

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

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

and

D.A.I.

RESPONDENT

and

**WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF) and DISABLED
WOMEN'S NETWORK CANADA (DAWN CANADA),
PEOPLE FIRST OF CANADA and CANADIAN ASSOCIATION FOR COMMUNITY
LIVING,
CRIMINAL LAWYERS' ASSOCIATION (ONTARIO) and
COUNCIL OF CANADIANS WITH DISABILITIES**

INTERVENERS

FACTUM OF THE INTERVENER
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PART I – STATEMENT OF FACTS

1. LEAF-DAWN takes no position on the facts.

PART II – POINTS IN ISSUE

2. At issue is the correct interpretation of *Canada Evidence Act* (“CEA”) s.16(3).

PART III – ARGUMENT

3. Women and men with mental disabilities¹ face significant systemic and legal barriers to access to justice. Challenges to competence under s.16 of the *CEA*, however, arise overwhelmingly in cases of sexual assault of women with mental disabilities.² The lower court’s interpretation of *CEA* s.16(3) will have a highly gendered impact and will effectively exclude mentally disabled women’s *viva voce* evidence of sexual abuse. This Court has repeatedly held that the truth seeking function of the criminal trial demands that relevant evidence be admitted and weighed by the trier of fact unless there is a principled basis for excluding it.³ The interrogation of mentally disabled witnesses’ understanding of “truth”, “lie” and “promise” under *CEA* s.16(3) will result in the exclusion of reliable and relevant evidence on the basis of stereotypes and outdated judicial assumptions that have been rejected by Parliament and are not binding on this Court. The s.16(1)(b) test ensures that a witness’s evidence meets the minimum threshold of reliability. The accused’s fair trial rights are protected by cross-examination and the court’s ability to accord greater or lesser weight to the evidence.

Sexual Assault of Women with Disabilities

4. The sexual assault of women with disabilities is pervasive.⁴ It is estimated that:
 - 83% of women with disabilities will be sexually abused in their lifetimes;
 - 40-70% of girls with intellectual disabilities will be sexually abused before the age of 18;

¹ Mental disability is an enumerated ground under section 15 of the *Charter*. LEAF-DAWN defines “mental disability” as including developmental disability, psychiatric disability, and chronic non-episodic mental disabilities like brain injury and neurological illnesses such as dementia and multiple sclerosis affecting cognition.

² For example, 80% of appellate decisions involving challenges to the competence of a mentally disabled *adult* have involved female sexual assault complainants. The results of a Quicklaw search using the query “canada evidence act /15 “16(3)” and “date after December 31, 1989” reveal that of the approximately 38 cases yielded with respect to testimonial capacity and admission of evidence (not including hearsay), over 80% of the cases involved sexual assault; approximately 75% of child sexual assault and three cases involving sexual assault of disabled adult.

³ *R. v. Levogiannis*, [1993] 4 S.C.R. 475 at p.487; *R. v. Marquard*, [1993] 4 S.C.R. 22; *R. v. Khan*, [1990] 2 S.C.R. 531.

⁴ This Court has repeatedly recognized the social reality of the abuse of disabled women: *R. v. O’Connor*, [1995] 4 S.C.R. 411 at para.120; *A (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536 at para.83; *R. v. Marquard*, at para.87 (per L’Heureux Dubé in dissent).

- 80% of psychiatric inpatients have experienced physical or sexual abuse in their lifetime;
- Women with mental disabilities are up to ten times more likely to be sexually assaulted than women without a disability; and
- Less than 25% of incidents of sexual assault are limited to one episode. Abuse of women with mental disabilities is frequently chronic and ongoing. The perpetrator is often a caregiver or someone who accesses the woman through her caregiver.⁵

5. The extremely high rate of sexual assault of women with mental disabilities can be explained by a number of factors, including the perception that they are easy targets. Offenders assume – in many cases correctly – that the women cannot or will not complain, will not be believed if they do complain, and any incidents reported will not be fully investigated or prosecuted.⁶ In addition, women with mental disabilities are often poor, dependent on others for their basic needs and economic welfare, isolated, segregated (in education, housing or institutional settings) and subject to the control of, among others, doctors, teachers, parents, and residential workers.⁷ These power dynamics make it difficult for women to resist and report sexual abuse. They may not even be aware that they can say no to sexual activity initiated by a person who has authority over them. Or they may not be aware that the activity in question is abusive.

6. A highly vulnerable group of women will be most affected by the judgment in this appeal. This Court has confirmed the importance of access to justice for marginalized groups and, more specifically, of society's interests in addressing the under-reporting and under-prosecution of sexual assault.⁸ Less than 10% of all sexual assaults are reported to police and of the assaults reported, even fewer result in charges being laid.⁹ This gap is significantly higher for women with disabilities, with

⁵ Public Health Agency of Canada, *Violence Against Women* (Ottawa: Minister of Public Works and Government Services Canada, 2009); Miriam Ticoll & Melanie Panitch, "Opening the Doors - Addressing the Sexual Abuse of Women with an Intellectual Disability" (1993) 13 *Canadian Women's Studies* 84; D. Sobsey and T. Doe, "Patterns of Sexual Abuse and Assault" (1991) *Sexuality and Disability* 243 at 248; Janine Benedet and Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief" (2007) 52 *McGill L.J.* 243-289 at paras. 36-45; Sobsey, D. *Violence and Abuse in the Lives of People with Disabilities: The End of Silent Acceptance?* (Baltimore: Paul H. Brookes, 1994) at 67-75; Roeher Institute, *Harm's Way: The Many Faces of Violence and Abuse Against Persons with Disabilities* (North York: Roeher Institute, 1995) at 8-9, 24-25; *R. v. O'Connor*, at para. 120.

⁶ Benedet and Grant, *supra* at para. 39; Joan R. Petersilia, "Crime Victims with Developmental Disabilities: A Review Essay" (2001) 28 *Criminal Justice and Behaviour* 655 at pp.666, 672, 680-83; see also Razack, Sherene, *Looking White People in the Eye* (Toronto: University of Toronto Press, 1998) at pp.139-140.

⁷ See notes 5 and 6 *supra*.

⁸ *R. v. Mills*, [1999] 3 S.C.R. 668 at paras.48, 58, 59, 73; *A (L.L.) v. B.(A.)* at para.60; *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at p.606 (per McLachlin J.); *R. v. Osolin*, [1993] 4 S.C.R. 595 at 669.

⁹ In 2007, charges were laid in approximately a third of sexual offences reported to police, as compared to over half of other types of violent crime. In adult court, sexual offences are less likely than other violent crimes to result in a

less than 4% of assaults reported to police and charges rarely laid.¹⁰ An interpretation of *CEA* s.16(3) which creates barriers to the admission of disabled women's evidence will exacerbate the already serious problem of impunity for sexual offenders, often serial abusers, who will "continue to prey on such victims without fear of being called to account for their actions".¹¹

The Extraordinary Nature of the Denial of Access to Justice

7. Witnesses whose competence is not challenged are entitled to testify in court upon swearing an oath or affirmation. Their competence is presumed, as is their understanding of the importance of truth-telling. They are not required to explain the meaning of an oath or affirmation, or even whether they feel bound by them. Not even convicted perjurers are subjected to such inquiries.

8. For all other witnesses, credibility testing is a function of the trial process. If the lower court decision is upheld, it is only adults with mental disabilities whose evidence is deemed too untrustworthy to even be heard by a court unless they can answer abstract questions about "truth" and "promise". It is only this already disadvantaged category of witness that must prove their reliability before they can even take the stand.

9. The lower court's inquiry is out of step with the law concerning oath-taking.¹² Witnesses are no longer required to have religious beliefs. Nor does the law require witnesses to explain the religious significance of swearing an oath, or to articulate the moral or conceptual basis for their affirmation. Requiring a mentally disabled witness to articulate her moral duty to tell the truth would replace a religious inquiry, with an equally metaphysical inquiry, that is not imposed on any other witness.

10. The centrality of sexual assault complainants' evidence has been used to justify heightened scrutiny of them as witnesses and to create discriminatory judicial obstacles to the

finding of guilt, see Canada, Status of Women Canada, *Assessing Violence Against Women A Statistical Profile* (1993); *R. v. Osolin* at p.669; *R. v. Seaboyer* at pp.648-651; Statistics Canada, Centre for Canadian Justice Statistics, *Sexual Assault in Canada, 2004* (Minister of Industry, 2008); Government of Ontario, "Sexual Assault Reporting Issues" (May 2007) at <http://citizenship.gov.on.ca/owd/english/resources/publications/dispelling/reporting/>.

¹⁰ Benedet and Grant, *supra* at para.39; Petersilia, *supra* at p.683; Deborah Tharinger, Connie Burows Horton, Susan Millia, "Sexual Abuse and Exploitation of Children and Adults with Mental Retardation and Other Handicaps" (1990) 14 *Child Abuse and Neglect* 301 at 304.

¹¹ *R. v. Marquard* at para.87 (per L'Heureux Dubé in dissent).

¹² *McWilliams' Canadian Criminal Evidence* 4th edition, Justice Casey Hill et. al ed. (Toronto: Canada Law Book Inc. 2004, looseleaf) at 17-39, 40.

receipt of their testimony.¹³ The exclusion of mentally disabled complainants' testimony will make conviction impossible in many cases. Given their rate of abuse, such a consequence is especially stark.

Exclusion Arbitrary and Based on Stereotypes

11. In cases involving witnesses with greater communicative challenges than K.B., this Court has held that “persons with disabilities should not be underestimated”, that “stereotypical assumptions about persons with disabilities should be avoided” and that “the Court should not be quick to leap to the assumption that a person with mental disabilities is not competent to give useful testimony”.¹⁴

12. In the context of sexual assault, discriminatory assumptions about persons with mental disabilities interact with rape mythologies that “complainants in sexual assault trials are inherently more untrustworthy than witnesses in any other trial where credibility is an issue.”¹⁵ This Court has warned lower courts to avoid “any suggestion that a particular treatment, therapy, illness, or disability implies unreliability”.¹⁶ Women with mental disabilities are devalued societally, are often socially constructed either as “hyper-sexual” and inappropriate in their behaviour, or childlike and asexual, and are even less likely than non-disabled women to be believed when they describe sexual assault.¹⁷ This Court must not perpetuate these stereotypes by creating a unique pre-testimonial inquiry into the reliability of these witnesses who are already so deeply disbelieved.¹⁸

13. Sexual assault proceedings have been pervaded by discriminatory and irrelevant attacks on credibility which have disproportionately affected women who experience multiple inequalities.¹⁹ The use of sexual history evidence was especially damaging for prostitutes/sex workers. Access to and use of psychiatric records to undermine credibility was especially problematic for women living with mental illness. The lower court's interpretation of *CEA* 16(3), however, goes further than discrediting mentally disabled complainants. It fundamentally shifts

¹³ Such as the doctrines of corroboration and recent complaint.

¹⁴ *R. v. Parrott*, 2001 SCC 3 at para.80.

¹⁵ *R. v. Osolin* at pp. 625, 628.

¹⁶ *R. v. O'Connor* at para.143.

¹⁷ *Benedet and Grant, supra*; *Razack, supra*.

¹⁸ These very stereotypes are relied on in the Respondents' factum. K.B.'s report of sexual assault by D.I. is too unreliable to be admitted, whether *viva voce* or as hearsay, yet K.B. is portrayed as sexually inappropriate and the Court is asked to give weight to hearsay evidence of sexual comments made by K.B. and of her reports of sexual “games” played with boys in school; see Respondent's Factum paras. 9, 10, 11.

¹⁹ The law has responded to limit some of these attacks, such as *Criminal Code of Canada* ss.276, 277, 278.1-278.9.

them from a category of complainant whose credibility is attacked to a unique category of witness whose experiences are so discounted that they are not entitled to be heard at all.

Exclusion Inconsistent with Development of Rules of Competence

14. Historically, mentally disabled persons, along with other categories of witnesses such as spouses, persons who did not believe in a supreme (originally Christian) God, persons convicted of a criminal offence, and young children, were incompetent to testify because their evidence was presumed to be so unreliable that it was dangerous to allow it to be heard.²⁰ These categorical presumptions and exclusions have been rejected.

15. Rules of evidence which excluded categories of witnesses based on discriminatory assumptions have been gradually challenged and broken-down. As noted in McWilliams' *Canadian Criminal Evidence* 2nd edition "[t]he competence and compellability rules that have developed over time reveal that the law of evidence is not simply a set of neutral rules governing the admissibility and use of evidence in criminal proceedings. Rather, it largely reflects the values and norms of those who create it."²¹ The law's recognition of these stereotypes and incorrect assumptions means that spouses are no longer presumed incompetent on the basis that wives have no independent identity from their husbands.²² People without religious belief are no longer disqualified on the assumption that they are inherently untrustworthy. Yet the lower court's s.16(3) inquiry categorically excludes the evidence of mentally disabled persons based on deeply-rooted stereotypes that such persons are unreliable and cannot accurately perceive, remember, or relate events or distinguish fact from fiction. Further it does so despite *CEA* s.16(4) which permits the exclusion of evidence only where the witness is unable to understand an oath and unable to communicate the evidence. There is no statutory provision for excluding the testimony of a witness who can communicate the evidence but is unable to articulate the meaning of the promise to tell the truth.

Inquiry Based on Discredited Assumption that a Promise to Tell the Truth is "Empty"

16. *CEA* s. 16(3) permits witnesses whose mental capacity is challenged to testify unsworn on a promise to tell the truth. The section requires only that the witness be able to "communicate the

²⁰ *McWilliams' Canadian Law of Criminal Evidence*, 4th edition, at pp.17-3 to 17-6.

²¹ *Ibid* at p.17-3.

²² Although s. 4 of the Canada Evidence Act continues to make husbands or wives of accused persons incompetent to testify for the Crown for most offences, in *R. v. Salituro* [1991] 3 SCR 654, this court rejected the notion of spousal unity as the basis for this provision.

evidence”, but the Ontario Court of Appeal in *R. v. Farley*²³ and other courts have imposed a further requirement that the witness demonstrate an understanding of the promise to tell the truth. This judicial interpretation has added a step to the competency inquiry: before they can testify unsworn, these witnesses must articulate abstract concepts like “truth”, “lie” and “promise.” The courts imposing this requirement reason that, if witnesses were not questioned on their understanding, the promise to tell the truth would be reduced to a “meaningless formalism” or an “empty gesture.” This proposition has now been discredited empirically, rejected by Parliament, and increasingly doubted in the courts.²⁴

17. Empirically, the *Child Witness Project* demonstrated, first, that children’s ability to answer abstract questions about the meaning of truth, lies, and promises was unrelated to whether they would tell the truth and, second, that even children who could not answer such questions were more likely to tell the truth when they promised to do so.²⁵ These findings fatally undermine the premise that a witness’s promise to tell the truth is meaningless if she cannot communicate a conceptual understanding of that promise.

18. In interpreting *CEA* s. 16, the courts reasoned that Parliament would not have required witnesses to promise to tell the truth without ensuring that they understood the meaning of the promise. Yet in enacting *CEA* s.16.1, Parliament has done precisely that. Parliament saw fit to require a child witness to “promise to tell the truth” while prohibiting an inquiry into their understanding of that promise. Unless Parliament is understood to have deliberately enacted a “meaningless formalism” in ss.16.1(6) and (7), Parliament has made clear that the promise to tell the truth, without an inquiry, has value. The premise in *Farley* is thus fundamentally rejected.

19. Further, as the British Columbia Court of Appeal recognized in *R. v. J.Z.S.* in reasons unanimously adopted by this Court,²⁶ by enacting s. 16.1 Parliament affirmed that a child’s ability to satisfactorily articulate an understanding of “such abstract concepts as ‘oath’, ‘promise’, ‘truth’ and ‘lies’” bears no relationship to their ability to give honest and reliable evidence.²⁷ The practice of asking children to articulate these abstract concepts was recognized as unhelpful.

²³[1995] O.J. No.1278 (C.A.).

²⁴*R. v. J.Z.S.*, 2008 BCCA 401, *aff’d* [2010] 1 S.C.R. 3.

²⁵Nick Bala, Katherine Duvall-Antonacopoulos, R.C.L. Lindsay & Victoria Talwar, “Bill C-2: A New Law for Canada’s Child Witnesses” (2006) 32 C.R. (6th) 48 at 56-58.

²⁶*R. v. J.Z.S.*, *supra*.

²⁷*Ibid.* at para.46.

20. *CEA* s.16 and s.16.1 treat children and adults distinctly. Women with disabilities are not analogous to children. However, that mentally disabled adults are not children and should not be infantilized does not justify the application of a discredited line of questioning to them. There is no evidence that a higher standard for persons with mental disabilities is intended by Parliament, promotes the truth-seeking function of the criminal trial, and is not based on stereotypes. Without such evidence, there is no principled basis to exclude mentally disabled persons' testimony for failing to meet a judicially-imposed metaphysical inquiry.

Communicating the evidence includes a functional understanding of “truth”

21. *CEA* s. 16(1)(b) provides that witnesses whose mental capacity is challenged may only testify if they can “communicate the evidence.” As this Court recognized in *Marquard*, a person who can communicate the evidence must meet the “minimum threshold”²⁸ of being able to perceive, recall and recount events accurately. The witness must demonstrate “some ability...to distinguish between fact and fiction,” “to relate to the court the essence of what happened,” to “differentiate between that which is actually perceived and that which the person may have imagined” or “been told by others.”²⁹

22. Thus, the s.16(1)(b) inquiry does in fact test whether a witness is able to understand “truth” in terms of identifying what she knows, saw, felt, heard or otherwise experienced. It explores the witness’s capacity to give a reliable account of his or her life experiences. That is the appropriate and intended focus of the competence inquiry. A witness who has no orientation to the truth in the sense that the person has no grasp of the lines between “unreal” and “real” experiences, between fact and fiction, will be unable to meet the s.16(1)(b) threshold. The fair trial rights of accused persons are thus protected.

23. Trial fairness and the principles of fundamental justice embrace rights and interests beyond those of the accused, including “fairness in the eyes of the community and the complainant.”³⁰ The truth-seeking function of the criminal trial, the interests of society, and the application of *Charter*

²⁸ *R. v. Marquard* at para.12.

²⁹ *R. v. Farley* at para. 14, citing *R. v. Caron* (1994), 19 O.R. (3d) 323(C.A.), see also paras.15-16 and *R. v. Marquard* at paras.12-14.

³⁰ *R. v. Mills* at paras.72-73.

values and international human rights standards³¹ all demand facilitating the testimony of mentally disabled complainants to ensure that their evidence is conveyed to the Court as effectively, accurately and fully as possible, recognizing the diversity of needs, experiences, abilities and range of possible accommodations. The starting presumption cannot be that the witness is too disabled to give any reliable evidence.

24. In this case, the Court did not hear from the complainant's teacher/support person until after the s.16 inquiry had concluded, despite the Crown's suggestions that such evidence would be helpful in terms of understanding how to ask K.B. questions. The Crown also expressed concern about the "language" of the questions put to K.B.³² K.B. was unable to answer abstract questions about her obligation to tell the truth, particularly in the context of ongoing questioning on a range of subjects and the pressure she was experiencing. Moreover, although K.B. was asked some concrete questions, it is not at all clear on the record that she was asked questions relating to her ability to accurately observe, recollect and recount her experiences. For example, she was asked information-based questions by the Court about her knowledge of names of specific hockey players. She was discounted as incompetent and too unreliable to give evidence because of her inability to answer questions about time, even though such questions (a) are often difficult for any witness; (b) were questions she could not comprehend, at least in the way they were asked;³³ and (c) pose particular difficulties when the alleged abuse may have occurred repeatedly over an extended period of time.

25. K.B. was able to answer questions about her everyday life, including her age, school, teachers and interests. She testified that she had a sister and did not have any brothers. She communicated her morning routine and that she makes herself a bowl of Honey Nut Cheerios with bananas (and not eggs "yuk") for breakfast. She testified about the name of the movie she had recently watched (*Land Before Time*) and what it was about (dinosaurs).³⁴ It is impossible to determine from the record how she would have responded to other questions about her personal experiences had accommodated questioning been available to her.

³¹ United Nations Convention on the Rights of Persons with Disabilities, Arts. 3, 6, 13.

³² Section 16 Inquiry, Appellant's Record, Vol. I, pp.120, 121, 124-127.

³³ Evidence of Mrs. White, Appellant's Record Vol. I., p.178.

³⁴ Section 16 Inquiry, Appellant's Record, Vol. I. pp.111, 115, 150, 151, 157.

26. Appropriately facilitating the evidence of mentally disabled complainants needs to occur at the s.16(1)(b) inquiry and during the complainant's evidence in chief and cross-examination. The accused's fair trial rights are protected by cross-examination and by the court's ability to weigh the evidence.

Section 16(3) Must be Interpreted Consistent with Charter Values

27. LEAF-DAWN submits that *CEA* s. 16(3) clearly requires a promise to tell the truth and no further inquiry into the promise. If, however, this Court finds the provision ambiguous, it must be interpreted and understood in a manner consistent with *Charter* values and principles, specifically the ss.15, 7 and 28 rights of mentally disabled women to equal protection of the law, access to justice, and security of the person, and the obligation to interpret these rights in a manner that guarantees them equally to men and women.³⁵

28. Substantive equality demands that laws are developed and interpreted so as to “remedy” and “prevent” discrimination against “groups suffering social, political and legal disadvantage”; resist the “exclusion” of those outside dominant norms; foster “participation”, inclusion and access to justice; and not perpetuate and “exacerbate the situation” of disadvantaged groups.³⁶

29. For women with mental disabilities, this appeal concerns the most fundamental violations of their dignity and personhood. Mentally disabled women are among the most disadvantaged in Canadian society. They are systemically sexually abused and are profoundly marginalized, devalued and excluded. The lower court's interpretation of s.16(3) will reinforce stereotypes that mentally disabled women lack inherent worth and that their evidence has so little value that meaningful efforts to facilitate their evidence are unnecessary. It will exacerbate existing conditions of inequality in which their experiences of abuse are denied, ignored, discounted and minimized. It will effectively render these women beyond the law's reach and protection. It will discourage reporting, impede prosecution, and further deepen these women's exclusion thus leaving the women with the most severe disabilities the least likely to have access to justice. This Court must reject an interpretation of s.16(3) which so seriously contravenes equality principles and further endangers this already disadvantaged group.

³⁵ *Application under s.83.28 of the Criminal Code (RE)*, [2004] 2 S.C.R. 248 at para.24.

³⁶ *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 35; *Eaton v. Brant County Board of Education*, [1997] 2 S.C.R. 3 at para.65; *Eldridge. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at paras.54-56; *M. v. H.*, [1999] 2 S.C.R. 3 at para.65.

Conclusion

30. There is no pre-testimonial guarantee that the evidence of any witness is credible. Credibility is an issue for the trier of fact. The goal of the s.16 inquiry cannot be “to ensure that the evidence is credible”.³⁷ Excluding mentally disabled complainants from even entering the door of the courthouse, however, has devastating consequences. Given the undeniably high rates of sexual assault of women with mental disabilities, the justice system should be reaching out to protect them from sexual assault and to punish and deter their abusers. It should recognize the diversity of their needs and experiences, accommodate them, and facilitate their evidence to ensure that their experiences are conveyed to the Court as accurately and fully as possible. This cannot be achieved by the erection of judicially-created barriers to access to justice.

31. The judicially created inquiry under s.16(3) is inconsistent with this Court’s admonition in *R. v. Parrott* to resist assumptions that persons with mental disabilities are too unreliable to give valuable evidence. It is also inconsistent with developments “to remove barriers to the truth-seeking process”.³⁸ The truth-seeking function of the criminal trial will be advanced, not subverted, by the testimony of a witness that meets the s.16(1)(b) threshold.

PART IV - COSTS

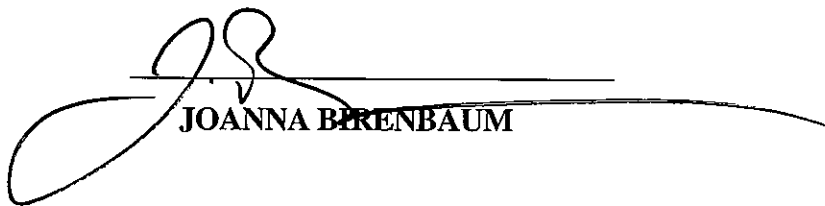
32. LEAF-DAWN seeks no award of costs and requests that no costs be awarded against it beyond disbursements ordered by this Court on April 4, 2011.

PART V - ORDER REQUESTED

33. LEAF-DAWN respectfully requests that this Court find that the lower courts erred in law in their interpretation of *CEA* s.16(3). LEAF-DAWN seeks leave to make oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED this 26th day of April, 2011



JOANNA BRENBAUM

³⁷ *R. v. Marquard* at para. 12.

³⁸ *R v. Levogiannis*, at p.487, see also *R. v. Marquard* at para.71 and cases cited therein.

PART VI - AUTHORITIES

Cases	Paragraph Nos.
<i>A (L.L.) v. B. (A.)</i> , [1995] 4 S.C.R. 536	4, 6
<i>Application under s.83.28 of the Criminal Code (RE)</i> , [2004] 2 S.C.R. 248	27
<i>Eaton v. Brant County Board of Education</i> , [1997] 1 S.C.R. 241.....	28
<i>Eldridge v. British Columbia (Attorney General)</i> , [1997] 3 S.C.R. 624	28
<i>R. v. Farley</i> , [1995] O.J. No. 1278 (C.A.)	21
<i>R. v. J.Z.S.</i> , 2008 BCCA 401, affirmed [2010] 1 S.C.R. 3	16, 19
<i>R. v. Khan</i> , [1990] 2 S.C.R. 531	3
<i>R v. Levogiannis</i> , [1993] 4 S.C.R. 475.....	3, 31
<i>M. v. H.</i> , [1999] 2 S.C.R. 3	28
<i>R. v. Marquard</i> , [1993] 4 S.C.R. 223	3, 4, 6, 21, 30, 31
<i>R. v. Mills</i> , [1999] 3 S.C.R. 668	6, 23
<i>R. v. O'Connor</i> , [1995] 4 S.C.R. 411	4, 12

<i>R. v. Osolins</i> , [1993] 4 S.C.R. 595	6, 12
<i>R. v. Parrott</i> , 2001 SCC 3	11, 31
<i>R. v. Salituro</i> , [1991] 3 SCR 654	15
<i>R. v. Seaboyer</i> , [1991] 2 S.C.R. 577	6
<i>Withler v. Canada (Attorney General)</i> , 2011 SCC 12	28

Secondary Sources

Paragraph Nos.

Bala, Nick, Katherine Duvall-Antonacopoulos, R.C.L. Lindsay & Victoria Talwar, “Bill C-2: A New Law for Canada’s Child Witnesses” (2006) 32 C.R. (6 th) 48	17
Benedet, Janine and Isabel Grant, “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief” (2007) 52 McGill L.J. 243-289	4, 5, 6, 12
Government of Ontario, Ontario Women’s Directorate, “Sexual Assault: Reporting Issues” (May 25, 2007) at http://citizenship.gov.on.ca/owd/english/resources/publications/dispelling/reporting/	6
<i>McWilliams’ Canadian Criminal Evidence</i> 4 th edition, Justice Casey Hill et. al ed. (Toronto: Canada Law Book Inc. 2004, looseleaf)	9, 14
Petersilia, Joan R. “Crime Victims with Developmental Disabilities: A Review Essay” (2001) 28 Criminal Justice and Behaviour 655	5, 6
Public Health Agency of Canada, <i>Violence Against Women</i> (Ottawa: Minister of Public Works and Government Services Canada, 2009) at http://www.phac-aspc.gc.ca/ncfv-cnivf/publications/femdisabus-eng.php	4

Razack, Sherene, <i>Looking White People in the Eye</i> (Toronto: University of Toronto Press, 1998)	5, 12
Roehrer Institute, <i>Harm's Way: The Many Faces of Violence and Abuse Against Persons with Disabilities</i> (North York: Roehrer Institute, 1995)	4
Sobsey, D. and Doe T., "Patterns of Sexual Abuse and Assault" (1991) <i>Sexuality and Disability</i> 243 at 248	4
Sobsey, D. <i>Violence and Abuse in the Lives of People with Disabilities: The End of Silent Acceptance?</i> (Baltimore: Paul H. Brookes, 1994)	4
Statistics Canada, <i>Assessing Violence Against Women A Statistical Profile</i> (1993) at www.labour.gov.sk.ca/default.aspx?DN=af449366-ead4-4197-b4f0-d197efb74533	6
Statistics Canada, Centre for Canadian Justice Statistics, <i>Sexual Assault in Canada, 2004</i> (Minister of Industry, 2008)	6
Tharinger, Deborah, Connie Burows Horton, Susan Millia, "Sexual Abuse and Exploitation of Children and Adults with Mental Retardation and Other Handicaps" (1990) 14 <i>Child Abuse and Neglect</i> 301	6
Ticoll, Miriam & Panitch, Melanie, "Opening the Doors" Addressing the Sexual Abuse of Women with an Intellectual Disability" (1993) 13 <i>Canadian Women's Studies</i> 84	4

PART VII - LEGISLATION

Legislation	Paragraph Nos.
<i>Criminal Code</i> , R.S.C. 1985, c. C-46, as am., ss.276, 277, 278.1-278.9.....	13
United Nations Convention on the Rights of Persons with Disabilities, Arts. 3, 6, 13	23