File No. 33684

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

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

- and –

J.A.

RESPONDENT
(Appellant)

- and –

WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF) and ATTORNEY GENERAL OF CANADA

INTERVENERS

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PART I – OVERVIEW OF POSITION

1. This case is about legal capacity to consent to sexual relations. The law does not recognize "advance" consent to sexual activity, let alone to sex while unconscious. "Advance" consent is only needed by those who contemplate sex with an unconscious or incapable person. Consent must be contemporaneous with the sexual activity at issue and given that the complainant was unconscious at the relevant time, her "consent" could only be implied or presumed from her earlier purported activities. Upholding the Court below would require overturning the unanimous decision in *R. v. Ewanchuk*[1] and ignoring the clear language of s.273.1 of the *Criminal Code.*

2. This appeal involves an accused who has twice been convicted of assaulting the complainant[2] and who this time strangled her into unconsciousness and then bound her hands behind her back and penetrated her unconscious body anally with a dildo.[3] The complainant first reported that she had not given her consent for the sexual activity.[4] At trial she changed her evidence, in what was described by the trial judge as a "typical cross-examination of a recanting complainant in a domestic matter."[5] The judge convicted the accused of sexual assault on the basis of a finding of fact that the complainant had not consented to the sexual activity performed on her while unconscious,[6] and further that, as a matter of law, valid consent cannot be given in advance to sex that takes place while a person is unconscious and thus incapable of giving or withdrawing consent.[7] The Court of Appeal reversed, holding that the Crown had failed to discharge its burden of proving non-consent beyond a reasonable doubt,[8] and a majority held that "advance" consent to unconscious sex is valid.

3. While this appeal involves the specific issue of whether a woman can give valid consent to sexual activity that will occur while she is unconscious or incapable of consent, the actual context of

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[1] *R. v. Ewanchuk*, [1999] 1 S.C.R. 330.
[2] Appellant's Record (A.R.), Evidence of K.D. p.78, l.30-33, 79, l.25-32; Appellant's Factum paras. 9, 75, 77; *R. v. J.A.*, [2008] O.J. No.4814 (O.C.J.) at para.2 ("Sentencing Decision").
[3] *R. v. A.(J.)*, 2008 ONCJ 195 (CanLII) at para.4 ("Trial Judgment).
[4] A.R., Evidence of K.D., p.96, l.5-9.
[5] Trial Judgment at para 8.
[6] In addition to determining that, as a matter of law, one cannot provide consent to sexual activity occurring while unconscious, the trial judge found as a fact that the complainant did not provide even a purported advance consent to anal penetration in this case: Trial Judgment at paras. 41, 42, 43 and 45.
[7] Trial Judgment at para. 45.
[8] The Court of Appeal did not hold that the complainant consented: *R. v. J.A.*, 2010 ONCA 226 at para. 55 ("Appeal Judgment").

this offence - the fact that it took place in a violent intimate relationship and that strangulation is a significant risk factor for intimate femicide[9]- must inform the legal analysis of consent. The decision below risks creating a defence for dangerous abusers who strangle their partners, normalizing intimate partner violence, and reviving the marital rape exemption.

4. This is not an appropriate case for the Court to determine the precise limits of consent in every case involving any kind of bodily harm caused in the context of sexual activity. This appeal deals with intentionally strangling another into unconsciousness, which meets the definitions of aggravated assault and/or assault causing bodily harm and for which "consent" is no defence.[10]

5. This appeal engages the common, even pervasive, circumstance of sexual assault of the unconscious or otherwise incapable victim. Because sexual assault eroticizes dominance and is a crime of opportunity, women who are unconscious or otherwise incapable of consent for any reason - through sleep, medication, voluntary or involuntary intoxication, accident, illness or disability - are acutely vulnerable to sexual assault.

6. The modernization of the law of sexual assault over the last 40 years has culminated in a *Criminal Code* regime that defines consent as the active, ongoing, and voluntary agreement of the woman, at the time the sexual activity is taking place. Section 273 of the *Code* rejects the mythologies that women, particularly intimate partners and those who do not resist or make "hue and cry," are in a state of constant consent. The notion that unconscious or incapacitated women can ever be deemed to be consenting goes to the very heart of these law reforms.

7. It is not an overstatement to say that the key advancements in sexual assault law could be reversed by the decision of the Court below. Recognition of "advance" consent:

a. eviscerates "voluntary agreement" and "capacity to consent" as required by *Code* s.273.1;

b. reverses *R. v. Ewanchuk* and re-instates the invidious notion of implied consent, including the improper reliance on past sexual history to show consent or mistaken belief in consent;

c. severs the issue of consent from the full context of the sexual activity, in this case the

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[9] Al J.C. O. Mara, *Domestic Violence Death Review Committee Annual Report to the Chief Coroner* (Ontario: 2005) at 76 reports that "prior forced sexual acts and/or assaults during sex" is a risk factor for intimate femicide.
[10] *R. v. Jobidon*, [1991] 2 S.C.R. 714; *R. v. Welch* (1995), 25 O.R. (3d) 665 (C.A.); *R. v. Cooper*, [1993] 1 S.C.R. 146.

context of strangulation and intimate partner violence;

d. nullifies s. 273.2(b), the *Code*'s "reasonable steps" requirement for the mistaken belief in consent defence; and

e. exacerbates the already serious and pervasive social problem of sexual assaults committed on women who are unconscious or incapable of consent.

PART II – POINTS IN ISSUE

8. It is contrary to Canadian law governing sexual assault and in violation of women's constitutional rights to security of the person and to equality to recognize a new doctrine of "advance" consent to sex with an unconscious or otherwise incapacitated woman.

PART III – ARGUMENT

Consent Must be Active, Contemporaneous, and Revocable

9. Section 273.1 of the *Code* defines consent. The introduction of s.273.1 in the *Code* in 1992 was part of an important substantive reform aimed at eliminating discriminatory practices and stereotypes from sexual assault law and crafting a criminal law that respects not only the rights of the accused but also women's rights to security of the person and equality guaranteed by *Charter* ss.7, 15 and 28. Such prevalent discriminatory myths and stereotypes included that women were in a constant state of consent; that certain groups of women (racialized women, Aboriginal women, spouses) were more sexually available and more likely to have consented to sex; that women who were silent or did not physically resist could be presumed to be consenting; and that consent could be implied from a woman's sexual history, whether it be her "promiscuity", source of income, or the fact that she had said "yes" on other occasions.

10. Section 273.1 defines consent as "voluntary agreement", which requires that the complainant be conscious so as to be capable of decision making and of revoking consent. No consent is obtained where the complainant is "incapable of consenting to the activity": s. 273.1(2)(b).

11. Capacity to consent requires more than bare consciousness, according to Justice Fish:

> As a matter both of language and of law, consent implies a reasonably informed choice, freely exercised. … the consent requirement [is not] satisfied if, because of his or her mental state, one of the parties is incapable of understanding the sexual nature of the act, or of realizing that he or she may choose to decline participation.

> "Consent" is, thus, stripped of its defining characteristics when it is applied to the submission, non-resistance, non-objection, or even the apparent agreement, of a deceived, unconscious or compelled will.[11]

12. No consent is obtained where the complainant expresses a lack of agreement to "continue to engage in the activity": s. 273.1(2)(e). It is a necessary condition of consent that the woman be able to withdraw consent at any time. As Justice McLachlin, (as she then was) explained, in dissent:

> The hypothetical case of a complainant giving advance consent to sexual contact before becoming unconscious does not constitute an exception [to the requirement that the complainant must have capacity to consent]. Consent can be revoked at any time. The person who assaults an unconscious woman cannot know whether, were she conscious, she would revoke the earlier consent.[12]

13. In a critical decision rejecting the centuries-old understanding that there is no sexual assault unless a woman has vigorously resisted, this Court held that acquiescence or passivity alone will not amount to consent: women are not required to offer resistance for the act to amount to sexual assault.[13] Consent is thus an active communication by a woman who has the capacity to voluntarily agree to "the sexual activity in question", in accordance with s. 273.1(1).

14. For all of these reasons, the Alberta Court of Appeal[14] and the Nunavut Court of Appeal[15] have concluded that the law does not recognize "advance" consent to sexual contact.

Ewanchuk Has Already Rejected the Doctrine of Implied Consent

15. As pointed out by Justice LaForme, dissenting in the Court below, by recognizing "advance" consent for sexual contact that takes place when a woman is incapable of consenting, the majority effectively presumes consent, contrary to *R. v. Ewanchuk*. In *Ewanchuk* this Court held that consent as part of the *actus reus* is tested subjectively, from the standpoint of the complainant, "at the time [the sexual contact] occurred."[16] *Ewanchuk* is particularly significant for its unequivocal rejection of "implied consent", whereby consent is "inferred" from a woman's behavior, manner of dress, status, or past history.[17] Thus the crucial question is not whether a woman indicated that she *would* consent,

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[11] *R. c. Saint Laurent*, [1993] J.Q. 2257 at paras. 98, 99 (C.A.); *R. v. Daigle*, [1997] J.Q. 2668 (C.A.) at para. 23.
[12] *R. v. Esau*, [1997] 2 S.C.R. 777 at p.810.
[13] *R. v. M.(M.L.)*, [1994] 2 S.C.R. 3.
[14] *R. v. Ashlee* (2006), 212 C.C.C. (3d) 447 (Alta C.A.).
[15] *R. v. Tookanachiak*, 2007 NUCA 1, 412 A.R. 42 (Nu. C.A.) at para. 5.
[16] *Ewanchuk*, *supra* at para 26.
[17] "It is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place.

but whether she actually did, at the time of the act in question.[18]

16. A woman has an absolute right to change her mind about consenting to sexual activity at any point during the sexual encounter if she no longer wishes it to take place. The unconscious woman is entirely unable to withdraw her consent, ensure that the activity stays strictly within the limits of what was discussed, or otherwise determine on an ongoing basis that this is what she wants. The fatal error of the majority decision below is that it presumed the complainant's ongoing consent.

17. The majority of the Court below and the Respondent suggest that a doctrine of "advance" consent is necessary to protect loving couples in non-violent, healthy relationships from criminal sanction. Notably, many of the hypothetical scenarios relied upon by the Respondent in his factum,[19] said to demonstrate the inappropriate criminalization of certain sexual conduct, do not rely on "advance" consent. They are nothing other than cases of implied consent. Any revival of implied consent for partners would be unworkable as an "exception" to *Ewanchuk*, would reinvigorate discredited stereotypes about women and sexual assault (eg. that women take revenge on men by fabricating sexual assault) and would disadvantage women in intimate relationships.

The Court Below Wrongly Severs or Abstracts the Purported Consent from the Context

18. The legal understanding of consent in any particular case cannot be severed from the actual context in which the alleged sexual assault occurred.[20] The fact that the sexual assault was preceded by violent acts that amount to aggravated assault, should have been considered by the court below in ascertaining whether there is, or should be, any such doctrine as "advance" consent. Moreover, the Court indicated that consent to being strangled into unconsciousness is invalid in law, but nevertheless found that the Complainant consented to the sexual activity that took place while she was unconscious as a result of this strangulation. The willingness of the majority of the Court below to find "advance" consent while overlooking the life endangering strangulation into unconsciousness of the complainant perpetrated by the accused mere moments before the sexual activity in question, speaks to the broader harms associated with resurrecting the now discredited doctrine of

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Autonomy entails the freedom and the capacity to make a choice of whether or not to do so:" *R. v. Cooper*, [2009] UKHL 42 at para. 27 ("*Cooper* HL").

[18] *R. v.Park*, [1995] 2 S.C.R. 836 at para. 52 (per L'Heureux-Dubé J.).

[19] Respondent's Factum at paras. 40, 41, and 42.

[20] *R. v. Litchfield*, [1993] 4 S.C.R. 333 at para. 8: "It is...important ... that courts not create unnecessary barriers to considering all the circumstances surrounding conduct which is alleged to constitute a sexual assault."

presumed/implied consent.

19. The context of intimate, marital, and co-habiting relationships must be taken into account in giving meaningful content to legal consent.[21] Women in relationships are particularly vulnerable to being sexual assaulted while sleeping or otherwise incapacitated.

20. Sexual assault in intimate relationships is highly associated with battering and coercive control.[22] Sadistic rape, which may include bondage and penetration using objects, is reported frequently by battered women.[23] Strangulation is a common form of violence against intimate female partners,[24] which is both notoriously difficult to detect because injuries are often internal,[25] and yet it is extremely dangerous. Strangulation raises the risk of intimate femicide seven-fold.[26]

21. Sexual assault perpetrated by husbands became a crime in 1983, when the marital rape exemption was abolished. However, these cases present real challenges to prosecutors.[27] Further, the fact that the complainant has been or is in a sexual relationship with the accused is commonly (and wrongly) relied upon to infer or imply consent on the occasion in question.[28] Improper resort to "implied consent" also facilitates reliance on women's prior sexual history with the accused, whether

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[21] *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at para. 123: "Certain relationships, especially those in which there is a significant imbalance in power or those involving a high degree of trust and confidence may require the trier of fact to be particularly careful in assessing the reality of consent."

[22] "If physical abuse, threats or intimidation are occurring, then rape is occurring as well. Consent involves the ability to safely give or refuse permission to be sexual. … It is easier and safer for [victims] to agree to do whatever the perpetrators demand than to risk being physically abused." Scott Allen Johnson, *Physical Abusers and Sexual Offenders* (Boca Raton, FL: CRC Press, 2007) at 3; See also *Code* s. 265(3)(a),(b) (consent vitiated by force, threats, or fear of application of force). See also more generally, Statistics Canada, *Women in Canada: A Gender-based Statistical Report* (5th Ed.) (Ottawa: Statistics Canada, 2006) at 161.

[23] Angela Browne, *When Battered Women Kill* (New York, NY: The Free Press, 1987) at 95-99; Judith Herman, *Trauma and Recovery* (New York, NY: Basic Books, 1992) at 96-97. See cases discussed in Jennifer Koshan, *The Legal Treatment of Marital Rape and Women's Equality: An Analysis of the Canadian Experience* (Ottawa: The Equality Effect, 2010), published on-line http://www.theequalityeffect.com/resources.html at pp. 31-35.

[24] A survey of battered women revealed that 68% experienced strangulation as a method of violence. Methods used were manual, using rope, clothing, seatbelt, chain, forearms and multiple methods: Lee Wilbur *et al.*, "Survey results of women who have been strangled while in an abusive relationship" (2001) 21(3) Journal of Emergency Medicine 297.

[25] Uniform Law Conference of Canada, *Report of the Criminal Section Working Group on Strangulation* (2006) at pp.8-9, citing Gael B. Strack, George E. McClane, & Dean Hawley, "A review of 300 attempted strangulation cases part I: Criminal legal issues" (2001) 21(1) Journal of Emergency Medicine 303.

[26] Nancy Glass *et al.*, "Non-fatal strangulation is an important risk factor for homicide of women" (2008) 35(3) Journal of Emergency Medicine 329.

[27] See Koshan, *supra*.

[28] Melanie Randall, "Sexual Assault in Spousal Relationships, "Continuous Consent," and the Law: Honest But Mistaken Judicial Beliefs" (2008) 32 Manitoba L.J. 144; Ruthy Lazar, "Negotiating Sex: The Legal Construct of Consent in Cases of Wife Rape in Ontario, Canada" (2010) 22(2) Can. J. Women & L. 329, forthcoming, see eg. pp.2-5, 35-36.

consensual or not, and a *de facto* marital rape exemption.[29] For example, the complainant's testimony that she and the accused had engaged in some of the violent sexual acts on other occasions and that they had in vague terms discussed the possibility of anal intercourse "long before"[30] the night in question, were improperly advanced in support of purported "consent." Moreover, women in relationships involving coercive control are required to be "willing victims": they must accept the abusive spouse's domination, including by reporting that they agreed to, enjoyed, or are responsible for, the violence and abuse. For these women, any added burden of establishing that "advance" consent was not given is even more problematic.[31]

22. "Advance" consent must be rejected for the distortions it would introduce to sexual assault law for women in relationships. As Justice LaForme pointed out, "Canadian law has long since abolished the notion of differing categories of victims in sexual assault cases. Victims, whether spouses of or strangers to the accused, are entitled to the same protections of the law."[32]

"Advance" Consent Effectively Nullifies the Statutory Protections for Women That Require Men to Take "Reasonable Steps" to Invoke the "Mistake" Defence

23. In order to rely upon the defence of mistake an accused must take reasonable steps, "in the circumstances known to him at the time, to ascertain the complainant's consent": s. 273.2(b). If "advance" consent were legally effective, accused men would be entitled to sexual access if they could plausibly claim that a woman agreed to unconscious or incapacitated sex. The objective "reasonable steps" evaluation of the accused's actions would shift to consideration of whether the accused subjectively thought that he had "advance" consent, without more.

24. Acceptance of "advance" consent would thus nullify the "reasonable steps" requirement aimed at disentangling mistaken beliefs about men's entitlements to sexual access to women from genuine "mistakes" regarding consent.[33] The judgment below would allow men to rely on women's earlier words or conduct without regard to the circumstances at the time of the contact. It would in

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[29] Koshan, *supra* at 31 reports in her study of marital rape prosecutions in Canada, "In the preponderance of cases involving so called "rough sex", evidence of the past sexual history of the parties was admitted as relevant to issues of consent (or mistaken belief in consent)." See also Randall, *supra*.
[30] Trial Judgment, para.5; A.R., Evidence of K.D., p.90, l.20-26, l.1-16; p.89, l.14-17.
[31] Herman, *supra* at 75.
[32] Appeal Judgment at para. 139.
[33] Lucinda Vandervort, "Mistake of Law and Sexual Assault: Consent and Mens Rea" (1987-88) 2 Can. J. Women & L. 238.

turn vitiate the decisions that have held that a man must ensure that his partner is conscious and capable of consent before he can claim "mistaken" belief in consent.[34] It would also overturn the legal principle that an accused cannot, as part of his "reasonable steps", commit assault upon a sleeping or otherwise incapacitated complainant by touching her sexually.[35]

25. Strict application of the requirement of reasonable steps is essential to protect women's security and equality. A 2010 review of cases involving complainants who reported sexual assault while they were unconscious comments on the not uncommon acquittal of men charged with sexual assault against unconscious women, concluding:

> The review of the case law has shown that our higher level courts have an uneven record interpreting the "reasonable steps" limitation to the mistake of fact defence for sexual assault. ...It is particularly important that judges of the superior courts demonstrate for the lower courts the application of the law in this area in light of its extraordinary complexity and the frequency of men's sexual assaults against unconscious women.[36]

This Appeal Does Not Demand a "New" Approach for "Exceptional" Cases: Women's Experiences of Incapacity Should Not Ground a New Defence

26. This is case is not unique. Sexual offenders eroticize their domination of women and act opportunistically. Women who are incapacitated are particularly vulnerable to sexual assault. The sleeping/drunk/passed out/unconscious victim is common place in sexual assault prosecutions.[37]

27. Permitting a new defence of "advance" consent would "perpetuate the discriminatory belief that female sexuality exists solely for the pleasure of men,"[38] and put a premium on the myths that intoxicated women are likely to "forget" that they have agreed in advance to sexual contact,[39] "that women are consenting when passive or incapable of communicating and do not have a full right

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[34] *R. v. Graham* (2008), 77 W.C.B. (2d) 578 (Sup. Ct. Just.); *R. v. Despins*, 2007 SKCA 119, 299 Sask. R. 249 at paras. 12, 13; *R. v. Malcolm*, 2000 MBCA 77, 148 Man.R. (2d) 143 (C.A.) at paras.35,36; *R. v. Cornejo* (2003), 68 O.R. (3d) 117 (C.A.). See also Abella J. (dissenting) in *R. v. Osvath* (1996), O.A.C. 274 at para. 29.
[35] *R. v. Despins*, *ibid.* at paras. 12, 47.
[36] Elizabeth Sheehy, "Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women" in Elizabeth Sheehy, ed. *Sexual Assault Law, Practice and Activism in a Post-Jane Doe Era, Vol II* (Ottawa: University of Ottawa Press, 2011) forthcoming.
[37] Janine Benedet, "The Sexual Assault of Intoxicated Women" (2010) 22(2) Can J. Women & L. 435, forthcoming.
[38] Janine Benedet and Isabel Grant, "R. v. A. (J.): Confusing Unconsciousness with Autonomy" (2010) 74 C.R. (6th) 80.
[39] *Esau, supra* at para. 95, per McLachlin, J.

of control over what is done to and with their bodies",[40] and that intoxicated women are uninhibited and therefore sexually indiscriminate.[41]

28. Myths about intoxicated or otherwise incapacitated women and sexual assault have a particularly damaging impact on Aboriginal women and women with disabilities, two groups of women who endure extraordinarily high rates of sexual violence.[42]

29. As numerous scholars and several judicial inquiries have shown, the stereotype of the "drunken squaw" persists in law and in society. Aboriginal women are regarded as without feelings, sexually promiscuous, immoral, and inherently violable.[43] The myth that "squaws" are both more likely to be passed out and experience less harm contributes to the violation of Aboriginal women in the first place, and it diminishes the court's capacity to recognize when they have been violated.[44] A doctrine of "advance" consent to unconscious sexual contact will inevitably draw upon racist narratives about Aboriginal women, and in turn will reinforce the damaging stereotype of Aboriginal women as "prey", creating real risk to their lives and safety.[45]

30. Similarly, women with physical and mental disabilities also face extraordinarily high risks of sexual violence generally and are particularly vulnerable to sexual assaults when they are sleeping or otherwise incapacitated. Furthermore, recognition of "advance" consent could have negative

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[40] *Esau*, *supra* at para. 39 (per L'Heureux-Dubé J.).

[41] Ducharme J.in *R. v. R. (J.)* (2006), 40 C.R. (6th) 97 (Ont. Sup. Ct.) at para. 39.

[42] "It is estimated that 83% of women with disabilities will be sexually assaulted in their lifetime:" Ontario, *Sexual Assault: Dispelling Myths* [Toronto]: Ontario Women's Directorate, 2009, online at http://www.citizenship.gov.on.ca/owd/english/resources/publications/dispelling; see also Janine Benedet and Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Equality" (2007) 52 McGill Law Journal 243; Aboriginal women are five times more likely than others to be sexually assaulted, see: Amnesty International, *No More Stolen Sisters: The Need for a Comprehensive Response to Discrimination and Violence Against Indigenous Women in Canada* (2009) at pp. 1, 5 ("No More Stolen Sisters"), citing *Aboriginal Women: A Demographic, Social and Economic Profile*, Indian and Northern Affairs Canada, Summer 1996; see also Department of Justice, *A Review of Research on Criminal Victimization and First Nations, Métis and Inuit Peoples 1990 to 2001* by Larry Chartrand & Celeste McKay (Ottawa: Department of Justice Policy Centre for Victim Issues, 2006) at p.v.

[43] Manitoba, *Public Inquiry into the Administration of Justice and Aboriginal People. Report of the Aboriginal Justice Inquiry of Manitoba, vol. 1, The Justice System and Aboriginal People* (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991), online version at www.ajic.mb.ca/volume1/chapter13.html; Sherene Razack, *Looking White People in the Eye* (Toronto: University of Toronto Press, 1998) at pp.68-70; Sherene Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George" (2000) 15(2) Can. J. Law and Society 91; *No More Stolen Sisters*.

[44] Judge Michael Bourassa as quoted in Margo L. Nightingale, "Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases" (1991) 23 Ottawa L. Rev. 71 at 73: "The majority of rapes in the Northwest Territories occur when the woman is drunk and passed out. A man comes along and helps himself to a pair of hips. That contrasts sharply to the cases I dealt with before (in southern Canada) of the dainty co-ed who gets jumped from behind." Teressa Nahanee, "Sexual Assault of Inuit Females: A Comment on 'Cultural Bias'" in Julian V. Roberts & Renate M. Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 192 at 194.

[45] *No More Stolen Sisters*.

repercussions for women with episodic disabilities whose capacity to consent may fluctuate over time.[46] Such women could be "deemed" to have consented, while capable, to sexual activity that takes place when they are incapable of consent and particularly vulnerable to sexual assault.

31. Women with disabilities are also more vulnerable to sexual assault in institutions and in their own homes when they must rely on caregivers and others in positions of authority over them who will have access to them while they sleep,[47] are using medications, experiencing various levels of consciousness related to their disabilities,[48] or recovering from treatment.

Conclusion

32. Section 273 of the *Code*'s express purpose was respecting and protecting women's rights to equality and security of the person. It must be interpreted and applied consistent with women's *Charter* rights and with their lived realities. For Aboriginal women, women with disabilities, intoxicated women, and women who experience intimate partner assault, consent is too easily presumed. The decision of the Court below will make it effectively impossible in circumstances of intoxication, unconsciousness and other forms of incapacity, to protect women from serious physical and emotional harm. In keeping with the legislative goals reflected in s.273 and the clear principles enunciated in *Ewanchuk*, this Court should reject the notion of "advance" consent to unconscious sex.

PARTS IV AND V – COSTS and REQUEST TO PRESENT ORAL ARGUMENT

33. LEAF seeks no order for costs and requests that no costs be awarded against it. LEAF seeks leave to make oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED this 29th day of October, 2010.

SUSAN M. CHAPMAN **ELIZABETH SHEEHY**

[46] *Cooper* HL, *supra* at para. 26.
[47] *R v. Harper*, [2002] Y.J. No. 38 (S.C.) (QL); and *People v. Thompson* 142 Cal App. 4th 1426 (4th Dist. 2006).
[48] *R. v. B.T.*, 2007 BCPC 268, [2007] B.C.J. No. 1836 (Prov. Ct.).

PART VI – AUTHORITIES

Secondary Sources **Paragraph Nos.**

Legislation	**Paragraph Nos.**
Criminal Code of Canada, R.S.C. 1985 c. 46 s. 265, 273	1, 6, 7, 9, 10, 12, 13, 20, 23, 32