File No. 39287

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

ROSS McKENZIE KIRKPATRICK

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

ATTORNEY GENERAL OF ONTARIO,
ATTORNEY GENERAL OF ALBERTA,
WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.,
WEST COAST LEGAL EDUCATION AND ACTION FUND ASSOCIATION,
BARBRA SCHLIFER COMMEMORATIVE CLINIC,
HIV & AIDS LEGAL CLINIC ONTARIO AND HIV LEGAL NETWORK and
CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

INTERVENERS

FACTUM OF THE INTERVENER,
WEST COAST LEGAL EDUCATION AND ACTION FUND ASSOCIATION
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

Counsel for the Intervener, West Coast Legal Education and Action Fund Association:

JESSICA LITHWICK
JENNIFER CROSMAN
SUGDEN, MCFEE & ROOS LLP
700 – 375 Water Street
Vancouver, BC V6B 5C6
Telephone: (604) 259-0846
Fax: (604) 687-5596
Email: jlithwick@smrlaw.ca

Agent for the Intervener, West Coast Legal Education and Action Fund Association:

MAXINE VINCELETTE
POWER LAW
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4
Telephone: (613) 702-5573
Fax: (613) 702-5573
Email: mvincelette@juristespower.ca

Co-counsel for the Intervener, West Coast Legal Education and Action Fund Association:

KATE FEENEY
WEST COAST LEGAL EDUCATION AND ACTION FUND ASSOCIATION
409 Granville Street
Vancouver, BC V6C 1T2
Telephone: (604) 684-8772
Email: kfeeney@westcoastleaf.org

Counsel for the Appellant:

PHILIP W. COTE
COTE & EVANS TRIAL LAWYERS
303 – 6321 King George Boulevard
Surrey, BC V3X 1G1
Telephone: (778) 395-6200
Fax: (778) 395-6226
Email: pcote@coteevans.ca

Agent for Counsel for the Appellant:

MOIRA S. DILLON
SUPREME LAW GROUP
900 – 275 Slater Street
Ottawa, ON K1P 5H9
Telephone: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

Counsel for the Respondent:

JOHN R.W. CALDWELL
JANET DICKIE
ATTORNEY GENERAL OF BRITISH COLUMBIA
CRIMINAL APPEALS AND SPECIAL PROSECUTIONS
865 Hornby Street, 6th Floor
Vancouver, BC V6Z 2G3
Telephone: (604) 660-1126
Fax: (604) 660-1142
Email: john.caldwell@gov.bc.ca

Agent for Counsel for the Respondent:

MATTHEW ESTABROOKS
GOWLING WLG (CANADA) LLP
2600 – 160 Elgin Street
PO Box 466, Stn A
Ottawa, ON K1P 1C3
Telephone: (613) 786-0211
Fax: (613) 788-3573
Email: matthew.estabrooks@gowlingwlg.com

Counsel for the Intervener, Attorney General of Ontario:

DENA BONNET
REBECCA DE FILIPPIS
ATTORNEY GENERAL OF ONTARIO
CROWN LAW OFFICE CRIMINAL
720 Bay Street, 10th Floor
Toronto, ON, M7A 2S9
Telephone: (416) 326-4600
Fax: (416) 326-4656
Email: dena.bonnet@ontario.ca

Counsel for the Intervener, Attorney General of Alberta:

CHRISTINE RIDEOUT, Q.C.
ATTORNEY GENERAL OF ALBERTA
3rd Floor, Centrium Place
300 - 332 6 Avenue, S.W.
Calgary, AB T2P 0B2
Telephone: (403) 297-6005
Fax: (403) 297-3453
Email: christine.rideout@gov.ab.ca

Agent for the Intervener, Attorney General of Alberta:

D. LYNNE WATT
GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Telephone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Counsel for the Intervener, Women's Legal Education and Action Fund:

FRANCES MAHON
HARKIRAT KHOSA
MAHON & COMPANY
1555 - 1500 West Georgia Street
Vancouver, BC V6G 2Z6
Telephone: (604) 283-1188
Fax: (604) 608-3319
Email: frances@mahonlitigation.com

Counsel for the Intervener, Barbra Schlifer Commemorative Clinic:

JOANNA BIRENBAUM
BIRENBAUM LAW
555 Richmond St. W. , Suite 1200
Toronto, ON M5V 3B1
Telephone: (647) 500-3005
Fax: (416) 968-0325
Email: joanna@birenbaumlaw.ca

Agent for the Intervenor, Barbra Schlifer Commemorative Clinic:

NADIA EFFENDI
BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9
Telephone: (613) 787-3562
Fax: (613) 230-8842
Email: neffendi@blg.com

Counsel for the Intervener, HIV & AIDS Legal Clinic Ontario and HIV Legal Network:

KHALID JANMOHAMED
RYAN PECK
RICHARD ELLIOTT
LINCOLN ALEXANDER SCHOOL OF LAW
350 Victoria Street
Toronto, ON M5B 2K3
Telephone: (416) 434-6809
Email: khalidj@ryerson.ca

Agent for the Intervenor, HIV & AIDS Legal Clinic Ontario and HIV Legal Network:

MARIE-FRANCE MAJOR
SUPREME ADVOCACY LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3
Telephone: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Co-Counsel for the Intervener, HIV & AIDS Legal Clinic Ontario and HIV Legal Network:

ROBIN NOBLEMAN
HIV & AIDS LEGAL CLINIC ONTARIO
1400 – 55 University Avenue
Toronto, ON M5J 2H7
Telephone: (416) 340-7790 ext 4043
Email: noblemar@lao.on.ca

Counsel for the Intervenor, Criminal Lawyers' Association (Ontario):

MARK C. HALFYARD
KATE ROBERTSON
DANIEL BROWN LAW LLP
36 Lombard Street, Suite 100
Toronto, ON M5C 2X3
Telephone: (416) 297-7200 Ext: 102
Fax: (855) 367-7566
Email: halfyard@danielbrownlaw.ca

Agent for the Intervenor, Criminal Lawyers' Association (Ontario):

COLLEEN BAUMAN
GOLDBLATT PARTNERS LLP
500 – 30 Metcalfe Street
Ottawa, ON K1P 5L4
Telephone: (613) 482-2463
Fax: (613) 235-3041
Email: cbauman@goldblattpartners.com

TABLE OF CONTENTS

PART I – Overview and Statement of Facts

1. Violative condom practices are a widespread and increasingly recognized form of sexual violence. A violative condom practice takes place when a person overrides or disregards their sexual partner's conditional consent to penetrative sex with a condom only. In this appeal, this Court is asked to determine the scope of the criminal law's protection of survivors of such abuse.

2. This Court is asked to clarify whether sex with a condom and sex without a condom can constitute different sexual acts for the purposes of s. 273.1(1) of the *Criminal Code,* R.S.C. 1985, c. C-46 (the "*Criminal Code*"). If the answer is no, a violative condom practice only constitutes a sexual assault in cases where the Crown can prove that fraud vitiated the complainant's consent pursuant to s. 265(3)(c). To prove consent-vitiating fraud, the Crown must prove both deceit and a deprivation in the form of a significant risk of serious bodily harm.

3. In this submission, the West Coast Legal Education and Action Fund ("West Coast LEAF") supports a definition of consent under s. 273.1(1) that recognizes that sex with a condom and sex without a condom are different sexual acts. West Coast LEAF submits that the harm caused by requiring the Crown to prove a significant risk of serious bodily harm in all violative condom practice cases would be both significant and unnecessary.

4. The fraud analysis revictimizes survivors of violative condom practices by requiring them to disclose intensely private and often stigmatizing information to police officers, Crown and defence counsel, the accused, and the court, in addition to discussing the details of a disenfranchising sexual encounter. The need for the complainant to testify, and possibly to disclose medical records, in order to address the deprivation requirement potentially opens the door to multifarious intrusions on their privacy, equality and security interests. The harm caused by the deprivation inquiry is not only concerning on the individual level. It operates within a criminal justice system which, despite making significant strides, continues to perpetuate the inequality of sexual assault complainants. It is submitted that, when deciding whether sex with a condom and sex without a condom are different sexual acts, this Court must consider the effects of its analysis on survivors' confidence in, and access to, justice.

5. The harms caused by the deprivation requirement are avoided if the law recognizes the unifying element of violative condom practices which requires criminal sanction: the autonomy-

denying decision to exceed the consent given by the complainant. This can be done while still preserving the law of HIV non-disclosure as developed by this Court in *R. v. Cuerrier*, 2 S.C.R. 371 ("*Cuerrier*"). There are significant immediate physical differences between sex with a condom and sex without a condom and, as such, there is a clear and principled reason to recognize that a complainant who has consent to sex with a condom has not consented to sex without a condom.

PART II – POSITION WITH RESPECT TO THE QUESTIONS IN ISSUE

6. Penetrative sex with a condom is a different "sexual activity" than sex without a condom for the purposes of section 273.1 of the *Criminal Code*.

PART III – ARGUMENT

A. Violative Condom Practices and Issue at Bar

7. Overriding or disregarding a person's conditional consent to sex with a condom only is a form of sexual violence regardless of whether it has health implications. Violative condom practices, including condom sabotage and secretly removing a condom during sex (commonly referred to as "stealthing") ultimately deprive survivors of their physical integrity, autonomy, and dignity.[1] This case concerns the allegation that Mr. Kirkpatrick committed such an act by breaking his promise to the complainant to wear a condom and then ejaculating inside of her vagina.

8. The Appellant submits that pursuant to *R v Hutchinson*, 2014 SCC 19 ("*Hutchinson*"), a violative condom practice only constitutes sexual assault in cases where the complainant's consent was vitiated by fraud. As set out in *Cuerrier*, to prove consent-vitiating fraud, the Crown must prove both deceit and a deprivation (i.e., proof of a significant risk of serious bodily harm).[2]

9. West Coast LEAF concurs with the Respondent and other interveners in this appeal that only protecting victims when the Crown can prove that there has been a significant risk of serious

---

[1] See Allira Boadle et al, "Young Women Subjected to Non-consensual Condom Removal: Prevalence, Risk Factors, and Sexual Self-Perceptions" (2020) 27:10 Violence Against Women 1169; Konrad Czecowski et al, "'That's not what was originally agreed to': Perceptions, outcomes and legal contextualization of non-consensual condom removal in a Canadian sample" (2019) 14:7 Plos One 1.

[2] *R v Cuerrier*, [1998] 2 SCR 371 at para 35 **[*Cuerrier*]**.

bodily harm is an overly narrow approach which impoverishes sexual assault law.[3] Such an approach problematically creates a discrete zone in the law of sexual assault wherein a violation of the complainant's physical integrity is insufficient to merit criminal sanction. As addressed below, it also unnecessarily causes criminal investigations and prosecutions to proceed in a manner that risks piling harm upon harm for survivors seeking redress through the criminal justice system.

B. The Deeply Invasive Deprivation Enquiry

10. The Crown's burden to prove that the accused put the complainant at a significant risk of serious bodily harm puts the complainant's health at issue. The court is asked to determine both which bodily risks resulted and whether those risks were "significant".

11. Courts have largely interpreted the deprivation requirement in terms of risks and harms to the complainant's physical health. To date, these deprivations include unwanted pregnancy;[4] risk of unwanted pregnancy;[5] HIV transmission;[6] risk of HIV transmission;[7] adverse reaction to post-HIV exposure prophylactic medication;[8] and transmission of genital herpes.[9]

12. There is also some legal basis to conclude that significant psychological distress can meet the deprivation requirement.[10] However, the case law is mixed[11] and there is concern that recognizing psychological harms as sufficient to meet the deprivation requirement could lead to

---

[3] See Factum of the Respondent, dated July 29, 2021; Factum of the Legal Education and Action Fund; Factum of the Barbra Schlifer Memorial Clinic. See also Isabel Grant, "The Complex Legacy of *R v Cuerrier*: HIV Non-Disclosure Prosecutions and Their Impact on Sexual Assault Law" (2020) 58:1 Alta L Rev 45.
[4] *R v Hutchinson*, 2014 SCC 19 at paras 70-71 **[*Hutchinson*]**.
[5] *R v Lupi*, 2019 ONSC 3713 at paras 38-40 **[*Lupi*]**.
[6] *Cuerrier*, *supra* note 2 at para 128; *R v Mabior*, 2012 SCC 47 at para 84.
[7] *Cuerrier*, *supra* note 2 at para 128.
[8] *R v Kirkpatrick*, 2020 BCCA 136 at para 119 **[*Kirkpatrick*]**; *Lupi*, *supra* note 5 at paras 35-40.
[9] *R v H(J)*, 2012 ONCJ 753.
[10] *Lupi*, *supra* note 5 at paras 36-37 (the type of harm capable of vitiating consent is not necessarily limited to bodily harm); *HMTQ v Chen*, 2003 BCSC 984 at paras 35-36, aff'd 2008 BCCA 523 (a substantial interference with psychological integrity beyond mere "mental distress" could meet the deprivation requirement) **[*Chen*]**.
[11] *R v Thompson*, 2018 NSCA 13 at paras 30-48 (even significant psychological harm does not vitiate consent in the HIV non-disclosure context).

the unwanted consequence of expanding the criminalization of HIV non-disclosure.[12]

13. As a result of the requirement to prove a significant risk of serious bodily harm, a complainant's health and healthcare decisions are an integral part of the investigation into and prosecution of a violative condom practice. Such information may include sensitive and/or stigmatizing information about a complainant's unwanted pregnancy, abortion, fertility, menopausal status, contraception practices, sexually transmitted infection(s), assigned sex at birth (where it affects fertility), and (perhaps) mental health. Each of these categories of information may speak to either or both of the complainant's pre-existing vulnerability to pregnancy and/or STI infection and the ultimate question of whether the accused's conduct actually caused the complainant harm (or risk thereof).

14. At the start, the complainant must provide such sensitive information for scrutiny to the police.[13] If charges are approved, a complainant, who may not be a willing participant by that time, may then be subject to invasive and humiliating questioning by both Crown and defence counsel, as well as applications by defence counsel for disclosure or use of the complainant's private health records. Factors such as the wide berth granted upon cross-examination[14] and the rigors of the "significant risk of serious bodily harm" standard mean that such inquiries could be expansive.

15. The accused's right to disclosure and the open court principle create risk that the complainant's personal information will seep out of the criminal process. This not only results in further erosion of the complainant's privacy, but may pose safety risks to the complainant and/or subject them to social repercussions. For example, the choice to have an abortion remains stigmatized in many communities. For these reasons, many complainants will not only be embarrassed at the police station or on the stand, they may also be afraid.

---

[12] Grant, *supra* note 3 at 20.

[13] The Honourable Michel Bastarache, Final Report of the Merlo Davidson Settlement Agreement, *Broken Dreams, Broken Lives: The Devastating Effects of Sexual Harassment on Women in the RCMP*, (Ottawa: Merlo/Davidson Settlement, 2020) at II; House of Commons, *Systemic Racism in Policing in Canada: Report of the Standing Committee on Public Safety and National Security*, (June 2021) (Chair: Hon. John McKay)

[14] See Sidney N Lederman, Alan W Bryant, Michelle K Fuerst, *Sopinka, Lederman & Bryant - The Law of Evidence in Canada*, 5th ed (Toronto: Lexis Nexis, 2018) at para 16.130.

16. The intensely personal nature of the information that may be required to substantiate the deprivation requirement is well-demonstrated by the Ontario Superior Court's reasons on appeal in *R. v. Lupi*, 2019 ONSC 3713. In that case, the accused was convicted of sexual assault after the trial judge found that he had penetrated the complainant without a condom without her consent. One argument the accused raised on appeal was that consent was not vitiated by fraud because there was no risk of serious bodily harm.[15] Justice Roberts rejected that argument, holding:

> [37] …She was deeply and obviously traumatized by Mr. Lupi's surreptitious removal of the condom part way through sexual intercourse. She testified that she broke down in tears in the moment, and became hysterical after leaving Mr. Lupi's apartment. She went to see her doctor the next morning and began a course of prophylactic treatment for pregnancy and STDs, including HIV, which required months of treatment, including regular checks to ensure that her liver function was not compromised by the medication she was required to take for the treatment. During her testimony at trial, she described the psychological effect of what happened as making her "suspicious of men". She noted that she "probably cried every day for two months" and that "it's bothered me since the day it happened", elaborating:
>
> > [S]ometimes I feel like I'm not even in my body. Like I feel faint and it's hard to focus….at times I felt like my personal safety is threatened. I don't know who this guy is….He takes a boxing class. [Transcript, Vol.1, pp.47-49]
>
> [38] In addition, based on Ms. V's decision to take the "Plan B" treatment, or morning after pill, to prevent unwanted pregnancy…

17. Many complainants will be deterred by the prospect discussing such sensitive information and will avoid or seek to withdraw from the criminal process. Complainants who wish to withdraw but are compelled by subpoena face a heightened risk of trauma and revictimization.[16]

18. The broader dynamics in which the deprivation requirement operates must also be borne in mind. The complainant is already engaged in a very challenging exercise: discussing the details of an abusive sexual encounter within a criminal process which has a long history of failing to deliver justice to complainants. Requiring a complainant to relinquish control over private,

---

[15] *Lupi*, *supra* note 5 at para 32.

[16] Boadle et al, *supra* note 1 at 4-6 on the potential psychosocial harms of violative condom practices.

sensitive, and perhaps stigmatizing information compounds the difficulty of the complainant's participation in the administration of criminal justice.

C. The Deprivation Inquiry Leads to Regressive Analyses

19. The requirement for a "significant risk of serious bodily harm" calls for consideration of the cause and degree of the harm suffered by the complainant. Depending on the nature of the Crown's case, this may open the door to regressive and harmful results, such as reduced protection of the law for complainants for arbitrary reasons and/or the admission of sexual history evidence adduced by the defence to raise a reasonable doubt as to the presence of a deprivation.

20. As the case at bar and *Lupi*, *supra*, demonstrate, the availability of evidence that speaks to the deprivation requirement is impacted by arbitrary factors such as the complainant's personal characteristics and/or circumstances. For example, in the case at bar, the complainant's post-assault actions comprised a key ingredient of the Crown's case. A majority of the Court of Appeal concluded that there was sufficient evidence of deprivation to survive a no evidence motion because the complainant suffered serious side effects after following medical advice and undergoing treatment to prevent potential HIV infection.[17] If the complainant had not accessed timely medical care, the Crown's case regarding deprivation would have been weaker.

21. There are however several reasons why survivors of similar violations might not be able to provide evidence of similar consequential harm. Some complainants may not be psychologically ready to seek medical care within the brief time frame required to take prophylactic medication. Others may face barriers to accessing health care because of their experiences of marginalization or oppression, or because of where they live.[18] Still others may not know about the accused's

---

[17] *Kirkpatrick, supra* note 8 at para 119 (per Bennett JA, dissenting) and para 124 (per Saunders JA, concurring with Bennett JA on this issue).

[18] Brenda L Gunn, "Ignored to Death: Systemic Racism in the Canadian Healthcare System" (2017) Submission to EMRIP the Study on Health, online: UN Human Rights Office <https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Health/UniversityManitoba.pdf>; Annette Browne, "Issues Affecting Access to Health Services in Northern, Rural and Remote Regions of Canada", online: University of Northern British Columbia <https://www2.unbc.ca/sites/default/files/sections/northern-studies/issuesaffectingaccesstohealthservicesinnorthern.pdf>; Hon. Dr. M.E. Turpel-Lafond (Aki-Kwe), Addressing Racism Review: Summary Report, *In Plain Sight: Addressing Indigenous-specific Racism and Discrimination in B.C. Health Care*, (Victoria: Minister of

conduct until it is too late. For such survivors, the deprivation requirement is less likely to be met.

22. If significant psychological harm alone qualifies as "serious bodily harm" for the purposes s. 265(3)(c) of the *Criminal Code*, the problem is even starker. Complainants who are less traumatized or more stoic or who do not have insight into their symptoms will receive less protection from the criminal law. Needless to say, this is deeply problematic. Whether or not the complainant "cried every day for two months" should not determine whether the law will recognize the violation the complainant has survived.[19] Such reasoning is regressive and shows the dangers of diverting from the autonomy-protecting goals of the general law of sexual assault.

23. It is also conceivable that evidence of a complainant's sexual history could become relevant to the defence as a result of the deprivation requirement. For example, if the Crown's case on the issue of deprivation rested upon evidence of the complainant's aborted unwanted pregnancy, an accused could attempt to raise a reasonable doubt by tendering evidence that the complainant was already pregnant before the sexual encounter at issue.[20] The highly prejudicial nature of such evidence is well-established and the justice system has repeatedly faltered in its attempts to eradicate the prejudicial and problematic reasoning that results in a complainant's broader sexual history from being unnecessarily aired at trial.[21] The problem is resolved if a complainant is entitled to consent to sex with a condom only, regardless of their reason for doing so.

D. Systemic Harm: Perpetuating Harm and Disadvantage

24. In considering the impact (and necessity) of the deprivation inquiry in the context of violative condom practice cases, the vulnerable position of sexual assault survivors within and outside the criminal justice process must be considered.

25. Sexual assault is the most underreported criminal offence in Canada.[22] It is also an

---

Health, 2020), online: <https://engage.gov.bc.ca/app/uploads/sites/613/2020/11/In-Plain-Sight-Summary-Report.pdf.>

[19] *Lupi*, *supra* note 5 at para 37. See also *Chen*, *supra* note 10 at paras 35-36.

[20] *R v Boone*, 2016 ONCA 227 at para 42.

[21] *R v Barton*, 2019 SCC 33 at para 56; *Criminal Code*, s 276.

[22] Statistics Canada, *Criminal Victimization in Canada, 2014*, by Samuel Perreault, Catalogue No 85-002-X (Ottawa: Statistics Canada, 23 November 2015) at 3; *R v Seaboyer*, [1991] 2 SCR 577 at para 171.

overwhelmingly gendered crime[23] which disproportionately affects people who experience overlapping inequalities because of their membership in more than one marginalized group, such as Indigenous women and sex workers.[24] Therefore, despite the significant strides that have been made, these groups are not yet receiving "equal protection and equal benefit of the law" as they are promised pursuant to s. 15 of the *Charter*. This will not improve unless unnecessary barriers to survivors' access to justice are removed.

26. All complainants must endure disclosing deeply personal information to the police regarding a violating sexual encounter and, if that hurdle is passed, to members of the bench and bar, as well as the accused. They do so in the social and legal context which, despite over 30 years of reforms, is still rife with gender hierarchies, myths and stereotypes about sexual assault, and victim blaming.[25] As a result, many survivors lack confidence in and/or feel alienated from the justice system.[26]

27. For complainants who experience overlapping inequalities, these problems are particularly acute. They not only experience excessive rates of sexual violence, but also face greater barriers to accessing the criminal justice system because of profound power differentials with members of the administration of justice and greater susceptibility to myths, stereotypes and bias.[27]

28. As recently recognized by the majority of this Court in *R. v. Barton*, 2019 SCC 33:

> [1] We live in a time where myths, stereotypes, and sexual violence against women[1] — particularly Indigenous women and sex workers — are tragically common. Our society has yet to come to grips with just how deep-rooted these issues truly are and just how devastating their consequences can be. Without a doubt, eliminating myths, stereotypes, and sexual violence against women is one of the more pressing challenges we face as a society. While serious efforts are being made by a range of actors to address and remedy these failings both within the criminal justice system and throughout

---

[23] Jennifer Koshan, "Disclosure and Production in Sexual Violence Cases: Situating Stinchcombe" (2002) 40:3 Alta L Rev 655 at 657; Caroline White, Joshua Goldberg, "Expanding Our Understanding of Gendered Violence: Violence Against Trans People and Their Loved Ones" (2006) 25:1/2 Canadian Woman Studies 124 at 125.
[24] Koshan, *supra* note 24 at 657; Statistics Canada, *supra* note 22 at 17.
[25] Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal: McGill-Queen's University Press, 2018).
[26] *Ibid.*
[27] *Ibid* at 10.

> Canadian society more broadly, this case attests to the fact that more needs to be done. Put simply, we can — and must — do better.

29. Taking the above into account, the deprivation requirement as applied to violative condom practice cases has the potential to contribute to the system's larger deficits in protecting survivors of sexual assault. Concerning this Court's call on the legal system to "do better", it is submitted that this appeal presents an opportunity to do just that. As addressed above, the deprivation inquiry creates the risk of significant harm. As addressed below, that risk is unnecessary.

E. Dismissing the Appeal on this Point Need Not Affect the Law of HIV Non-Disclosure

30. Unlike the harm of HIV non-disclosure, the violation that occurs upon the commission of a violative practice extends beyond subjecting the complainant to health-related risks. The abuse that unites all violative condom practice cases is the denial of the complainant's right to consent to the way that their body is touched and the resulting insult to the complainant as an autonomous person who has a right to maintain their physical integrity.

31. The fact that the abusiveness of a violative condom-related act extends beyond putting a complainant at risk of a negative health outcome is illustrated by a growing body of social science research,[28] the facts of *Hutchinson* and the case at bar. In *Hutchinson*, the accused committed repeated acts of surreptitious condom sabotage in order to cause the complainant to become pregnant and prevent her from ending their relationship.[29] His conduct would have been a form of intimate partner violence even if his plan had failed. In the case at bar, the complainant not only sought prophylactic treatment to prevent HIV transmission, she was also distressed by Mr. Kirkpatrick's flagrant disregard for her boundaries and viewed his actions as rape.[30]

32. The criminal law can and should recognize these violations in a principled way without threatening to undermine the law on HIV non-disclosure and the crucial goal of preventing the over-criminalization of HIV non-disclosure as discussed in *Cuerrier* and *R. v. Mabior*, 2012 SCC 47.[31] This is because there is a clear distinction between the personal characteristics of the accused,

---

[28] *Ibid*.
[29] *R v Hutchinson*, 2013 NSCA 1 at paras 3- 4.
[30] Respondent's Factum at paras 17-18.
[31] *Hutchinson, supra* note 4 at paras 42-54.

which should not form part of the consent analysis, and the act of wearing a condom.

33. A condom is an immediate, physical, visible and easily changeable element of a sexual encounter that has implications for its intimacy. Condom-less sex entails fuller genital skin-to-skin contact and the potential receipt of one's partner's bodily fluids. A condom creates a physical boundary between participants and both participants must consent to the removal of that boundary.

34. In sum, unlike HIV non-disclosure, the reprehensibility of violative condom practices exists whether or not the complainant is exposed to a significant risk of serious bodily harm. Liability for a violative act relating to condom use should not turn on a requirement for health implications for the complainant. The law can recognize as much while still preventing the over-criminalization of people living with HIV by recognizing that sex with a condom and sex without a condom are different sexual acts.

F. Conclusion

35. The decision of the majority of the British Columbia Court of Appeal should be confirmed. The fraud analysis unnecessarily puts the health of the person violated under the microscope in order to determine the accused's criminal liability. This further disenfranchises the complainant and also impoverishes the law of sexual assault by failing to recognize a serious affront to the claimant's right to physical integrity as sufficient to ground criminal liability.

PART IV – Submission on Costs

36. West Coast LEAF seeks no costs and asks that none be awarded against it.

PART V – Order Sought

37. West Coast LEAF does not seek any orders.

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

for Jessica Lithwick, Kate Feeney and Jennifer Crosman
Counsel for West Coast LEAF

PART VI – TABLE OF AUTHORITIES

JURISPRUDENCE	**PARA(S)**
R v Barton, 2019 SCC 33	23, 28
R v Boone, 2016 ONCA 227	23
HMTQ v Chen, 2003 BCSC 984, aff'd 2008 BCCA 523	12, 22
R v Cuerrier, [1998] 2 SCR 371	5, 8, 11, 32
R v Hutchinson, 2013 NSCA 1	31
R v Hutchinson, 2014 SCC 19	8, 11, 32
R v H(J), 2012 ONCJ 753	11
R v Kirkpatrick, 2020 BCCA 136	11, 20
R v Lupi, 2019 ONSC 3713	11-12, 16, 20, 22
R v Mabior, 2012 SCC 47	11, 32
R v Seaboyer, [1991] 2 SCR 577	25
R v Thompson, 2018 NSCA 13	12
SECONDARY SOURCES	**PARA(S)**
The Honourable Michel Bastarache, Final Report of the Merlo/Davidson Settlement Agreement, *Broken Dreams, Broken Lives: The Devastating Effects of Sexual Harassment on Women in the RCMP* (Ottawa: Merlo/Davidson Settlement, 2020)	14
Allira Boadle et al, "Young Women Subjected to Non-consensual Condom Removal: Prevalence, Risk Factors, and Sexual Self-Perceptions" (2020) 27:10 Violence Against Women 1169.	7, 17
Annette Browne, "Issues Affecting Access to Health Services in Northern, Rural and Remote Regions of Canada"	21
Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal: McGill-Queen's University Press, 2018)	26-27, 31
Konrad Czecowski et al, "'That's not what was originally agreed to': Perceptions, outcomes and legal contextualization of non-consensual condom removal in a Canadian sample" (2019) 14:7 Plos One 1	7
Isabel Grant, "The Complex Legacy of *R. v. Cuerrier*: HIV Non-Disclosure Prosecutions and Their Impact on Sexual Assault Law" (2020) 58:1 Alta L Rev 45	9, 12
Brenda L Gunn, "Ignored to Death: Systemic Racism in the Canadian Healthcare System" (2017) Submission to EMRIP the Study on Health	21
House of Commons, *Systemic Racism in Policing in Canada: Report of the Standing Committee on Public Safety and National Security*, (June 2021) (Chair: Hon John MacKay)	14