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The Canadian Centre for Legal Innovation in Sexual Assault Response

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The Corrosive Implications of *R. v. Hutchinson* for the Law of Consent

New research by **Lise Gotell** finds that the Supreme Court of Canada's interpretation of "voluntary agreement to the sexual activity in question" in *R. v. Hutchinson* undermines Canada's affirmative consent standard.

CONTEXT

The Supreme Court of Canada [SCC] has defined the purpose of sexual assault law as the protection of sexual autonomy, controlling "who touches one's body and how" (*R. v. Ewanchuk*, [1999] 1 SCR 330 at para 28). At issue in *R. v. Hutchinson* (2014 SCC 19) [Hutchinson], a case in which an accused poked holes in a condom, causing a woman to become pregnant, was the question of what one consents to when agreeing to sexual activity. When someone has made it clear that she would not agree to unprotected sexual intercourse, does the sabotage of condoms mean that there was no consent? To avoid criminalizing trivial sexual lies, the majority decided that "voluntary agreement to the sexual activity in question" (s. 273.1(1) of the *Criminal Code*) means agreeing to the sexual nature of the activity, to the identity of one's sexual partner, and to the "physical sex act itself" (para 52). The majority determined that condom use is not included within the meaning of "sexual activity in question." Instead of deciding that there was no consent to unprotected vaginal intercourse, the Court upheld the accused's conviction on the basis that he had engaged in sexual fraud that caused a risk of serious bodily harm (unwanted pregnancy), thereby negating the complainant's consent. This article explores the consequences of defining the scope of consent so narrowly that it does not include something as important as condom use.

OVERVIEW

The article traces the implications of *Hutchinson* by examining *R. v. Dadmand* (2016 BCSC 1565), a case of sexual scamming, as well as *R. v. Barton* (2019 SCC 33), a tragic case in which an Indigenous woman died from injuries caused by the accused in the context of an arrangement of sex for payment. Gotell argues that a narrow understanding of the "sexual activity in question," combined with a concept of sexual fraud that is focused on the risk of bodily harm, can work against the recognition of serious acts of sexual violence.

KEY FINDINGS

- In *Hutchinson*, the majority failed to acknowledge condom sabotage as reproductive coercion, a practice that is correlated with domestic violence and that reinforces women's inequality.
- The SCC's conclusion that condom use is not part of "the sexual activity in question" was influenced by Canadian law's approach to HIV non-disclosure. If voluntary agreement to "the sexual activity in question"

could be invalidated by condom sabotage, the concern was that other conditions, such as the failure to disclose one's HIV status, could also negate agreement, even where the risk of bodily harm is minimal.

- *Dadmand* demonstrates how a narrow understanding of "sexual activity in question" can prevent serious violations of sexual autonomy from being recognized as sexual assault. None of the complainants in this case of serial sexual scamming would have consented had they known the accused was not a modelling agent. However, the accused was only convicted on counts where video showed him ignoring protestations or engaging in sexual activity with unconscious complainants.
- *Hutchinson* has created legal uncertainty about whether non-consensual condom removal will constitute sexual assault if the complainant does not become pregnant or risk contracting a sexually transmitted infection. One of the allegations at issue in *Dadmand* concerned surreptitious condom removal. The accused was acquitted on this charge, even though the video evidence showed the complainant objecting.
- In Barton, a case where the sexual activity caused the complainant's death, the accused argued that consent to the physical sex act does not require specific agreement to the level of force. The SCC's decision declined to revisit the definition of "sexual activity in question" established by *Hutchinson* and failed to clarify whether agreeing to manual penetration means agreeing to force rough enough to cause fatal injury.

QUESTIONS AND IMPLICATIONS

Condom use, and the level of force involved in sexual activity, are both fundamental to sexual consent. *Hutchinson* creates legal uncertainty around whether non-consensual condom removal constitutes sexual assault when there is no risk of pregnancy or sexually transmitted infection, and whether agreeing to a particular sexual activity means accepting the possibility of bodily harm. Other jurisdictions have recently criminalized non-consensual condom removal, and a ban on the rough sex defence is before the British Parliament. It is worth considering legislating the definition of "sexual activity in question" adopted by the concurring judges in *Hutchinson*. They argued that in order to safeguard sexual autonomy, consent must be understood as agreement to sexual touching and to how it is carried out.

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FOR MORE INFORMATION

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Lise Gotell, "Thinly Construing the Nature of the Act Legally Consented to: The Corrosive Implications of *R. v. Hutchinson* for the Law of Consent" (2020) *University of British Columbia Law Review* 53:1, 53-100.

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