "how".

4. The British Columbia Court of Appeal identified two potential routes to a finding of sexual assault where sexual activity is conditional on condom use, and a condom is subsequently removed or refused prior to sex.[2] The first approach, as held by Justice Groberman for the majority of the Court, interprets the "sexual activity in question" in section 273.1(1) to include the physical aspects of the act, including the use of a condom. An alternative route, as held by Justice Bennett, is under the fraud analysis in section 265(3)(c) of the *Code*. Justice Bennett concluded, following this Court's decision in *Hutchinson*, that non-consensual condom removal or refusal[3] is a type of deception that can vitiate consent, if the other conditions of the *Hutchinson* analysis are met – a deprivation or a risk of deprivation in the form of serious bodily harm, which results from the deception. LEAF agrees with the majority of the British Columbia Court of Appeal that the first approach is correct in cases of nonconsensual condom removal or refusal.

5. As this Court explained in *Ewanchuk*, sexual assault is criminalized specifically because an individual's right to physical integrity has been a fundamental principle of the common law for centuries.[4] Analyzing cases of nonconsensual condom removal or refusal under the "sexual activity in question" framework respects a person's right to sexual autonomy and to exercise affirmative consent over their body. Justice

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[1] *R. v. Ewanchuk,* [1999] 1 SCR 330 [*Ewanchuk*], at para. 28 [Emphasis added].
[2] *R. v. Kirkpatrick,* 2020 BCCA 136 [*Kirkpatrick*], at paras. 32, 35.
[3] The phrase "condom refusal" does not only refer to verbal refusal, it also includes implicit and unspoken refusal to comply with the complainant's request to use a condom.
[4] *Ewanchuck*, at para. 28.

Groberman's reasoning offers "protection to a person who sets limits on the conditions of sexual activity, and their partner simply chooses to ignore those limits."[5]

6. Sexual activity without a condom is a qualitatively different physical act from sexual activity with a condom. It requires separate, communicated consent.[6] Consent in section 273.1(1) of the *Code* is defined as the voluntary agreement to a specific sexual activity ("the sexual activity in question"). Subsection (2) makes it clear that no consent is obtained where a person "expresses, by words or conduct, a lack of agreement to engage in the activity". If a person's consent is conditional on condom use, and a condom is refused or removed, consent has not been obtained. There is no agreement to the physical sexual activity in question: sex with a condom.

7. The fraud analysis in section 265(3)(c) requires deception and a significant risk of serious bodily harm to establish a vitiation of consent. Sexual assault laws should not solely focus on serious bodily harm, though that could result from nonconsensual condom removal or refusal. The law ought to be fundamentally aimed at protecting the right of an individual to set limits on who may touch them, and how.

8. The question before this Court is whether the complainant's consent to the sexual activity in question – sex with a condom – was respected. The determination of whether a sexual assault occurred should not depend on the manner in which a person's consent is violated and whether that engaged an element of deception, or a risk of serious bodily harm. The question is simply whether a violation of consent was committed.

9. A person may be assaulted by a sexual partner pretending to wear a condom, or by secretly removing a condom before sex. A person may also be assaulted by a partner openly refusing to wear a condom, despite the requirement that a condom be worn for sex, without first obtaining consent to sex without a condom. In all of these scenarios, a condition for the sexual activity was not respected and a sexual assault has occurred.

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[5] *Kirkpatrick,* at para. 43.
[6] *R. v. Barton,* 2019 SCC 33 [*Barton*], at para. 90.

10. The *actus reus* for sexual assault is defined by three elements: touching, the sexual nature of the contact, and the absence of consent.[7] The first two elements are objective and defined in relation to the accused. At the *actus reus* stage, consent is "assessed from the point of view of the complainant, whereas at the *mens rea* stage, the focus shifts to the accused and his steps to ascertain consent."[8] Absence of consent is "subjective and determined by reference to the complainant's subjective internal state of mind at the time it occurred".[9] It is the complainant's state of mind that is determinative. Indeed, the trier of fact must be "only concerned with the complainant's perspective. The approach is purely subjective".[10] A complainant "must subjectively agree to the act, its sexual nature, and the specific identity of their partner or partners."[11]

11. Factors can *prevent* subjective consent or render subjective consent *ineffective* depending on the circumstances.[12] Recently, in *G.F.,* this Court held that "to prevent subjective consent, the factor must prevent a condition of subjective consent from being satisfied. If it does not, then it can only vitiate consent, which entails questions of broad criminal law policy untethered from the conditions of subjective consent".[13] Consent to the "sexual activity in question" is a condition of lawful subjective consent. Subjective consent to sexual activity is prevented where the complainant has consented *only* to sexual activity *with* a condom, and yet a condom is not used.

12. Nonconsensual condom removal and condom refusal prevents subjective consent, satisfying the *actus reus* requirement for sexual assault. In *Ewanchuk,* this Court held that "the trier of fact may only come to one of two conclusions: the complainant either consented or not. There is no third option."[14] The majority of the Court of Appeal in *Kirkpatrick* was correct in finding that the complainant did not consent to sexual activity without a condom.

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[7] *Ewanchuk*, at para. 25.
[8] *R. v. Capewell,* 2020 BCCA 82 [*Capewell*], at para. 52; *Barton*, at paras. 89-90.
[9] *Ewanchuk*, at paras. 25-26.
[10] *Ewanchuk*, at para. 27 [Emphasis added].
[11] *Barton,* at para. 90.
[12] *R. v. G.F.,* 2021 SCC 20 [*G.F.*], at para. 36.
[13] *G.F.,* at para. 41.
[14] *Ewanchuk*

13. This interpretation, which defines sexual activity with a condom as a distinct physical act within the "sexual activity in question" in section 273.1(1) of the *Code*, does not offend the principle of restraint in criminal law. It provides the necessary certainty and will not lead to over-incarceration.

14. As found by this Court in *Hutchinson*, "the criminal law should be used with *appropriate restraint*, to avoid over-incarceration. It draws a line between conduct deserving the harsh sanction of the criminal law, and conduct that is undesirable or unethical but 'lacks the reprehensible character of criminal acts'… The companion of restraint is *certainty*".[15]

15. This Court in *Hutchinson* was concerned that including *deceptive* activities regarding birth control measures might also inadvertently capture *mistakes* about the use of ineffective birth control measures that should not be criminalized, and thereby offend the principle of restraint.[16] There is no such concern with analyzing nonconsensual condom refusal or removal as an aspect of consenting to the sexual activity in question.

16. There is a clear demarcation between using a condom and not using one. There is no mistake made by the person willfully choosing to disrespect the scope and nature of a sexual partner's consent. Requiring individuals to respect a partner's desire to use a condom, when the use of a condom is a paradigmatic negotiated aspect of how a person is sexually touched, does not create legal ambiguity. Nor does including the use of a condom within the meaning of "sexual activity in question" represent a so-called "opening of the floodgates". Requiring the use of a condom sets a reasonable expectation and a limited scope of consent that must be respected unless a person states otherwise. This interpretation is a principled approach that affirms and protects the dignity and autonomy of sexual assault complainants while appropriately circumscribing and directing the ambit of the criminal law.

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[15] *R. v. Hutchinson*, 2014 SCC 19 [*Hutchinson*], at para. 18, citing *R. v. Cuerrier*, [1998] 2 SCR 371 [*Cuerrier*], at para. 133 [Emphasis in original].
[16] *Hutchinson*, at paras. 21, 39, 45-46.

B. Limiting "sexual activity in question" to exclude condom use could lead to unfair results and decreased access to justice for complainants

17. Interpreting the phrase "sexual activity in question" to include sexual activity with a condom promotes substantive equality for equity-seeking groups, by ensuring that a person can voluntarily agree to – and not agree to – the manner in which they are physically touched, and that they may seek justice when their consent is not respected.

18. The exclusion of condom use from the phrase "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. It creates the possibility of further exacerbating inequality for marginalized groups who already experience both higher rates of sexual violence, and limited access to justice, particularly in sexual assault prosecutions.

19. As explained by this Court in *Ewanchuk,* the rationale for criminalizing assault and sexual assault stem from a society "committed to protecting the personal integrity, both physical and psychological, of every individual… [t]he inclusion of assault and sexual assault in the *Code* expresses society's determination to protect the security of the person from any nonconsensual contact or threats of force".[17]

20. Legal remedies for nonconsensual condom removal and condom refusal should not be dependent upon whether those acts vitiate consent and amount to fraud under section 265(3)(c) of the *Code*. Justice Groberman observed that the "absence of fraud in this case should serve as a caution against an expansive reading of paragraph 55 in *Hutchinson*".[18] LEAF agrees with Justice Groberman's analysis in this regard.

21. Excluding nonconsensual condom removal or refusal from the notion of consent is particularly problematic in cases such as *Kirkpatrick* where the facts may or may not support a finding of active deception on the part of the accused, unlike what occurred in

[17] *Ewanchuk*, at para. 28
[18] *Kirkpatrick,* at para. 43.

Hutchinson. Again, the point is not whether a person has been deceived. The point is that the scope of their consent or the nature of the sexual activity to which they agreed should be respected. People who have been sexually assaulted by someone removing or refusing to wear a condom without first obtaining consent should not be denied legal recourse simply because there is no evidence of deception, or risk of serious bodily harm.

22. Where a complainant consents *only* to sex with a condom and the accused disregards the limits of that consent, it cannot be said that the complainant consented to the sexual activity without a condom – there is an absence of consent. It follows that the appropriate outcome, in the absence of fraud, is one that provides a person with legal recourse when their sexual partner chooses to ignore a condition of their consent. To find otherwise would have the effect of compounding inequality for marginalized groups, who already experience limited access to justice, particularly in sexual assault prosecutions.

23. Interpreting "sexual activity in question" to exclude condom use will perpetuate inequality and lead to unfair results. It is imperative for this Court to interpret s. 273.1(1) in a manner that permits sexual partners to exercise sexual autonomy, to have control over <u>how</u> they are touched, and to require their sexual partners to respect their consent.[19] Failing that, sexual partners who ignore the scope of consent being limited to sex with a condom should be held accountable for their actions.

24. In cases where the accused chooses to ignore that a sexual partner consents only to sexual activity using a condom, and there is no evidence of fraud and/or no risk of serious bodily harm, the *Hutchinson* framework simply does not work. There is a gap of accountability for persons who engage in nonconsensual condom removal or refuse to wear a condom altogether, contrary to their sexual partner's communicated consent.

25. Sexual assault law, as it stands, does not provide adequate protection for complainants in these real-world scenarios. Individuals may be reluctant to report instances where a partner exerted control by choosing to ignore that their consent was only to sexual activity with a condom, knowing there is little legal recourse. Victims of

[19] *Ewanchuk,* at para. 28.

nonconsensual condom removal or condom refusal experience emotional and physical harm, akin to being a victim of any other form of sexual assault. To interpret "sexual activity in question" to include the use of a condom, a clear message will be sent to offenders who choose to ignore the scope of their sexual partner's consent and undermine their sexual autonomy.

26. Any gap in the law will be amplified for groups who already experience intersecting forms of discrimination that result in higher rates of sexual assault, and limited access to justice. In *Barton*, this Court referenced the Interim Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, and found that "[t]here is no denying that Indigenous people – and in particular, Indigenous women, girls, and sex workers – have endured serious injustices, including high rates of sexual violence against women".[20]

27. This finding is just one example of the ways in which a person's identity may intersect with the ability to negotiate consent in sexual encounters. That is, certain groups are disproportionately impacted by sexual violence because of power imbalances linked to other experiences of discrimination. LEAF respectfully submits that these experiences are not limited to Indigenous women and girls, and that other groups who face discrimination and marginalization in society are also vulnerable to sexual violence. For example, in *Friesen*, this Court examined the circumstances of child victims of sexual violence, and the disparate and disproportionate impacts on Indigenous children, children in care, children experiencing poverty, persons with disabilities, and LGBT2Q+ youth, finding that these groups may be especially vulnerable to sexual abuse.[21]

28. Limiting how a person may bring forward a complaint of sexual assault will also compound the systemic and substantive inequality experienced by groups already disproportionately impacted by sexual violence.

29. This Court also acknowledged in *Barton*, and indeed on many other occasions, the "detrimental effects of widespread racism against Indigenous people within our criminal

[20] *Barton*, at para. 198.
[21] *R.v. Friesen*, 2020 SCC 9 [*Friesen*], at paras. 70-73.

justice system".[22] Experiencing racism within the criminal justice system is not limited to being subjected to racist stereotyping or overincarceration as an accused person. It also includes being treated fairly as a complainant and having adequate and fair access to the justice system.

C. Consenting only to sexual activity with a condom limits the scope of consent in all sexual encounters, unless stated otherwise

30. Consent entails "the conscious agreement of the complainant to engage in every sexual act in a particular encounter".[23] Where a sexual partner indicates they are solely consenting to the activity of sex with a condom, their partner must take reasonable steps in the circumstances to ascertain whether consent is still limited to that activity, before deciding not to use a condom.

31. Accused persons may not avail themselves of the defence of honest but mistaken belief in consent where they failed to take positive and active steps to ascertain consent, since there will be no air of reality to the defence.[24] Moreover, sexual partners are not entitled to assume from the circumstances of the sexual activity or the nature of their relationship that a person is consenting to all types of sexual activity.[25]

32. Thus, when a person states that they consent *only* to sexual intercourse using a condom, it is not a valid defence to assume – without confirming that the complainant had expanded the scope of the sexual activity to which they consented – that there is consent to sexual intercourse without a condom during subsequent sexual activity.

33. Further, section 273.1(2)(d) states there can be no consent if the "complainant expresses by words or conduct, a lack of agreement to engage in the activity". If a sexual partner expresses a lack of agreement to engage in sexual activity without a condom, there can be no consent. Similarly, if a person who consents to engage in sexual activity without a condom at first, but then expresses a lack of agreement to continue to engage

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[22] *Barton*, at para. 199.
[23] *Ewanchuk,* at para. 26.
[24] *R. v. Gagnon*, 2018 SCC 41 [*Gagnon*]
[25] See, e.g. *Barton,* at para. 118; *Ewanchuk,* at para. 31.

in the activity[26] and consents only to sexual activity *with* a condom, their consent to sexual activity *without* a condom is withdrawn unless a condom is used. Consent must be re-established for subsequent acts.

34. It is an "error of law for the accused to believe that the complainant is still consenting" after they express, by words or conduct, a lack of agreement to continue to engage in that activity.[27] Parliament intended for people to be "capable of revoking their consent at any time during the sexual activity" under section 273.1(2)(e).

35. Irrespective of whether a person expresses revocation of their consent to the sexual activity in question, it is their state of mind that matters for the *actus reus* of sexual assault. An "absence of consent is established if the complainant was not experiencing the state of mind of consent while the sexual activity was occurring."[28] For a person who only consents to engaging in sexual activity with a condom, there is no consent to engaging in sexual activity without one, unless stated otherwise.

PART IV & V – COSTS & ORDERS

36. LEAF is a non-profit organization represented on this appeal by counsel acting *pro bono.* LEAF does not seek costs and asks that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of August 2021.

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[26] *Criminal Code*, s.273.1(e)
[27] R. v. *J.A.*, [2011] 2 SCR 440 [*J.A.*], at para. 40.
[28] *J.A.*, at para. 45

PART VI – TABLE OF AUTHORITIES

	Authority	Cited at Paragraph No.
1.	*R. v. Ewanchuk,* [1999] 1 SCR 330	3, 5, 9, 10, 12, 19, 23, 30
2.	*R. v. Kirkpatrick,* 2020 BCCA 136	4, 5, 12, 20, 21
3.	*R. v. Barton*, 2019 SCC 33	6, 10, 26, 29, 31
4.	*R. v. Capewell,* 2020 BCCA 82	10
5.	*R. v. G.F.,* 2021 SCC 20	11
6.	*R. v. Hutchinson,* 2014 SCC 19	4, 14, 15, 20, 21, 24
7.	*R. v. Cuerrier,* [1998] 2 SCR 371	14
8.	*R. v. Friesen,* 2020 SCC 9	27
9.	*R. v. Gagnon*, 2018 SCC 41	31
10.	*R. v. J.A.,* [2011] 2 SCR 440	34, 35
	Legislation	
11.	*Criminal Code of Canada s. 273.1(e)* *Code Criminel, s. 273.1(e)*	1, 4, 6, 13, 19, 20, 33