

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

Her Majesty the Queen

Appellant

- and -

Bassam Al-Rawi

Respondent

BRIEF OF ARGUMENT OF THE PROPOSED INTERVENORS
Motion for Leave to Intervene pursuant to Rule 91.19

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PART I – OVERVIEW

1. This is a motion by the Women’s Legal Education and Action Fund Inc. (“LEAF”) and the Avalon Sexual Assault Centre Society (“Avalon”) (together, the “Proposed Intervenors”) for leave to intervene in *R v Al-Rawi* pursuant to Rules 90.19 and 35.10 of the Nova Scotia *Civil Procedure Rules* (the “Proposed Intervention”).
2. The Proposed Intervenors request that their motion for leave to intervene be granted. The Proposed Intervenors have a genuine interest in the development of sexual assault law and jurisprudence in a manner that advances equality on the basis of sex, and this appeal raises issues that will affect significantly the law of sexual assault in Canada beyond the instant case.
3. In particular, this appeal raises the important question of how courts are to evaluate capacity to consent, and consent to sexual contact, where the complainant can provide no direct evidence of her subjective state of mind because of intoxication-related memory loss. If leave to intervene is granted, the Proposed Intervenors will draw on their expertise in the area of sexual assault law and equality rights to provide the Court with a substantive equality analysis on this issue.
4. The Proposed Intervention will not prejudice any party, but will offer the Court a useful perspective in the resolution of the issues, which is different from that of the immediate parties.

PART II – STATEMENT OF FACTS

A. The Appeal

5. Bassam Al-Rawi, a Halifax taxi driver, was charged with sexually assaulting a female passenger in his taxi on May 23, 2015, contrary to s. 271 of the *Criminal Code*.¹ The female passenger was intoxicated at the time of the alleged assault and has no memory of the incident.

¹ RSC 1985, c C-46.

6. In an oral decision issued on March 1, 2017, the trial judge acquitted Mr. Al-Rawi, holding that the Crown had not discharged its burden of proving the complainant's lack of consent to sexual contact beyond a reasonable doubt.
7. The Crown appeals from the acquittal of Mr. Al-Rawi on the grounds that the trial judge erred in law by:
 - a. Holding the Crown had adduced no evidence of lack of consent on the part of the complainant;
 - b. Engaging in speculation on the issue of consent rather than drawing inferences from the facts proven in evidence;
 - c. Failing to give proper legal effect to the facts found by him;
 - d. Misinterpreting and misapplying the test for capacity to consent;
 - e. Failing to direct himself to the provisions of s. 273.1 of the *Criminal Code*; and
 - f. Failing to determine whether the accused had taken all reasonable steps to ascertain that the complainant was consenting.

B. Women's Legal Education and Action Fund Inc. (LEAF)

8. LEAF is a leading national organisation dedicated to strengthening equality rights of women and girls in Canada as guaranteed by the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). LEAF was founded in 1985 and has membership branches across the country, including LEAF Halifax.²
9. LEAF uses litigation, law reform work and public education to advance the equality rights of women and girls. LEAF regularly intervenes in litigation, including criminal appeals, to give a voice to women who experience discrimination, and to expand the equality rights of women who experience discrimination arising from the intersection

² Affidavit of Hailee Morrison affirmed on March 23, 2017, at paras 3-4 [Morrison Affidavit].

of multiple personal characteristics, such as age, race, disability, religion, family or socio-economic status.³

10. LEAF has contributed substantially to developing the law of sexual assault in Canada in a manner that respects and promotes women's substantive equality. LEAF has intervened in dozens of criminal and civil sexual assault appeals before the Supreme Court of Canada and provincial courts of appeal.⁴ As an intervenor, LEAF has assisted courts to understand the ways in which the law of sexual assault maintains sex-based inequalities, including by exposing and challenging discriminatory stereotypes and rape myths that inform legal norms and trial processes.⁵

11. In addition, LEAF has advocated for amendments to *Criminal Code* provisions dealing with sexual assault, in order to respect and promote women's substantive equality.⁶

C. Avalon Sexual Assault Centre Society

12. Avalon is a feminist organisation located in Halifax, Nova Scotia, which provides services for individuals affected by sexualized violence. Avalon has been a primary provider of support and advocacy services to victims/survivors of sexualized violence in Nova Scotia since its inception in 1983, and remains a cornerstone for sexual assault services in the province. Avalon directly serves individuals who have experienced sexual assault, including by providing support, education, therapeutic counselling, and leadership and advocacy services.⁷

13. Avalon also engages in legal advocacy and education on the issue of sexual assault in Nova Scotia. For many years, Avalon operated a Legal Support and Advocacy Worker program which monitored and tracked sexual assault cases in local courts to identify trends and emerging issues to inform policy recommendations. Through that

³ *Ibid* at paras 3, 5.

⁴ *Ibid* at paras 6-8, 12-13.

⁵ *Ibid* at para 11.

⁶ *Ibid* at para 10.

⁷ Affidavit of Jacquelyn Stevens sworn on March 24, 2017, at paras 2-5 [Stevens Affidavit].

program, Avalon assisted sexual assault victims/survivors in navigating the criminal justice system, and in preparing and accompanying them to court.⁸

14. More recently, Avalon has worked to illuminate and evaluate the impact of discriminatory stereotypes on sexual assault victims, and their influence on decisions by officials at various stages in the criminal justice process, through a multi-party empirical evaluation of its Sexual Assault Nurse Examiner program.⁹

PART III – ISSUES

15. The question before the Court is whether the Proposed Intervenors should be granted leave to intervene in this appeal.

PART IV – ARGUMENT

A. The proposed intervention satisfies the requirements for leave to intervene in criminal appeals.

16. The Proposed Intervention satisfies the requirements for leave to intervene in a criminal appeal before this Honourable Court. The Proposed Intervention will not expand the *lis* between the parties or occasion delay or prejudice to any party, and the Proposed Intervenors have a genuine interest in the appeal.

17. If granted leave to intervene, the Proposed Intervenors will offer the Court a substantive equality analysis on the legal issues, which is useful and different from the perspective of the Crown or the respondent. The Proposed Intervention would accordingly serve the public interest and the motion should be granted.

⁸ *Ibid* at paras 7-8.

⁹ *Ibid* at para 10.

i. Approach applied by the Court of Appeal on motions for leave to intervene.

18. Rule 90.19 allows a proposed intervenor to make a motion to a judge of the Court of Appeal for leave to intervene in an appeal.

19. Pursuant to Rule 90.19(5), the material on a motion for leave to intervene must describe the intervenor, their interest in the appeal, their position to be taken on the appeal, their proposed submissions and their relevance, the reasons those submissions will be useful to the Court of Appeal, and how those submissions will differ from those of the other parties.¹⁰

20. Rule 35.10(2) in turn sets out the criteria the Court considers in assessing whether to grant leave to intervene. The proposed intervenor must first satisfy the Court that the intervention will not unduly delay the proceeding or cause serious prejudice to any party. The Court may then grant leave to intervene if one of the following conditions is satisfied:

- a. The person has an interest in the subject of the proceeding;
- b. The person may be adversely affected by the outcome of the proceeding;
- c. The person ought to be bound by a finding on the determination of a question of law or fact in the proceedings; or
- d. Intervention by the person is in the public interest.¹¹

21. In addition to the factors set out in Rule 35.10(2), the Court has considered other flexible criteria in deciding whether to exercise its discretion to allow an intervention:

[8] ... Generally, an intervention should (1) target the parties' existing *lis* and (2) accommodate the process of the existing appeal while (3) augmenting and not just duplicating the parties' submissions or perspectives to assist the court's consideration of the parties' issues... In the circumstances of this application the key factor is whether the proposed intervention would bring

¹⁰ Rule 90.19(5).

¹¹ Rule 35.10(2).

a different or broader perspective that may assist the court to consider and determine the parties' issues on the appeal.¹²

22. In assessing proposed interventions, the Court has recognized the value that an intervenor's different perspective may bring to the parties' joined issues, including in the context of criminal appeals.¹³

23. The Proposed Intervenors submit that the above factors weigh in favour of granting the Proposed Intervention, as detailed below.

ii. No prejudice, delay or expansion of the lis between the parties to the appeal.

24. The Proposed Intervention will not cause prejudice to any party.

25. In particular, it will not delay the proceedings. The motion for leave to intervene was brought within the 15-day timeline required by Rule 90.19(4). The Crown has yet to set its motion for date and directions. The Proposed Intervenors will abide by all filing and hearing dates directed by the Court.

26. The Proposed Intervention also will not result in the respondent "facing two prosecutors".¹⁴ The Proposed Intervenors take no position on the disposition of the appeal. Their submissions will be confined to advancing an interpretation of the legal principles arising from the grounds of appeal in a manner informed by the *Charter* value of equality. The issues on which the Proposed Intervenors intend to make argument are outlined later in these submissions.

27. The Proposed Intervention will not expand the *lis* between the parties. The Proposed Intervenors will make legal argument on issues arising directly from the grounds of appeal identified by the Crown. The Proposed Intervenors do not seek to raise new grounds of appeal, or to introduce new evidence not contained in the appeal book.

¹² *Logan v Nova Scotia (Workers Compensation Appeals Tribunal)*, 2006 NSCA 11 at para 8 [emphasis added] [*Logan*]; *R v Chehill*, 2009 NSCA 85 at para 14.

¹³ *R v Chehill*, above at para 21; *Logan*, above at paras 9-11.

¹⁴ See *R v Murdoc and Johnson* (1996), 148 NSR (2d) 183 (CA) [*Murdoc*].

iii. *The Proposed Intervenors have a genuine interest in the appeal.*

28. Pursuant to Rule 35.10(2), a direct interest in the outcome of a particular case is not required for the Court to grant leave to intervene. This Honourable Court has granted leave to intervene, including in criminal appeals, where the proposed intervenor has established a genuine interest in the resolution of the legal issues and the legal principles to be applied.¹⁵

29. The interest of the Proposed Intervenors in the legal issues arising from this appeal is clear and indisputable. The appeal raises issues of public importance that will affect the development of sexual assault jurisprudence beyond the immediate parties.

30. The interpretation and application of sexual assault law in a manner consistent with women's equality rights strikes at the core of the respective mandates of both Proposed Intervenors. What is more, Avalon serves Nova Scotian women who will be directly affected by the precedent set in this appeal.¹⁶

31. The Proposed Intervenors have an interest in ensuring that the legal principles governing consent and capacity in the context of an intoxicated complainant are interpreted in a manner that is informed by the *Charter* value of substantive equality. The Proposed Intervenors are concerned that these legal principles should develop without reference to rape myths and discriminatory stereotypes about women.¹⁷

iv. *The submissions of the proposed intervenors will offer a unique and distinct contribution to the resolution of the legal issues in the appeal.*

32. The Proposed Intervenors will take no position on the disposition of the appeal, but will offer the Court an interpretation of the law that advances women's substantive equality. Without expanding the *lis* between the parties, the Proposed Intervenors'

¹⁵ *R v Chehill*, above; *Murdoc*, above. See also, in the context of a civil appeal: *Nova Scotia (Labour Relations Board) v Future Inns* (1999), 204 NSR (2d) 63 (CA).

¹⁶ Morrison Affidavit at paras 3, 15; Stevens Affidavit at paras 2, 5, 13-14.

¹⁷ Stevens Affidavit at para 13.

submissions will offer a unique and distinct contribution beyond the submissions of the parties.¹⁸

33. The Proposed Intervenor seeks to make submissions on the central issue of how the Court should evaluate incapacity or lack of consent when a complainant has no memory of the events due to her intoxication. The relevance of this question is not limited to the facts of the instant case, and this Court's decision will have a lasting impact on future cases which address this scenario.

34. Specifically, the Proposed Intervenor will focus on the following three issues:

- a. The interpretation of the legal principles that ought to inform the concept of capacity under s. 273.1 of the *Criminal Code*, in the specific context of an intoxicated complainant, as informed by s. 15 of the *Charter*;
- b. The meaning of consent in law and its application in the specific context of an intoxicated complainant, as informed by s. 15 of the *Charter*; and
- c. The application of discriminatory myths and stereotypes about women, including intoxicated women, in the analysis of the law and the assessment of evidence of capacity and consent to sexual activity under s. 273.1 of the *Criminal Code*.

35. An equality-focused analysis is essential to the resolution of this appeal. Sexual assault is a crime committed predominantly against women and girls, making it a form of sexual inequality, as recognized by the courts.¹⁹ Women from disadvantaged groups, including young women, are particularly at risk of sexual assault.²⁰ Despite the prevalence of the crime, sexual assault continues to be underreported and under-

¹⁸ See *R v Chehill*, above at para 21; *Logan*, above at para 8.

¹⁹ *R v Osolin*, [1993] 4 SCR 595 at paras 165-68 (Cory J) [*Osolin*]; see also *R v Ewanchuk*, [1999] 1 SCR 330 at paras 69-75 (L'Heureux-Dubé J concurring) [*Ewanchuk*].

²⁰ Lise Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" (2008) 41.4 *Akron Law Review* 865 at 882-84; Janine Benedet, "Sexual Assault of Intoxicated Women" (2010) 22 *CJWL* 435 at 436-39.

prosecuted.²¹ The law of capacity and consent in the context of an intoxicated complainant must be interpreted with this gendered reality in mind.

36. As set out in more detail below, the relationship between the legal principles of capacity and consent, and inequalities based on sex, will inform the Proposed Intervenor's analysis.

(a) The interpretation and application of the legal principles governing capacity to consent

37. In deciding this appeal, this Honourable Court will be asked to consider what constitutes capacity to consent to sexual contact in the case of an intoxicated complainant. Sections 273.1(1) and 2(b) of the *Criminal Code* provide that "[n]o consent is obtained ... where the complainant is incapable of consenting." The Proposed Intervenor submits that there is a need for further judicial clarification of the law of capacity in the context of an intoxicated complainant who has not lost consciousness prior to the assault.²²

38. If granted leave to intervene, the Proposed Intervenor will offer the Court an interpretation of the legal principles that ought to inform the concept of capacity under s. 273.1 and its application in the context of an intoxicated but conscious complainant, having regard to the *Charter* value of equality.

39. Specifically, the Proposed Intervenor will endorse an interpretation of the legal standard for capacity to consent to sexual contact which requires the complainant to have the ability to make a voluntary and informed decision. In particular, capacity to consent must include, on an ongoing basis:

- a. An understanding of the nature of the sexual act;

²¹ *Osolin*, above at para 166 (Cory J); *R v Seaboyer*, [1991] 2 SCR 577 at para 173ff (L'Heureux-Dubé J dissenting in part).

²² The last time this issue was squarely considered by the Nova Scotia Court of Appeal was in *R v MAP*, 2004 NSCA 27, where an intoxicated 14-year-old complainant was found to lack the capacity to consent even though she was not unconscious during the assault.

- b. An ability to assess the risks and consequences associated with the act in the particular circumstances confronting the complainant;
- c. An understanding that she may choose to decline to participate in the act,²³ and
- d. The capacity to communicate consent.

40. The Proposed Intervenor will argue that the Court ought to reject a threshold for incapacity which requires the Crown to prove that an intoxicated complainant was insensate, automaton, or suffering from impairments approaching unconsciousness, as applied by some courts.²⁴

41. The Proposed Intervenor will situate the appropriate legal standard for capacity to consent within a substantive equality framework. A central concern animating the offence of sexual assault is the recognition of a woman's inherent right to exercise full control over her body and to engage only in sexual activity on a voluntary and informed basis.²⁵ The law of capacity therefore must be interpreted in a manner that advances the values of women's personal autonomy, physical and psychological integrity, and human dignity – all of which underpin the s. 15 equality guarantee.²⁶

42. The Proposed Intervenor will also make submissions on the availability of circumstantial evidence to establish incapacity to consent under s. 273.1. The Proposed Intervenor will suggest factors that may be relevant to this analysis, arguing that the factors relied on to evaluate capacity ought to facilitate the protection of vulnerable targets of sexual violence, and be free of the influence of discriminatory myths or stereotypes, as discussed in more detail in (c), below.

²³ See *R v Daigle* (1997) 127 CCC 3(d) 130 (QCCA) at 137, aff'd [1998] 1 SCR 1220.

²⁴ *Contra R v Mullaney*, [1998] BCJ No 2188 (QL) (BCSC) at para 16; *R v L.C.* 2002 BCSC 1467 at paras 6, 15-16.

²⁵ *Ewanchuk*, above at para 75 (L'Heureux-Dubé J concurring).

²⁶ *Ibid* at para 74 (L'Heureux-Dubé J concurring); para 28 (Major J).

(b) The meaning of consent under s. 273.1 of the *Criminal Code*

43. In the instant case, the trial judge found that the Crown had adduced no evidence of lack of consent, on the basis that the complainant suffered from intoxication-related memory loss and could offer no direct evidence of her state of mind.²⁷ The Crown raises this finding as an error of law on appeal.
44. This issue will require the Court to consider the meaning of consent under s. 273.1 of the *Criminal Code* in the context of an intoxicated complainant experiencing alcohol-induced memory loss. The Court will also be called upon to consider whether and how circumstantial evidence can be relied on to establish lack of consent. If granted leave, the Proposed Intervenors will offer the Court a substantive equality-focused analysis of this ground of appeal.
45. First, the Proposed Intervenors will submit that in cases where there is no finding of incapacity, courts must be sure to engage in a distinct inquiry to determine whether the Crown has established a lack of consent beyond a reasonable doubt. Though a judge may find there exists a reasonable doubt that a complainant was incapable of consenting, it does not necessarily follow that there must also be a reasonable doubt as to her subjective lack of consent. Lack of consent must be separately established. Intoxicated women are not presumed to be in a perpetual state of consent, vitiated only by incapacity.
46. Second, the Proposed Intervenors will argue that it is appropriate for courts to consider circumstantial evidence when evaluating lack of consent if no direct evidence is available. It is possible for circumstantial evidence to establish non-consent beyond a reasonable doubt where non-consent is the only rational inference available on the evidence.²⁸ The assessment must focus on the complainant's consent to the particular sexual act, in the particular factual circumstances confronting the complainant, without reliance on myths or stereotypes.

²⁷ Decision dated March 1, 2017, Appeal Book, Tab 3, p 19, lines 9-11 and p 22, lines 1-4.

²⁸ *R v Griffin*, [2009] 2 SCR 42 at para 27.

47. The Proposed Intervenor will discuss the types of circumstantial evidence that have been considered in the jurisprudence as relevant to an inference of non-consent, and offer an equality-focused analysis of the appropriateness of these factors. For example, the Proposed Intervenor will argue that courts have properly considered: the complainant's own evidence about her personal habits; her prior knowledge of the accused; the location of the alleged assault; the age of the complainant relative to the accused; or the complainant's condition at the time of the alleged assault.²⁹
48. The Proposed Intervenor will argue that it is also open to courts to consider whether intoxication has diminished the voluntariness of the complainant's agreement to sexual contact, even where it has not eliminated her capacity to consent entirely.³⁰ Courts have recognized that the voluntariness of consent may be constrained, short of incapacity, in other contexts.³¹ A proper construction of s. 273.1, informed by *Charter* values, requires courts to engage in an analysis of all the evidence, including how intoxication may have reduced the complainant's capacity, to determine whether the Crown has established a lack of consent beyond a reasonable doubt.
49. In drawing a rational or reasonable inference from circumstantial evidence, courts may properly consider, also, the vulnerability of intoxicated complainants to sexual assault, and any intersecting grounds of vulnerability that a particular complainant may experience.
50. Among the evidence the Proposed Intervenor will argue is *not* relevant to assessing consent is the fact that the complainant's intoxication was voluntary, or that the complainant engaged in behaviour of which the trial judge might disapprove.³² As will be discussed in greater detail below, courts should be cautious not to allow

²⁹ See e.g., *R v JR* (2006), 40 CR (6th) 97 (Ont Sup Ct J) at para 39, aff'd 2008 ONCA 200, leave to appeal dismissed [2008] SCCA No 189 (QL); *R v BSB*, 2008 BCSC 917 at paras 72 and 90, aff'd 2009 BCCA 520; *R v Ashlee*, 2006 ABCA 244 at para 38.

³⁰ Benedet, above at 461.

³¹ *Norberg v Wynrib*, [1992] 2 SCR 226.

³² Benedet, above at 460.

considerations of the “fault” or “responsibility” of the complainant colour their assessment of consent.³³

(c) “Reasonable” inferences about capacity and consent

51. The Proposed Intervenors will argue that a proper application of the meaning of consent and capacity to consent under s. 273.1 must account for Parliament’s intention to exclude discriminatory myths and stereotypes about women, including intoxicated women, from judicial decision-making, consistent with women’s equality rights.
52. In particular, it is a judicial error to find that reasonable doubt exists because of speculation or assumptions informed solely or primarily by discriminatory myths or stereotypes, rather than based on the evidence. An inference that an intoxicated complainant consented to sexual contact cannot be “reasonable” or “rational”, for instance, if it is based primarily on the myth or stereotype that intoxication makes women more likely to consent to any sexual encounter, regardless of the circumstances.
53. Further, the Proposed Intervenors will urge that reasonable inferences about an intoxicated complainant’s consent to sexual contact must be made with recognition of the social reality in which her consent is sought. The law must view the sexual assault of a woman who is vulnerable due to intoxication in the context of gender-based inequality, in order to be consistent with the *Charter* values of dignity and equality.
54. Notwithstanding Parliament’s intention to exclude discriminatory myths and stereotypes about women from the law of sexual assault, these myths and stereotypes continue to pervade the judicial process. The submissions of the Proposed Intervenors are intended to provide assistance to this Honourable Court in employing an equality-focused analysis to the issues raised on this appeal.

³³ *Ibid*; Gotell, above at 878-80.

(d) Additional issues arising from the parties' submissions

55. In addition to the above, the Proposed Intervenors may offer a substantive equality analysis on further issues arising from the parties' submissions.

v. *The expertise of the Proposed Intervenors offers a different and broader perspective that may usefully assist the Court.*

56. The Proposed Intervenors' expertise in substantive equality, discrimination, and sexual assault law offers a perspective that is different and broader than that of the immediate parties, and which will be useful to the Court.

57. LEAF has considerable expertise in equality rights law and theory and their application in the context of sexual assault law. LEAF has gained this expertise in part through its history intervening in litigation at the appellate level. LEAF's expertise in articulating and applying a contextual legal analysis of sexual assault as a form of inequality will assist the Court in its analysis of the law of consent and capacity in the context of an intoxicated complainant.³⁴

58. Avalon's front-line experience also uniquely positions it to make a useful contribution to the resolution of the issues in this appeal. Avalon understands how the legal concepts of capacity and consent translate into practice, and into the lived experiences of the women Avalon serves. Avalon will draw on this unique perspective in developing a feminist legal analysis to the issues in the appeal.³⁵

59. The Proposed Intervenors' special perspective and expertise are detailed in the affidavits of Hailee Morrison and Jacquelyn Stevens filed in support of this motion.

vi. *The Proposed Intervention is in the public interest.*

60. The Proposed Intervenors submit that their intervention is in the public interest for the reasons set out above. In addition, the Proposed Intervention would serve the public

³⁴ Morrison Affidavit at paras 9-12, 16.

³⁵ Stevens Affidavit at paras 15-17.

interest by providing the women represented by LEAF and Avalon – including sexual assault complainants who are among the most marginalized members of society – a voice in this appeal. The Proposed Intervention would thereby promote access to justice and the inclusiveness of the court process.³⁶

vii. Conclusion on the legal test for leave to intervene.

61. The Proposed Intervenors request that their motion for leave to intervene in this appeal be granted. The Proposed Intervention will not delay the proceedings nor otherwise prejudice any party. The Proposed Intervenors have demonstrated a genuine interest in the issues of public importance raised in this appeal concerning the interpretation of the law of consent and capacity in the context of an intoxicated complainant. If granted leave, the Proposed Intervenors will advance a unique, equality-focused analysis which has the potential to greatly assist the Court.

B. No costs should be awarded in respect of the Proposed Intervention

62. LEAF and Avalon are non-profit organisations with limited financial resources, and which rely on the generosity and commitment of *pro bono* counsel and committee members to participate in litigation.

63. The Proposed Intervenors therefore respectfully request that they not be subject to any award of costs in respect of this motion to intervene and in respect of their intervention, should leave be granted.

³⁶ Morrison Affidavit at para 17; Stevens Affidavit at para 14.

PART V – RELIEF SOUGHT

64. The Proposed Intervenors respectfully request that this Honourable Court order that:

- a. LEAF and Avalon are granted leave to intervene in the within appeal;
- b. LEAF and Avalon shall bear no liability for, nor entitlement to, costs;
- c. LEAF and Avalon are granted leave to file a joint factum on the appeal of 25 pages or less;
- d. LEAF and Avalon are granted leave to make joint oral submissions at the hearing of the appeal not exceeding 30 minutes in length.

All of which is respectfully submitted this day of May, 2017.

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SCHEDULE A – LIST OF AUTHORITIES

Case Law

1. *Logan v Nova Scotia (Workers Compensation Appeals Tribunal)*, 2006 NSCA 11.
2. *Norberg v Wynrib*, [1992] 2 SCR 226.
3. *Nova Scotia (Labour Relations Board) v Future Inns* (1999), 204 NSR (2d) 63 (CA).
4. *R v Ashlee*, 2006 ABCA 244.
5. *R v BSB*, 2008 BCSC 917.
6. *R v BSB*, 2009 BCCA 520.
7. *R v Chehill*, 2009 NSCA 85.
8. *R v Daigle* (1997), 127 CCC 3(d) 130 (QCCA).
9. *R v Daigle*, [1998] 1 SCR 1220.
10. *R v Ewanchuk*, [1999] 1 SCR 330.
11. *R v Griffin*, [2009] 2 SCR 42.
12. *R v JR* (2006), 40 CR (6th) 97 (Ont Sup Ct J).
13. *R v JR*, 2008 ONCA 200.
14. *R v JR*, [2008] SCCA No 189 (QL).
15. *R v L.C.* 2002 BCSC 1467.
16. *R v M.A.P.*, 2004 NSCA 27.
17. *R v Mullaney*, [1998] BCJ No 2188 (QL) (BCSC).
18. *R v Murdoc and Johnson* (1996), 148 NSR (2d) 183 (CA).
19. *R v Osolin*, [1993] 4 SCR 595.
20. *R v Seaboyer*, [1991] 2 SCR 577.

Scholarly Articles

21. Janine Benedet, "Sexual Assault of Intoxicated Women" (2010) 22 *CJWL* 435.
22. Lise Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" (2008) 41.4 *Akron Law Review* 865.

SCHEDULE B – STATUTES AND REGULATIONS

Criminal Code, RSC 1985, c C-46.

Sexual Assault

271 Everyone who commits a sexual assault is guilty of

- (a) an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or
- (b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

Meaning of *consent*

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.

Where no consent obtained

(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.

Subsection (2) not limiting

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