



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Kirkpatrick,  
2022 SCC 33

**APPEAL HEARD:** November 3,  
2021

**JUDGMENT RENDERED:** July  
29, 2022

**DOCKET:** 39287

**BETWEEN:**

**Ross McKenzie Kirkpatrick**  
Appellant

and

**Her Majesty The Queen**  
Respondent

- and -

**Attorney General of Ontario, Attorney General of Alberta, HIV & AIDS  
Legal Clinic Ontario, HIV Legal Network, Barbra Schlifer Commemorative  
Clinic, West Coast Legal Education and Action Fund Association, Women's  
Legal Education and Action Fund Inc. and Criminal Lawyers' Association  
(Ontario)**  
Interveners

**CORAM:** Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin,  
Kasirer and Jamal JJ.

**REASONS FOR  
JUDGMENT:**  
(paras. 1 to 108)

Martin J. (Moldaver, Karakatsanis, Kasirer and Jamal JJ.  
concurring)

**JOINT  
CONCURRING  
REASONS:**  
(paras. 109 to 310)

Côté, Brown and Rowe JJ. (Wagner C.J. concurring)

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**Ross McKenzie Kirkpatrick**

*Appellant*

v.

**Her Majesty The Queen**

*Respondent*

and

**Attorney General of Ontario,  
Attorney General of Alberta,  
HIV & AIDS Legal Clinic Ontario,  
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**2022 SCC 33**

File No.: 39287.

2021: November 3; 2022: July 29.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer  
and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Criminal law — Sexual assault — Consent — Complainant consenting to sexual intercourse on condition that accused wear condom — Complainant realizing after intercourse that accused failed to wear condom — Whether accused’s failure to wear condom when complainant’s consent conditional on its use results in there being no voluntary agreement of complainant to engage in sexual activity in question — Alternatively, whether such failure can constitute fraud vitiating complainant’s consent — Criminal Code, R.S.C. 1985, c. C-46, ss. 265(3)(c), 273.1(1).*

The complainant testified that she and K met online and then in person to determine if they wanted to have sex with each other. The complainant made clear to K that she would only agree to have sex with him if he wore a condom. Despite this, during their second episode of intercourse, K did not wear a condom. The complainant only realized that K had not been wearing a condom after he ejaculated inside her. Based upon these events, K was charged with sexual assault.

K applied to have the charge dismissed by bringing a no-evidence motion. He argued that the Crown failed to prove the absence of the complainant’s consent — an essential element in the *actus reus* of sexual assault — based on the Court’s decision in *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, which sets out a two-step process for analyzing consent. At the first step, the question is whether the complainant consented to engage in the “sexual activity in question” under s. 273.1(1) of the *Criminal Code*, which is defined by reference to the specific physical sex act involved. If the complainant consented, or her conduct raises a reasonable doubt about her

consent, the second step is to consider whether there are any circumstances under s. 265(3) or s. 273.1(2)(c), including fraud, that vitiate her apparent consent. Fraud under s. 265(3)(c) requires proof of the accused's dishonesty, which can include non-disclosure, and a deprivation in the form of significant risk of serious bodily harm from that dishonesty. K argued that the complainant's agreement to sexual intercourse was enough to establish consent to the sexual activity in question, as she consented to all the physical acts the parties engaged in, and there was no evidence that this consent was tainted by fraud.

The trial judge granted K's no-evidence motion and dismissed the sexual assault charge. The Court of Appeal unanimously allowed the Crown's appeal, set aside the acquittal and ordered a new trial; however, the three judges split on the reasoning as to which *Criminal Code* provision applied in examining consent: s. 273.1(1) or s. 265(3)(c). K appeals to the Court from the setting aside of his acquittal.

*Held:* The appeal should be dismissed.

*Per* Moldaver, Karakatsanis, **Martin**, Kasirer and Jamal JJ.: Condom use, when it is a condition of the complainant's consent, forms part of the "sexual activity in question" under s. 273.1 of the *Criminal Code*. This is the only interpretation that provides a harmonious reading of the text of the relevant provisions in their entire context and that accords with Parliament's purpose of promoting personal autonomy and equal sexual agency. Conditioning agreement to sexual touching on condom use goes to the heart of the specific physical activity in question and the existence or

non-existence of subjective consent, and there is no need to resort to the doctrine of fraud and its stringent legal requirements. *Hutchinson* remains binding authority for what it decided — that cases involving condom sabotage and deceit should be analyzed under the fraud provision rather than as part of the sexual activity in question — but is distinguishable in situations such as in the case at bar where the accused refuses to wear a condom and the complainant’s consent has been conditioned on its use. In the instant case, the complainant gave evidence that she had communicated to K that her consent to sex was contingent on condom use and K did not wear a condom. This was evidence of a lack of subjective consent by the complainant to the sexual activity in question — an element of the *actus reus* of sexual assault. As a result, the trial judge erred in granting K’s no evidence motion.

The starting point and primary provision for determining whether there is consent to sexual activity for sexual assault offences is s. 273.1. The key term “sexual activity in question” in s. 273.1(1) exists within a composite phrase that requires “voluntary agreement . . . to engage in the sexual activity in question”. Parliament’s intent as demonstrated by the text, context, and purpose of the sexual assault provisions must be sought and interpreted consistently with the Court’s jurisprudence on consent and harmoniously with all parts of s. 273.1 and the overall legislative scheme. The legal meaning given to the “sexual activity in question” cannot be narrowly drawn or fixed for all cases — it is tied to context and cannot be assessed in the abstract, relates to particular behaviours and actions, and will depend on the facts and circumstances of the individual case. It will be defined by the evidence and the complainant’s allegations,

and will emerge from a comparison of what actually happened and what, if anything, was agreed to.

In the instant case, the specific sexual assault alleged and the sexual activity in question is vaginal sexual intercourse without a condom. In determining whether the complainant's agreement to sexual intercourse with a condom means she also agreed to sexual intercourse without a condom, the starting point is the proposition from *Hutchinson* that the "sexual activity in question" the complainant must agree to is the "specific physical sex act". The focus should therefore be on the specific sex acts, defined by reference to the physical acts involved. Applying *Hutchinson*'s focus on the "specific physical sex act", condom use may form part of the "sexual activity in question" under s. 273.1(1) because sexual intercourse without a condom is a fundamentally and qualitatively different physical act than sexual intercourse with a condom. The physical difference is that intercourse without a condom involves direct skin-to-skin contact, while intercourse with a condom involves indirect contact. Logically and legally, direct and unmediated sexual touching is a different physical act than indirect and mediated contact; whether a condom is required is basic to the physical act.

All principles of statutory interpretation compel the conclusion that sex with a condom is a different physical activity than sex without a condom for the purposes of the "sexual activity in question". It is the only interpretation that reads s. 273.1 as a whole and harmoniously with the Court's jurisprudence on subjective and

affirmative consent. When interpreting Parliament's definition of consent expressed in s. 273.1, subs. (1) must be read together with subs. (2), which specifies situations where no consent would be obtained in relation to sexual assault offences. Section 273.1(2)(d) and (e) in particular underscore how the complainant's words and actions are directly relevant to whether or not there was consent to the sexual activity in question. Based on the complainant's evidence in the case at bar, she expressed, by words and conduct, a lack of agreement to engage in sexual intercourse without a condom. Section 273.1(2)(d) expressly reinforces that the clear rejection of a specific activity must be respected if consent is to have any meaning. Condom use cannot be irrelevant, secondary or incidental when the complainant has expressly conditioned her consent on it. Recognizing that condom use may form part of the sexual activity in question affirms that individuals have the right to determine who touches their bodies and how, is the only way to respect the need for a complainant's affirmative and subjective consent to each and every sexual act, and situates condom use at the definitional core of consent, where it belongs. The complainant's "no" to sexual intercourse without a condom cannot be ignored under either s. 273.1(1) or (2) because today, not only does no mean no, but only yes means yes. Further, voluntary agreement to sex with a condom cannot be taken to imply consent to sex without one as consent cannot be implied from the circumstances or the relationship between the accused and the complainant.

In addition, recognizing that condom use may be part of the sexual activity in question fulfills Parliament's objective of giving effect to the equality and dignity-affirming aims underlying the sexual assault prohibitions, responds to the



context and harms of non-consensual condom refusal or removal, and respects the restraint principle in criminal law. Non-consensual condom refusal or removal is a form of sexual violence generating physical and psychological harms. The power dynamic it rests on is exacerbated among vulnerable women and among people with diverse gender identities and sex workers. Preventing a complainant from limiting consent to circumstances where a condom is used erodes the right to refuse or limit consent to specific sexual acts, leaving the law of Canada seriously out of touch with reality, and dysfunctional in terms of its protection of sexual autonomy. There are no vagueness or certainty concerns if condom use is seen as part of the sexual activity in question. Asking whether a condom was required and if so, whether one was used, has the necessary certainty to prevent over-criminalization. While restraint is an important criminal law principle, it does not override Parliament's countervailing imperative of enacting sexual assault laws that respect the rights and realities of those subject to such violence.

While vitiation of consent by fraud under s. 265(3)(c) may still arise in other cases, it does not apply when condom use is a condition of consent. Instead of asking whether the complainant subjectively wanted the touching to take place, fraud shifts the focus to how the accused behaved and asks whether he attempted to, or succeeded in, deceiving the complainant about his lack of condom use. The requirement to prove deception and a deprivation misdirects the inquiry and creates gaps which leave many outside the law's protection in relation to sexual assault. Such an approach should not be adopted where the complainant has not agreed to sex without

a condom because: (1) requiring proof of a deprivation fails to account for how, under the law of consent, all persons are able to decide to consent or not based on whatever grounds are personally meaningful to them; (2) the harms of non-consensual condom refusal or removal go beyond a significant risk of serious bodily harm and are much wider than the risk of pregnancy and STIs; (3) the harm requirement for fraud means that certain people and certain types of sex would not come within the law's protection; and (4) proving a significant risk of serious bodily harm will likely entail a patronizing assessment of whether the harm the complainant experienced was significant enough to vitiate a consent that, in their mind, was never given.

*Hutchinson* does not govern a case like the present one where consent turns on condom use and no condom was worn, and should therefore be distinguished. *Hutchinson* simply held that cases involving condom sabotage and deceit should be analyzed under the fraud provision rather than as part of the sexual activity in question in s. 273.1. *Hutchinson* was chiefly concerned with the delineation of deception under the criminal law and did not establish the sweeping proposition that all cases involving a condom fall outside s. 273.1 and can only be addressed when the conditions of fraud are established. The decision in *Hutchinson* is limited by its factual context and the majority's repeated references to the effectiveness of the condom, its sabotaged state and the accused's deception. In cases involving condoms, *Hutchinson* applies where the complainant finds out after the sexual act that the accused was wearing a knowingly sabotaged condom. If the complainant finds out during the sexual act that the condom

was sabotaged, then they can revoke their subjective consent, the *actus reus* of sexual assault is made out, and there is no need to consider the fraud analysis.

*Per* Wagner C.J. and Côté, Brown and Rowe JJ.: There is agreement with the majority that the appeal should be dismissed. However, there is disagreement that *Hutchinson* is distinguishable. *Hutchinson* squarely applies to the case at bar. It held, categorically, that condom use is not part of “the sexual activity in question” contemplated in s. 273.1(1) of the *Criminal Code*. When a person agrees to have sex on the condition that their partner wear a condom, but that condition is circumvented in any way, the sole pathway to criminal liability is the fraud vitiating consent analysis under s. 265(3)(c). Applying *Hutchinson* to the present case, there is some evidence that the complainant consented to the sexual activity in question, but a new trial is required to determine whether her apparent consent was vitiated by fraud.

The case at bar is indistinguishable from *Hutchinson* for several reasons. First, the binding *ratio decidendi* of all the decisions of the Court, as an apex court, is necessarily wider than the majority acknowledges. When the question of law is one of statutory interpretation, the *ratio* of the binding precedent at issue must be understood in the context of the Court’s role: to provide a clear and uniformly applicable interpretation of how a statutory provision is to be understood and applied by lower courts across Canada. Second, the interpretation of *Hutchinson* advanced by the majority is contradicted by a plain reading of the decision, by the *Hutchinson* minority opinion, and by *Hutchinson*’s treatment by courts across the country. Third, the

distinction the majority draws between *Hutchinson* and the case at bar is both incoherent and illogical. Distinguishing *Hutchinson* on the basis of no condom versus sabotaged condoms obscures the bright line of criminality established in *Hutchinson*. By arguing that the *Hutchinson* majority referred only to effective condom use, the majority in the instant case introduces needless uncertainty into the criminal law. It follows from the foregoing that the majority's attempt to distinguish *Hutchinson*, in substance, effects an overturning of that precedent. *Hutchinson* conclusively determined the meaning of "the sexual activity in question" under s. 273.1(1) as excluding all forms of condom use, not only condom sabotage.

As *Hutchinson* cannot be distinguished, it must either be applied or overturned. To assess whether *Hutchinson* can be overturned, it is necessary to examine the Court's horizontal *stare decisis* jurisprudence and articulate a framework for assessing whether the Court can overturn a prior precedent. According to the foundational doctrine of *stare decisis* — to stand by previous decisions and not to disturb settled matters — judges are to apply authoritative precedents and have like matters be decided by like. There are two forms of *stare decisis*: vertical and horizontal. Vertical *stare decisis* requires lower courts to follow decisions of higher courts, with limited exceptions. Horizontal *stare decisis*, which binds courts of coordinate jurisdiction in a similar manner, operates differently at each level of court. As the apex court, the Court's decisions often require the elaboration of general principles that can unify large areas of the law and provide meaningful guidance to the legal community and the general public. Such guidance is given effect in a variety of circumstances and

for an indefinite period. Eventually, these frameworks may need to be revisited to ensure that they remain workable and responsive to social realities. The framework for horizontal *stare decisis* at the Court must take account of its institutional role and how that role relates to the rationale for *stare decisis*.

First, *stare decisis* promotes legal certainty and stability, allowing people to plan and manage their affairs. It serves to take the capricious element out of law and to give stability to a society. Second, it promotes the rule of law, such that people are subject to similar rules. Third, *stare decisis* promotes the legitimate and efficient exercise of judicial authority. *Res judicata* prevents re-litigation of specific cases and *stare decisis* guards against this systemically, by preventing re-litigation of settled law. Both doctrines promote judicial efficiency. *Stare decisis* also upholds the institutional legitimacy of courts, which hinges on public confidence that judges decide cases on a principled basis, rather than based on their own views. *Stare decisis* is foundational in that it requires that judges give effect to settled legal principles and depart from them only where a proper basis is shown. The criticisms that *stare decisis* is inherently conservative and that courts only adhere to it when the impugned precedent accords with their personal preference arise from the inconsistent application of *stare decisis*. Both criticisms are answered by its proper application.

Given the disparate nature of the Court's horizontal *stare decisis* jurisprudence and given the importance of *stare decisis*, it is necessary to set out a clear and coherent framework: the Court can only overturn its own precedents if that

precedent (1) was rendered *per incuriam*, that is, in ignorance or forgetfulness of the existence of a binding authority or relevant statute; (2) is unworkable, or (3) has had its foundation eroded by significant societal or legal change.

To overturn a precedent on the ground that it was rendered *per incuriam*, a litigant must show that the Court failed to consider a binding authority or relevant statute and that this failure affected the judgment. This will be a rare basis to overturn a decision because the Court has the benefit of party and intervener submissions, lower court decisions on the issue, and rigorous internal processes, and because the standard to establish that a decision was decided *per incuriam* is high.

An unworkable precedent is one that is unduly complex or difficult to apply in practice and that undermines at least one of the purposes that *stare decisis* is intended to promote (legal certainty, the rule of law, judicial efficiency). Parties seeking to overturn precedent on this basis need to demonstrate that a precedent undermines the goals of *stare decisis*. It is not enough for litigants to assert baldly that a precedent has been applied in an uneven and unpredictable manner, creates uncertainty, or is doctrinally incoherent.

Where fundamental changes undermine the rationale of a precedent, this eroded precedent can be overturned by the Court. This can occur in two ways, through: (1) societal change (e.g., social, economic, or technological change in Canadian society), or (2) legal change, such as constitutional amendments, or, incrementally, when subsequent jurisprudence attenuates a precedent. With respect to societal change,

the Court can overturn its decisions when fundamental changes to societal conditions undermine the decision's rationale, because the changes either render the concerns underlying the precedent moot or inconsistent with contemporary societal norms. Those seeking to overturn precedent based on societal change must demonstrate such change. As for legal change, the need to revisit precedents that conflict with the Constitution is clear but the point at which subsequent decisions have attenuated a precedent sufficiently so as to warrant overturning it is more difficult to define. The jurisprudence reveals a common theme: the precedent relies on principles or gives effect to purposes inconsistent with those underlying the Court's subsequent decisions.

All *per incuriam* decisions should be overturned. But an unworkable or eroded precedent may be upheld if overturning the decision would result in unforeseeable change or expand criminal liability. It should no longer be argued that a precedent should be overturned because it is (1) subject to judicial or academic criticism, (2) diverges from foreign jurisprudence, (3) is wrong in the eyes of some, (4) is a new or old precedent, or (5) was decided by a narrow majority. This framework for horizontal *stare decisis* is intended to apply to all statutory interpretation, common law, and constitutional precedents of the Court. However, differences exist between these types of precedents. In order for the Court to revisit a precedent based on statutory interpretation, it must be shown that the Court misconstrued the legislature's intent. As the meaning of a statute is fixed at the time of enactment, parties cannot argue that social change has altered the meaning of a particular provision. If the passage of time

renders the statute inconsistent with contemporary social reality, it is the legislature that must remedy the statute's deficiencies.

Applying this horizontal *stare decisis* framework, *Hutchinson* meets none of the criteria for overturning precedent. First, it was not rendered *per incuriam* as it cannot be demonstrated that the *Hutchinson* panel ignored binding precedent, much less that the result would have been different had it considered an allegedly overlooked authority. Further, the failure to consider binding precedent would be grounds for overturning *Hutchinson*, not a basis for reading its *ratio* so narrowly that it may be distinguished. Second, *Hutchinson* is not unworkable. Far from creating uncertainty, the *raison d'être* of *Hutchinson* was to provide a bright line rule for interpreting the "sexual activity in question" under s. 273.1(1). The *Hutchinson* rule consigns all forms of deception involving contraception, including condom use or non-use, to the fraud analysis under s. 265(3)(c). Post-*Hutchinson* jurisprudence discloses no difficulty applying it. At most, it may be said that a tiny fraction of reviewing judges simply disagree with *Hutchinson*. Likewise, the academic criticism levied against *Hutchinson* suggests that it was wrongly decided but the existence of criticism alone is insufficient to justify departing from a precedent. Third, no foundational erosion has occurred with respect to *Hutchinson*. Any societal change that may have occurred since *Hutchinson* cannot change Parliament's legislative intent as authoritatively interpreted by the *Hutchinson* Court. The statutory meaning of "the sexual activity in question" set out in *Hutchinson* reflects Parliament's intent at the time of enactment. If the passage of time has rendered this statutory provision inconsistent with contemporary social reality, it is



for the legislature to further study and to remedy any alleged deficiency. Finally, the Crown has not pointed to any legal change that could warrant overturning *Hutchinson*: no constitutional or jurisprudential developments post-*Hutchinson* that would attenuate its precedential value are mentioned. The Court’s recent sexual assault jurisprudence does not purport to displace *Hutchinson*’s clear and categorical interpretation of the “sexual activity in question” under s. 273.1(1) as excluding condom use.

Even if *Hutchinson* were unworkable or if its precedential foundation had eroded, there are at least two compelling reasons to uphold it. First, overturning *Hutchinson* would raise concerns regarding the retrospective expansion of criminal liability. Second, overturning *Hutchinson* may lead to unforeseeable consequences. Suddenly re-orienting the law to expand the scope of consent would be a major legal change engaging potentially wide-reaching policy issues. *Hutchinson* therefore governs the case at bar, such that the two-step fraud vitiating consent analysis under s. 265(3)(c) is engaged, rather than the consent analysis under s. 273.1(1).

At the first step of the *Hutchinson* framework, there is some evidence that the complainant voluntarily agreed to the sexual activity in question. However, at the second step, there is also some evidence that the complainant’s apparent consent may have been vitiated by fraud. On the low threshold of a no-evidence motion, there was at least some evidence of dishonesty by omission and risk of deprivation through the risk of pregnancy. Accordingly, a new trial is required.

## **Cases Cited**

By Martin J.

**Distinguished:** *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346;  
**referred to:** *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828; *United States of America v. Shephard*, [1977] 2 S.C.R. 1067; *R. v. Monteleone*, [1987] 2 S.C.R. 154; *R. v. Charemski*, [1998] 1 S.C.R. 679; *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579; *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440; *R. v. G.F.*, 2021 SCC 20; *R. v. Cuerrier*, [1998] 2 S.C.R. 371; *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584; *R. v. L.T.H.*, 2008 SCC 49, [2008] 2 S.C.R. 739; *R. v. Park*, [1995] 2 S.C.R. 836; *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3; *R. v. Olotu*, 2017 SCC 11, [2017] 1 S.C.R. 168, aff'g 2016 SKCA 84, 338 C.C.C. (3d) 321; *R. v. Poirier*, 2014 ABCA 59; *R. v. Flaviano*, 2014 SCC 14, [2014] 1 S.C.R. 270, aff'g 2013 ABCA 219, 309 C.C.C. (3d) 163; *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22; *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360; *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, [2011] 2 S.C.R. 670; *R. v. D.A.I.*, 2012 SCC 5, [2012] 1 S.C.R. 149; *R. v. Chartrand*, [1994] 2 S.C.R. 864; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Lupi*, 2019 ONSC 3713; *R. v. Rivera*, 2019 ONSC 3918; *R. v. Kraft*, 2021 ONSC 1970; *R. v. Hutchinson*, 2011 NSSC 361, 311 N.S.R. (2d) 1; *R. v. Hutchinson*, 2013 NSCA 1, 325 N.S.R. (2d) 95; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609.

By Côté, Brown and Rowe JJ.

**Applied:** *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346;  
**considered:** *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *R. v. Bernard*, [1988] 2 S.C.R. 833; *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; *Hamstra (Guardian ad litem of) v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092; *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33, [2013] 2 S.C.R. 438; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *Teva Canada Ltd. v. TD Canada Trust*, 2017 SCC 51, [2017] 2 S.C.R. 317; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *McLean v. Pettigrew*, [1945] S.C.R. 62; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *Bowhey v. Theakston*, [1951] S.C.R. 679; *Deacon v. The King*, [1947] S.C.R. 531; *R. v. Beaulac*, [1999] 1 S.C.R. 768; *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584; **referred to:** *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729; *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Quinn v. Leathem*, [1901] A.C. 495; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293; *R. v. Arcand*, 2010 ABCA 363, 264 C.C.C. (3d) 134; *Osborne v. Rowlett* (1880), 13 Ch. D. 774; *Delta Acceptance Corporation Ltd. v.*

*Redman* (1966), 55 D.L.R. (2d) 481; *TCF Ventures Corp. v. Cambie Malone's Corp.*, 2017 BCCA 129, 95 B.C.L.R. (5th) 346; *R. v. A.E.*, 2021 ABCA 172, 466 D.L.R. (4th) 226; *R. v. Brar*, 2021 ABCA 146, 23 Alta. L.R. (7th) 1; *R. v. P.D.C.*, 2021 ONCA 134, 401 C.C.C. (3d) 406; *R. v. Nauya*, 2021 NUCA 1; *R. v. G. (N.)*, 2020 ONCA 494, 152 O.R. (3d) 24; *R. v. Capewell*, 2020 BCCA 82, 386 C.C.C. (3d) 192; *R. v. Kwon*, 2020 SKCA 56, 386 C.C.C. (3d) 553; *R. v. Percy*, 2020 NSCA 11, 61 C.R. (7th) 7; *Charest v. R.*, 2019 QCCA 1401; *R. v. Al-Rawi*, 2018 NSCA 10, 359 C.C.C. (3d) 237; *P. (P.) v. D. (D.)*, 2017 ONCA 180, 409 D.L.R. (4th) 691; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579; *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692; *R. v. Ahmad*, 2020 SCC 11; *R. v. C.P.*, 2021 SCC 19; *Beamish v. Beamish* (1861), 9 H.L.C. 274; *Stuart v. Bank of Montreal* (1909), 41 S.C.R. 516; *R. v. Salituro*, [1991] 3 S.C.R. 654; *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429; *Practice Statement (Judicial Precedent)*, [1966] 1 W.L.R. 1234; *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Willers v. Joyce (No. 2)*, [2016] UKSC 44, [2018] A.C. 843; *Queensland v. Commonwealth*, [1977] 139 C.L.R. 585; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342; *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590; *R. v. Sullivan*, 2022 SCC 19; *R. v. Neves*, 2005 MBCA 112, 201 Man. R. (2d) 44; *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161; *Tan v. Canada*

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APPEAL from a judgment of the British Columbia Court of Appeal (Saunders, Groberman and Bennett JJ.A.), 2020 BCCA 136, 388 C.C.C. (3d) 60, 63 C.R. (7th) 338, [2020] B.C.J. No. 791 (QL), 2020 CarswellBC 1201 (WL), setting aside the acquittal entered by Solomon Prov. Ct. J., 2018 BCPC 415, [2018] B.C.J. No. 7258 (QL), 2018 CarswellBC 4109 (WL), and ordering a new trial. Appeal dismissed.

*Philip W. Cote*, for the appellant.

*John R. W. Caldwell* and *Janet A. M Dickie*, for the respondent.

*Dena Bonnet* and *Rebecca De Filippis*, for the intervener the Attorney General of Ontario.

*Christine Rideout, Q.C.*, for the intervener the Attorney General of Alberta.

*Khalid Janmohamed*, *Robin Nobleman* and *Ryan Peck*, for the interveners the HIV & AIDS Legal Clinic Ontario and the HIV Legal Network.

*Joanna Birenbaum*, for the intervener the Barbra Schlifer Commemorative Clinic.

*Jessica Lithwick* and *Kate Feeney*, for the intervener the West Coast Legal Education and Action Fund Association.

*Frances Mahon* and *Harkirat Khosa*, for the intervener the Women's Legal Education and Action Fund Inc.

*Mark C. Halfyard* and *Kate Robertson*, for the intervener the Criminal Lawyers' Association (Ontario).

The judgment of Moldaver, Karakatsanis, Martin, Kasirer and Jamal JJ. was delivered by

MARTIN J. —

I. Introduction

[1] This appeal raises an important legal question about consent and condom use in the context of an allegation of sexual assault. What analytical framework applies when the complainant agrees to vaginal sexual intercourse only if the accused wears a condom, and he instead chooses not to wear one? All parties and members of this Court agree that his negation of her express limits on how she can be touched engages the criminal law. The question is: should condom use form part of the “sexual activity in question” to which a person may provide voluntary agreement under s. 273.1(1) of the *Criminal Code*, R.S.C. 1985, c. C-46? Or alternatively, is condom use always irrelevant to the presence or absence of consent under s. 273.1(1), meaning that there is consent but it may be vitiated if it rises to the level of fraud under s. 265(3)(c) of the *Criminal Code*?

[2] I conclude that when consent to intercourse is conditioned on condom use, the only analytical framework consistent with the text, context and purpose of the prohibition against sexual assault is that there is no agreement to the physical act of intercourse without a condom. Sex with and without a condom are fundamentally and

qualitatively distinct forms of physical touching. A complainant who consents to sex on the condition that their partner wear a condom does not consent to sex without a condom. This approach respects the provisions of the *Criminal Code*, this Court's consistent jurisprudence on consent and sexual assault and Parliament's intent to protect the sexual autonomy and human dignity of all persons in Canada. Since only yes means yes and no means no, it cannot be that "no, not without a condom" means "yes, without a condom". If a complainant's partner ignores their stipulation, the sexual intercourse is non-consensual and their sexual autonomy and equal sexual agency have been violated.

[3] Here, the complainant gave evidence that she had communicated to the appellant that her consent to sex was contingent on condom use. Despite the clear establishment of her physical boundaries, the appellant disregarded her wishes and did not wear a condom. This was evidence of a lack of subjective consent by the complainant — an element of the *actus reus* of sexual assault. As a result, the trial judge erred in granting the appellant's no evidence motion. Accordingly, I would dismiss the appeal and uphold the order of the Court of Appeal for British Columbia setting aside the acquittal and remitting the matter to the Provincial Court of British Columbia for a new trial.

## II. Background

[4] The appellant, Ross McKenzie Kirkpatrick, was charged with the sexual assault of the complainant based upon events that occurred in March 2017. The

allegation of criminal conduct relates only to the parties' second act of vaginal sexual intercourse in which Mr. Kirkpatrick admits he penetrated and ejaculated into the complainant without wearing a condom.

[5] The complainant was the only person to give evidence at trial. She testified that she was 22 years old at the time of the trial and that she and Mr. Kirkpatrick met online. After messaging back and forth, she thought he could be a potential sexual partner and they met in person to determine if they wanted to have sex with each other. In that meeting, they discussed themselves, past sexual partners and present sexual practices. The complainant made clear to Mr. Kirkpatrick that she would only agree to sex using condoms. While he said that he "hasn't used them", she "mentioned that I only have sex if I use condoms. It's the only way I feel like it's the safest for everyone involved" (A.R., vol. II, at p. 17). During that conversation, the appellant also agreed that it is safest for everyone involved to use condoms.

[6] A few days after this meeting, the complainant and Mr. Kirkpatrick arranged to meet at Mr. Kirkpatrick's home to have sex. They went to Mr. Kirkpatrick's bedroom. When Mr. Kirkpatrick "motioned for [her] to . . . get on his penis" (A.R., vol. II, at p. 20), she asked him if he had any condoms and told him that if he did not, she had brought some with her. When questioned at trial about why she had asked this, she replied that it was "[b]ecause I only have protected sex. And I -- and I wanted to have sex, so I wanted to make sure that he had a condom" (A.R., vol. II, at p. 22).

[7] Mr. Kirkpatrick told the complainant that he had condoms, and he put one on. It was dark in the room, but the complainant saw Mr. Kirkpatrick turn to his right and take a condom from his bedside table. She heard the wrapper open and saw Mr. Kirkpatrick making motions consistent with putting on a condom. They proceeded to have vaginal intercourse, with the complainant positioned on her back. Mr. Kirkpatrick asked the complainant where he could ejaculate, and she told him he could not ejaculate on her vagina or buttocks. Mr. Kirkpatrick removed the condom and ejaculated on the complainant's stomach.

[8] After they finished having sex in his room, they were in the bathroom together. While there, the complainant asked Mr. Kirkpatrick whether he wore a condom and he said he did. She asked to see it because the bedroom was dark and it was important to her that he had worn one. He went back to his room, retrieved it and showed it to her. She saw that the condom was stretched out and was reassured it had been used.

[9] The complainant fell asleep in Mr. Kirkpatrick's bed and was awakened to Mr. Kirkpatrick placing his erect penis against her buttocks. She pushed him away and saw him turn towards his bedside table — the same one from which he had previously retrieved a condom. She thought he put a condom on. She repositioned herself onto her stomach and Mr. Kirkpatrick penetrated her vaginally with his penis. After about a minute, he asked the complainant if this felt better than the last time. She agreed, believing that he was referring to the different position.

[10] After a period of time, they changed position and she was then on her back. When his penis fell out he asked her to guide it back into her, which she did. They continued to have sex until Mr. Kirkpatrick ejaculated inside her. It was not until this point that the complainant realized that during this second episode of intercourse he had not been wearing a condom.

[11] The complainant testified that she felt shocked and panicked and left the bedroom. She had trusted Mr. Kirkpatrick based on their previous discussions and his use of a condom when they first had intercourse previously that evening. She was upset by the lack of respect he had shown for the boundaries she had set and the lack of concern he had shown for the potential repercussions and consequences she could face from his decision not to use a condom. Mr. Kirkpatrick suggested she “could just get an . . . abortion” (A.R., vol. II, at p. 25). When she expressed fear of contracting a sexually transmitted infection (“STI”), he was very relaxed about the idea of transmission because he said people could now just live with infections such as HIV, chlamydia and gonorrhea.

[12] The next afternoon, the complainant texted Mr. Kirkpatrick to ask him why he had not worn a condom despite her specific request that he do so. He replied that he had been “too excited” to put a condom on (A.R., vol. II, at p. 27). When the complainant expressed her view that this could be considered sexual assault, her impression was that Mr. Kirkpatrick thought “it was really funny” (A.R., vol. II, at p. 28). He responded in various texts by sending her a pornography video called “Oh



my god, daddy came inside me” and offering to have his friends “gang bang” her (A.R., vol. II, at p. 28).

[13] On the advice of medical professionals, the complainant followed a 28-day course of preventive HIV treatment. The treatment had serious physical and mental side effects that affected her day-to-day life and her ability to work.

[14] In cross-examination, she maintained that their discussion about the need for condom use not only occurred, but that without it, she would not otherwise have gone to his house and agreed to have sex. She testified that she said multiple times that she only had sex with condoms and that “if we didn’t have a conversation about safe sex before I had sex with him, I wouldn’t have been there that night” (A.R., vol. II, at p. 62). She said his disregard of her express and explicit condition to only have safe sex with a condom was equivalent to “rape”.

[15] At the close of the Crown’s case, Mr. Kirkpatrick applied to have the charge of sexual assault dismissed by bringing a no-evidence motion. He argued the Crown had failed to prove the absence of the complainant’s consent, an essential element in the *actus reus* of sexual assault. Specifically, he argued that based on *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, her agreement to sexual intercourse was enough to establish consent to the “sexual activity in question” under s. 273.1(1) of the *Criminal Code* and there was no evidence that this consent was tainted by fraud under s. 265(3)(c). The Crown argued that the sexual intercourse without the required condom was not consensual and alternatively, consent was vitiated by fraud.

[16] In determining whether to grant a no-evidence motion, the trial judge must ask “whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty” (*R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828, at para. 21, quoting *United States of America v. Shephard*, [1977] 2 S.C.R. 1067, at p. 1080; see also *R. v. Monteleone*, [1987] 2 S.C.R. 154, at pp. 160-61). The Crown must adduce some evidence of culpability for every essential definitional element of the crime (*R. v. Charemski*, [1998] 1 S.C.R. 679, at paras. 2-3). If there is any such admissible evidence, a directed verdict is not available (*Monteleone*, at pp. 160-61; *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368, at para. 48).

[17] On a no-evidence motion, the motion judge is compelled, as are we, to accept the facts as stated by the complainant in her testimony as true. The accused may have a different version of events, but the question is whether her evidence, if believed, would justify a conviction (*Monteleone*, at pp. 160-61, citing *Shephard*, at p. 1080).

A. *Provincial Court of British Columbia, 2018 BCPC 415 (Solomon Prov. Ct. J.)*

[18] The trial judge granted Mr. Kirkpatrick’s no-evidence motion and dismissed the sexual assault charge. Relying on *Hutchinson*, the judge concluded that based on the complainant’s evidence, she had “consented to all the physical acts of sexual relations that the parties engaged in”, despite the fact that no condom was used (para. 27 (CanLII)). Thus, the only issue was whether there was any evidence of fraud vitiating consent. Fraud requires proof of the accused’s dishonesty, which can include non-disclosure, and a deprivation in the form of significant risk of serious bodily harm

from that dishonesty. The judge reasoned that, because Mr. Kirkpatrick had made no efforts to deceive the complainant into believing he had worn a condom, there was no evidence of dishonesty and therefore no evidence to support a finding of fraud.

B. *Court of Appeal for British Columbia, 2020 BCCA 136, 63 C.R. (7th) 338 (Saunders, Groberman and Bennett JJ.A.)*

[19] The Court of Appeal for British Columbia unanimously allowed the Crown's appeal, set aside the acquittal, and ordered a new trial, although the judges split on the reasoning as to which *Criminal Code* provision applied in examining consent: s. 273.1(1) or s. 265(3)(c).

[20] Groberman J.A. concluded that the trial judge had erred in finding that the complainant had consented to the sexual activity in question under s. 273.1(1). He held that *Hutchinson* should not be read as excluding important physical aspects — such as the wearing of a condom — from forming part of the sexual activity in question. Therefore, there was no consent in this case. Groberman J.A. did, however, agree with the trial judge's conclusion that there was no evidence to support that Mr. Kirkpatrick had attempted to deceive the complainant with respect to condom use so as to engage a fraud analysis under s. 265(3)(c).

[21] Bennett J.A. disagreed with Groberman J.A.'s reading of *Hutchinson*. In her view, the majority reasons in *Hutchinson* rejected the notion that condom use can form part of the sexual activity in question; instead, deception with respect to condom

use must be analyzed under the fraud provision in s. 265(3)(c). On the facts of this case, however, she held the trial judge erred in concluding there was no evidence of fraud.

[22] Saunders J.A. agreed in part with both of her colleagues' reasons, but on different issues. She agreed with Groberman J.A.'s reading of *Hutchinson*, and in the alternative with Bennett J.A.'s conclusion that there was evidence of fraud.

### III. Issues

[23] This appeal raises two questions. First, when a complainant makes their consent to sexual intercourse conditional on their partner wearing a condom, does failure to wear a condom result in "no voluntary agreement of the complainant to engage in the sexual activity in question" under s. 273.1(1) of the *Criminal Code*, or should failure to wear a condom be analyzed under the fraud provision in s. 265(3)(c)?

[24] Second, what is required to establish fraud, and was there some evidence of dishonesty by the appellant capable of constituting fraud vitiating consent under s. 265(3)(c) of the *Criminal Code*?

### IV. Analysis

#### A. *The Analytical Framework for Consent and Condom Refusal or Removal*

[25] Two alternative pathways are available to decide the legal effect of Mr. Kirkpatrick's failure to wear a condom on the *actus reus* of sexual assault. To resolve the correct approach, I begin by providing an overview of the offence of sexual assault, including a review of s. 273.1 and s. 265(3) and the constituent elements of the offence. I present the arguments of the respondent Crown and the appellant and then explain why, when it is a condition of the complainant's consent, condom use must form part of the "sexual activity in question" under s. 273.1 of the *Criminal Code*. This is the only interpretation that provides a harmonious reading of the text of the relevant provisions in their entire context and that accords with Parliament's purpose of promoting personal autonomy and equal sexual agency. Finally, I will explain why *Hutchinson* does not mandate another result for the specific issue raised in this appeal.

(1) The Offence of Sexual Assault

[26] In the early 1980s, Parliament modernized and fundamentally restructured the *Criminal Code* provisions on sexual offences. It repealed discriminatory evidentiary rules and moved away from prior specific provisions, like the prohibition against rape, to instead adopt prohibitions grounded in the law of assault. This change reflected the shift away from "categorizing sexual offences based on the nature of the sexual act and the perceived chastity of the victim", and "toward an understanding that treats sexual assault much more like other crimes of violence" (J. Benedet, "Judicial Misconduct in the Sexual Assault Trial" (2019), 52 *U.B.C. L. Rev.* 1, at p. 17).

[27] As a result, under s. 265(1)(a) of the *Criminal Code*, a person commits an assault by intentionally applying force to another person, directly or indirectly, without their consent. Where the assault is sexual in nature, it is an offence under s. 271 of the *Criminal Code*. Placing assault at the core of the new offences conveyed the central role consent was intended to play in distinguishing criminal sexual conduct from agreed-to sexual activity.

[28] The foundational nature of consent to the offence of sexual assault is demonstrated in its centrality to both the *actus reus* and the *mens rea* elements of the offence. The *actus reus* of the offence is “unwanted sexual touching”, while the *mens rea* is the intention to touch, knowing, being reckless of, or being wilfully blind to a lack of consent from the person being touched (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 23). For the *actus reus*, the absence of consent is entirely subjective and dependent on the complainant’s state of mind about whether they wanted the touching to take place at the time it occurred (*Ewanchuk*, at paras. 25-27 and 31). There is no need to inquire into the accused’s perspective at the *actus reus* stage (*R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at paras. 87 and 89).

[29] In 1992, Parliament introduced further amendments to sexual assault in Bill C-49, the *Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38, s. 1, to correct outdated approaches that linked non-consent to physical resistance and to settle debates as to whether passivity, silence, non-resistance or submission could constitute consent. These amendments defined consent for the first time in s. 273.1(1), set out

certain circumstances where no consent was obtained as a matter of law in s. 273.1(2), and limited access to the defence of honest but mistaken belief in communicated consent in s. 273.2.

[30] Parliament expressly stated its remedial purpose and objectives for enacting these amendments in the preamble to Bill C-49. These amendments were designed to reflect the realities, concerns and rights of complainants, reduce the fear of sexual assault, and encourage the reporting of this traditionally underreported crime. Parliament was “gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual assault against women and children” (Bill C-49, preamble). Parliament wanted to ensure the “full protection of the rights guaranteed under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*” (protecting the rights to life, liberty and security of the person and the right to the equal protection and benefit of the law without discrimination). One of Parliament’s primary objectives was to promote gender equality and protect individuals’ personal autonomy to make choices about their bodies and whether or not to engage in sexual activity (see *House of Commons Debates*, vol. VIII, 3rd Sess., 34th Parl., April 8, 1992, at pp. 9505-7). Its objectives are reflected in the framework for consent and the wording of the individual provisions we have today.

[31] Section 273.1 is a key provision and operates as the gateway to consent. It is specific to sexual offences, more recent than s. 265(3) and was enacted to “recogniz[e] the unique character of the offence of sexual assault” (Bill C-49,

preamble). Subsection 273.1(1) requires “the voluntary agreement of the complainant to engage in the sexual activity in question”. Subsection 273.1(2) provides a non-exhaustive list of circumstances in which no consent is obtained in law. At the relevant time, s. 273.1 provided:<sup>1</sup>

**273.1** (1) Subject to subsection (2) and subsection 265(3), “consent” means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

(2) No consent is obtained, for the purposes of sections 271, 272 and 273, where

(a) the agreement is expressed by the words or conduct of a person other than the complainant;

(b) the complainant is incapable of consenting to the activity;

(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

[32] Subsections (1) and (2) in s. 273.1 both address consent and are to be read together. Subsection (2) is multifaceted and sheds further light on Parliament’s understanding of consent (*R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at paras. 33

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<sup>1</sup> Section 273.1 has been amended since the events in question in this appeal, but nothing turns on those amendments in this appeal (S.C. 2018, c. 29, s. 19(1) and (2)).



and 35). All but one of the circumstances outlined in s. 273.1(2) operate to clarify what subjective consent requires. Only s. 273.1(2)(c) vitiates consent, where the complainant's induced agreement by reason of an abuse of power, trust, or authority is deemed ineffective in law (*R. v. G.F.*, 2021 SCC 20, at para. 44).

[33] Section 265(3) applies to all forms of assault (including sexual assault). It lists four situations where consent is not obtained as a matter of law, including where consent is obtained by fraud. In these cases, there is subjective consent under s. 273.1, but the law intervenes to vitiate that consent. Section 265(3) provides:

**(3)** For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

**(a)** the application of force to the complainant or to a person other than the complainant;

**(b)** threats or fear of the application of force to the complainant or to a person other than the complainant;

**(c)** fraud; or

**(d)** the exercise of authority.

[34] At the heart of this case is consent at the *actus reus* stage. When vitiation under s. 265(3) is argued, *Hutchinson* sets out a two-step process for analyzing consent, even though it does not impose a strict order-of-operations (*G.F.*, at paras. 51-52). At the first step, the question is whether the complainant consented to engage in the sexual activity in question under s. 273.1(1) (*Hutchinson*, at para. 4). If the complainant consented, or their conduct raises a reasonable doubt about the lack of voluntary

agreement to the sexual activity in question, the second step is to consider whether there are any circumstances under s. 265(3) or s. 273.1(2)(c) — including fraud — that vitiate the complainant’s “apparent consent” (*Hutchinson*, at para. 4). If the complainant has not consented in the first place, there is no consent to be vitiated under s. 265(3) or s. 273.1(2)(c).

[35] This Court explained in *G.F.* how the distinction between a lack of subjective consent to the sexual activity in question under s. 273.1(1) and the vitiation of consent “may be subtle, but it is important” (para. 36). While a lack of subjective consent under s. 273.1(1) is directly linked to the voluntary agreement to the sexual activity in question, vitiating factors under s. 265(3) or s. 273.1(2)(c) are instead tied to various general policy considerations (*G.F.*, at para. 36).

(2) The Arguments of the Parties

[36] The respondent Crown submits that condom use is relevant to a complainant’s consent and is an important aspect of sexual activity within s. 273.1. It says that sex with and without a condom are fundamentally different forms of touching and are physically different types of “sexual activity” under s. 273.1(1). A complainant who consents to sex on the condition that their partner wears a condom does not consent to sex without a condom. Where their partner ignores the request for a condom, the sexual intercourse is non-consensual. In such a case, where the trier of fact finds that the complainant did not voluntarily agree to engage in the sexual activity in question, there is no consent, the *actus reus* is established and the analysis turns to *mens rea*. If

*Hutchinson* dictates a different result, the Crown asks this Court to overturn that decision and clarify the law.

[37] Alternatively, Mr. Kirkpatrick argues that the only route to a finding of no consent for his failure to wear a condom is fraud under s. 265(3). He submits that the complainant agreed to the sexual activity in question on the basis that she agreed to vaginal sexual intercourse. He claims her consent can only be vitiated if the Crown proves beyond a reasonable doubt: (1) dishonesty, including falsehoods and deliberate deceit as well as the non-disclosure of important facts; and (2) deprivation, or risk of deprivation, which consists of actual risk of serious bodily harm (*R. v. Cuerrier*, [1998] 2 S.C.R. 371, at para. 116; *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 12). Serious bodily harm includes physical or psychological hurt or injury that “interferes in a substantial way with the integrity, health or well-being of a victim” (*Mabior*, at para. 82) and is often tied to physical harms such as the risk of pregnancy and/or sexually transmitted infection (*Hutchinson*, at paras. 69 and 71). He claims *Hutchinson* decided that in all cases, condom use can never form part of the physical act and is therefore always irrelevant to consent under s. 273.1(1). He argues that the Crown cannot and did not establish that he deceived the complainant or that she suffered serious bodily harm or a significant risk thereof as a result of his deception. He therefore submits that the trial judge was correct to dismiss the case against him.

[38] The parties' arguments and the decisions at the Court of Appeal demonstrate the two alternative pathways available to decide the legal effect of Mr. Kirkpatrick's failure to wear a condom on the *actus reus* of sexual assault.

(3) Interpreting the "Sexual Activity in Question" in Section 273.1(1)

[39] The starting point and primary provision for determining whether there is consent to sexual activity for sexual assault offences is s. 273.1. This particular section was enacted more recently than s. 265(3) and was singularly designed for and uniquely directed to sexual assault offences. This statutory definition of consent plays a central role in Parliament's assault-based prohibitions against sexual violence. The key term "sexual activity in question" in s. 273.1(1) exists within a composite phrase that requires "voluntary agreement . . . to engage in the sexual activity in question". We are to seek Parliament's intent as demonstrated by the text, context, and purpose of the sexual assault provisions and interpret it consistently with this Court's considerable jurisprudence on consent and "harmonious[ly]" with all parts of s. 273.1 and the overall legislative scheme (*J.A.*, at para. 33).

[40] The legal meaning given to the "sexual activity in question" cannot be narrowly drawn or fixed for all cases. Like the consent of which it is part, it is tied to context and cannot be assessed in the abstract; it relates to particular behaviours and actions (*Hutchinson*, at para. 57; *Barton*, at para. 88). Much will depend on the facts and circumstances of the individual case. In a very real way, it will be defined by the evidence and the complainant's allegations. What touching does the complainant say

was unlawful? Which acts were beyond the boundaries of any consent given? The sexual activity in question will emerge from a comparison of what actually happened and what, if anything, was agreed to. This is bound to change in every case.

[41] Here, the complainant makes no complaint about the first act of vaginal intercourse in which the appellant used the required condom. She nevertheless claims that she never consented to what he did subsequently, which was to have vaginal intercourse without a condom. The specific sexual assault alleged, and the sexual activity in question, was therefore vaginal sexual intercourse without a condom.

[42] In determining whether her agreement to sexual intercourse with a condom means she also agreed to sexual intercourse without a condom, we start with the proposition from *Hutchinson* that the “sexual activity in question” that the complainant must agree to is the “specific physical sex act” (para. 54 (emphasis deleted)). The focus should therefore be on the *specific* sex act(s), defined by reference to the *physical* acts involved. The Court in *Hutchinson* also provided examples of different physical acts, like “kissing, petting, oral sex, intercourse, or the use of sex toys” (para. 54). These were mere illustrations and operate only in comparison to each other in the sense that kissing is a different physical activity than petting; petting is not the same thing as oral sex; and intercourse is distinguished from the use of sex toys. These are not closed or mandatory legal categories of broad sexual activity, regardless of the particular evidence and allegations at issue.

[43] Applying *Hutchinson*'s focus on the "specific physical sex act", condom use may form part of the sexual activity in question because sexual intercourse without a condom is a fundamentally and qualitatively different physical act than sexual intercourse with a condom. To state the obvious, the physical difference is that intercourse without a condom involves direct skin-to-skin contact, while intercourse with a condom involves indirect contact. Indeed, this difference, of a changed physical experience, is put forward by some men to explain why they prefer not to wear a condom (K. Czechowski et al., "*That's not what was originally agreed to*": *Perceptions, outcomes, and legal contextualization of non-consensual condom removal in a Canadian sample*, in PLoS ONE, 14(7), July 10, 2019 (online), at p. 2).

[44] The law recognizes that consent to penetration in one area of the body does not constitute consent to penetration in a different area because these are distinct physical acts (*Hutchinson*, at para. 54). Similarly, consent to a form of touching may depend on what is being used to touch the body because the law appreciates there is a physical difference between being touched by a digit, penis, sex toy or other object. It is also clear, for example, that the law sees different specific physical sex acts when a person who has obtained consent to touch a woman's chest over her clothing instead reaches underneath her clothing to make direct skin to skin contact with her bare breast. In the same way, being touched by a condom-covered penis is not the same specific physical act as being touched by a bare penis. Logically and legally, direct and unmediated sexual touching is a different physical act than indirect and mediated contact. Indeed, given the centrality of the distinction, whether a condom is required is basic to the physical act.

[45] All principles of statutory interpretation compel the conclusion that sex with a condom is a different physical activity than sex without a condom. It is the only meaning of the “sexual activity in question” that reads s. 273.1 as a whole and harmoniously with this Court’s jurisprudence on subjective and affirmative consent. In addition, it fulfills Parliament’s objective of giving effect to the equality and dignity-affirming aims underlying the sexual assault prohibitions; responds to the context and harms of non-consensual condom refusal or removal; and respects the restraint principle in criminal law. While vitiation by fraud may still arise in other cases, it does not apply when condom use is a condition of consent.

(a) *It Is the Only Harmonious Reading of Section 273.1 As a Whole*

[46] Principles of statutory interpretation require that the text of provisions must be read as a whole and harmoniously. It is presumed that provisions are intended to work together as parts of a functioning whole to form a rational, internally consistent framework (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at §11.2; *R. v. L.T.H.*, 2008 SCC 49, [2008] 2 S.C.R. 739, at para. 47). It follows that when interpreting Parliament’s definition of consent expressed in s. 273.1, subss. (1) and (2) must be read together in a consistent manner.

[47] In enacting a definition of consent, Parliament specified situations where no consent would be obtained in relation to sexual assault offences in s. 273.1(2). Section 273.1(2)(d) and (e) in particular provides that there can be no consent if the “complainant expresses, by words or conduct, a lack of agreement to engage in the

activity” or, “having consented to engage in sexual activity, expresses . . . a lack of agreement to continue to engage in the activity”. While a complainant is not required to express her lack of consent for the *actus reus* to be established, when she does so it is directly relevant to whether or not there was subjective consent to the sexual activity in question and may also impact whether a mistaken belief in consent could be reasonable under the *mens rea* analysis (*J.A.*, at paras. 23-24, 41 and 45-46).

[48] These subsections underscore how the complainant’s words and actions are directly relevant to whether or not there was consent to the sexual activity in question. Based on the complainant’s evidence in the case at bar, she expressed, by words and conduct, a lack of agreement to engage in sexual intercourse without a condom. Section 273.1(2)(d) expressly reinforces that the clear rejection of a specific activity must be respected if consent is to have any meaning. Condom use cannot be irrelevant, secondary or incidental when the complainant has expressly conditioned her consent on its use. As stated by L’Heureux-Dubé J. in *Ewanchuk*, s. 273.1(2)(d) “acknowledges that when a woman says ‘no’ she is communicating her non-agreement, regardless of what the accused thought it meant, and that her expression has an enforceable legal effect” (para. 101).

[49] Recognizing that condom use may form part of the sexual activity in question is also the only way to respect the need for a complainant’s affirmative and subjective consent to each and every sexual act, every time. It not only affirms that individuals have the right to determine who touches their bodies and how; it situates



condom use at the definitional core of consent, where it belongs. It is the only interpretation consistent with the foundational principles of consent expressed in s. 273.1 and this Court's longstanding jurisprudence, including *Hutchinson*.

[50] Including condom use as part of the sexual activity in question properly places the focus at the doctrinal heart of the *actus reus* analysis: was there actual consent under s. 273.1? Since *Ewanchuk*, this Court has consistently emphasized the centrality of the complainant's subjective perspective at the *actus reus* stage (*J.A.*, at paras. 23 and 45-46; *Barton*, at paras. 87-89; *G.F.*, at paras. 29 and 33). The assessment of consent under s. 273.1(1) is determined by reference to the complainant's internal state of mind towards the touching, when it happened (*Ewanchuk*, at paras. 26 and 61). It is a purely subjective approach where the complainant's individual perspective alone is determinative: they either consented or not (*Ewanchuk*, at paras. 27 and 31; *J.A.*, at para. 23; *Barton*, at para. 89). The accused's perspective is irrelevant at this stage (*Barton*, at paras. 87 and 89).

[51] According to the foundational principles of consent, the complainant's reasons for granting or withholding consent and insisting on a condom are not relevant: "If the complainant did not subjectively consent (for whatever reason) then the *actus reus* is established" (*G.F.*, at para. 33 (emphasis added)). That all persons are entitled to refuse sexual contact at any time, and for *any reason*, is a fundamental principle of Canadian sexual assault law (*J.A.*, at para. 43; *G.F.*, at para. 33). All persons "have an inherent right to exercise full control over their own bodies, and to engage only in

sexual activity that they wish to engage in” (*R. v. Park*, [1995] 2 S.C.R. 836, at paras. 38 and 42; *Ewanchuk*, at para. 75, per L’Heureux-Dubé J., concurring). Each person’s ability to set the boundaries and conditions under which they are prepared to be touched is grounded in concepts as important as physical inviolability, sexual autonomy and agency, human dignity and equality (*Ewanchuk*, at para. 28; *G.F.*, at para. 1). As McLachlin C.J. explained in *Mabior*, the “modern understanding of sexual assault is based on the preservation of the right to refuse sexual intercourse: sexual assault is wrong because it denies the victim’s dignity as a human being”; fails to respect each sexual partner as an “autonomous, equal and free person”; and involves “the wrongful exploitation of another human being. To engage in sexual acts without the consent of another person is to treat him or her as an object and negate his or her human dignity” (paras. 45 and 48). See also J. McInnes and C. Boyle, “Judging Sexual Assault Law Against a Standard of Equality” (1995), 29 *U.B.C. L. Rev.* 341, at p. 353, fn. 30, and p. 357, fn. 38.

[52] The complainant’s “no” to sexual intercourse without a condom cannot be ignored under either s. 273.1(1) or (2) because “[t]oday, not only does no mean no, but only yes means yes” (*R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, at para. 44). As a result, when a complainant states: “no, not without a condom”, our law of consent says, emphatically, this actually means “no”, and cannot be reinterpreted to become “yes, without a condom”.

[53] Voluntary agreement to sex with a condom cannot be taken to imply consent to sex without one as consent cannot be implied from the circumstances or the relationship between the accused and the complainant (*J.A.*, at para. 47; *Ewanchuk*, at para. 31; *G.F.*, at para. 32; *Barton*, at paras. 98 and 105). Nothing substitutes for the complainant's actual consent to the sexual activity at the time it occurred, which involves the "conscious agreement of the complainant to engage in every sexual act in a particular encounter" (*J.A.*, at para. 31). A complainant must agree to the specific sexual act since "agreement to one form of penetration is not agreement to any or all forms of penetration and agreement to sexual touching on one part of the body is not agreement to all sexual touching" (*Hutchinson*, at para. 54; *R. v. Olotu*, 2017 SCC 11, [2017] 1 S.C.R. 168, aff'g 2016 SKCA 84, 338 C.C.C. (3d) 321; *R. v. Poirier*, 2014 ABCA 59; *R. v. Flaviano*, 2014 SCC 14, [2014] 1 S.C.R. 270, aff'g 2013 ABCA 219, 309 C.C.C. (3d) 163).

[54] Likewise, an accused cannot ignore limits or "test the waters" during a second episode of intercourse to "see" if the complainant now consents to sex without a condom as consent must be specifically renewed and communicated for "each and every sexual act" (*J.A.*, at para. 34; *Barton*, at para. 118). Implying consent revives the "mythical assumptions that when a woman says 'no' she is really saying 'yes', 'try again', or 'persuade me'" (*Ewanchuk*, at para. 87, per L'Heureux-Dubé J.). Instead, as stated in *Ewanchuk* (at para. 52, per Major J.):

Common sense should dictate that, once the complainant has expressed her unwillingness to engage in sexual contact, the accused should make

certain that she has truly changed her mind before proceeding with further intimacies. The accused cannot rely on the mere lapse of time or the complainant's silence or equivocal conduct to indicate that there has been a change of heart and that consent now exists . . . .

[55] Placing required condom use outside the core definition of consent under s. 273.1 would undercut these principles and undermine Parliament's goals. Too narrow a reading of sexual activity will deem a complainant to have consented in law when they did not subjectively agree to sex without a condom in fact. For some people — like the complainant in this case — the difference between using a condom or not means the difference between subjectively agreeing to the activity or refusing it. To ignore express physical boundaries when defining consent under s. 273.1 effectively repeals the need for subjective and affirmative consent. Deeming the complainant's consent to intercourse without a condom, after she has specifically rejected this form of touching, comes close to reinstating the rejected doctrine of implied consent (see *Ewanchuk*, at para. 31; *J.A.*, at para. 47; *G.F.*, at para. 32; *Barton*, at paras. 98 and 105). Recognizing that when the complainant agreed to sexual intercourse with a condom, she was not agreeing to the different physical act of direct skin to skin contact without a condom is precisely what Major J. protected in *Ewanchuk*, when he stated that, “[h]aving control over who touches one's body, and how, lies at the core of human dignity and autonomy” (para. 28; see also *G.F.*, at para. 1).

(b) *It Is the Only Approach Consistent With Parliament's Purpose of Promoting Sexual Autonomy and Equal Sexual Agency*

[56] Recognizing that condom use may be part of the sexual activity in question best respects Parliament's equality-seeking and dignity-promoting purposes and its desire to reflect the realities, rights and concerns of complainants. This approach is most respectful of Parliament's aims as evidenced by the legislative history, the preamble to the 1992 amendments in which consent was first defined, the social context in which s. 273.1 was introduced, and the present problems associated with condom refusal and removal (*1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, at paras. 6 and 14-15; *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360, at paras. 5 and 37; *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, [2011] 2 S.C.R. 670, at paras. 18, 63 and 69; *R. v. D.A.I.*, 2012 SCC 5, [2012] 1 S.C.R. 149, at paras. 30 and 38; *R. v. Chartrand*, [1994] 2 S.C.R. 864; *R. v. Gladue*, [1999] 1 S.C.R. 688, at paras. 49-51).

[57] Regrettably, the refusal or removal of a condom when one has been requested and required is not uncommon. In recent years, "non-consensual condom refusal or removal" has become the subject of social science research and increased societal recognition (R.F., at para. 79; I.F., Barbra Schlifer Commemorative Clinic ("Barbra Schlifer Factum"), at paras. 4 and 7-10, citing A. Brodsky, "'Rape-Adjacent': Imagining Legal Responses to Nonconsensual Condom Removal" (2017), 32 *Colum. J. Gender & L.* 183; A. Boadle, C. Gierer and S. Buzwell, "Young Women Subjected to Nonconsensual Condom Removal: Prevalence, Risk Factors, and Sexual Self-

Perceptions” (2021), 27 *Violence Against Women* 1696; R. L. Latimer et al., *Non-consensual condom removal, reported by patients at a sexual health clinic in Melbourne, Australia*, in PLoS ONE, 13(12), December 26, 2018 (online); Czechowski et al.; M. Ahmad et al., “‘You Do It Without Their Knowledge.’ Assessing Knowledge and Perception of *Stealth* among College Students” (2020), 17:10 *Int. J. Environ. Res. Public Health* 3527 (online), at p. 6).

[58] Non-consensual condom refusal or removal involves a range of conduct employed to avoid using a condom with a partner who wants to use one. This includes the refusal to use a condom in the first place, whether the accused informs the complainant of their refusal or not. It also covers cases of “stealth”, where the accused pretends to have put on a condom or secretly removes it. There are many forms of “condom use resistance” and they may involve using physical force, manipulation, threats and deception to obtain unprotected sex (R.F., at para. 79; see also paras. 80-85; Barbra Schlifer Factum, at paras. 6-11; I.F., West Coast Legal Education and Action Fund Association, at para. 7).

[59] Recent empirical studies indicate the rates of non-consensual condom refusal or removal may be very high (Latimer et al., at p. 11; Czechowski et al., at pp. 16 and 20-21). The Intervener Barbra Schlifer Commemorative Clinic notes that Canadian universities have begun to consider non-consensual condom refusal or removal in their sexual violence prevention policies (I.F., at para. 10, citing University of Ottawa, *Policy 67b Prevention of Sexual Violence*, December 9, 2019; St. Francis

Xavier University, *Sexual Violence Response Policy*, February 1, 2020, at p. 4; Dalhousie University, *Sexualized Violence Policy*, June 25, 2019, at p. 5).

[60] Non-consensual condom refusal or removal is experienced as and recognized as a form of sexual violence which generates various forms of harm. There are clear physical risks, but the psychological consequences are also very real. Women who have experienced non-consensual condom refusal or removal have been found to develop negative self-perception about their sexual agency and sometimes themselves (Boadle, Gierer and Buzwell, at p. 1708). Victims of non-consensual condom refusal or removal describe it as a “disempowering, demeaning violation of a sexual agreement”, a violation of consent, a betrayal of trust, a denial of autonomy, and an act of sexual violence (Brotsky, at pp. 184 and 186; Czechowski et al., at pp. 11-13; S. Lévesque and C. Rousseau, “Young Women’s Acknowledgment of Reproductive Coercion: A Qualitative Analysis” (2021), 36 *J. of Interpers. Violence* NP8200 (online), at p. NP8210). The complainant’s testimony — which we must take to be true at this preliminary stage — is clearly consistent with that research. She described the appellant’s conduct as “like, freaking rape, like, because — like, I said I only have sex with condoms” (A.R., vol. II, at p. 63).

[61] As with other forms of sexual coercion, the risk of experiencing non-consensual condom refusal or removal is not distributed equally throughout the population. The power dynamic it rests on is exacerbated among vulnerable women, including women living in poverty, racialized women, migrant women, and among

people with diverse gender identities and sex workers (Barbra Schlifer Factum, at para. 9, citing K. T. Grace and J. C. Anderson, “Reproductive Coercion: A Systematic Review” (2018), 19 *Trauma, Violence, & Abuse* 371, at pp. 383-85). Younger women, who may agree to sexual activity only if protection is used in dating contexts or casual sexual relationships with partners they do not know well (as the facts of this case demonstrate), are also targets of non-consensual condom refusal or removal (Boadle, Gierer and Buzwell, at pp. 1706-7; see, e.g., *R. v. Lupi*, 2019 ONSC 3713; *R. v. Rivera*, 2019 ONSC 3918; *R. v. Kraft*, 2021 ONSC 1970). The phenomenon is also particularly associated with intimate partner violence (Barbra Schlifer Factum, at para. 9, citing Grace and Anderson, at p. 385).

[62] Sexual assault remains a highly gendered crime (*Goldfinch*, at paras. 37-38; *Barton*, at para. 1). Sexual violence disproportionately impacts women and gender diverse people, including trans and cisgender women and girls and other trans, non-binary, and Two Spirit people. This is even more true for racialized members of those communities (I.F., Women’s Legal Education and Action Fund Inc., at para. 18). I agree with the Attorney General of Alberta that a narrow interpretation of the sexual activity in question will have a disproportionate impact on vulnerable groups, contribute to sexual inequality and deny Canadians equality under the law (I.F., at para. 23). Where a complainant’s wishes are ignored by their partner, with or without deception, failing to recognize condom use as part of the sexual activity in question for the purposes of their consent would deny recognition of their sexual agency, equality and right to control over their reproductive and physical health and well-being (Barbra



Schlifer Factum, at para. 17, citing E. C. Neilson et al., “Psychological Effects of Abuse, Partner Pressure, and Alcohol: The Roles of in-the-Moment Condom Negotiation Efficacy and Condom-Decision Abdication on Women’s Intentions to Engage in Condomless Sex” (2019), 36 *J. of Interpers. Violence* NP9416).

[63] Condom refusal or removal disproportionately affects women, but it can be experienced by any person and the sexual assault laws are designed to provide equal protection to all. The offence of sexual assault protects the inviolability of each and every individual, and is inextricable from notions of power and control. In addition to sex inequality, there can also be inequality in sex. Requiring a condom is an act of agency, but negotiating its use often takes place in circumstances of inequality. Who has the authority to insist and ultimately decide how their bodies will be touched is at the heart of human dignity and equal sexual agency. Disregarding a complainant’s insistence on a condom is both proof and practice of an unequal relationship. It allows one partner to appropriate to themselves the ability to overrule the other partner’s conditions of consent. It is a clear exercise of dominance which shows a disregard for the other person’s ability to dictate the boundaries of their participation. Overruling the complainant’s insistence on the use of a condom is unlawful; an accused is not permitted to privilege his desire over her express limits and use her as a means to his sexual ends.

[64] The recognition that condom use when required is part of the sexual activity in question provides the requisite protection for everyone against illegal

conduct which produces complex harms. Having control over how one's body is touched must include the right to choose whether one's body is penetrated by a bare penis or a condom-covered penis and to limit one's consent accordingly. It is no different than having the right to choose whether one's body is touched over or under clothing, penetrated by a digit or a sex toy, or where and how penetration may occur. Preventing a complainant from limiting consent to circumstances where a condom is used erodes the right to refuse or limit consent to specific sexual acts, leaving "the law of Canada seriously out of touch with reality, and dysfunctional in terms of its protection of sexual autonomy" (C.A. reasons, at para. 3).

(c) *The Fraud Framework Advanced by the Appellant*

[65] Placing required condom use outside consent to the sexual activity in question in s. 273.1 threatens the foundational principles of consent and undermines Parliament's goals. Yet, that is precisely what the appellant seeks when he proposes that the legal implications of his refusal to wear a condom are only to be analyzed under the fraud framework of s. 265(3)(c). While s. 265(3)(c) has a role to play in other cases, it is not well equipped to address cases of sexual assault based on an allegation of no consent to a different physical act — especially when the complainant has expressly rejected the specific sexual act in question. A comparison of the appellant's alternative proposed pathway to liability shows how the general fraud provision in s. 265(3)(c) misses the mark when a sexual assault complainant says they did not consent to sexual intercourse without a condom.

[66] The appellant's narrow reading of "sexual activity in question" will deem the complainant to have consented in law when she did not in fact subjectively agree to sex without a condom. She will be taken to have said yes to intercourse without a condom when she really said no. By contrast, including condom use as part of the sexual activity in question properly places the focus at the first stage of the *actus reus* analysis: was there actual consent under s. 273.1?

[67] In this case the complainant's evidence is clear — she repeatedly confirmed she did not consent to having sex without a condom at any time:

Q So, in relation to the March 16, 2017 incident, did you consent to having sexual intercourse with Ross without a condom?

A No.

Q Did you want to have sexual intercourse without a condom?

A No.

Q So, between the first time you had sexual intercourse and the second time, at any point during that time did Ross ask you whether he could have sexual intercourse without a condom?

A No.

Q At any time did you tell him that he could have sexual intercourse with you without a condom?

A No.

(A.R., vol. II, at p. 26)

[68] Under s. 273.1, this evidence, if believed, is sufficient to establish a lack of consent on her part to the sexual activity in question. Instead of asking whether she subjectively wanted the touching to take place, fraud shifts the focus to how the accused behaved and asks whether he attempted to, or succeeded in, deceiving the complainant about his lack of condom use. Indeed, according to the appellant, the complainant in

this case is deemed to have consented under s. 273.1 to sexual intercourse without a condom despite the clear evidence she did not consent and the equally clear legal principle that what is required is her subjective agreement to that sexual act. The appellant further argues there can be no deception because *he* did not agree to wear a condom during the second act of intercourse.

[69] The requirement to prove deception and a deprivation misdirects the inquiry and creates gaps which leave many outside the law's protection in relation to sexual assault. This may not be surprising, as the general requirements for fraud do not always respect or track the rationales of sexual autonomy, human dignity and equal sexual agency at the core of the sexual assault offences. In addition to this disconnect, there are many reasons why the approach advocated for by the appellant should not be adopted where the complainant has not agreed to sex without a condom.

[70] First, requiring proof of a deprivation fails to account for how, under our law of consent, all persons are able to decide to consent or not based on whatever grounds are personally meaningful to them. Under s. 273.1, the law has no interest in why a person gave or withheld consent as their thoughts, motivations and desires are private. What matters is whether there was or was not subjective consent in fact. This respect for individual choice, and the personal motivations underlying it, lies at the core of sexual agency. Requiring a complainant who has insisted on condom use to prove a deprivation before consent is vitiated is inconsistent with the foundational principle that people are entitled to refuse consent regardless of their motivation. The

complainant may insist on a condom for “whatever reason” is meaningful to them — whether or not it is based on the risk of pregnancy or STIs or has any relationship with the law’s view of a significant risk of serious bodily harm (*G.F.*, at paras. 29 and 33). In the court below, Groberman J.A. was correct to point out, at para. 28, that “[s]uch a limitation on the definition of ‘the sexual activity in question’ would be perverse, as it would, without any rationale, prevent a person from limiting their consent in a manner that is intimately related to their personal autonomy and the public interest”.

[71] Second, the harms of non-consensual condom refusal or removal go beyond a significant risk of serious bodily harm and are so much wider than the risk of pregnancy and STIs. Constructing the harm as equivalent only to its “physical” or “bodily” consequences “inhibits legal recognition of how [it] is experienced as harmful and degrading because it transgresses the limits of consent to the sexual activity in question” (L. Gotell and I. Grant, “Non-Consensual Condom Removal in Canadian Law Before and After *R. v. Hutchinson*” (2021), 44 *Dal. L.J.* 439, at p. 442). It reinforces the myth that “real rape” is defined by physical violence, beyond the violence of non-consensual touching (Gotell and Grant, at p. 456). As L’Heureux-Dubé J. emphasized in *Cuerrier*, the essence of the offence is the violation of the complainant’s physical dignity in a manner contrary to their autonomous will and that violation is what justifies criminal sanction, regardless of the risk or degree of serious bodily harm involved (paras. 18-19).

[72] Third, the harm requirement for fraud also means that certain people and certain types of sex would not come within the law's protection. The recognition of one's security of the person and equality should not depend upon whether a particular complainant is capable of becoming pregnant or whether the sex act involved carries either the risk of pregnancy or the transmission of STIs.

[73] Fourth, proving a significant risk of serious bodily harm will likely entail a patronizing assessment of whether the harm the complainant experienced was significant enough to vitiate a consent that, in their mind, was never given. Establishing deprivation may be highly invasive for complainants. In addition to explaining the circumstances of their violation, they must establish that they suffered a significant risk of serious bodily harm beyond the indignity of being assaulted. The deprivation requirement focuses on intensely personal, sensitive or stigmatizing information about a complainant's unwanted pregnancy, abortion, fertility, menopausal status, contraception practices, STIs, assigned sex at birth (where it affects fertility), and possibly 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 STIs and the ultimate question of whether the accused's conduct actually caused the complainant harm (or risk thereof). These factors are not relevant to consent under s. 273.1 and yet play a prominent, even a determinative role under s. 265(3).

[74] Sexual assault law, based on s. 273.1, protects the complainant's choice, regardless of her reasons for requiring a condom. There is no need to overcome the

strictures of fraud by giving a wide definition to deception, by covering undisclosed condom refusal under the dishonesty requirement, or by finding that damage to dignitary interests qualifies as a significant risk of serious bodily harm. Parliament enacted its robust definition of consent under s. 273.1 in part because the general vitiation provision in s. 265(3) for all assaults was insufficient in the specific context of sexual assault. The direct route of asking whether there was subjective consent to the physically different act under s. 273.1 is better on every measure: it is what Parliament intended, it is logically prior, more respectful of complainants, substantively superior, and goes to the core of the statutory definition designed to address sexual violence and its consequences. It is Parliament's preferred provision for responding to consent violations because it is more specific than the fraud provision and newer (R. Sullivan, *Statutory Interpretation* (3rd ed. 2016), at pp. 327-28).

[75] The "sexual activity in question", properly interpreted, is sufficiently broad to capture physical aspects that were crucial to the complainant's agreement to the specific touching in the first place. The determination of whether no consent has been given to the distinct physical act of unprotected skin-to-skin sex should not depend on the manner in which a person's consent has been violated. In cases of condom refusal or removal, the fraud analysis draws attention away from the foundational principles of consent, focuses attention elsewhere, and creates gaps in coverage antithetical to Parliament's intention to address the rights, realities and harms of sexual violence. All the basic principles of statutory interpretation and consent law support the common-

sense proposition that sexual intercourse with a condom is a different sexual activity from sexual intercourse without a condom.

(4) The *Hutchinson* Decision Is Not Determinative

[76] The appellant nevertheless argues that this Court is bound to employ the fraud pathway based on his reading of *Hutchinson*. He specifically relies on paras. 41, 55 and 64 to argue that condoms should always be excluded from the sexual activity in question because they are a contraceptive (A.F., at paras. 21-23 and 26). He submits that the majority in *Hutchinson* expressly rejected the “distinction between a faulty condom and the absence of a condom” in the sexual activity in question analysis (A.F., at para. 26). He also invokes the minority’s clarification as to their disagreement with the majority to confirm his interpretation (*Hutchinson*, at para. 97; A.F., at para. 27). I disagree. *Hutchinson* does not have the broad application he suggests: the decision did not establish mandatory rules for all future cases involving a condom.

[77] In this section, I first set out the case in *Hutchinson* and then explain why it does not govern the case at bar in which no condom was used.

(a) *The Case*

[78] In *Hutchinson*, this Court addressed how the law should approach consent where an accused intentionally sabotaged the condom he was required to use during intercourse. In that case, the complainant and the accused were in a rather rocky long-



term intimate relationship. She repeatedly told him that she did not want to get pregnant and therefore insisted on condom use. Mr. Hutchinson instead wanted to get her pregnant, hoping their relationship could continue. While the complainant consented to sexual intercourse with a condom, he had, unbeknownst to her, poked holes in it, rendering it ineffective as a means of birth control (para. 2; see also *R. v. Hutchinson*, 2011 NSSC 361, 311 N.S.R. (2d) 1, at para. 2; *R. v. Hutchinson*, 2013 NSCA 1, 325 N.S.R. (2d) 95, at para. 3). The majority held that the complainant's consent had been vitiated by fraud under s. 265(3), while the minority held that she had not agreed to the "sexual activity in question" under s. 273.1(1) (paras. 74 and 103).

[79] The majority rejected an approach that placed condom sabotage under s. 273.1 for three reasons. First, they held that Parliament did not intend to expand the notion of sexual activity by including "potentially infinite collateral conditions" (para. 27). They said the ordinary meaning of the "sexual activity in question" is the specific physical sex act agreed to (for example, "kissing, petting, oral sex, intercourse, or the use of sex toys") and this "does not include conditions or qualities of the physical act, such as birth control measures or the presence of sexually transmitted diseases" (paras. 54-55). Second, the majority wanted to avoid putting the outcomes of *Cuerrier* and *Mabior*, which established when HIV non-disclosure could amount to fraud, at risk (paras. 29 and 42-43). Third, they sought to avoid a vague and unclear test for consent that could result in criminalizing conduct lacking the necessary reprehensible character before criminal sanctions are warranted (paras. 21 and 45-46).

[80] Applying the law to the facts, the majority held that the “sexual activity in question” was sexual intercourse and the complainant voluntarily agreed to it (paras. 64-65). However, the complainant’s consent had been vitiated by fraud because the test set out in *Cuerrier* and *Mabior* was satisfied: the dishonesty was evident and admitted, and there had been a sufficiently serious deprivation in the form of exposure to an increased risk of becoming pregnant (*Hutchinson*, at paras. 68 and 71).

[81] The minority was of the view that the complainant only agreed to sexual intercourse with an intact condom. It followed that there was no consent under s. 273.1(1) as the sexual activity was not carried out in the manner agreed to (paras. 101 and 103).

(b) *Hutchinson Is Distinguishable and Does Not Apply When No Condom Was Used*

[82] *Hutchinson* is a classic case of deception in which the accused deliberately made holes in the condom hoping that pregnancy would result. It simply held that cases involving condom sabotage and deceit should be analyzed under the fraud provision rather than as part of the sexual activity in question in s. 273.1. Read properly, and consistently with well-established principles for *stare decisis*, *Hutchinson* was chiefly concerned with the delineation of deception under the criminal law. The majority’s statements addressed the particular context of condom sabotage and did not intend to displace the fundamental principle, grounded in physical integrity and human dignity,

that the law allows all persons to insist on condom use as part of consent and thereby limit who may touch them and how.

[83] *Hutchinson* did not establish the sweeping proposition that all cases involving a condom fall outside s. 273.1 and can only be addressed, if at all, when the conditions of fraud are established. As this new case at bar demonstrates, condom use is not always collateral or incidental to the sexual activity in question. Indeed, conditioning agreement to sexual touching on condom use goes to the heart of the specific physical activity in question and the existence or non-existence of subjective consent, and there is no need to resort to the doctrine of fraud and its stringent legal requirements in this circumstance. *Hutchinson* thus remains binding authority for what it decided, but it does not apply to when the accused refuses to wear a condom and the complainant's consent has been conditioned on its use.

[84] I explain my conclusion that *Hutchinson* does not apply this widely in two parts. First, the majority's decision in *Hutchinson* is limited by its factual context and the majority's repeated references to the effectiveness of the condom, its sabotaged state and the accused's deception. The majority was not deciding the legal framework relating to the total absence of a condom or other forms of non-consensual condom refusal or removal. Second, I set out why, when considered in this light, the paragraphs the appellant relies on do not support his interpretation.

- (i) The Factual Context in *Hutchinson* and the Majority's Framing of the Issue on Appeal

[85] Cases are only authorities for what they “actually decide[d]”; they are not “statutes where every word counts as binding legal authority” (R. J. Sharpe, *Good Judgment: Making Judicial Decisions* (2018), at p. 148). The facts of *Hutchinson* and the particular legal issue raised limit what was decided in that case and how widely its dicta should be read. There, as here, the complainant premised her consent to sexual intercourse on condom use. Unlike the case at bar, Mr. Hutchinson had used a condom and the complainant knew he had done so. The sexual activity in question therefore involved the very physical touching she authorized — sexual intercourse with a penis sheathed in a condom — but the problem arose because he had sabotaged the condom. This is a substantial and materially different fact; it goes not to whether or not a condom was used but rather whether the condom was effective for birth control. This is important context in which to understand the majority’s interpretation of the “sexual activity in question” in s. 273.1.

[86] Faced with a clear case of deception as to the condom’s *condition*, the majority in *Hutchinson* framed the legal issue as whether “condom sabotage” should result in no consent under s. 273.1(1) of the *Criminal Code*, or whether “condom sabotage” should be analyzed under the fraud provision (para. 14). It was the “condom sabotage” that the majority held to constitute fraud under s. 265(3)(c) “with the result that no consent was obtained” (para. 6). Mr. Hutchinson’s actual use of a condom when one was required allowed the Court to find that the complainant subjectively consented to the sexual activity in question and to state the question before them as whether, despite this “apparent agreement”, the complainant’s consent was vitiated “because

that agreement was obtained as a result of Mr. Hutchinson’s deceit about the condition of the condom” (para. 17; see also para. 3).

[87] The focus on his deceptive use of a sabotaged condom weaves through the majority’s analysis, including in its overview of sexual autonomy in criminal law (at para. 19) and in introducing its statutory interpretation analysis (para. 20). Notably, their consideration of this Court’s jurisprudence in the statutory interpretation exercise deals only with cases relating to the fraud provision: *Cuerrier* and *Mabior*. Their discussion of previous interpretations of the fraud provision highlights difficulties drawing the line “between deceptions that did and did not vitiate consent” (para. 30). The analysis is centred on fraud and does not consider this Court’s jurisprudence on consent or purport to overrule it.

(ii) The Paragraphs the Appellant Relies on Do Not Support His Interpretation

[88] I do not accept that the paragraphs of the majority judgment in *Hutchinson*, as interpreted and relied on by the appellant in this case, support his argument that his failure to wear a condom can only be analyzed under s. 265(3) as a potential case of fraud. Taken in context, whether alone or in combination, these paragraphs do not preclude the failure to wear a condom from being considered under s. 273.1. In its analysis, the majority in *Hutchinson* often used the qualifier “effective” or “sabotaged” when discussing condom use and other birth control measures (see, e.g., paras. 44, 48 and 64). The majority does not explicitly say that condom non-use should be analyzed

through the same lens as condom sabotage or ineffective birth control. The issue of condom non-use as a material fact was not before the Court in *Hutchinson*.

[89] Significant attention has been paid to para. 55 of *Hutchinson*:

The “sexual activity in question” does not include conditions or qualities of the physical act, such as birth control measures or the presence of sexually transmitted diseases. Thus, at the first stage of the consent analysis, the Crown must prove a lack of subjective voluntary agreement to the specific physical sex act. Deceptions about conditions or qualities of the physical act may vitiate consent under s. 265(3)(c) of the *Criminal Code*, if the elements for fraud are met.

[90] This statement could be read as always excluding condoms from the “sexual activity in question” because condoms may be used as a birth control measure. But it need not and should not be read in this unnecessarily expansive manner. The majority’s opinion does not preclude treating effective condom use and condom non-use differently. The majority’s analysis leading up to this paragraph is focused on the delineation of fraud or deception in a case concerning a sabotaged condom. I agree with Groberman J.A. in the court below that properly interpreted in its context, para. 55 of *Hutchinson* holds that birth control measures may be “conditions or qualities of the physical act” where they do not inherently change the physical act itself. However, where they do change the physical act itself, like condom use, they may fall under s. 273.1. By reading *Hutchinson* in this way, I do not alter the meaning attributed to s. 273.1 by the majority of the Court, determined as it was for the purpose of disposing of the different matter at issue in that case. The interpretation and scope of this paragraph must consider the reasoning behind the majority’s differentiation between

the physical act itself and other “conditions or qualities”, which formed the basis for its exclusion of contraceptive measures and the presence of STIs from the sexual activity in question (*Hutchinson*, at paras. 5 and 55). This distinction stemmed from the concern that the minority’s approach — premised on the efficacy of the condom — would be unclear, cause over-criminalization, render the fraud provision “redundant in many cases” and undermine *Cuerrier* and *Mabior* (*Hutchinson*, at paras. 5, 21, 26, 29 and 39-46). The majority’s discussion of the problems with the minority’s approach, however, does not suggest that condom use, as an element of the physical act, carries these same problems (*Hutchinson*, at paras. 39-45).

[91] The *Hutchinson* majority held that “the ‘sexual activity in question’ was the sexual intercourse that took place in th[at] case” and effective condom use was “a method of contraception and protection against sexually transmitted disease”, not a “sex act” (para. 64). As there was “no dispute that the complainant subjectively consented to sexual intercourse with Mr. Hutchinson at the time it occurred”, the Crown had failed to prove a lack consent under s. 273.1(1) (para. 65).

[92] These statements do not help the appellant. Crucially, the complainant had subjectively consented to “the sexual intercourse that took place in th[at] case” because Mr. Hutchinson wore a condom. What the Court was addressing was *effective condom use*, which presupposes the use of a condom. The Court should not be taken as saying that requiring the use of a condom can never be part of the sex act. The position that an “effective condom” was a method of contraception is once again tied to the facts at

hand: a condom was used, but had been sabotaged by deception in a situation where the complainant was particularly concerned with the risk of conception.

[93] Finally, I am not persuaded that the majority took the position that no condom and sabotaged condoms were the same in para. 41 of *Hutchinson*. This paragraph does not speak to the absence of a condom. Rather, it sets out why the majority says adopting the “essential features”/“how the act was carried out” approaches (taken in the court below and by the minority judges) would make the law “inconsistent, highly formalistic and unduly uncertain”. It says the law should provide consistent treatment to a lie that obtains consent to unprotected sex and a lie as to the condition of a condom. However, the first lie relates to something other than the sexual activity in question because it causes the complainant to subjectively agree to unprotected sex (rather than causing the complainant to unwittingly have sex without a condom when she only agreed to sex with a condom). In the second example, the lie has to do with the state of the condom. This lie is about whether the condom is effective at preventing STI transmission or pregnancy, not about the sexual activity in question. It follows, for example, that fraud would be the proper approach to analyzing (1) a lie about STI status that leads the complainant to agree to have unprotected sex, and (2) a lie about the physical integrity of the condom. This paragraph treats these lies as similar, but it does not preclude actions that go to the core of the complainant’s conditioned consent from forming part of the sexual activity in question.



[94] Critically, nowhere in the judgment does the Court address the total absence of a condom in circumstances where consent was conditional on its use. In speaking of the specific physical sex act, they did not say that as a matter of law, condom use is never a physical aspect of the sexual activity in question. At no point did the majority convey any intention to overrule or modify the foundational principles of affirmative and subjective consent. Indeed, McLachlin C.J. and Cromwell J., writing for the majority, not only referred to *Ewanchuk*, they highlighted its primacy by introducing its basic principles in the very first paragraph of *Hutchinson*. They also explained that the complainant must agree to the “*specific* physical sex act” because “agreement to one form of penetration is not agreement to any or all forms of penetration and agreement to sexual touching on one part of the body is not agreement to all sexual touching” (para. 54). *Hutchinson* did not displace this Court’s well-established jurisprudence on the law of sexual assault and consent. Consistent with this jurisprudence, the majority undoubtedly would not have found that the complainant gave her voluntary agreement to unprotected sex had Mr. Hutchinson refused to wear a condom or removed it without her knowledge.

[95] The appellant relied on the minority reasons to support his expansive interpretation of what *Hutchinson* decided. I need not address these arguments because what the minority says is not the law and what the minority said about the majority judgment is also not the law. Neither bind this Court.

[96] To read *Hutchinson* as broadly as the appellant suggests would radically constrain the scope and centrality of consent under s. 273.1, and in a manner wholly inconsistent with this Court’s jurisprudence on consent both before and after it. Based on the appellant’s broad interpretation of *Hutchinson*, we heard argument from the respondent Crown, and the interveners the Attorneys General of Ontario and Alberta; the Barbra Schlifer Commemorative Clinic; the West Coast Legal Education and Action Fund Association; and the Women’s Legal Education and Action Fund Inc. asking us to overrule, revise or revisit the *Hutchinson* decision.

[97] In my view, it is not necessary to take this step because *Hutchinson* does not govern a case where consent turns on condom use and no condom is worn. The decision should not be read as widely as the appellant contends. To be clear, I am distinguishing *Hutchinson*, not overruling it. Again, the majority in *Hutchinson* did not explicitly consider the difference between condom non-use and condom sabotage, nor did they speak to the impact that such a difference would have on the interpretation of ss. 265(3) and 273.1(2). My analysis, which examines this distinction because it is material to the facts in this appeal, is grounded in the time-honoured tradition of interpreting the scope of a previous decision. This method is described by some scholars as “restrictive distinguishing” (see, e.g., G. Williams and A. T. H. Smith, *Glanville Williams: Learning the Law* (17th ed. 2020), at pp. 83-85; N. Duxbury, *The Nature and Authority of Precedent* (2008), at p. 114; D. Parkes, “Precedent Unbound? Contemporary Approaches to Precedent in Canada” (2006), 32 *Man. L.J.* 135, at pp. 141-42). It leaves the previous precedent in place and, in my respectful view, is

consonant “with the basic fundamental principle that the common law develops by experience” (*R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 57).

[98] *Hutchinson’s* interpretation of the relevant sections of the *Criminal Code* remains the law. This is based on a restrictive distinguishing between effective condom use and non-use, in light of the ineffective condom use that was a material fact in issue in that case. The *Criminal Code* was not, however, interpreted in light of the material fact of non-use of a condom that is central to the outcome of this appeal. Instead, I propose an interpretation of s. 273.1 in respect of material facts not ruled upon in *Hutchinson*.

#### (5) Summary and Application

[99] At the *actus reus* stage of sexual assault, placing a condition of condom use on consent defines the sexual activity voluntarily agreed to under s. 273.1. The “sexual activity” to which the complainant must consent may include the use of condoms.

[100] The question of whether condom use forms part of the sexual activity in question depends on the facts and whether it is a condition of the complainant’s consent in those particular circumstances. As explained in *Ewanchuk* (at paras. 29-30), this will require the trier of fact to consider the complainant’s testimony and assess their credibility in light of all the evidence.

[101] Recognizing that condom use may form part of the sexual activity in question not only brings clarity and consistency to the law, it leaves intact the careful limits set out in *Cuerrier* and *Mabior* in relation to the non-disclosure of HIV. Nothing in this approach impacts the criminalization of people living with HIV, unless they fail to respect their partner's condition of condom use.

[102] Where condom use is a condition of the complainant's consent to the sexual activity in question, it will form part of the "sexual activity in question" and the consent analysis under s. 273.1. If the *actus reus* is established, the focus will shift to the *mens rea*. If the accused is mistaken and has not been reckless or willfully blind to the complainant's consent, and has taken reasonable steps to ascertain this consent, they may be able to put forward a defence at the *mens rea* stage of the analysis (s. 273.2; *Ewanchuk*, at paras. 25, 47 and 49; *J.A.*, at para. 42; *Barton*, at paras. 90-94). The trier of fact will be the best placed to assess in light of the evidence whether a condom was removed in ignorance of the complainant's conditioned consent, or whether, for example, it accidentally fell off without the accused noticing.

[103] In cases involving condoms, *Hutchinson* applies where the complainant finds out *after* the sexual act that the accused was wearing a knowingly sabotaged condom. *Hutchinson* remains good law and applies only to cases of deception, for example where a condom is used, but rendered ineffective through an act of sabotage and deception. If the complainant finds out *during* the sexual act that the condom was

sabotaged, then they can revoke their subjective consent, the *actus reus* of sexual assault is made out, and there is no need to consider the fraud analysis.

[104] Recognizing that condom use can be part of the sexual activity in question is not an expansion of s. 273.1 and does not offend the principle of restraint in criminal law. Parliament has stated repeatedly that it is criminally reprehensible conduct to impose an unconsented-to sexual act on an unwilling or unwitting victim. Non-consensual condom refusal or removal is a form of sexual violence that generates harms and undermines the equality, autonomy, and human dignity of complainants. It is not simply “undesirable” behaviour (trial reasons, at para. 30).

[105] There are also no vagueness or certainty concerns if condom use, including non-consensual condom refusal or removal, is seen as part of the sexual activity in question. Asking whether a condom was required and if so, whether one was used has the necessary certainty to prevent over-criminalization. While restraint is an important criminal law principle, it does not override Parliament’s countervailing imperative of enacting sexual assault laws that respect the rights and realities of those subject to such violence. Excluding such physical aspects from the sexual activity in question would leave an avoidable and undesirable gap in the law of sexual assault, where certain violations of a complainant’s physical integrity and equal sexual agency are demoted as less worthy of protection. This runs contrary to the fundamental principle that a complainant’s motives for only agreeing to sex with a condom are irrelevant.

[106] The complainant's evidence in this case was clear: she would not consent to having sex with the appellant without a condom, but the appellant nevertheless chose to engage in sexual intercourse without one. Therefore, there was some evidence that the complainant did not subjectively consent to the sexual activity in question. The trial judge erred in concluding otherwise.

B. *Evidence of Fraud*

[107] Given my conclusion on the first issue, it is not necessary to consider the second issue of whether there was evidence capable of meeting the requirements to establish fraud under s. 265(3)(c).

V. Conclusion

[108] For these reasons, I would dismiss the appeal and uphold the order of the Court of Appeal for British Columbia setting aside the acquittal and ordering a new trial.

The reasons of Wagner C.J. and Côté, Brown and Rowe JJ. were delivered  
by

CÔTÉ, BROWN AND ROWE JJ. —

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[109] We agree with our colleague Martin J. on the proper disposition of this appeal. We, too, would dismiss Mr. Kirkpatrick's appeal and uphold the order of the Court of Appeal for British Columbia for a new trial.

[110] We also broadly and emphatically agree with our colleague's summary, at paras. 26-35, of Canadian sexual assault law. No means *only* no; and *only* yes means yes. Consent to sexual activity requires nothing less than positive affirmation. In this way, our law strives to safeguard bodily integrity and sexual autonomy for all.

[111] But that is not what this appeal is about. This appeal asks whether this Court may interpret the same provision of the *Criminal Code*, R.S.C. 1985, c. C-46, twice, in radically different ways, without overturning itself. Our colleague says it can. We say it cannot.

[112] At stake here, however, is not only the coherence of our jurisprudence on this issue, but the methodology by which judicial authority is exercised at this Court.

[113] Our reasons proceed in four parts. First, we show that *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, governs the very issue now before this Court. The *Hutchinson* majority held, *categorically*, that condom use is not part of "the sexual activity in question" contemplated in s. 273.1(1) of the *Criminal Code*. When a person agrees to have sex on the condition that their partner wear a condom, but that condition is circumvented *in any way*, the sole pathway to criminal liability is the fraud vitiating consent analysis under s. 265(3)(c).



[114] This is precisely what occurred between Mr. Kirkpatrick and the complainant in this case. As we will explain, we are bound — as is our colleague — to apply *Hutchinson*. Yet, our colleague treats the matter of which framework to use — s. 273.1(1) or s. 265(3)(c) — as an open question that *Hutchinson* did not resolve. She addresses this binding precedent only secondarily, and towards the conclusion of her reasons, and gives short shrift to this Court’s definitive answer to the very question raised in this appeal. In doing so, our colleague superimposes the *Hutchinson* minority’s view onto this settled legal question, despite correctly pointing out that “what the minority says is not the law” (para. 95).

[115] And even were our colleague *not* bound by *Hutchinson*, she neither acknowledges nor accounts for how her proposed re-interpretation of s. 273.1(1) opens the door to over-criminalization, the burden of which is likely to fall disproportionately on the same marginalized communities she claims to defend. It is, after all, precisely the interpretation that our colleague now revives from the minority reasons in *Hutchinson* that was rejected by the majority as failing to strike the proper balance between protecting sexual autonomy and ensuring the “blunt instrument” of the criminal law is applied with certainty and restraint (para. 18). The unsustainable distinction that our colleague draws to escape *Hutchinson* skates over the risk of over-criminalization that the majority in *Hutchinson* identified in the minority judges’ approach. Our colleague sweeps aside the “principled and clear line between criminal and non-criminal conduct” achieved in *Hutchinson*, which ensured that the failure to

respect a partner's conditioning of sex on condom use is criminalized only where it is both dishonest and potentially harmful to the complainant (para. 49).

[116] Second, as *Hutchinson* cannot be distinguished, it must either be applied or overturned. In claiming that *Hutchinson* is factually distinguishable, our colleague avoids the difficult work of determining whether *Hutchinson* should be overturned. To fairly assess whether *Hutchinson* can be overturned, we examined all of this Court's horizontal *stare decisis* jurisprudence since the introduction of the *Constitution Act, 1982*. We underscore that *stare decisis* is fundamental to legal stability, judicial legitimacy, and the rule of law. We also synthesize the common themes that emerge from our jurisprudence and articulate a test for assessing whether this Court can overturn a prior precedent. In sum, this Court can only overturn its own precedents if that precedent (1) was rendered *per incuriam*, (2) is unworkable, or (3) has had its foundation eroded by significant societal or legal change.

[117] Third, applying our horizontal *stare decisis* framework, we conclude that *Hutchinson* meets none of the criteria for overturning precedent. It therefore governs the case at bar, such that the fraud vitiating consent analysis under s. 265(3)(c) is engaged, rather than the consent analysis under s. 273.1(1).

[118] Finally, applying *Hutchinson* to the present case, we conclude there is some evidence that the complainant consented to the sexual activity in question, but that a new trial is required to determine whether her apparent consent was vitiated by fraud.

## II. Analysis

### A. *Hutchinson Applies to This Appeal*

[119] Our colleague treats the legal effect of the appellant’s “failure to wear a condom” as an open question, and suggests the answer to this question is unresolved in the jurisprudence (para. 25). She contends that, based on “well-established principles” of *stare decisis*, *Hutchinson* is a case “chiefly concerned with the delineation of deception under the criminal law” (para. 82). She says the *ratio decidendi* of *Hutchinson* relates solely to “sabotaged” condoms, not the absence of a condom (paras. 84-87). *Hutchinson* is, she says, “a classic case of deception” (para. 82). She says that this Court did not canvas the broader issues of a refusal to wear a condom or non-consensual condom removal (at para. 85), and, as such, *Hutchinson* “did not establish mandatory rules for all future cases involving a condom” (para. 76).

[120] None of this is remotely so. Indeed, it is demonstrably to the contrary. As we will explain, the case at bar is indistinguishable from *Hutchinson* for several reasons. First, the binding *ratio* of all the decisions of the Court, as an apex court, is necessarily wider than our colleague acknowledges, undermining her attempt to confine *Hutchinson* to its particular facts. Second, the interpretation of *Hutchinson* she advances is contradicted by a plain reading of the decision, by the *Hutchinson* minority opinion, and by *Hutchinson*’s treatment by courts across the country. Third, the distinction our colleague would draw between *Hutchinson* and the case at bar is both incoherent and illogical. And finally, we say, respectfully but adamantly, it follows

from the foregoing that our colleague’s attempt to “distinguish” *Hutchinson*, in substance, effects an overturning of that precedent. Although the facts are “bound to change in every case”, as our colleague says (at para. 40), the applicable legal framework does not. With respect, our colleague claims her analysis is “grounded in the time-honoured tradition of interpreting the scope of a previous decision” (para. 97), when she in fact overturns *Hutchinson*, if not in form then in substance.

(1) This Court’s Decisions Are Intended to Apply Broadly

[121] Our colleague purports to distinguish *Hutchinson* by narrowly confining it to its highly unusual facts. While the facts of *Hutchinson* included a sabotaged condom (as opposed to no condom at all), the *ratio* of *Hutchinson*, as is typical of all cases decided at this Court, is broader than its facts. Our colleague’s methodology is wholly inconsistent with this Court’s established jurisprudence on interpreting the binding *ratio* of its decisions. She reinterprets *Hutchinson* on the narrow basis that the decision is “limited by its factual context” involving a sabotaged condom (para. 84). As we will explain, her emphasis on these aspects of the majority reasons overlooks the principles to be applied to ascertain the *ratio* of a case.

[122] Not all judicial decisions are created equal. The breadth of a decision’s *ratio* varies according to the level of court rendering it. While trial courts are rarely called upon to break new legal ground, intermediate appellate court decisions, generally speaking, concern the application of a point of law to the facts found by the trial court. This reflects the respective roles of the lower courts within our common law system

(see, e.g., D. J. M. Brown, with the assistance of D. Fairlie, *Civil Appeals* (loose-leaf), at §§ 1:1-1:7; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 11-18; *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at paras. 35-36; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729, at paras. 105-8, per Côté J., dissenting, but not on this point).

[123] By contrast, apex courts consider broader legal questions (Brown, at § 1:7; B. Laskin, “The Role and Functions of Final Appellate Courts: The Supreme Court of Canada” (1975), 53 *Can. Bar Rev.* 469, at p. 475; *Housen*, at para. 9; *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 34). The decisions of this Court “resonate through the legal system” by enunciating, as they often do, general principles meant to apply broadly to the system as a whole (P. Daly, “Introduction”, in P. Daly, ed., *Apex Courts and the Common Law* (2019), 3, at pp. 4-5; M. Rowe and L. Katz, “A Practical Guide to *Stare Decisis*” (2020), 41 *Windsor Rev. Legal Soc. Issues* 1, at p. 9). Accordingly, where this Court “turns its full attention to an issue and deals with it definitively”, its “guidance . . . should be treated as binding”, even where those comments were not strictly necessary for resolving the particular facts of that case (Rowe and Katz, at p. 10).

[124] Indeed, where once it was thought that “a case is only an authority for what it actually decides”, identifying the *ratio* of a decision of a modern apex court is a more expansive undertaking (*R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 53;

Daly, at p. 4). Apex courts do not merely resolve individual cases; they expound general principles intended to guide — and bind — lower courts. The institutional position of our Court thus precludes an unduly narrow understanding of the law as we pronounce it, confined to the facts of each individual case. It requires instead a broader approach that produces general legal principles with the power to “unify large areas of the law and provide meaningful guidance to the legal community” (Daly, at pp. 4-5). For example, this Court’s decision in *R. v. Oakes*, [1986] 1 S.C.R. 103, stands for more than the proposition that s. 8 of the *Narcotic Control Act*, R.S.C. 1970, c. N-1, is unconstitutional. As such, it is not open to this Court to reinvent the framework of analysis for s. 1 of the *Charter* each time a constitutional appeal arises with facts different from those in *Oakes*.

[125] Despite the foregoing, our colleague, as we say, maintains that “[c]ases are only authorities for what they ‘actually decide[d]’” (para. 85). But this view, stated over 120 years ago by the Earl of Halsbury L.C. at the House of Lords in *Quinn v. Leatham*, [1901] A.C. 495, at p. 506, has been explicitly *rejected* by this Court. Indeed, in *Henry, Binnie J.*, writing for the Court, explained at length, at para. 53, why this obsolete approach of the Lord Chancellor Halsbury and our colleague no longer applies:

The caution [that a case is only an authority for what it actually decides] was important at the time, of course, because the House of Lords did not then claim the authority to review and overrule its own precedents. This is no longer the case. . . . In Canada in the 1970s, the challenge became more acute when this Court’s mandate became oriented less to error correction and more to development of the jurisprudence (or . . . to deal with questions of “public importance”). The amendments to the *Supreme Court Act* had two effects relevant to this question. Firstly, the Court took fewer appeals,

thus accepting fewer opportunities to discuss a particular area of the law, and some judges felt that “we should make the most of the opportunity by adopting a more expansive approach to our decision-making role”: B. Wilson, “Decision-making in the Supreme Court” (1986), 36 *U.T.L.J.* 227, at p. 234. Secondly, and more importantly, much of the Court’s work (particularly under the Charter) required the development of a general analytical framework which necessarily went beyond what was essential for the disposition of the particular case. . . . It would be a foolhardy advocate who dismissed Dickson C.J.’s classic formulation of proportionality in *Oakes* as mere *obiter*. Thus if we were to ask “what *Oakes* actually decides”, we would likely offer a more expansive definition in the post-*Charter* period than the Earl of Halsbury L.C. would have recognized a century ago. [Emphasis added.]

[126] We agree with Binnie J.’s statement that the “strict and tidy demarcation” between the narrow *ratio decidendi* of a case, which is binding, and *obiter*, which is not, is an “oversimplification” of how the law develops (*Henry*, at para. 52). The legal point decided by the Court may be narrow or broad, depending on its proximity to the *ratio* of the case. The focus remains on the words this Court uses in its reasons, read in the context of the decision as a whole, as well as “the basic fundamental principle” that the law “develops by experience” (*Henry*, at para. 57).

[127] That said, in statutory interpretation cases, the context of the decision as a whole must not stray beyond its appropriate limits. While context remains relevant, it cannot be used to achieve different outcomes for different litigants. Statutory interpretation of *Criminal Code* provisions engages questions of law, which must be answered consistently for all types of offenders. For example, the meaning of “the sexual activity in question” cannot differ from one offender to the next. The *ratio decidendi* of a decision is a statement of law, not facts, and “[q]uestions of law forming

part of the *ratio* . . . of a decision are binding . . . as a matter of *stare decisis*” (*Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 71, per Côté and Brown JJ., dissenting, but not on this point; *R. v. Arcand*, 2010 ABCA 363, 264 C.C.C. (3d) 134, at para. 413, per Hunt and O’Brien JJ.A.; *Osborne v. Rowlett* (1880), 13 Ch. D. 774, at p. 785). A question of law cannot, therefore, be confused with the various factual matrices from which that question of law might arise.

[128] In our respectful view, our colleague’s reasons are flawed because the core issue on appeal (the statutory interpretation of “the sexual activity in question” in s. 273.1(1)) is a straightforward question of law that this Court categorically resolved in *Hutchinson*. Our colleague relies on the argument that this case is *factually* distinguishable. But this is irrelevant, as the underlying question of law is identical across both appeals.

[129] Further, when the question of law is one of statutory interpretation, the *ratio decidendi* of prior jurisprudence of this Court must be understood in the context of the Court’s role: to provide a clear and uniformly applicable interpretation of how a statutory provision is to be understood and applied by lower courts across Canada. When this Court is presented with a statutory interpretation question for the first time, its role is to “give effect to the intention of the legislature insofar as that intention is discoverable from the language of the text” and further assisted by the rules of statutory interpretation (R. Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 38).



[130] The exercise of statutory interpretation, by necessity, cannot invite multiple competing interpretations or “gradients” of application based on the facts of a particular case. As a matter of *stare decisis*, a court is bound by a prior interpretation of a statutory provision, whether of the same court or of a higher court, until that statement is reversed by a court of higher authority, or until the statutory provision is amended by the legislature (*Delta Acceptance Corporation Ltd. v. Redman* (1966), 55 D.L.R. (2d) 481 (Ont. C.A.), at p. 485, per Schroeder J.A.).

[131] Our colleague sidesteps *Hutchinson* by suggesting that the understanding of its *ratio* has shifted over time in accordance with “the basic fundamental principle that the common law develops by experience” (para. 97, quoting *Henry*, at para. 57). We do not dispute that principle; but it is of no moment here. *Hutchinson* is not a common law precedent. It is a statutory interpretation precedent. The meaning of the interpreted statutory provision in *Hutchinson* — s. 273.1(1) of the *Criminal Code* — does not shift over time (see paras. 261-62, below). Nor does its meaning shift because some have criticized what it plainly stands for: that condom use does not go to the sexual activity in question (Martin J.’s reasons, at para. 96). In interpreting a statutory provision, the judicial role is to give effect to the intent of the legislature. It is a fundamental error to apply the “living tree” methodology to the interpretation of statutes. And it is no less an error to confuse statutory interpretation with development of the common law, which is judge-made and applies in the absence of legislative enactment.

[132] An additional systemic point is worth mentioning here. Our colleague’s approach would tend to undermine the precedential force of all our decisions. Future litigants could attempt to confine all our precedents to their peculiar facts. Similarly, lower courts could routinely sidestep our precedents by distinguishing the case before them with ease. Our court would cease to be an apex court institutionally tasked with definitively resolving legal issues of public importance, and instead become a court of error correction whose decisions are confined to the facts of each case. As the authorities reviewed above make clear, the role of this Court at the apex of our modern judicial hierarchy is not comparable to that of the House of Lords at the close of the reign of Queen Victoria.

(2) Properly Interpreted, *Hutchinson* Governs This Appeal

[133] In light of the foregoing, to ascertain the binding *ratio* of *Hutchinson*, it is necessary to review what the majority actually said, what the minority understood the majority to be saying, and how courts have interpreted and applied the holding in *Hutchinson*.

(a) *The Hutchinson Majority Held That Condom Use Is Not a Sex Act Under Section 273.1(1)*

[134] The plain words used throughout the majority decision in *Hutchinson* confirm its *ratio*; that condom use does not form part of “the sexual activity in question” under s. 273.1(1) of the *Criminal Code*.

[135] At paras. 2-3 and 5, the majority stated its intention to provide *broad* and *binding* guidance on the proper interpretation of consent under s. 273.1(1) as it relates to condom use. These passages are particularly illuminating, so we reproduce them here in their entirety:

In this case, the complainant consented to sexual activity with a condom to prevent conception. Unknown to her at the time, her partner, Mr. Hutchinson, poked holes in the condom and the complainant became pregnant. Mr. Hutchinson was charged with aggravated sexual assault. The complainant said that she did not consent to unprotected sex. The trial judge agreed and convicted Mr. Hutchinson of sexual assault. The majority of the Nova Scotia Court of Appeal . . . upheld the conviction on the basis that condom protection was an essential feature of the sexual activity, and therefore the complainant did not consent to the “sexual activity in question”. Farrar J.A., dissenting, held that there was consent to the sexual activity, but that a new trial was required to determine whether consent was vitiated by fraud.

The immediate problem is how cases such as this fall to be resolved under the provisions of the *Criminal Code*. This is an issue of statutory interpretation. Underlying this is a broader question — where should the line between criminality and non-criminality be drawn when consent is the result of deception?

...

We conclude that the first step [of the process for analyzing consent to sexual activity] requires proof that the complainant did not voluntarily agree to the touching, its sexual nature, or the identity of the partner. Mistakes on the complainant’s part (however caused) in relation to other matters, such as whether the partner is using effective birth control or has a sexually transmitted disease, are not relevant at this stage. [Emphasis added; citations omitted.]

[136] These passages — for which our colleague does not adequately account — are a complete answer to para. 90 of her reasons, which embrace Groberman J.A.’s unduly narrow reading of *Hutchinson* in the judgment below.

[137] Our colleague, like Groberman J.A., contends that *Hutchinson* endorses an interpretation of “the sexual activity in question” that treats birth control measures as “‘conditions or qualities of the physical act’ where they do not inherently change the physical act itself” and, “where they do change the physical act itself, like condom use, they may fall under s. 273.1” (para. 90). Our colleague suggests the majority drew a distinction “premised on the efficacy of the condom” (para. 90). But, again, this is simply not so. The *Hutchinson* majority *explicitly* held that “there is no reason in principle to analyze a case of a lie that obtains consent to unprotected sex and a lie as to the condition of a condom differently” (para. 41 (emphasis added)). Our colleague’s attempt to parse this sentence in a manner that supports her position is neither cogent nor tenable (para. 93).

[138] Our colleague also expresses the view that “nowhere in [*Hutchinson*] does the Court address the total absence of a condom in circumstances where consent was conditional on its use” (para. 94). Again, this is clearly not so. To the contrary, the *Hutchinson* majority stated that the law must treat “a lie that obtains consent to unprotected sex and a lie as to the condition of a condom” consistently, and later that “[e]ffective condom use . . . is not a sex act” (paras. 41 and 64). Sabotage is obviously one means by which a sexual partner’s stipulation of condom use can be circumvented. But the *Hutchinson* Court did not confine itself to this particular means. Another way of rendering a condom *ineffective* is to remove it or fail to wear it, despite an agreement that it be worn, leading to *unprotected sex*. This is exactly what is alleged to have occurred in the case at bar: Mr. Kirkpatrick, by deceptively concealing from the

complainant that he was not wearing a condom, obtained her consent to unprotected sex despite her express wish that he wear protection. It is obvious that the *Hutchinson* majority was alive to this scenario and intended it to be treated consistently with condom sabotage, i.e., under s. 265(3)(c).

[139] In rejecting the “essential features” approach, the *Hutchinson* majority decided on a narrow reading of s. 273.1(1). In so doing, it made a categorical statement that precludes any distinction between effective condom use and the absence of a condom. It thus confined “the sexual activity in question” to the physical act itself (for example, kissing, petting, oral sex, intercourse, or the use of sex toys) (para. 54). Again, this is a complete answer to our colleague’s claim, at para. 25, that “[t]wo alternative pathways are available to decide the legal effect of Mr. Kirkpatrick’s failure to wear a condom”. It is this simple: *Hutchinson* firmly blocks the pathway our colleague now proposes to take.

(b) *The Hutchinson Minority Understood the Majority’s Holding That Condom Use Is Not a Sex Act Under Section 273.1(1)*

[140] Our colleague declines to address the minority reasons in *Hutchinson* because “what the minority says is not the law and what the minority said about the majority judgment is also not the law” (para. 95). We see three issues with this proposition. First, our colleague essentially adopts the *Hutchinson* minority’s reasoning to rewrite this Court’s jurisprudence on the issue at hand. Second, she herself looks to the “minority’s approach” (premised on condom efficacy) to explain the “reasoning

behind” the majority’s interpretation of s. 273.1(1) (para. 90). Finally, and with respect, our colleague misses the point of our reference to the minority reasons in this context. Of course, the minority reasons do not state the law. Indeed, and as we will show, it is *our colleague* who treats the minority reasons in *Hutchinson* as governing here. But minority reasons may be helpful in clarifying the *ratio* of a case, as stated by the majority (see *TCF Ventures Corp. v. Cambie Malone’s Corp.*, 2017 BCCA 129, 95 B.C.L.R. (5th) 346, at para. 25). And, here, *our* understanding of the *ratio* of *Hutchinson* — and not that of *our colleague* — is confirmed by the minority opinion in that case. Simply put, how the minority understood the import of the majority reasons in *Hutchinson* assists in identifying the *ratio* of that case.

[141] Animating the majority’s reasons in *Hutchinson* was the desire to maintain a bright line rule to avoid over-criminalization. This led the majority to conclude that condom use was not part of “the sexual activity in question”. It contrasted this approach with the minority’s “variation” on the “essential features” approach, which in the majority’s view “would also result in the criminalization of acts that should not attract the heavy hand of the criminal law” (paras. 44-46). This point of disagreement between the *Hutchinson* majority and minority reinforces our view that the issue presented in the present appeal has already been decided by this Court. The *Hutchinson* majority’s very point in drawing a bright line between sex with a condom and “the sexual activity in question” was to consign *all* “conditions or qualities of the physical act, such as birth control measures” to the fraud analysis (para. 55).

[142] Crucially, the minority confirmed *the effect* of the majority’s reasoning, at paras. 97-98:

The heart of our disagreement with [the majority] turns on whether the use of a condom is included in the manner in which the sexual activity is carried out. According to our colleagues, the use of a condom during sexual intercourse does not change the “specific physical sex act” which occurs, but rather is merely a “collateral conditio[n]” to the sexual activity. In their view, so long as there is consent to “sexual intercourse”, this general consent is not vitiated by a deception about condom use unless it exposes the individual to a deprivation within the meaning of s. 265(3)(c), which they conclude in this case means depriving a woman of the choice to become pregnant by “making her pregnant, or exposing her to an increased risk of becoming pregnant”.

With respect, it does not follow that because a condom is a form of birth control, it is not also part of the sexual activity. Removing the use of a condom from the ambit of what is consented to in the sexual activity because in some cases it may be used for contraceptive purposes, means that an individual is precluded from requiring a condom during intercourse where pregnancy is not at issue. . . . If one of those individuals has insisted upon the use of a condom, and their partner has deliberately and knowingly ignored those wishes — whether by not using a condom at all, removing it partway through the sexual activity, or sabotaging it — that individual will nonetheless be presumed to have consented under the approach suggested by our colleagues. . . . We fail to see how condoms can be seen as anything but an aspect of how sexual touching occurs. When individuals agree to sexual activity with a condom, they are not merely agreeing to a sexual activity, they are agreeing to how it should take place. That is what s. 273.1(1) was intended to protect. [Underlining added.]

[143] With respect, our colleague misses the mark in saying that *Hutchinson* does not stand for the proposition that “all cases involving a condom fall outside s. 273.1 and can only be addressed, if at all, when the conditions of fraud are established” (para. 83). She also incorrectly contends that *Hutchinson* “does not apply to when the accused refuses to wear a condom and the complainant’s consent has been conditioned

on its use” (para. 83). The foregoing passages make plain that this Court squarely considered and categorically resolved this matter. Our interpretation is not an “unnecessarily expansive” one (para. 90). It is anchored in the words of both the majority and minority reasons in *Hutchinson*.

[144] We would add only this. The upshot of our colleague’s interpretation of *Hutchinson* is that the minority did not understand the true effect of the majority’s decision. It should go without saying that we ardently reject any suggestion that three members of this Court, after deliberating for four months, could have misconstrued their colleagues’ position in such a fundamental way. This notion is belied by the opening paragraph of the *Hutchinson* minority opinion, at para. 76, which captures the minority’s understanding of the core question before the Court: Is sexual intercourse with a condom a different sexual activity than sexual intercourse “*without* a condom”? (para. 76 (emphasis in original)). The majority answered this question in the negative, despite the minority’s vigorous disagreement. This is, of course, the very basis upon which our colleague now says *Hutchinson* is “distinguishable”.

(c) *Subsequent Jurisprudence Confirms Hutchinson’s Ratio Is That Condom Use Is Not a Sex Act Under Section 273.1(1)*

[145] As the Honourable R. J. Sharpe (writing extra-judicially) has observed, “the answer to the question ‘What does a case decide?’ is usually ‘Only time will tell’” (*Good Judgment: Making Judicial Decisions* (2018), at p. 152). Indeed, it is only



“through the crucible of the common law fact-specific method that we determine the precedential value of a prior decision” (p. 152).

[146] And, in this case, time *has* told. The judicial treatment of *Hutchinson* (our colleague’s reasons excepted) removes any doubt that may somehow have lingered about what the decision stands for. Our colleague says that “the basic principles of statutory interpretation and consent law support the common-sense proposition that sexual intercourse with a condom is a different sexual activity from sexual intercourse without a condom” (para. 75). As a matter of law, this is simply not so. Our colleague cites no authority in support of this “common-sense” proposition. And she overlooks a vast swath of persuasive jurisprudence undermining it.

[147] *Many* appellate court decisions affirm the two-step approach set out in *Hutchinson* as good law and reiterate that “the sexual activity in question” is limited to the specific physical sex act, its sexual nature, and the identity of the sexual partner. Other conditions, such as condom use or sexually transmitted diseases are not included in this definition (see, e.g., *R. v. A.E.*, 2021 ABCA 172, 466 D.L.R. (4th) 226, at paras. 24 and 65-66; *R. v. Brar*, 2021 ABCA 146, 23 Alta. L.R. (7th) 1, at paras. 27-29; *R. v. P.D.C.*, 2021 ONCA 134, 401 C.C.C. (3d) 406, at para. 73; *R. v. Nauya*, 2021 NUCA 1, at para. 12 (CanLII); *R. v. G. (N.)*, 2020 ONCA 494, 152 O.R. (3d) 24, at paras. 53-54; *R. v. Capewell*, 2020 BCCA 82, 386 C.C.C. (3d) 192, at paras. 51 and 64; *R. v. Kwon*, 2020 SKCA 56, 386 C.C.C. (3d) 553, at paras. 27-28; *R. v. Percy*, 2020 NSCA 11, 61 C.R. (7th) 7, at paras. 110-11; *Charest v. R.*, 2019 QCCA 1401, at

para. 99 (CanLII); *R. v. Al-Rawi*, 2018 NSCA 10, 359 C.C.C. (3d) 237, at para. 68; *P. (P.) v. D. (D.)*, 2017 ONCA 180, 409 D.L.R. (4th) 691, at para. 76).

[148] Several of these appellate decisions have adopted and used the phrase “physical sex act” to describe a *type* of sex act, not condom usage, offering further support for our interpretation of the *ratio* of *Hutchinson*. For example, in *P. (P.) v. D. (D.)*, the claimant mistakenly believed his partner had been taking birth control pills only to discover she had conceived his child. Rouleau J.A. of the Court of Appeal for Ontario described the *Hutchinson ratio* as follows: “The majority in *Hutchinson* considered that the presence or absence of a condom during sexual intercourse does not affect the ‘specific physical sex act’ to which the complainant consented, namely, sexual intercourse, but is rather a ‘collateral condition’ to that sexual activity” (para. 81, citing *Hutchinson*, at para. 67).

[149] Likewise, in *A.E.*, a case involving a brutal sexual assault alleged by the complainant, Martin J.A. of the Court of Appeal for Alberta held that the *ratio* in *Hutchinson* was that the “‘sexual activity in question’ is to be interpreted narrowly — to refer to the basic physical act in question — and does not include conditions or qualities of the act, such as birth control measures or the presence of STDs” (para. 65). On appeal, this Court endorsed this narrow approach in oral reasons.

[150] And finally, in *G. (N.)*, the appellant wore a condom but did not disclose his HIV status to his sexual partners. Fairburn J.A. of the Court of Appeal for Ontario

(as she then was) explained, at para. 53, “the sexual activity in question” in the following terms:

. . . as set out in *Hutchinson*, at paras. 55, 57, and recently reinforced in *Barton*, at para. 88, consent is linked to the “sexual activity in question”, which encompasses “the specific physical sex act”, “the sexual nature of the activity”, and the “identity of the partner”. It does not, though, include the “conditions or qualities of the physical act, such as . . . the presence of sexually transmitted diseases”. [Citations omitted.]

(Citing to Bennett J.A.’s holding in the court below (2020 BCCA 136, 63 C.R. (7th) 338, at para. 89).)

[151] Indeed, *this Court’s own* post-*Hutchinson* sex assault jurisprudence accords with the plain wording of the decision, as understood by the *Hutchinson* minority and appellate courts nationwide.

[152] In *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, Moldaver J. held that consent “must be linked to the ‘sexual activity in question’”, which “does not include ‘conditions or qualities of the physical act, such as birth control measures’” (para. 88, citing *Hutchinson*, at paras. 55 and 57).

[153] In *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, Karakatsanis J. cited para. 27 of *Hutchinson* for the proposition that affirmative communicated consent must be given “for each and every sexual act” (para. 44). This citation is notable. Paragraph 27 of *Hutchinson* explains the legislative history regarding amendments to the definition of “consent” in s. 273.1(1) of the *Criminal Code*, and concludes with the following remark: “There was no suggestion that Parliament intended to expand the

notion of ‘sexual activity’ by including not only the sexual act for which consent is required, but also potentially infinite collateral conditions, such as the state of the condom” (emphasis added).

[154] We pause here to briefly draw attention to our colleague’s reference, at para. 96, to criticism of the majority’s reasoning in *Hutchinson* from various interveners to this appeal. Our colleague says that, if *Hutchinson* is interpreted as we say it must be — i.e., as excluding condom use from the consent analysis in s. 273.1(1) — that interpretation would “radically constrain the scope and centrality of consent under s. 273.1, and in a manner wholly inconsistent with this Court’s jurisprudence on consent both before and after it”. She proposes an interpretation of *Hutchinson*’s scope that immunizes it from the criticisms levied by various interveners in this appeal and certain academic commentators. Respectfully, this reasoning is misguided. We say this for two reasons.

[155] First, the criticism of *Hutchinson* cited by the Crown and some interveners supports our reading of the decision, not our colleague’s. Indeed, the relevant submissions and articles reveal virtual consensus that *Hutchinson* categorically excluded condom use from the definition of “the sexual activity in question” under s. 273.1(1). To highlight but one example, Professors L. Gotell and I. Grant, cited by the Crown (and by our colleague, at para. 71), summarize the *Hutchinson* majority decision as follows:

The central issue in *Hutchinson* was how to define voluntary agreement to “the sexual activity in question” under section 273.1(1) of the *Criminal Code*. Was “the sexual activity in question” in *Hutchinson* simply vaginal intercourse, or was it vaginal intercourse with a condom? The majority . . . determined that the sexual activity in question does not include whether a condom was used, holding that the complainant had subjectively consented, but that her consent had been vitiated by fraud. The concurring minority, per Justices Abella and Moldaver, concluded that the complainant had not consented to unprotected sex and there was no need to consider fraud vitiating consent. [Emphasis added; emphasis in original deleted.]

(“Non-Consensual Condom Removal in Canadian Law Before and After *R. v. Hutchinson*” (2021), 44 *Dal. L.J.* 439, at p. 454)

Put simply, the commentary cited in the submissions before this Court show just how divergent and novel our colleague’s reading of *Hutchinson* is. *None* of the relevant interveners or commentators suggest that *Hutchinson* can be confined to condom “sabotage”. In fact, its jurisprudential breadth is precisely why they criticize it.

[156] Second, and more significantly from the standpoint of legal error, our colleague misconceives the exercise of identifying the *ratio* of a case and the broader doctrine of *stare decisis*. She appears to suggest that we ought to interpret a decision’s *ratio* more narrowly because it would otherwise be subject to criticism and would therefore need to be overturned. Later in these reasons, we discuss in detail why the fact that others disagree with a particular precedent is not grounds for overturning it. For now, it suffices to say that this is decidedly *not* how the doctrine of *stare decisis* operates. More to the point, our colleague cites no authority for the proposition that this Court may effectively read down the *ratio* of one of its prior decisions in response to extrinsic opprobrium. This is unsurprising; the very suggestion is astonishing. This

Court has the solemn duty to resolve some of the most controversial and difficult legal questions in the country. In adjudicating these matters, it is inevitable that some people will feel that the Court has made the “wrong” decision. But the mere fact of criticism does not provide a proper basis on which to retrospectively re-cast a statutory provision that has been carefully and authoritatively interpreted by a panel of this Court.

(d) *Conclusion*

[157] In sum, the *ratio* of *Hutchinson* is broader than its facts. *Hutchinson* conclusively determined the meaning of “the sexual activity in question” under s. 273.1(1) as excluding all forms of condom use, not only condom sabotage.

[158] Like the accused in *Hutchinson*, Mr. Kirkpatrick is alleged to have known the complainant “would not have consented to sex without a condom” (para. 44). Rather than sabotaging the condom, Mr. Kirkpatrick is further alleged to have deceptively failed to disclose he was not wearing one before penetrating the complainant. Had our colleague properly interpreted *Hutchinson*, she would have found that she was required to analyze this scenario under s. 265(3)(c). This approach is mandated by *Hutchinson* because it provides a “principled and clear line between criminal and non-criminal conduct” (para. 49). Our colleague’s approach muddies that line by re-introducing the “how the physical act is carried out” approach explicitly rejected in *Hutchinson*.

[159] But our colleague does not merely misinterpret *Hutchinson*. She also attempts to distinguish it on grounds that, in our respectful view, are both illogical and incoherent. We will next explain why doing so risks undermining the “twin watchwords” of clarity and restraint motivating the *Hutchinson* majority (para. 42).

(3) Our Colleague Attempts to Distinguish *Hutchinson* on Grounds That Are Incoherent and Illogical

[160] It is incoherent to distinguish *Hutchinson* on the basis of “no condom” versus “sabotaged condoms”, as our colleague attempts to do at paras. 82-98. She suggests that a sabotaged condom differs from non-use of a condom, because sabotage concerns the efficacy of a condom as a method of contraception whereas condom non-use goes to an element of the physical sex act (paras. 88 and 92-93). She thus concludes, at paras. 25 and 101, respectively, that, where condom use is a condition of consent, it either “must” or “may” form part of the “sexual activity in question”. She says that her interpretation “brings clarity and consistency to the law” (para. 101). We disagree. To the contrary, our colleague obscures the bright line of criminality established in *Hutchinson*.

[161] Further, the “distinction” is illogical. Whether a condom is not worn or an ineffective condom is worn, the gravamen of the problem is the same: the participant’s stipulation (that the accused wear *a condom*) has not been respected by the accused. Our colleague is, in substance, saying that *Hutchinson* governs *only one way* of failing to respect that stipulation, whereas her reasons deal with *another*. And so, *one*

particular way will be treated as a condition precedent to obtaining consent, whereas *another* will be treated as a vitiation of consent previously obtained. This introduces an undesirable and unnecessary irrationality to the law governing consent to sexual activity.

[162] We acknowledge that our colleague frequently uses the word “effective” as a qualifier in attempts to distinguish between the present case, where a condom was not worn at all, and *Hutchinson*, where a sabotaged and thus an “ineffective” condom was worn. But this is a distinction without a difference. Our colleague says that *Hutchinson* “did not establish mandatory rules for all future cases involving a condom” (para. 76). Rather, she characterizes it as a “classic case of deception” and says that *Hutchinson* “simply held that cases involving condom sabotage and deceit should be analyzed under the fraud provision rather than as part of the sexual activity in question” (para. 82). We see two issues with this statement. First, we see nothing in the facts of *Hutchinson* that could remotely be described as “classic”. If there is a body of case law suggesting that the deception of sexual partners by using a pin to poke holes in condoms is a routine occurrence, we are unaware of it. More to the point, our colleague oversimplifies what this Court said in *Hutchinson*. As noted above, one obvious way to render a condom *ineffective* is to surreptitiously remove it or fail to wear it despite the complainant’s express wish that it be worn.

[163] By arguing that the majority in *Hutchinson* referred only to *effective* condom use, our colleague introduces needless uncertainty into the criminal law. Our



colleague's new standard is that birth control measures may be conditions of the physical sex act "where they do not inherently change the physical act itself" but "where they do change the physical act itself, like condom use, they may fall under s. 273.1" (para. 90). On this approach, pinpricks in a condom fall under the *Hutchinson* regime, but the absence of a condom does not. What should courts do about a condom that had its tip cut off? Should it matter how much of the tip was cut off? What about a condom that rips mid-intercourse? What if the condom falls off completely during intercourse? This type of inquiry introduces both absurdity and uncertainty in the law where there was neither. This highly undesirable result is precisely what the majority sought to avoid in *Hutchinson*. The passage from the majority reasons on this point, at para. 41, bears repeating:

... adopting the "essential features"/"how the act was carried out" approaches would make the law inconsistent, highly formalistic and unduly uncertain. The law would be inconsistent because there is no reason in principle to analyze a case of a lie that obtains consent to unprotected sex and a lie as to the condition of a condom differently.

Thus, in the *Hutchinson* majority's words, an ineffective condom is equivalent to no condom at all.

[164] Our colleague defends her flawed reading of *Hutchinson*, in part, on the basis that it "best respects Parliament's equality-seeking and dignity-promoting purposes" by protecting "vulnerable women, including women living in poverty" and "racialized women" from non-consensual condom removal (paras. 56 and 61). Yet, in the same breath, she contends that dealing with condom use under s. 273.1(1) "is not

an expansion” of the provision (para. 104). In effect, our colleague is retroactively re-interpreting (or updating) Parliament’s intent in a manner inconsistent with that intent as it was discerned by the *Hutchinson* majority, at paras. 27-28. We say again: statutes are not “living trees”. Statutory interpretation entails searching for *original* intent — a point-in-time inquiry that does not evolve or change based on a reviewing court’s imputation to Parliament of an intent that better conforms to the court’s own policy preferences. Parliament could have amended s. 273.1(1) of the *Criminal Code* after *Hutchinson* was released, had it wished to pursue the “equality-seeking” and “dignity-promoting” purposes our colleague finds wanting in Parliament’s first effort, and now retroactively imputes.

[165] Moreover, in our respectful view, and (once again) contrary to the letter and spirit of *Hutchinson*, our colleague fails to consider how her interpretation of consent not only expands the scope of criminal liability, but does so in a way that is likely to undermine, rather than promote, equality. In *Hutchinson*, the majority explained that the imperative of restraint in applying the “blunt instrument of the criminal law” may “sometimes work at cross-purposes to absolute protection of sexual autonomy” (paras. 18-19). Avoiding over-criminalization through restraint recognizes the criminal law’s profound impact on the lives and liberties of those it ensnares. This Court has repeatedly recognized that our criminal justice system disproportionately ensnares poor and racialized communities (*R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at paras. 90-97; *R. v. Ahmad*, 2020 SCC 11, at para. 25; *R. v. C.P.*, 2021 SCC 19, at paras. 88-89). Many scholars also contend that North American criminal laws targeting

sexual violence “have contributed to the disproportionate criminalization of racialized men, the diminishment of female legal and sexual agency, and the scapegoating of a widespread social problem onto a handful of sexual deviants” (D. Phillips, “Let’s Talk About Sexual Assault: Survivor Stories and the Law in the Jian Ghomeshi Media Discourse” (2017), 54 *Osgoode Hall L.J.* 1133, at p. 1148; see also D. L. Martin, “Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies” (1998), 36 *Osgoode Hall L.J.* 151; A. Gruber, “Rape, Feminism, and the War on Crime” (2009), 84 *Wash. L. Rev.* 581; I. B. Capers, “The Unintentional Rapist” (2010), 87 *Wash. L. Rev.* 1345, at p. 1367; K. Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement against Sexual Violence* (2008), at pp. 9-10; M. Randall, “Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance, and Victim Blaming” (2010), 22 *C.J.W.L.* 397, at pp. 406-7; E. Bernstein, “Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns” (2010), 36 *Signs* 45; M. Johnston, “Sisterhood Will Get Ya: Anti-rape Activism and the Criminal Justice System”, in E. A. Sheehy, ed., *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (2012), 267, at p. 291; A. Gruber, “A ‘Neo-Feminist’ Assessment of Rape and Domestic Violence Law Reform” (2012), 15 *J. Gender Race & Just.* 583; E. Mykhalovskiy and G. Betteridge, “Who? What? Where? When? And with What Consequences? An Analysis of Criminal Cases of HIV Non-disclosure in Canada” (2012), 27 *C.J.L.S.* 31, at pp. 44-46; F. Ashley, “Nuancing Feminist Perspectives on the Voluntary Intoxication Defence” (2020), 43:5 *Man. L.J.* 65; U. Khan, “Homosexuality and Prostitution: A Tale of Two Deviancies” (2020), 70

*U.T.L.J.* 283; H. Millar and T. O’Doherty, “Racialized, Gendered, and Sensationalized: An examination of Canadian anti-trafficking laws, their enforcement, and their (re)presentation” (2020), 35 *C.J.L.S.* 23).

[166] The *Hutchinson* majority was clearly alive to concerns about over-extending the criminal law. It explicitly declared its aversion to criminalizing conduct that would lack “the necessary reprehensible character” and to “casting the net of the criminal law too broadly” (para. 53). Contrary to our colleague’s assertion, at paras. 103-104, her proposed approach would undermine this key pillar of *Hutchinson* by expanding the scope of criminal liability for sexual assault and offending the principle of restraint. It would treat a complainant’s *mistake* regarding condom usage (e.g., believing a condom was being used when it was not) as a consent violation under s. 273.1(1), even in the absence of deception by the accused or a risk of harm to the complainant. As Dickson C.J., dissenting, but not on this point, held in *R. v. Bernard*, [1988] 2 S.C.R. 833, it is not for the courts to “broaden the net of [criminal] liability, particularly as changes in the law through judicial decision operate retrospectively” (pp. 860-61). In our respectful view, it is reasonable to surmise that the burden of the expansion of criminal liability proposed by our colleague will disproportionately fall on the same vulnerable communities she purports to protect.

[167] Finally, our colleague discusses the problem of “stealth” (i.e., where the accused pretends to have put on a condom or secretly removes it) at length in her reasons (paras. 57-64). She appears to suggest that this is a brand new issue the

*Hutchinson* Court did not consider. We disagree. Our colleague mistakes form for substance. As we have already explained (and as the *Hutchinson* majority stated, at para. 41) a sabotaged condom is equivalent to no condom or a condom that is surreptitiously removed. In both scenarios, consent to “unprotected sex” is obtained through deceit, such that the proper analysis flows through s. 265(3)(c), not s. 273.1(1).

(4) Our Colleague’s Misreading of *Hutchinson* Effects an Overturning of Precedent

[168] Although our colleague uses the term “distinguish”, in effect, she overturns *Hutchinson*.

[169] Indeed, our colleague’s description of *Hutchinson*’s jurisprudential role leaves *Hutchinson* with virtually no precedential value. *Hutchinson*, we are assured, will continue to govern cases “of deception, for example where a condom is used, but rendered ineffective through an act of sabotage and deception” and where a complainant “finds out after the sexual act” that the condom was sabotaged, but not during (para. 103 (emphasis removed)). In other words, on her interpretation, *Hutchinson* would apply *only* where an accused poked holes in a condom, or perhaps (but we do not know) damaged the condom in some other unidentified way. We do not accept that a 4-3 split panel of this Court intended its decision to be confined to a single bizarre set of factual circumstances. As we have indicated, this unduly narrow reading is manifestly inconsistent with this Court’s long-standing jurisprudence on the proper flexible and broad approach to interpreting the *ratio* of its decisions.

[170] This brings us to the following section of our reasons, wherein we (1) reaffirm the importance of *stare decisis*, particularly at the apex court level; and (2) outline a clear framework for deciding whether to overturn a precedent of this Court, rooted in the relevant jurisprudence and buttressed by the foundational principles of *stare decisis* as central tenets of our justice system.

#### B. *Stare Decisis*

[171] As set out above, *Hutchinson* is not properly distinguishable; rather it is binding precedent in this case. In claiming that *Hutchinson* is distinguishable, our colleague declines to do the difficult work of determining whether *Hutchinson* should be overturned. The Crown argued (in the alternative) that it should be. As we hold that *Hutchinson* is not distinguishable, it necessarily follows that we must consider whether it should be overturned.

[172] In deciding whether *Hutchinson* should be overturned it is necessary to consider the framework for making such decisions. Ironically, the jurisprudence of this Court regarding overturning its own precedents — horizontal *stare decisis* — lacks clarity and coherence. In this section, we examine that doctrine. We underscore that *stare decisis* is fundamental to legal stability, judicial legitimacy, and the rule of law. Failing to have proper regard to *stare decisis* has serious, far-reaching consequences.

[173] First, we define *stare decisis* and briefly set out its history. Second, we describe its rationale. Third, we consider two criticisms of *stare decisis* and explain

how these critiques arise not from its proper application, but rather from the failure to do so. Fourth, we set out circumstances in which this Court *should* overturn its own precedents, as well as factors that *should not* be the basis for doing so. Fifth, we deal with differences in applying *stare decisis* in cases involving statutory interpretation (like this one), the common law, and constitutional decisions.

(1) The Doctrine of *Stare Decisis*

(a) *Introduction and History*

[174] *Stare decisis* is derived from the Latin phrase, *stare decisis et non quieta movere* — “to stand by previous decisions and not to disturb settled matters” (*Black’s Law Dictionary* (11th ed. 2019), at p. 2016). According to this foundational doctrine, judges are to apply authoritative precedents and have like matters “be decided by like” (T. Healy, “Stare Decisis As A Constitutional Requirement” (2001), 104 *W. Va. L. Rev.* 43, at p. 56, citing the 13th century English jurist Henry de Bracton).

[175] English and Canadian courts came to treat *stare decisis* as rigid, with no ability to revisit precedent (see *Beamish v. Beamish* (1861), 9 H.L.C. 274; *Stuart v. Bank of Montreal* (1909), 41 S.C.R. 516). These courts adhered to the then dominant Blackstonian view of the law which posited that judges could only discover the law, not change it (*R. v. Salituro*, [1991] 3 S.C.R. 654, at pp. 665-66; *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, at para. 84). To escape this

historical straitjacket, courts interpreted the *ratios* of decisions narrowly, distinguishing precedents for which they claimed no authority to overturn (*Henry*, at para. 53).

[176] The mid-20th century brought change, as courts affirmed authority to depart from precedent. In a 1966 practice statement, the House of Lords indicated they could depart from previous decisions where “too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law” (*Practice Statement (Judicial Precedent)*, [1966] 1 W.L.R. 1234). This Court had adopted a somewhat similar approach in *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198.

[177] This Court, like apex courts in other common law jurisdictions, has sought within the doctrine of *stare decisis* to balance principled development of the law and the rationale for maintaining precedent (see, e.g., *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518, at pp. 528-29; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 24; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at para. 58; *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Willers v. Joyce (No. 2)*, [2016] UKSC 44, [2018] A.C. 843, at paras. 4 et seq.). As the High Court of Australia stated:

No Justice is entitled to ignore the decisions and reasoning of [their] predecessors, and to arrive at [their] own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot



introduce a programme of reform which sets at nought decisions formerly made and principles formerly established.

(*Queensland v. Commonwealth*, [1977] 139 C.L.R. 585, at p. 599)

(b) *Types of Stare Decisis: Vertical and Horizontal*

[178] There are two forms of *stare decisis*: vertical and horizontal. Vertical *stare decisis* requires lower courts to follow decisions of higher courts, with limited exceptions (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 42 and 44; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 44; *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at paras. 26 and 41). Horizontal *stare decisis* binds courts of coordinate jurisdiction in a similar, but not identical, manner (Rowe and Katz, at p. 17).

[179] Horizontal *stare decisis* operates differently at each level of court. There is more room to depart from precedent as one moves up the judicial hierarchy. The test for overturning precedent at the trial level is more limited than that for overturning precedent by intermediate appellate courts (for horizontal *stare decisis* at the trial level, see *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.); *R. v. Sullivan*, 2022 SCC 19; for horizontal *stare decisis* at the intermediate appellate level, see *R. v. Neves*, 2005 MBCA 112, 201 Man. R. (2d) 44, at paras. 100-108; *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161 (C.A.), at paras. 126-43; *Tan v. Canada (Attorney General)*, 2018 FCA 186, [2019] 2 F.C.R. 648, at paras. 24-36; *Toronto Standard Condominium Corporation No. 1628 v. Toronto*

*Standard Condominium Corporation*, 2020 ONCA 612, 454 D.L.R. (4th) 126, at para. 73).

[180] The tests for horizontal *stare decisis* at the trial and at the intermediate appellate level differ, reflecting the institutional roles of those courts. We will not deal with *stare decisis* in these contexts. We would note only that the tests differ because most trial decisions are appealable as of right to a Court of Appeal, whose responsibility is to correct legal errors made at first instance. Conversely, intermediate appellate courts are often the court of last resort. Courts of Appeal therefore need more room to depart from their past precedents than trial courts.

(c) *Supreme Court of Canada Precedents Are Governed by a Particular Type of Horizontal Stare Decisis*

[181] Our Court's decisions are different from decisions by intermediate appellate or trial courts. As we have already indicated, our decisions as the apex court often require "the elaboration of general principles that can unify large areas of the law and provide meaningful guidance to the legal community and the general public" (Daly, at p. 5). Such guidance is given effect in a variety of circumstances and for an indefinite period. Eventually, these frameworks may need to be revisited to ensure that they remain workable and responsive to social realities. The framework for horizontal *stare decisis* at this Court must take account of its institutional role and how that role relates to the rationale for *stare decisis*.

(2) The Rationale for *Stare Decisis*

[182] It is worthwhile to reflect on the rationale for *stare decisis*. Why is it that *stare decisis* disentitles judges from arriving at their decisions afresh? What value does the doctrine bring to Canada’s judicial system? Why does disregard for the doctrine have far-reaching consequences? How does such disregard validate criticisms levied at this Court? (See, e.g., D. Parkes, “Precedent Revisited: *Carter v Canada (AG)* and the Contemporary Practice of Precedent” (2016), 10:1 *McGill J.L. & Health* S123.)

[183] *Stare decisis* promotes: (1) legal certainty and stability, allowing people to plan and manage their affairs (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 20, 270 and 281; Sharpe, at p. 147); (2) the rule of law, such that people are subject to similar rules (*Vavilov*, at paras. 260 and 281); and (3) the legitimate and efficient exercise of judicial authority (*Watkins v. Olafson*, [1989] 2 S.C.R. 750, at pp. 760-61). We explain each of these rationales below.

(a) *Legal Certainty and Stability*

[184] *Stare decisis* promotes legal certainty and stability. The doctrine “provides some moorings so that [people] may trade and arrange their affairs with confidence. *Stare decisis* serves to take the capricious element out of law and to give stability to a society” (W. O. Douglas, “Stare Decisis” (1949), 49 *Colum. L. Rev.* 735, at p. 736). Failure to adhere to the doctrine creates unpredictability in the law (Sharpe, at p. 146).

The construct of planning one's affairs stretches beyond business and estate reliance; *stare decisis* also protects societal reliance on the law (see, e.g., the discussion of societal reliance on *Roe v. Wade*, 410 U.S. 113 (1973), in *Casey*, at p. 856).

(b) *The Rule of Law*

[185] The rule of law has interlocking components (T. Bingham, *The Rule of Law* (2010), at pp. 160-70; Sharpe, at pp. 122-24). *Stare decisis* relates to the component that demands like cases be treated alike. “[T]here will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon” (Douglas, at p. 736; see also *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609, at para. 18; Sharpe, at p. 146).

[186] Failure to properly apply *stare decisis* creates different law in similar cases, as recently demonstrated in *R. v. Chan*, 2018 ONSC 3849, 365 C.C.C. (3d) 376. Judges' inconsistent adherence to precedential declarations of invalidity of s. 33.1 of the *Criminal Code* gave certain accused access to the defence of automatism, but precluded the same access to others (*Chan*, at paras. 51-52). This confounds the rule of law. The availability of a defence cannot depend on the personal preferences of the presiding judge. Proper application of *stare decisis* is necessary for equal application of the law.

(c) *Judicial Efficiency and Legitimacy*

[187] *Res judicata* prevents re-litigation of specific cases. *Stare decisis* guards against this systemically, by preventing re-litigation of settled law. Both doctrines promote judicial efficiency (Congressional Research Service, “The Supreme Court’s Overruling of Constitutional Precedent”, September 24, 2018, at p. 7; *Vavilov*, at para. 272, per Abella and Karakatsanis JJ., concurring). Such re-litigation contributes to delay and a waste of judicial resources (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631). *Chan* is, again, illustrative: since 1998, at least six judges in Ontario have considered the constitutionality of s. 33.1 (see *Chan*; *R. v. Fleming*, 2010 ONSC 8022; *R. v. Dunn* (1999), 28 C.R. (5th) 295 (Ont. C.J. (Gen. Div.)); *R. v. Jensen*, [2000] O.J. No. 4870 (QL), 2000 CarswellOnt 6489 (WL) (S.C.J.); *R. v. Decaire*, [1998] O.J. No. 6339 (QL); *R. v. Cedeno*, 2005 ONCJ 91, 195 C.C.C. (3d) 468). Proper application of *stare decisis* prevents judicial inefficiency and the associated uncertainty in the law.

[188] *Stare decisis* also upholds the institutional legitimacy of courts, which hinges on public confidence that judges decide cases on a principled basis, rather than simply based on their own views. The public should have confidence that the law will not change simply because the composition of the panel or the court hearing a legal issue changes. There is “a point beyond which frequent overruling would overtax the country’s belief in the Court’s good faith. . . . The legitimacy of the Court would fade with the frequency of its vacillation” (*Casey*, at p. 866).

[189] Legitimacy does not depend on popular agreement with outcomes, but rather is founded on confidence that courts decide cases in accordance with principle. This requires that judges give effect to settled legal principles and depart from them only where a proper basis is shown. In this way, *stare decisis* is foundational.

(3) Criticisms of *Stare Decisis*

[190] Two noteworthy criticisms are made of *stare decisis*. The first is that it is inherently conservative. The second is that courts only adhere to *stare decisis* when the impugned precedent accords with their personal preference. Both criticisms arise from inconsistent application of *stare decisis* and both are answered by its proper application.

(a) *Inherent Conservatism*

[191] Professor E. Craig writes that *stare decisis* is an “inherently conservative concept and one without any intrinsic value” (“Personal *Stare Decisis*, HIV Non-Disclosure, and the Decision in *Mabior*” (2015), 53 *Alta. L. Rev.* 207, at p. 208). She argues the doctrine should be abandoned whenever it does not align with the values it is said to serve. See also J. J. Arvay, S. M. Tucker and A. M. Latimer, “*Stare Decisis* and Constitutional Supremacy: Will Our Charter Past Become an Obstacle to Our Charter Future?” (2012), 58 *S.C.L.R.* (2d) 61, at p. 62.

[192] A principled framework, as we set out below, will enable this Court to revisit precedent in many circumstances that Professor Craig argues may be necessary:

i.e., when adhering to precedent perpetuates unworkability or fails to have proper regard to societal or legal change. As well, this Court has revisited precedent in such circumstances for over four decades, albeit without setting out with clarity and consistency a framework for doing so (see, e.g., *Ranville*).

[193] We also reject the notion that *stare decisis* is inherently conservative. The doctrine has no policy slant. To the contrary, proper application of *stare decisis* protects progressive development of the law (see, e.g., *Dickerson v. United States*, 530 U.S. 428 (2000), at p. 443, refusing to overturn *Miranda v. Arizona*, 384 U.S. 436 (1966): “Whether or not we would agree with *Miranda*’s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.”). *Stare decisis* demands judges give sober second thought to revisiting precedent, regardless of the *ratio* set out within the impugned decision. The framework of analysis we set out is a far cry from the early *Beamish*-era inelastic conceptualization of *stare decisis*. The framework facilitates the contemporary development of Canada’s law and, properly applied, does not inappropriately moor this Court to the past.

(b) *Inconsistent Application*

[194] Some academics suggest that courts apply *stare decisis* inconsistently, based on their personal opinions (see, e.g., Parkes, at p. S147; D. Stuart, Annotation to *United States of America v. Sriskandarajah* (2013), 97 C.R. (6th) 268; Congressional Research Service, discussing *stare decisis* at the Supreme Court of the United States,

at pp. 7-8). For example, Professor D. Parkes explores the connection between the *stare decisis* framework applied in a particular case and judges' views on the impugned precedent at issue (pp. S147-48). The overarching suggestion within these types of criticism is that *stare decisis* is not a true legal framework — but an illusory concept invoked when courts want to uphold the law and eschewed when courts want to change it.

[195] This criticism is not about *stare decisis per se*. Rather, it highlights the need for a coherent framework of analysis to ensure clarity and consistency. We agree. The framework we set out addresses both unworkability and inconsistent application. Thus, we seek to respond directly to the foregoing criticisms.

#### (4) Circumstances in Which This Court May Overturn Its Own Precedent

[196] Despite the fundamental importance of *stare decisis*, this Court has never clearly articulated when it will depart from precedent nor has it settled the framework by which to analyze submissions requesting it do so. This has created uncertainty and led to ad hocery. Parties do not know what arguments to advance or what evidence to lead when seeking to overturn this Court's precedents. Guidance is needed.

[197] With that goal, our analysis proceeds in four parts. First, we explain why the jurisprudence to date is unsatisfactory. Second, we set out a horizontal *stare decisis* framework to apply going forward. This is a synthesis of common themes that emerge from a careful reading of this Court's jurisprudence since the *Constitution Act, 1982*.



Third, we identify factors that should *not*, on their own, provide a basis for overturning precedent. Fourth, we explain the different considerations that apply depending on whether an impugned precedent concerns the common law, statutory interpretation, or a constitutional issue.

(a) *There Is No Settled Framework*

[198] This Court has never definitively set out the circumstances in which it may depart from precedent. Some decisions have overturned precedent without any discussion of *stare decisis* (see, e.g., *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2; *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391). Others refer to *stare decisis* but offer little analytical guidance beyond the need for a “compelling reason” to depart from precedent (see, e.g., *Ranville*, at pp. 527-28; *Hamstra (Guardian ad litem of) v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092, at paras. 18-19; *Henry*, at para. 44; *Craig*, at para. 25; *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33, [2013] 2 S.C.R. 438, at para. 23).

[199] On occasion, this Court has offered a set of non-exhaustive factors. In *Bernard*, for example, Dickson C.J., dissenting, wrote that the Court should consider four factors: (1) whether the precedent is consistent with the *Charter*; (2) whether it has

been attenuated by subsequent jurisprudence; (3) whether it has created uncertainty; and (4) whether the proposed legal change would broaden the scope of criminal liability, or is otherwise unfavourable to an accused (see also *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at p. 1353; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at pp. 777-78; *Fraser*, at paras. 134-37, per Rothstein J., concurring).

[200] These factors have not been applied consistently. Some decisions do not refer to the factors; others introduce new criteria, such as whether the decision was decided by “firm majorities” (*Craig*, at para. 24), is of “recent vintage” (*Fraser*, at para. 57), or has been subject to judicial, academic and “other” criticism (*Nishi*, at para. 28; *Vavilov*, at para. 20).

[201] Given the disparate nature of the jurisprudence and the importance of *stare decisis*, it is necessary to set out a clear and coherent framework. It is open to this Court to do so now for three reasons. First, there is no true precedent of this Court that sets out such a framework. Thus, we are not departing from precedent; rather, we are unifying 40 years of unstructured analysis into a cogent framework. Second, to the extent these reasons depart from any earlier decisions, we justify this on the basis of “unworkability”, discussed below. Finally, the rationale for *stare decisis* — being foundational to the proper operation of the courts — needs to be vindicated in practice.

(b) *Three Circumstances in Which Overturning Precedent May Be Warranted*

[202] Our review of the past 40 years of jurisprudence discloses that it is proper for this Court to overturn its precedents where:

1. The Court rendering the decision failed to have regard to a binding authority or relevant statute (“*per incuriam*”);
2. The decision has proven unworkable (“unworkability”); or
3. The decision’s rationale has been eroded by significant societal or legal change (“foundational erosion”).

[203] These three bases are not mutually exclusive. For example, a precedent whose foundation has been eroded may also give rise to issues of workability.

[204] The decision to overturn precedent should remain discretionary. While this Court should revisit *per incuriam* decisions, countervailing considerations may persuade the Court that it is better to uphold unworkable or foundationally eroded precedent. This should be the exception and would need to be justified.

(i) *Per Incuriam*

[205] *Per incuriam* means rendering a decision “in ignorance or forgetfulness of the existence of [a] case or . . . statute” (*Police Authority for Huddersfield v. Watson*, [1947] 1 K.B. 842, at p. 847). To overturn a precedent on this ground, a litigant must

show that the Court failed to consider a binding authority or relevant statute and that this failure affected the judgment. Overturning *per incuriam* decisions promotes *stare decisis* by affirming that binding authorities or relevant statutes should have been followed but were not.

[206] This Court has on occasion rendered a *per incuriam* decision (see discussion of impugned precedent in *R. v. C. (T.L.)*, [1994] 2 S.C.R. 1012; see also *R. v. George*, [1966] S.C.R. 267, at pp. 277-79). That said, this will be a rare basis to overturn a decision. We say this for two reasons. First, our Court has the benefit of party and intervener submissions, commonly two lower court decisions on the issue, and rigorous internal processes. Given these safeguards, it is unlikely that binding authority or relevant statute would be forgotten by all. Second, the standard to establish that a decision was decided *per incuriam* is high. Parties must do more than point to a binding authority or relevant statute ignored within the impugned decision. Parties must show that the judgment would have been different if the court considered the missing binding authority or relevant statute (Rowe and Katz, at pp. 18-19; *Sullivan*, at para. 77; *Walker v. Bank of Montreal*, 2017 SKCA 42, [2017] 12 W.W.R. 130, at para. 25). This Court's jurisprudential history reveals few decisions indeed that were rendered *per incuriam*. We have every confidence that decisions rendered on such a basis will be rare in the future.

(ii) Unworkability

1. *Unworkable Precedents Undermine the Rationales of Stare Decisis*

[207] An unworkable precedent is one that is unduly complex or difficult to apply in practice. This can take several forms. The unifying factor is that an unworkable precedent *undermines* at least one of the purposes that *stare decisis* is intended to promote (legal certainty, the rule of law, judicial efficiency). Several examples will illustrate instances where the Court has overturned precedent on this basis.

a. Legal Stability and Certainty

[208] In *Vavilov*, this Court overturned precedents on the standard of review for administrative decisions because they were “unclear and unduly complex” (para. 21). Litigants and courts routinely struggled to determine the applicable standard of review (paras. 20-21). This led to frequent appeals as to the standard of review and its proper application (see, e.g., *Areva Resources Canada Inc. v. Saskatchewan (Minister of Energy and Resources)*, 2013 SKCA 79, 417 Sask. R. 182; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283). Administrative law was in a state of uncertainty. Revisiting precedent was justified in the circumstances so as to “promote the values underlying *stare decisis*” by making the law more “certain, coherent and workable going forward” (*Vavilov*, at para. 22).

[209] In *Ranville*, at pp. 526-28, the Court revisited the confusing “*persona designata*” concept as courts struggled to use it in practice. Since “adherence to the *stare decisis* principle would generate more uncertainty than certainty”, the Court overturned this line of precedent (p. 528).

[210] In *Henry*, the Court overturned a s. 13 *Charter* precedent in part because courts and juries struggled to give effect to an “unduly and unnecessarily complex and technical” framework (para. 45, citing *Bernard*, at p. 859; see also paras. 42-44).

[211] In *Nishi*, at paras. 24-28, this Court refused to overturn precedents because the litigants failed to establish that the law was uncertain. To the contrary, the precedents provided “certainty and predictability” (para. 28). There was therefore no compelling reason for overturning them.

[212] In *Teva Canada Ltd. v. TD Canada Trust*, 2017 SCC 51, [2017] 2 S.C.R. 317, the majority refused to overturn precedents because they had “served the commercial world for 40 years without serious complaint from that world” (para. 67). In contrast, the dissent would have overturned the precedents because, in their view, adhering to them would perpetuate legal uncertainty; the precedents were “unnecessarily complex and elusive” and “undermined certainty as courts have struggled to apply” them (paras. 141-46). It is noteworthy that the majority and dissent parted ways on the basis of whether the precedents had given rise to uncertainty.

b. Rule of Law

[213] The Court can overturn precedents that have the effect of undermining the rule of law by making the law indeterminate and subject to a judge’s idiosyncratic preferences, rather than a principled framework. *Jordan* is illustrative. *Jordan* overturned *R. v. Morin*, [1992] 1 S.C.R. 771, because lower courts had not been

applying *Morin*'s s. 11(b) framework consistently (see, e.g., the decision to set aside a stay of proceedings in *R. v. Stilwell*, 2014 ONCA 563, 313 C.C.C. (3d) 257). The application of s. 11(b) had become “something of a dice roll” (*Jordan*, at para. 32). An accused's s. 11(b) rights turned in large part on the views of the judge hearing the case, rather than on a consistently applied framework. This undermined the rule of law.

[214] In *Bernard*, Dickson C.J., dissenting, would have overturned a precedent because its framework classified offences in an “*ad hoc*, unpredictable” manner, which made it difficult for accused persons to know what defences were available to them (pp. 858-60).

[215] In *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at paras. 21-22, the Court effectively overturned a s. 15 *Charter* precedent that made “human dignity” the basis for a legal test because it was an abstract, subjective concept that was not applied consistently. This made the scope of a claimant's s. 15 *Charter* right indeterminate.

c. Judicial Efficiency

[216] The Court can overturn precedents that are unnecessarily complex or cumbersome. Such decisions needlessly drain judicial resources. For example, *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811, changed the law on accomplice testimony because technicalities in the existing framework had created judicial inefficiencies (pp. 817-18 and 824-25). Lower courts and juries struggled to apply the framework, and numerous appeals turned on the intricacies of the law. The result was that a simple

common sense proposition — that an accomplice’s testimony should be viewed with caution — was “transformed into a difficult and highly technical area of law” that needlessly took up too much court time (pp. 825-26). In these circumstances, departing from *stare decisis* was proper so as to achieve judicial efficiency.

## 2. *Demonstrating Unworkability*

[217] Parties seeking to overturn precedent on the basis of unworkability need to demonstrate that a precedent undermines the goals of *stare decisis*. It is not enough for litigants to assert baldly, as the Crown did here, that a precedent has been applied in an “uneven and unpredictable” manner, creates “uncertainty”, or is doctrinally incoherent (transcript, at pp. 53, 59 and 83).

[218] *Jordan* is instructive on this point. To support their intervention seeking clarifications to *Morin*, the British Columbia Civil Liberties Association referred to numerous decisions that had denied relief under s. 11(b) “even in the face of delay far beyond what was contemplated in *Morin*” (see I.F., *Jordan*, at para. 18, fn. 35). The intervener factum of the Criminal Lawyers’ Association (Ontario) in *Jordan*, at paras. 8-9, took a similar approach. These submissions *demonstrated* unworkability, rather than merely asserting it.

### (iii) Foundational Erosion



[219] This Court has also departed from precedent where fundamental changes undermine the rationale of the precedent. This can occur in two ways, through: (1) societal change (e.g., social, economic, or technological change in Canadian society), or (2) legal change, such as constitutional amendments (e.g., the introduction of the *Charter*) or, incrementally, when subsequent jurisprudence “attenuates” a precedent.

[220] Such change must be significant and lasting. It typically takes years, if not decades, to emerge. Passing trends or temporary shifts will not suffice. Further, the change must arise *after* the precedent was decided.

[221] This Court can properly overturn eroded precedent. This is because the values underlying *stare decisis* are not the only ones that the legal system is designed to promote. Strict adherence to precedents based solely on workability would lead eventually to a stagnant legal system: the “common law of England” deemed women “not in general . . . capable of exercising public functions” for many years (*De Souza v. Cobden*, [1891] 1 Q.B. 687 (C.A.), at p. 691). While such a rule may have remained “workable”, the law must evolve alongside the country (Sharpe, at p. 159). While our justice system must retain a high degree of certainty and stability, it must also be just and responsive to the needs of contemporary Canadian society.

1. *Societal Change (Social, Economic, Technological)*

[222] This Court can overturn its decisions when fundamental change to societal conditions undermine the decision’s rationale. These changes either render the

concerns underlying the precedent moot or inconsistent with contemporary societal norms (*Sriskandarajah*, at para. 19). These changes can come in various forms: (i) social, (ii) economic, or (iii) technological.

[223] We provide examples of precedents overturned by virtue of societal change under these three headings. By so doing, we do not suggest that these are mutually exclusive; rather, societal change may well manifest itself from several of these perspectives. However characterized, such changes must reflect *broad* and *fundamental* shifts in society in order to undermine the rationale for a precedent.

a. Social Change

[224] This Court can overturn a precedent when the social considerations animating the decision are no longer relevant. In *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, the Court overturned *McLean v. Pettigrew*, [1945] S.C.R. 62, because the social concerns animating *McLean* had dissipated. *McLean* endorsed a private international law rule that allowed a litigant to apply the law from their home province to actionable wrongs committed in a different province (pp. 69-70). The rule from *McLean* originated in 19th century England. The decision's rationale was grounded in part on two "social considerations" (*Tolofson*, at p. 1053). First, England was a colonial power. The country had little concern about extending its law to foreign states at the time. Second, there were practical issues with proving the law of a foreign country in English courts because transportation and communication was difficult.

[225] These concerns were no longer persuasive when *Tolofson* was decided (p. 1053). Information could be communicated with relative ease, and society's views on international relations had shifted in a way that favoured comity and sovereignty. This left "no compelling reason" for following *McLean* (pp. 1050-54).

[226] *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, overturned *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183, because the impugned decision perpetuated inequities no longer acceptable in Canadian society. *Bliss* held that legislation disentitling pregnant women from receiving certain unemployment benefits did not discriminate against women on the basis of sex. *Bliss* reasoned that the legislation discriminated against pregnancy, not sex, as the legislation treated women differently because they were pregnant, and not because they were women. As more women entered the workforce and suffered the disadvantage sanctioned by *Bliss*, attitudes shifted. It became clear that drawing a distinction between pregnancy and sex was illogical and allowed employers to discriminate against women. Dickson C.J. concluded that *Bliss* "would not be decided now as it was decided then" because it was now "obvious" that those who bear children should not be economically or socially disadvantaged (p. 1243). Society had changed and *stare decisis* did not demand perpetuation of discriminatory practices (pp. 1243-44).

[227] In *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, this Court effectively overturned precedents as to when Canada would extradite those facing the death penalty. The Court justified this change partially on shifts in society's views

regarding capital punishment. *Burns* reasoned that Canadians' strong aversion to the death penalty and the growing evidence showing that wrongful convictions are more common than once thought justified changing the law (paras. 76-77 and 95-117).

b. Economic Change

[228] This Court can overturn precedent if economic change affects the concerns underlying the decision. *Hamstra* overturned *Bowhey v. Theakston*, [1951] S.C.R. 679, because of the greatly increased insurance coverage in Canada. *Theakston* required judges to discharge juries if they became aware of information suggesting that a defendant was insured (*Hamstra*, at paras. 11-12). This rule was designed to protect trial integrity, the concern being that awareness of insurance coverage would bias a jury in favour of the plaintiff since an insurer would pay the awarded damages (paras. 11-12). However, by the time of the decision in *Hamstra*, Canadians had become aware that many defendants had insurance, particularly for automobiles (para. 19). Accordingly, "the rationale for the [old] rule [was] no longer valid" and this Court overturned *Theakston* (*Hamstra*, at para. 19).

c. Technological Change

[229] This Court can overturn precedent if technological change affects the concerns underlying the decision. In *Deacon v. The King*, [1947] S.C.R. 531, this Court adopted the orthodox rule that held that parties could use a witness's prior inconsistent statements only to impeach a witness's credibility (*Deacon*, at p. 534). The rationale

behind the orthodox rule was that most out of court statements were unreliable and could not be properly assessed since the trier of fact could not see the witness's demeanor (see *B. (K.G.)*, at p. 792).

[230] In *B (K.G.)*, the Court relied on the use of video recording to justify changing the law on prior inconsistent statements. The Court reasoned that the “rationale for the orthodox rule”, as adopted in *Deacon*, had been “attenuated by changes in the methods of proof and demonstration in the modern trial process” — namely, readily accessible videotaping (pp. 780-81). This allowed the trier of fact to assess the witness's demeanor, which addressed some of the hearsay concerns animating *Deacon*. *B. (K.G.)* overturned *Deacon* and created a new rule: in limited circumstances, such as when the statement is videotaped, a prior inconsistent statement of a non-accused witness could be used for the truth of its contents.

## 2. *Demonstrating Societal Changes That Warrant Overturning Precedent*

[231] Just as parties seeking to overturn a precedent based on unworkability need to *demonstrate* unworkability, so too must those seeking to overturn precedent based on societal change demonstrate such change. In *Burns*, parties adduced evidence demonstrating that: wrongful convictions are more common than had been thought, inmates suffer serious psychological trauma on death row, and views on capital punishment had shifted. Through this evidence, the parties *demonstrated* societal change, rather than merely asserting it.

[232] It is much preferable for such evidence to be led at trial, where it can be thoroughly tested. Trial judges hear a high volume of cases and develop expertise in assessing the testimony of witnesses and other evidence (*R. v. Suter*, 2018 SCC 34, [2018] 2 S.C.R. 496, at para. 164, per Gascon J., dissenting in part, but not on this point; R. D. Gibbens, “Appellate Review of Findings of Fact” (1991-92), 13 *Advocates’ Q.* 445, at p. 446, cited in *Housen*, at para. 14). If parties seek to challenge precedent at first instance, on the basis of the vertical *stare decisis* framework set out in *Bedford* and *Carter*, we would expect there to be a full evidentiary record on societal change. However, if evidence is not adduced at trial, then a party should seek to adduce fresh evidence before the Court of Appeal, where it may be assessed by that court. As a method of last resort, this Court may choose to receive fresh evidence where parties seek to demonstrate societal change as the basis to overturn a precedent. We would stress that parties should make an application to adduce fresh evidence, rather than burying evidence in academic articles and footnotes of their written submissions. Opposing parties should have the opportunity to address such applications and plan their submissions accordingly.

### 3. *Legal Change*

[233] The Court has overturned precedents when legal change has undermined the decision’s foundation. Legal change may arise from constitutional amendments, notably the adoption of the *Charter*, as well as by the release of subsequent decisions “attenuating” the precedent (see, e.g., *R. v. Tutton*, [1989] 1 S.C.R. 1392, at

pp. 1410-11, per Wilson J., concurring; *Bernard*, at pp. 855-56, per Dickson C.J., dissenting, but not on this point; *R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623, at paras. 116 and 119, per Major J., dissenting, but not on this point; *Nishi*, at para. 24; *R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967, at para. 95, per Rowe J., dissenting, but not on this point).

[234] The need to revisit precedents that conflict with the Constitution is clear: see *R. v. Robinson*, [1996] 1 S.C.R. 683 (overturning *MacAskill v. The King*, [1931] S.C.R. 330, on the defence of intoxication because it was inconsistent with ss. 7 and 11(d) of the *Charter* and not saved by s. 1); *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (overturning *Robertson and Rosetanni v. The Queen*, [1963] S.C.R. 651, on the meaning of “freedom of religion”); *R. v. Therens*, [1985] 1 S.C.R. 613 (overturning *Chromiak v. The Queen*, [1980] 1 S.C.R. 471, on the meaning of “detention”).

[235] By contrast, the point at which subsequent decisions have “attenuated” a precedent sufficiently so as to warrant overturning it is more difficult to define. The jurisprudence reveals a common theme justifying departure from precedent: the precedent relies on principles or gives effect to purposes inconsistent with those underlying the Court’s subsequent decisions.

[236] In *R. v. Beaulac*, [1999] 1 S.C.R. 768, the Court overturned cases regarding s. 133 of the *Constitution Act, 1867* and s. 16 of the *Charter* that had failed to promote official language communities and their culture (paras. 16-25). This was inconsistent

with later decisions which affirmed the importance of broadly interpreting language rights (paras. 17-21).

[237] *Brooks* overturned *Bliss* in part because it was inconsistent with the contemporary approach to interpreting human rights legislation (pp. 1244-46).

[238] *Hamstra* overturned *Theakston* in part because its skepticism of juries was undercut by subsequent jurisprudence that reaffirmed confidence in juries (paras. 15-17, 23 and 25).

[239] *B. (K.G.)* overturned *Deacon* in part because it was attenuated by subsequent cases which provided for a more flexible approach to hearsay evidence (p. 780).

[240] *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680, at pp. 704-9, overturned precedent interpreting the scope of federal powers over railways because it was inconsistent with later s. 92(10) jurisprudence, which cautioned against an overly broad reading of exclusive federal jurisdiction.

[241] *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at paras. 70-71 and 94, overturned a precedent because it was inconsistent with the principles of maritime law in subsequent cases.

#### 4. *Demonstrating When Changes in the Law Warrant Overturning Precedent*



[242] While this Court may overturn precedent if it is demonstrated that the decision is unworkable or has been foundationally eroded, this decision should remain discretionary. Two factors should guide the exercise of this discretion.

[243] First, the Court should consider whether overturning the precedent would result in unforeseeable or unpredictable change. In such circumstances, change is better undertaken by the legislature rather than by the courts. The legislature is better equipped to study and weigh the costs and benefits of significant legal change (*Watkins*, at pp. 760-64; *R. v. Hawkins*, [1996] 3 S.C.R. 1043, at paras. 42-51; *R. v. Hodgson*, [1998] 2 S.C.R. 449, at para. 29; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34, [2000] 1 S.C.R. 842, at paras. 48-52). Our Court has used this reasoning to uphold potentially outdated common law rules (see *Hodgson*). Similar reasoning can apply more broadly to upholding unworkable or eroded precedents, pending legislative reform.

[244] Second, the Court should be mindful of whether overturning precedent would have the effect of expanding criminal liability (see, e.g., *B. (K.G.)*, at pp. 781-83; *R. v. Prokofiew*, 2012 SCC 49, [2012] 2 S.C.R. 639, at para. 66, per Fish J., dissenting, but not on this point). Since changes in the law through judicial decisions operate retrospectively, overturning a precedent that limited or circumscribed criminal liability would effectively criminalize previously unpunishable conduct (*Bernard*, at pp. 860-61). This is inconsistent with the fundamental requirement of criminal law that people must know what constitutes punishable conduct and what does not. Punishing

“people for conduct that they could not have reasonably known was criminal is Kafkaesque and anathema to our notions of justice” (*R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 14). Accordingly, only Parliament is permitted to expand the scope of criminal liability, and they must generally do so prospectively (see *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 57, citing *Frey v. Fedoruk*, [1950] S.C.R. 517; *Charter*, ss. 11(g) and 11(i)). This Court should avoid overturning precedent when doing so would overstep its institutional role, especially in this way.

(c) *Factors That Should Not Provide a Basis to Overturn Precedent*

[245] Our framework does not refer to all the factors this Court has previously referenced in deciding whether to overturn precedent. While some of those factors are implicit in our framework, some are not. This is so because they are not relevant to the purposes of *stare decisis*, as outlined above. In this regard, we elaborate on five factors, and their relevance to horizontal *stare decisis*: (1) judicial or academic criticism; (2) divergence from foreign jurisprudence; (3) whether the decision is plainly “wrong”; (4) the age of the precedent; and (5) whether the decision was the result of a “strong” majority.

(i) Judicial or Academic Criticism

[246] As we have already indicated, the fact that a decision is subject to judicial or academic criticism is not, on its own, reason to overturn it. Such criticism can be

relevant, but only to the extent that it demonstrates that the decision was rendered *per incuriam*, is unworkable or foundationally eroded.

[247] To allow criticism, as an unbounded concept, to justify revisiting precedent would subjugate principle to popular views. This Court has made, and undoubtedly in future will make, decisions with which others will disagree. Commentary and debate is productive to the development of the law. But, precedential force cannot hinge on popularity. *Stare decisis* is fundamental to the legitimacy of the judiciary. Our court cannot overturn precedent simply because a chorus of voices, even well-informed voices, expresses disagreement with our decisions (*Vavilov*, at para. 274, per Abella and Karakatsanis JJ., concurring).

[248] All that said, judicial or academic criticism of a precedent can be highly persuasive where it demonstrates that the precedent was rendered *per incuriam*, is unworkable, or its societal or legal foundations are eroded. In such circumstances, the Court may well overturn a precedent on those bases, but not because of the *existence* of criticism *per se*.

[249] Trial judges are particularly well-placed to observe and comment on such matters. They “apply the procedure in a great variety of cases and thus have much firsthand experience bearing on its advantages and disadvantages” (*Pearson v. Callahan*, 555 U.S. 223 (2009), at p. 231). For example, in *Tolofson*, in deciding whether to overturn *McLean*, La Forest J. reviewed a series of trial decisions which questioned the outcome demanded by the precedent.

(ii) Divergence From Foreign Jurisprudence

[250] The fact that a precedent is inconsistent with foreign jurisprudence is not a reason to overturn it. Foreign jurisprudence is not binding and its persuasive significance needs to be considered in a structured, careful way.

[251] That said, foreign jurisprudence can be instructive. For example, it can be useful to demonstrate: (a) that complexity causing unworkability could be ameliorated by adopting an alternative approach; (b) that changing the law would not have unforeseeable repercussions, as other jurisdictions have implemented the change without such consequences (see, e.g., *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210); (c) that reform is better undertaken by the legislature, given the difficulties that other jurisdictions have encountered when courts changed the law (see, e.g., *Hodgson*, at paras. 28-29); or (d) support for other arguments within our horizontal *stare decisis* framework (see, e.g., *Robinson*, at para. 35).

(iii) That the Precedent Was “Wrongly” Decided

[252] Phrases like “plainly wrong” and “manifest error” are, too often, pejorative descriptors used as a façade to disguise mere disagreement (*Queensland*, at p. 603). If a panel of this Court can simply disregard any decision with which it disagrees, then *stare decisis* would cease in any meaningful way to exist and the criticisms of Professor Craig, referred to above, would be well-founded. The doctrine has consequence only

to the extent that it sustains decisions that judges themselves would not render. *Stare decisis* has no role to play with respect to judgments mirroring what a judge would have decided independent of the impugned precedent (*Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446 (2015), at p. 455; see also, on this point, *Willers*, at para. 7; *R. v. Kneller (Publishing, Printing and Promotions) Ltd.*, [1973] A.C. 435 (H.L.), cited in *R. v. Cunningham*, [1982] A.C. 566 (H.L.), at pp. 581-82; *Queensland*, at pp. 597-99 and 602-4, per Gibbs and Stephen JJ., concurring). True analytical “error” in a precedent will manifest itself as unworkability or erosion by subsequent legal change (see, e.g., *Ranville*).

[253] That the Court believes that one of its own cases was wrongly decided is not a proper basis for overturning precedent. Were this so, each iteration of the Court’s membership could remake the law as they saw fit. In our common law tradition, this cannot be the case.

(iv) Age of the Precedent

[254] The age of a precedent is not relevant to whether the Court may overturn it. There is no magic “best before” date after which it becomes open season for the Court to revisit precedent, nor is there any arbitrary period before which it cannot be reconsidered.

[255] The Court has been inconsistent on the relevance of the “age” of a precedent. Sometimes, the Court has suggested that it should not overturn a precedent

because it is recent (see, e.g., *Fraser*, at para. 57; *Prokofiew*, at para. 66, per Fish J., dissenting; *R. v. Nedelcu*, 2012 SCC 59, [2012] 3 S.C.R. 311, at para. 115, per LeBel J., dissenting; *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, at para. 3). Other times, the Court has suggested that it should be more difficult to overturn longstanding precedents because they have engendered reliance (see, e.g., *Hawkins*; *Friedmann Equity Developments Inc.*, at para. 47). This inconsistency suggests that the precedent’s age is not what is impelling the decision of whether it ought to be overturned.

[256] That said, unworkability and foundational erosion require time to materialize. In this sense, newer precedents are less likely to be overturned.

(v) The Presence or Absence of a “Strong Majority”

[257] Whether a decision is the product of a “firm” or “strong” majority should not be relevant to the *stare decisis* framework. The precedential weight of a decision does not depend on how many judges signed onto it — once a majority is achieved, it becomes a binding decision (see, e.g., *Ross v. The Queen* (1895), 25 S.C.R. 564, per Strong C.J.; see also *Neuman v. M.N.R.*, [1998] 1 S.C.R. 770, at para. 27). The majority decision in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567 — set out by four judges — is of no less precedential weight than is *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555 — a unanimous decision. Dissenting reasons may assist future panels to identify unworkability or foundational erosion. But how many judges dissent should not be relevant to how “easily” a precedent can be overturned.

[258] In so saying, we recognize that this Court has alluded to the relevance of a “firm” or “strong” majority when considering whether to overturn a precedent (see, e.g., *Fraser*, at para. 57; *Craig*, at para. 24; *Nedelcu*, at para. 114; *Nishi*, at para. 23; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3, at paras. 167 and 211, per Rothstein J., dissenting; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 59; *Teva Canada Ltd.*, at para. 139, per Côté and Rowe JJ., dissenting; *Vavilov*, at para. 255, per Abella and Karakatsanis JJ., concurring).

[259] It is time to close this door. A decision of the Court is no less a precedent when there is dissent, regardless of how many judges disagree with the majority. To say otherwise is to suggest that what really matters is the composition of the Court as it changes over time. This would not be a principled basis on which to decide the law. Indeed, it would undermine the rule of law and the legitimacy of judicial authority.

(d) *Differences in Applying Stare Decisis in Cases Involving Statutory Interpretation, Common Law, and Constitutional Precedents*

[260] This framework for horizontal *stare decisis* is intended to apply to all statutory interpretation, common law, and constitutional precedents of the Court. However, it is important to acknowledge differences between these types of precedents.

(i) Statutory Interpretation

[261] As the meaning of a statute is fixed at the time of enactment, it is not open to this Court to overturn precedent on the basis that a statute's meaning has changed over time (*Big M Drug Mart Ltd.*, at pp. 334-35; *Clark*, at pp. 703-4; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 46). It is not open to parties to argue, as they do in the present case, that social change has altered the meaning of a particular provision of the *Criminal Code*. If the passage of time renders the statute inconsistent with contemporary social reality, it is the legislature that must remedy the statute's deficiencies; it is not for the courts to do so.

[262] This does not mean that the Court can never revisit a precedent based on statutory interpretation. Rather, it means that to do so it must be shown that the Court misconstrued the legislature's intent. For example, unworkability can indicate that the Court failed properly to comprehend legislative intent, as legislatures are presumed to have intended to pass workable laws (see *Ranville*). A party should not, as did the Crown in this case, seek to overturn a precedent simply by re-litigating the interpretation undertaken by a different panel (*Big M Drug Mart Ltd.*, at pp. 334-35).

(ii) Common Law

[263] The Court must ensure that the common law develops in line with societal change (*Salituro*, at p. 670). If such changes render a common law rule inconsistent with contemporary social reality, the Court can and should reform the common law to accord with those changed realities.



[264] That said, given the institutional limitations of the courts with respect to public policy, they should be inclined to change the common law only incrementally (*Bow Valley Husky (Bermuda) Ltd.*, at para. 93, per McLachlin J. (as she then was), dissenting in part, but not on this point; *Hodgson*, at para. 29; *Salituro*, at p. 670). Legislatures have the capacity to study and assess consequences of major legal changes. By contrast, courts have limited capacity to comprehend the collateral effects that may flow from changing the law (*Watkins*). The courts' approach to developing the common law needs to be mindful of these realities.

(iii) Constitutional Law

[265] Constitutional precedents must remain workable and responsive to the realities of contemporary society (see, e.g., *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, at paras. 22 and 30; *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56, [2005] 2 S.C.R. 669, at paras. 9-10; *Comeau*, at paras. 33 and 52; *Reference re Code of Civil Procedure (Que.)*, art. 35, 2021 SCC 27, at paras. 53-54). Unlike statutes, the meaning of a constitutional provision is “capable of growth” and may be revisited on the basis of societal change (*Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, at para. 8, quoting *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41, at p. 88). This Court can also overturn unworkable constitutional precedents (see *Kapp*, at paras. 21-22).

[266] The ability to revisit constitutional precedent is not an unbridled licence to reinterpret the Constitution. Interpretation of the Constitution must be anchored in the historical context of the provision in issue and the natural limits of the text (*R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236, at para. 40; *Hislop*, at para. 94).

(5) Conclusion: *Stare Decisis*

[267] To summarize, this Court can only overturn its own precedents if that precedent (1) was rendered *per incuriam*, (2) is unworkable, or (3) has had its foundation eroded by significant societal or legal change. All *per incuriam* decisions should be overturned. But an unworkable or eroded precedent may be upheld if overturning the decision would result in unforeseeable change or expand criminal liability.

[268] Litigants should now use this test when asking this Court to overturn a precedent. They need to clearly establish that a missing authority affected the decision, thereby rendering it *per incuriam*. Or they must come armed with evidence establishing unworkability or foundational erosion. They should no longer argue that a precedent should be overturned because it is (1) subject to judicial or academic criticism, (2) diverges from foreign jurisprudence, (3) is “wrong” in the eyes of some, (4) is a new or old precedent, or (5) was decided by a narrow majority.

[269] With this framework in mind, we will now apply it to the facts of this case. As we explain below, there is no basis for overturning *Hutchinson*.

C. *None of the Circumstances for Overturning Precedent Apply to Hutchinson*

[270] In this section, we apply the horizontal *stare decisis* framework arising from long-standing jurisprudence of this Court to *Hutchinson*, the precedent impugned by our colleague, the Crown, and certain interveners to this appeal. We conclude that none of the circumstances that may warrant overturning precedent apply to *Hutchinson*. Accordingly, the *ratio decidendi* of *Hutchinson* must govern this appeal.

[271] Our application of the horizontal *stare decisis* framework proceeds in four parts. First, we reject our colleague’s suggestion that *Hutchinson* was rendered *per incuriam*. Second, we conclude that the Crown has failed to show *Hutchinson* is unworkable. Third, we demonstrate that no foundational erosion has occurred with respect to *Hutchinson* and explain, in particular, why any relevant societal change that may have transpired since *Hutchinson* is for Parliament to reconcile, not the courts. Finally, in the alternative, we discuss why we would decline to exercise our discretion to overturn *Hutchinson*, even if overturning precedent were warranted here.

(1) *Hutchinson Was Not Rendered Per Incuriam*

[272] Any suggestion that *Hutchinson* was rendered *per incuriam* is meritless. The Crown’s position, at its highest, is that excluding condom use from consent under s. 273.1(1) is “inconsistent” with long-standing sexual assault jurisprudence, such as *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, and *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440. Notably, the Crown does *not* say, as our colleague does, at para. 87, that

*Hutchinson* “does not consider this Court’s jurisprudence on consent” (emphasis added). And for good reason; this is wrong. The *Hutchinson* majority cited *Ewanchuk* repeatedly (at paras. 1, 4, 17 and 27), while using the term “consent” no less than *124 times* in its reasons for judgment. Further, *J.A.* is explicitly cited by the *Hutchinson* minority, at para. 86, where it notes that “the relevant time for determining . . . consent is when the activity occurred”. Since *J.A.* was cited by the minority, it is implausible that the majority could have neglected to consider the case. We believe this point obvious, unless our colleague is suggesting that the majority did not read the minority’s opinion.

[273] As such, the Crown cannot demonstrate (nor has it even attempted to) that the *Hutchinson* panel *ignored* binding precedent, much less that the result would have been different had it considered an allegedly overlooked authority. The reason for this is simple: all relevant authorities were expressly considered by the *Hutchinson* Court. Further, as we have already noted, the failure to consider binding precedent would be grounds for overturning *Hutchinson*, *not* a basis for reading its *ratio* so narrowly that it may be “distinguished”, as our colleague purports to do. In fact, some of the interveners in this appeal fairly recognize that *Hutchinson* has a role to play within this Court’s jurisprudence on sexual assault law (I.F., Barbra Schlifer Commemorative Clinic, at para. 21; I.F., HIV & AIDS Legal Clinic Ontario and HIV Legal Network, at para. 10). Yet our colleague steadfastly refuses to acknowledge that this Court’s sexual assault jurisprudence includes within its ambit not only decisions such as *Ewanchuk* and *J.A.*, which emphasized the importance of affirmative consent, but also *R. v. Cuerrier*,

[1998] 2 S.C.R. 371, and *Mabior*, which were designed to ensure legal certainty and avoid over-criminalization of individuals living with HIV.

[274] To fasten the scarlet letter of *per incuriam* to a decision of this Court requires more than mere disagreement. In our view, the requisite stringent threshold for doing so is not met here. Accordingly, we see no possible basis on which to overturn *Hutchinson* as *per incuriam*.

(2) *Hutchinson* Is Not Unworkable

[275] The Crown has also failed to demonstrate that *Hutchinson* is unworkable. Far from creating uncertainty, the *raison d'être* of *Hutchinson* was to provide a bright line rule for interpreting “the sexual activity in question” under s. 273.1(1). The *Hutchinson* rule consigns *all* forms of deception involving contraception, including condom use or non-use, to the fraud analysis under s. 265(3)(c). By contrast, re-interpreting s. 273.1(1) in the manner our colleague suggests — i.e., by distinguishing between two nearly identical forms of “physicality” — would re-introduce the modified “essential features” approach advanced by the *Hutchinson* minority and *explicitly rejected* by the majority (*Hutchinson*, at para. 45). We have already explained why this method of examining consent is confusing and may lead to over-criminalization, particularly amongst already marginalized communities. The majority, per McLachlin C.J. and Cromwell J., wisely made a similar point in *Hutchinson*, at paras. 45 and 46, holding that such an approach is the very antithesis of workability:

[The minority] introduce a variation on [the “essential features”] approach but one which, as we see it, is equally uncertain. Under their approach, the “sexual activity in question” extends to “how” the sexual touching occurs, but not to the consequences of the sexual activity. But it is not clear what the “how” of the act includes, or whether agreement is undermined by only deception or also by a complainant’s unilateral mistake. Presumably, it extends to any physical aspect of the sexual activity to which the complainant has not agreed in advance — a vast swath of conduct indeed. And again, the line is blurry; many aspects of the sexual activity can be characterized as *both* part of the “how” and part of the consequences. . . .

These approaches would also result in the criminalization of acts that should not attract the heavy hand of the criminal law. We have already noted the difficulty of seeing why the presence of a sexually transmitted infection would not be a “component” of the sexual activity or part of “how” the sexual touching occurs. Under the . . . “essential features” test, a man who pierces a condom may be found guilty of sexual assault; why would a woman who lies about birth control measures not be equally guilty? Under [the minority’s] test, the quality or effectiveness of a condom changes the sexual activity that takes place; why would it not follow that an individual might be prosecuted for using an expired condom or a particular brand of condom? Anomalies abound. The “how the physical act was carried out” test appears not to capture a woman who lies about taking birth control pills, but it might well capture a woman who lies about using a diaphragm. [Underlining added.]

[276] Neither the Crown nor our colleague have pointed to a plenary body of case law that demonstrates the *ratio* from *Hutchinson* has proven unworkable. That is because such case law does not exist. As we have already demonstrated (at paras. 145-56, above) the post-*Hutchinson* jurisprudence discloses no workability problems. At most, it may be said that a tiny fraction of reviewing judges simply *disagree* with *Hutchinson*. Indeed, our colleague is entitled to disagree with *Hutchinson*. However, horizontal *stare decisis* ensures that precedents like *Hutchinson* continue to bind this Court, notwithstanding putative disagreement amongst lower courts — and even individual members of the Court itself — as to their “correctness”.

In this way, the *proper* application of *stare decisis* stabilizes our legal system and safeguards the rule of law.

[277] Likewise, and as we have already noted, the academic criticism levied against *Hutchinson*, distilled to its essence, suggests that it was wrongly decided. The writings cited by our colleague and the Crown do not identify any unworkability arising from *Hutchinson* that might warrant overturning it. Indeed, the authors point toward cases (the very same cases erroneously cited by our colleague) that do not actually impugn *Hutchinson* in a manner that would justify overturning it (see, e.g., Gotell and Grant, at pp. 459 and 464-71). To repeat: the existence of criticism alone is insufficient to justify departing from a precedent delivered by a conscientious panel of this Court.

[278] In short, *Hutchinson* provides a clear, workable framework for analyzing consent to “the sexual activity in question” in s. 273.1(1). Beyond bald assertions, neither our colleague nor the Crown has demonstrated that lower courts have had any difficulty applying *Hutchinson*. No legitimate argument has been put forth to overturn *Hutchinson* on the ground of unworkability. In our respectful view, this is because no such argument exists.

(3) There Is No Foundational Erosion Undermining *Hutchinson*

[279] Finally, the Crown has not shown any foundational erosion that would undermine the precedential force of *Hutchinson*. As we will explain, any societal change that may have occurred since *Hutchinson* cannot change Parliament’s

legislative intent as authoritatively interpreted by the *Hutchinson* Court. Further, the Crown has not pointed to any legal change that could warrant overturning *Hutchinson*.

(a) *Societal Change Cannot Undermine Hutchinson*

[280] It may fairly be argued that social attitudes regarding sexual violence, or the prevalence of certain sexual behaviours, has shifted since the release of *Hutchinson* in 2014. However, as we have explained, precedents which authoritatively interpret a statute are not susceptible to shifting social mores or trends. The *Hutchinson* Court determined the meaning of the words “the sexual activity in question” as Parliament intended. In doing so, the *Hutchinson* majority was alive to Parliament’s “concerns about sexual violence against women and children” and, in particular, the pressing need to protect ss. 7 and 15 *Charter* rights in the context of sexualized violence (para. 27). The fact that the issue of “stealthing”, for example, may now be more prevalent or prominent in the public consciousness does nothing to erode the precedential foundation of *Hutchinson*, which interpreted the meaning of s. 273.1(1) of the *Criminal Code*. The statutory interpretation set out therein therefore reflects Parliament’s intent at the time of enactment. If the passage of time has rendered this statutory provision inconsistent with contemporary social reality, it is for the legislature — not the courts — to further study and, if necessary, to remedy any alleged deficiency.

(b) *There Is No Legal Change Attenuating Hutchinson*



[281] Finally, we see no constitutional or jurisprudential developments post-*Hutchinson* that would attenuate its precedential value.

[282] This Court's recent sexual assault jurisprudence builds upon foundational precedents like *Ewanchuk* and *J.A.* (see, e.g., *R. v. G.F.*, 2021 SCC 20; *Goldfinch*; *Barton*), which were duly considered by the *Hutchinson* Court. Crucially, however, these recent cases do not purport to displace *Hutchinson*'s clear and categorical interpretation of "the sexual activity in question" under s. 273.1(1) as excluding condom use. To the contrary, as we have discussed, in *Goldfinch* and *Barton* this Court expressly endorsed the interpretation of s. 273.1(1) set out in *Hutchinson*.

[283] In sum, the Crown has failed to demonstrate any foundational erosion that would warrant departing from *Hutchinson*.

(4) Even if *Hutchinson* Could Be Overturned, This Court Should Exercise Its Discretion to Uphold It

[284] In the alternative, even if *Hutchinson* were unworkable or if its precedential foundation had eroded, there are at least two compelling reasons to uphold it.

[285] First, overturning *Hutchinson* would raise concerns regarding the retrospective expansion of criminal liability. In *Hutchinson*, this Court explicitly excluded contraceptive use from the scope of consent contemplated in s. 273.1(1). However, our colleague now purports to re-interpret s. 273.1(1) to include condom use

in the consent analysis in certain circumstances, thus broadening the ambit of criminal liability for sexual assault beyond that set out in *Hutchinson*. As we explained above, and as Dickson C.J. (dissenting, but not on this point) underscored in *Bernard*, an expansion of criminal liability weighs heavily against overturning precedent. Even if it were open to our colleague to overturn *Hutchinson* (which it is not), the radical approach to the consent analysis she proposes would give us pause. More to the point, and as the *Hutchinson* majority recognized, while s. 273.1 signals Parliament's emphasis on positive affirmation of consent, there is "no suggestion that Parliament intended to expand the notion of 'sexual activity' by including not only the sexual act for which consent is required, but also potentially infinite collateral conditions, such as the state of the condom" (para. 27 (emphasis added)). Yet this is precisely what our colleague's re-interpretation of s. 273.1(1) would do, contrary to Parliament's intent as ascertained by this Court in *Hutchinson*.

[286] Second, overturning *Hutchinson* may lead to unforeseeable consequences. Suddenly re-orienting the law to expand the scope of consent would be a major legal change engaging potentially wide-reaching policy issues. Where, as here, there is no constitutional infirmity with the impugned provision, it is not for the Court "to second-guess the wisdom of policy choices made by our legislators" (*Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1199). Parliament may see fit to legislate a distinction between, for instance, the act of surreptitiously removing a condom to ejaculate inside one's sexual partner, and the act of lying about having had a vasectomy to do the same. Our colleague would

characterize the former as a consent violation, and the latter as fraud vitiating consent previously obtained. But, for all the foregoing reasons, the interpretation of s. 273.1(1) set out by the *Hutchinson* Court precludes her from doing so. Whether this distinction should form part of Canadian sexual assault law is a matter for Parliament — and not our colleague — to decide.

(5) Conclusion on Horizontal *Stare Decisis* Applied to *Hutchinson*

[287] The seriousness of overturning a precedent of this Court cannot be overstated. We are not persuaded that any proper basis exists on which to overturn *Hutchinson*. Since it cannot be distinguished, *Hutchinson* must govern the case at bar. In the following section, we apply the two-step consent analysis mandated by *Hutchinson* to the facts of this appeal.

D. *Application of Hutchinson to This Appeal*

[288] In our view, Bennett J.A. in the court below properly applied *Hutchinson* and the principles applicable on no-evidence motions. Like Bennett J.A., applying the two-step consent analysis mandated by the *Hutchinson* Court, we conclude that: (1) condom use cannot be analyzed under s. 273.1(1) as part of “the sexual activity in question”; and (2) there was some evidence that the complainant’s consent to unprotected sex may have been vitiated by fraud within the meaning of s. 265(3)(c).

(1) The Two-Step Analysis of Consent Mandated by *Hutchinson*

[289] We are bound — as is our colleague — to apply the two-step analytical framework set out in *Hutchinson* to determine whether valid consent existed at the time of the impugned sexual activity between Mr. Kirkpatrick and the complainant.

[290] The first step is to determine whether the evidence establishes that there was no “voluntary agreement of the complainant to engage in the sexual activity in question” under s. 273.1(1). If the complainant voluntarily agreed to the sexual activity within the meaning of s. 273.1 (or a reasonable doubt was raised), the court should then turn to the second step.

[291] The second step is to consider whether any of the enumerated circumstances in ss. 265(3) or 273.1(2) are present, such that the complainant’s voluntary agreement to the sexual activity in question did not constitute consent in law. Section 265(3) defines circumstances, including fraud at subs. (c), under which the law recognizes the complainant did not consent, notwithstanding their apparent agreement to participate in sexual activity (*Hutchinson*, at para. 55; *Ewanchuk*, at para. 36).

[292] At this juncture, it is critical to recall the low threshold on a no-evidence motion. It is not the trial judge’s role at this preliminary stage to test the quality or reliability of the evidence, measure the credibility of the witnesses, draw inferences from facts, or weigh the evidence to determine if he or she would be satisfied of the guilt of the accused. The task is simply to determine whether, *if the Crown’s evidence is believed*, it would be reasonable for a trier of fact to infer guilt (S. N. Lederman, A. W. Bryant and M. K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in*

*Canada* (5th ed. 2018), at §5.27; *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828, at para. 30). It is this generous threshold by which we must assess the evidence that was before the trial judge in the present case.

[293] We will now address each step of the *Hutchinson* framework in turn, applying the requisite evidentiary threshold on a no-evidence motion.

(a) *Step One: Consent to the Sexual Activity in Question*

[294] We have already explained, at length, that *Hutchinson* categorically eliminates condom use from the definition of “the sexual activity in question” under s. 273.1(1). *Hutchinson* thus precludes us from assessing Mr. Kirkpatrick’s admitted failure to wear a condom in determining whether there was voluntary agreement to the sexual activity in question. We need say no more on this point.

[295] The sole question at this stage is whether there is any evidence that the complainant consented to the impugned sexual intercourse with Mr. Kirkpatrick. At trial, the complainant’s evidence was that she consented to all physical sex acts in which the parties engaged on the night in question. Accordingly, we agree with the trial judge and Bennett J.A. of the Court of Appeal that there is some evidence of consent to “the sexual activity in question” at the first step of the *Hutchinson* framework under s. 273.1.

[296] Therefore, the analysis for the no-evidence motion can then proceed to whether there is any evidence of fraud on behalf of Mr. Kirkpatrick that may have vitiated the complainant's apparent consent.

(b) *Step Two: Fraud Vitiating Consent*

[297] *Hutchinson* confirmed that fraud capable of vitiating consent to sexual activity has two elements: (1) dishonesty by the accused; and (2) deprivation or a risk of deprivation in the form of serious bodily harm to the complainant flowing from the accused's dishonesty (para. 67; see also *Mabior*, at para. 104).

[298] As we will explain, we agree with Bennett J.A. that there was at least "some evidence" before the trial judge on both elements, such that the trial judge erred in granting Mr. Kirkpatrick's no-evidence motion.

(i) Dishonesty

[299] Dishonesty under s. 265(3)(c) "can include non-disclosure of important facts" (*Cuerrier*, at para. 116). In *Mabior*, this Court clarified that "a clear misrepresentation or a lie in response to a clear question" is not necessary to establish dishonesty (para. 61). Rather, a failure to disclose information will amount to dishonesty where the complainant would not have consented had they known the undisclosed information, such as the fact that the accused is HIV-positive (para. 104). Prior conversations between sexual partners and the circumstances surrounding their

sexual encounter may be relevant to determining whether one party's alleged failure to disclose amounts to dishonesty (para. 64).

[300] We conclude that Mr. Kirkpatrick's failure to disclose he was not wearing a condom constituted at least "some evidence" of dishonesty sufficient to preclude a directed acquittal. We agree with Bennett J.A. that the trial judge misapplied *Mabior* by looking for specific deception on Mr. Kirkpatrick's part prior to the second round of sexual intercourse (C.A. reasons, at para. 117). The complainant testified that she had repeatedly communicated to Mr. Kirkpatrick that condom use was a condition of her consent. The first time they had sex, the complainant testified that she "asked him if he had any condoms with him and if he didn't have any condoms, it was okay because I have brought condoms with me" (A.R., vol. II, at p. 20). Afterwards, the complainant testified that she asked the appellant "if he used a condom and he said that he did and I asked to see it" (A.R., vol. II, at p. 21). If we accept — as we must at this preliminary stage — the complainant's evidence, Mr. Kirkpatrick would have been well aware that her consent was conditional on condom use. Nevertheless, when they had sex for the second time, mere hours later, Mr. Kirkpatrick failed to disclose that he was not wearing a condom. In our view, in the context of a no-evidence motion, this constitutes some evidence of dishonesty by omission, as contemplated in *Mabior*.

[301] We would reject Mr. Kirkpatrick's submission that this reasoning imposes a positive duty to disclose condom use in all situations where a partner has advised of its importance. To the contrary, it is rooted firmly in the factual record. On the

complainant's evidence, days before their sexual encounter she told Mr. Kirkpatrick she would never consent to sexual intercourse without a condom. According to the complainant, she reminded Mr. Kirkpatrick about this condition twice: once before the first round of intercourse, when she asked if he was wearing a condom, and once again afterwards, when she asked to see the condom. The complainant further testified that, prior to the second round of intercourse, Mr. Kirkpatrick turned away from her in the direction of the bedside table from which he had obtained a condom the first time. In our view, the foregoing provides at least some evidence that the complainant would not have consented had Mr. Kirkpatrick told her he was not wearing a condom, despite her clear stipulation that he wear one, before penetrating her on the second occasion. Despite this conclusion, we wish to be clear. We do not mean to suggest that non-disclosure of one's failure to wear a condom will always be criminal. Our conclusion is intertwined with the particular facts of this case.

[302] Further, it must be recalled that no conclusive factual findings are made on a no-evidence motion. At re-trial, the Crown will need to establish not only the *actus reus* of fraud vitiating consent under s. 265(3)(c), but that Mr. Kirkpatrick had the requisite *mens rea* for fraud. This will require the Crown to prove that Mr. Kirkpatrick subjectively *knew* that he was behaving dishonestly, and that his dishonesty would lead to a deprivation, or risk of deprivation, to the complainant (*Cuerrier*, at para. 114). Whether the Crown succeeds in doing so is a matter for the trial judge.

(ii) Deprivation



[303] In our view, Bennett J.A. was correct to find some evidence of a risk of deprivation to the complainant in this case, namely, a risk of pregnancy (C.A. reasons, at para. 119).

[304] In *Hutchinson*, at paras. 70-71, the majority held that “[d]epriving a woman of the choice whether to become pregnant or increasing the risk of pregnancy” may constitute a sufficiently serious deprivation for the purposes of fraud vitiating consent under s. 265(3)(c). The complainant in this case testified that Mr. Kirkpatrick ejaculated inside her vagina. Upon realizing that he had not been wearing a condom, the complainant expressed concern to him about becoming pregnant. There was no evidence before the trial judge to suggest that the complainant was on birth control or otherwise incapable of becoming pregnant. Mr. Kirkpatrick fairly concedes that it is “undisputed that risk of pregnancy meets the second element of fraud” (A.F., at para. 52). We see no basis on which to interfere with Bennett J.A.’s conclusion on this point. Accordingly, applying the proper standard of proof applicable on a no-evidence motion, there was at least some evidence of a risk of deprivation through the risk of pregnancy.

[305] In light of the foregoing, there is no need to discuss Bennett J.A.’s finding, at para. 119, that the side effects of HIV prophylactic treatment allegedly pursued by the complainant may constitute evidence of deprivation. We leave this issue for another day, with the benefit of a full evidentiary record and comprehensive argument on this important issue.

(2) Conclusion on the Two-Step Consent Framework

[306] In sum, at the first step of the *Hutchinson* framework, there is some evidence that the complainant voluntarily agreed to the sexual activity in question under s. 273.1(1).

[307] However, at the second step, there is also some evidence that the complainant's apparent consent may have been vitiated by fraud. In our view, Bennett J.A.'s conclusion that the trial judge misapplied the *Mabior* test for dishonesty is sound. On the low threshold of a no-evidence motion, there was at least some evidence of dishonesty by omission and risk of deprivation through the risk of pregnancy.

[308] Accordingly, a new trial is required to determine whether the complainant's consent was in fact vitiated through fraud and, consequently, whether Mr. Kirkpatrick committed sexual assault within the meaning of s. 265(3)(c).

[309] We would add a final point on the subject of re-trial. We agree with our colleague that one is warranted, in light of the legal error we have identified in the trial judge's fraud analysis. However, given the pending re-trial, we believe it is inappropriate for this Court to draw inferences in favour of either party from the evidence at the first trial. We take particular issue with our colleague's inference, at para. 58, that Mr. Kirkpatrick engaged in "stealththing", a term never put to the complainant or discussed at trial. We affirm that it is not our role at this preliminary

stage to make any finding relevant to Mr. Kirkpatrick's culpability for the offence alleged, or to draw any inference that may impinge upon the presumption of his innocence at re-trial.

### III. Disposition

[310] For all the foregoing reasons, we would dismiss the appeal. In the result, we affirm the Court of Appeal's order setting aside the acquittal and ordering a new trial.

*Appeal dismissed.*

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