File No. AR11-30-07535

IN THE COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN,

RESPONDENT,

- and -

KENNETH HOWARD CECIL RHODES,

(ACCUSED),
APPELLANT.

MOTION BRIEF OF THE PROPOSED INTERVENER
WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.
HEARING DATE: NOVEMBER 3, 2011 @ 10:00 A.M.

Thompson Dorfman Sweatman LLP
Barristers and Solicitors
201 Portage Avenue, Suite 2200
Winnipeg MB R3B 3L3

(Matter No. 0107996 AEMF)
(Allison E.M. Fenske 934-2346)
(Fax. No. 934-0570)

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I. LIST OF DOCUMENTS

1. Reasons of the Honourable Justice Dewar for Judgment on Conviction, dated October 12, 2010;

2. Reasons of the Honourable Justice Dewar for Judgment on Sentencing, dated February 18, 2011;

3. Notice of Motion herein;

4. Affidavit of Debra Parkes, sworn October 28, 2011.

II. LIST OF AUTHORITIES

1. Court of Appeal Rules, M.R. 555/88R;

2. *R. v. Mabior (C.L.)*, 2009 MBCA 93;

3. *R. v. A.J.S.*, 2005 MBCA 2;

4. R. v. Bauder, [1997] 118 Man. R. (2d) 32 (MBCA);

5. *R. v. Cornejo*, [2003] 68 OR (3d) 117 (ONCA);

6. *R. v. Arcand*, 2010 ABCA 363;

7. *Manitoba Métis Federation Inc. v. Canada (Attorney General) et al.*, 2009 MBCA 17

III. LIST OF POINTS TO BE ARGUED

A. OVERVIEW

1. For several decades, feminist legal scholars and activists have worked to reform sexual assault law to make it more consistent with sexual equality. The amendments to the Criminal Code in the early 1990s were motivated, as stated in the preamble to Bill C-46, by Parliament being "gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual assault against women and children" and Parliament's express wish to encourage the reporting and prosecution of these offences.

2. The modernization of sexual assault law over the past several decades has reformed substantive and evidentiary procedures and norms that uniquely disadvantaged sexual assault complaints, including by clarifying and strengthening the legal definition of consent, abolishing the doctrines of spousal immunity, recent complaint and corroboration, discrediting the defence of implied consent, and requiring men to take objectively reasonable steps to establish consent. These Criminal Code amendments have received critical judicial affirmation, for example, in *R. v.*

Ewanchuk [1990] 1 S.C.R. 330, *L. C. v. Mills*, [1999] 3 S.C.R. 668, and most recently, *R. v. J. A.*, [2011] 2 S.C.R. 440.

3. For all that has changed, however, discriminatory beliefs and stereotypes continue to infect the criminal justice process, sometimes overtly and more often subtly, resulting in the under-reporting, under-prosecution and under-sentencing of sexual assault. Vigilance is required to ensure that discriminatory beliefs and stereotypes are not permitted to bring the administration of justice into disrepute.

4. The comments of the Honourable Justice Dewar (the "Learned Trial Judge"), in the course of his reasons for judgment on conviction and sentencing (both the subjects of the within appeal), play on discredited legal norms that consent to sex can be implied from a woman's dress, state of intoxication, or presence at a bar at closing time. His comments also express a newer but related and equally problematic discriminatory belief, which holds women partly or fully responsible for their assaults when they engage in "risky" behaviour, like getting into a car with a man in the wee hours of the morning, after drinking at a bar, thus inviting "something bad" to "happen". [Reasons for Judgment on Conviction ("Decision"), Page 1, Lines 21-22]

5. The Learned Trial Judge's comments also raise systemic issues with respect to the persistence of stereotypical discriminatory views of Aboriginal women in the justice system and the barriers these views present for access to justice for Aboriginal women. Aboriginal women's consent is frequently implied, or their evidence of lack of consent discounted, as a result of stereotypes about their sexual availability when intoxicated or "out ready to party."

6. The Women's Legal Education and Action Fund ("LEAF") is not seeking leave to intervene to sanction the comments of one particular judge, but rather to offer an important systemic perspective. The Learned Trial Judge's comments should not be treated in an isolated way. The discriminatory beliefs which underlie the Learned Trial Judge's comments are serious and persistent and have not been eradicated, despite the progressive development of sexual assault law and increased awareness among the police, the criminal bar and the judiciary.

7. Yet, in spite of the influence of these discriminatory beliefs and stereotypes which prejudice complainants, the facts in the case at bar were so clear that a sexual assault had occurred that the Learned Trial Judge found the accused guilty of sexual assault on review of the totality of the

evidence before him. The influence of discriminatory beliefs however, led the Learned Trial Judge to err in law by considering the defence of mistaken belief in consent. This Honourable Court is now being asked to overturn the accused's conviction on the basis of an alleged *W.(D.)* error relating to the defence of mistake, thus further entrenching the role played by these discredited and discriminatory views.

8. LEAF seeks leave to intervene in the within appeal, to file a factum up to 20 pages in length and to make oral argument, pursuant to Court of Appeal Rule 46.1 to address three systemic issues not raised by the parties to this appeal and which are of significant importance to sexual assault prosecutions in Manitoba:

(a) The social context of the pervasiveness of sexual assault and the pervasiveness of discriminatory beliefs which prejudice complainants and bring the administration of justice into disrepute;

(b) Racialized and sexualized violence against Aboriginal women and girls and the discriminatory beliefs and stereotypes which

perpetuate intersecting inequalities experienced by Aboriginal women; and

(c) the influence of discriminatory beliefs and stereotypes that infect the criminal justice process and result in distortions of appropriate criminal law principles and procedures, in particular, in the defence of mistaken belief in consent and the *W.(D.)* test. The influence of discriminatory beliefs in this regard are critical to this Court's review of the parties' submissions that the Learned Trial Judge committed a *W.(D.)* error in his reasons for conviction.

B. STATEMENT OF FACTS

9. This appeal is from the decision of the Honourable Justice Dewar in *R. v. Rhodes*, following a trial in the Court of Queen's Bench in Thompson, Manitoba on September 27, 28, and 29, 2010. On October 12, 2010, the Learned Trial Judge convicted the Accused (Appellant), Kenneth Howard Cecil Rhodes, of one count of sexual assault, contrary to section 271 of the *Criminal Code of Canada*. On February 18, 2011, the Appellant

was sentenced by the Learned Trial Judge to a conditional sentence of two years less a day.

10. It is from that conviction that the Appellant now appeals. Further, the Appellant's sentence, a conditional sentence of two years less a day, is the subject of a related Crown appeal (AR11-30-07534).

11. By Order allowing an amended Notice of Appeal dated August 4, 2011, this appeal will be heard on November 30, 2011.

12. LEAF relies on the facts as outlined in the affidavit of Debra Parkes sworn October 28, 2011.

C. POINTS IN ISSUE

13. Should this Honourable Court grant leave to LEAF to intervene in the within Appeal, pursuant to Court of Appeal rule 46.1?

14. Should this Honourable Court extend the time limit for filing this motion to intervene?

D. STATEMENT OF SUBMISSIONS

CRITERIA FOR OBTAINING INTERVENER STATUS

15. Court of Appeal Rule 46.1 provides as follows:

> 46.1(1) Any person who is interested in an appeal may, by motion, apply to a judge for leave to intervene upon such terms and conditions as the judge may determine.
>
> 46.1(3) A motion for intervention shall briefly
>
> (a) describe the intervener and the intervener's interest in the appeal;
>
> (b) identify the position to be taken by the intervener on the appeal; and
>
> (c) set out the submissions to be advanced by the intervener, their relevancy to the appeal and the reasons for believing that the submissions will be useful to the court and different from those of the other parties.

Court of Appeal Rules, [Tab 1]

16. The factors to consider on intervener applications are:

(i) The nature of the case;

(ii) The issues which arise; and

(iii) The likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

When the application for intervener status is made by a public interest group, the following additional factors should be considered:

> (a) whether the intervener has a real, substantial and identifiable interest in the subject-matter of the proceedings;
>
> (b) whether the intervener has an important perspective distinct from the immediate parties; or
>
> (c) whether the intervener is well-recognized group with a special expertise and with a broad and identifiable membership base.

R. v. *Mabior* at paras. 5 and 6 [Tab 2]

17. It is submitted that LEAF meets each and every one of the relevant factors.

<u>LEAF'S INTEREST AND EXPERTISE</u>

18. LEAF is a national organization committed to achieving substantive equality for women and girls. To this end, LEAF engages in litigation, research and public education. LEAF has extensive experience as an intervener, having intervened in over 150 cases at all levels of court

to advance equality rights jurisprudence and to ensure that the realities of women's live and experiences inform judicial decision-making that affect women's rights. LEAF is recognized nationally and internationally as an expert in equality rights.

Parkes Affidavit at para 6.

19. LEAF's work and expertise in the area of criminal law, and in particular, sexual assault law in Canada is extensive. Three aspects are highlighted:

(a) Past Interventions: LEAF has intervened in over a dozen criminal and civil sex assault appeals, as well as in numerous provincial Courts of Appeals in which LEAF has developed a contextual analysis which addresses the section 7, 15 and 28 *Charter* rights of sexual assault complainants and litigants. LEAF has played a leadership role in exposing and challenging rape mythologies, exploring the ways in which legal norms and trial processes continue to reinforce stereotypes and myths to the prejudice of complainants, and developing a nuanced understanding of a fair criminal trial process, which considers

the rights and circumstances of complainants, as well as those of the accused and society at large.

(b) Law Reform Analysis: LEAF's role expands well beyond the courtroom. LEAF's specialised legal expertise produces high quality research that has influenced policy reform in a range of areas, including criminal law and sexual assault law. LEAF's expertise was engaged in the modernization of statutory and procedural sexual assault law at issue before the Court in this appeal. LEAF's litigators and researchers are frequently called upon to offer expertise in policy areas such as social benefits, criminal justice, reproductive rights, and violence against women – nationally and internationally.

(c) Education: LEAF recognizes the importance of building knowledge among women, girls and others, about substantive equality rights as they apply to everyday life. To that end, and in addition to its litigation work, LEAF has produced educational kits, like *LEAF and Your Body*, which provides hands on instruction for high school students on their rights and responsibilities in sexual relations, with particular emphasis on

the definition of consent in *R. v. Ewanchuk* and the role of gender discrimination in sexual assault.

Parkes Affidavit, paras. 9-13, 19-21.

20. LEAF and LEAF's constituents are directly affected by cases that raise issues around sexual assault, such as the case at bar.

21. LEAF asks that this Honourable Court grant LEAF leave to intervene in this appeal. The argument proposed will be useful and different from the arguments at issue. The argument however will remain within the issues raised in the appeal. Shedding the discriminatory beliefs and stereotypes that persist about women who are victims of sexual assault is a matter of pressing public interest and it is submitted that the interests of justice are served if LEAF is allowed to bring its substantial expertise in sexual assault law to this appeal.

LEAF'S PROPOSED LEGAL ARGUMENTS

The Systemic Significance of this Appeal: The Social Context of Sexual Assault and the Pervasiveness of Discriminatory Beliefs

22. The potentially far-reaching implications of this appeal can only be fully understood with reference to the realities of sexual assault and the

continued pervasiveness of discriminatory beliefs in sexual assault prosecutions in Manitoba and the rest of Canada.

23. Sexual assault continues to be a vastly under-reported crime. Just eight percent of women who were sexually assaulted in 2004 reported those assaults to police. While police-reported sexual assaults have declined since 1993, the estimated incidences of sexual assault have remained relatively constant and the rate at which sexual assaults are reported to the police remains consistently low (never rising above 10%).

> Holly Johnson, "Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault" (Paper presented to the Sexual Assault Law, Practice and Activism in a post-Jane Doe Era, University of Ottawa conference, March 2009)
>
> Lisa Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women," (2008) 41.4 Akron Law Review symposium issue: "Rape, Affirmative Consent, and Sexual Autonomy," 865-888 ("Gotell, Rethinking Affirmative Consent")

24. Moreover, of those cases reported, even fewer proceed to trial or result in a guilty verdict. In 2009/2010, 31% of sexual assault cases in Manitoba resulted in a guilty verdict, as compared to 43% of sexual cases Canada-wide. Of the remaining cases in Manitoba, 67% resulted in a stay of proceedings, compared to 45.8% Canada wide. During the same time

period, 37.5% of guilty cases of sexual assault in Manitoba included sentences of incarceration, as compared to 55% of guilty cases of sexual assault, Canada-wide. 17.5% of guilty cases of sexual assault in Manitoba resulted in a conditional sentence, as compared to only 11% of cases Canada-wide.

2009/2010 Incident-based Uniform Crime Reporting Survey,
Statistics Canada, CANSIM, Table 252-0045,
Catalogue No. 85-002-x

25. Statistics which compare sexual assaults and other major assaults in Manitoba in 2009/2010 are also revealing and troubling:

- Cases resulting in a guilty verdict: 31% of sexual assault cases, and 51% of major assault cases;

- Cases resulting in a stay of proceedings: 67% of sexual assault cases resulted in a stay of proceedings, whereas only 47% of major assault cases resulted in a stay;

- Sentencing: 17.5% of convictions for sexual assault resulted in a conditional sentence, while only 5% of convictions for major assaults resulted in a conditional sentence.

2009/2010 Incident-based Uniform Crime Reporting Survey,

Statistics Canada, CANSIM, Table 252-0045,
Catalogue No. 85-002-x

26. LEAF submits that the statistics on prosecution and sentencing of sexual assaults in Manitoba as compared to the rest of Canada, and of sexual assault in Manitoba as compared to other major assaults in Manitoba, paint a picture of inequality in action in the criminal justice system, which can, at least in part, be attributed to the influence of sexist and other discriminatory beliefs about sexual assault complainants.

27. Systemic consequences of the operation of discriminatory beliefs and stereotypes include creating and maintaining a "chill factor" for women who experience sexual assault, which contributes to systemic issues around sexual assaults, including under-reporting, under-charging, under-prosecuting and under-sentencing.

28. LEAF submits that discriminatory beliefs and stereotypes about women who are victims of sexual assault have no place in a criminal justice system underpinned by basic human rights.

29. While the seminal case of *R. v. Ewanchuk* did much to shift the standards of consent, accepting that only yes means yes and it is the

responsibility of those initiating sexual activity to take active, positive steps to ensure consent, LEAF respectfully submits that despite these law reforms, discriminatory assumptions regarding the idealized "good victim" continue to inform judicial reasoning in sexual assault cases in Canada.

Melanie Randall, "Sexual Assault, Credibility and "Ideal Victims" Consent, Resistance and Victim Blaming" (2010) Can J.of Women and the Law, 397

30. Some of these discriminatory beliefs are shifting and re-emerging in new and insidious forms, particularly in a preference towards a "risk-averse victim". Women are increasingly sent the message that they are to blame for their sexual assaults. The performance of diligent and cautious femininity grants some women access to the protections of law, while those who fail to follow the rules of sexual safekeeping can be denied protection. Women have been questioned for their role in being accessible to their attackers (for example, by borrowing a lawnmower from them or being a precocious baby-sitter in the attacker's home), and the offenders accorded diminished responsibility.

Gotell, "Rethinking Affirmative Consent"

R. v. A.J.S., [2005] 192 Man. R. (2d) 4 (MBCA) [Tab 3]

R. v. Bauder, [1997] 118 Man. R. (2d) 32 (MBCA) [Tab 4]

Anne McGillivray, "R. v. Bauder: Seductive Children, Safe Rapists, and Other Justice Tales" (1997-1998) 25 Man. L.J. 359-383

31. As seen in the decision in the case at bar, the Learned Trial Judge seems to imply or seemingly accepts the legitimacy of pervasive discriminatory beliefs and stereotypes about women who are victims of sexual assault. If granted leave to intervene, LEAF will make submissions with respect to the presence of discredited beliefs in the lower Court's reasons (examples of which follow) in order to assist this Honourable Court by making submissions with respect to: a fulsome analysis of and gendered perspective on these errors; the systemic impact and implications of these errors; and the relationship between these views, mistaken belief in consent and the *W.(D.)* test.

32. One discriminatory belief that causes direct harm to women's experience of sexual equality is the idea that <u>sexual assault is not inherently violent</u>. The Learned Trial Judge, on sentencing, states:

> This is a case of **misread signals and inconsiderate behaviour**. There is a different quality to these facts than found in many cases of serious sexual assault... This is not a case in which Mr. Rhodes' anticipation was groundless... This, however, is a different situation from sexual assaults where there is no **perceived invitation**...

[emphasis added]

[Transcript of Proceedings on Sentencing ("Sentencing"), Page 76, Lines 30-32 and Page 77, Lines 3-4 and 6-7.]

33. The Learned Trial Judge also relies on the discriminatory belief and stereotype that some women enjoy being sexually assaulted. The Learned Trial Judges, on sentencing, states:

> But here there were no threats knowingly given, **there was no violence knowingly imposed**. Mr. Rhodes, in his testimony, had said that he wasn't out there to hurt anyone. **Even his sexual activity, bizarre as it was and as hurtful as it was to the complainant, cannot be said to be only self gratification**. It had the characteristics of **a clumsy Don Juan**. [emphasis added]

[Sentencing, Page 77, Lines 24-30.]

34. A further example of a discriminatory belief and stereotype at play in the within appeal is the idea that once a woman gives any indication of sexual interest, even if it is just by where they are, how they dress or if they give a kiss, they have forfeited the right to say no:

> After a night of drinking **when four people decide to climb into a car around 2:30 a.m. to continue to party** rather than head home to their own beds **something bad is bound to happen**

[Decision, Page 1, Lines 19-28]

On the evening of August 18, 2006, the complainant and her second cousin, S.M., planned a night of partying... the two of them remained drinking at the bar until closing at which time **they spilled over onto the parking lot in front of the bar looking for a party** to which they could attend.

[Decision, Page 2, Lines 15-16, Lines 25-28]

Given that the girls and the men were strangers, they all had been drinking, that the girls were actively looking for a party and that the men were not intending to go straight home, that the plan proposed was to go swimming, and that no one had bathing suits, **it would not be a stretch to conclude that a casual sexual encounter was in the minds of at least some of them, more than a remote possibility**.

[Decision, Page 4, Lines 6-13]

It must be acknowledged that **the parties met in what can only be described as "inviting" circumstances**.

[Decision, Page 19, Lines 8-10]

At 2:30 on a summer morning, **two young women, one of which was dressed in a tube top without a bra and jeans, and both of whom were made up and wore high heels, in a parking lot outside a bar, made their intentions publicly known that they wanted to "party"**. Then, the women (in particular S.M.) made the suggestion that the group should go swimming, notwithstanding that not one of them had had any bathing suit. These facts could fairly conjure up in the mind of the accused that **getting together with these women had potential that sexual activity lay ahead**.

[Decision, Page 19, Lines 10-14]

> I conclude that although **the accused was led by the circumstances to conclude that sex was "in the air"**, he was **insensitive to the fact that the complainant was not a willing participant**.
>
> [Decision, Page 22, Lines 14-17]
>
> The fact that she [the complainant] **didn't say no**, at any time, is not a defence to the conviction. But does it add anything; **is it part of the sentencing consideration**?
>
> [Sentencing, Page 32, Lines 4-7]
>
> She [the complainant] was a frightened young woman all alone in the presence of a large, perhaps loud, overbearing older man. But **she did give signals that he read the wrong way and was not considerate enough to make sure of what they were saying**.
>
> [Sentencing, Page 78, Lines 4-8]
>
> I'm sure that whatever signal were there that **sex was in the air** was unintentional. But that does not change the fact that they were there**, more then [sic] just a manner of dress, more than the fact that she was a woman**. And they are a **relevant, mitigating factor**.
>
> [Sentencing, Page 79, Line 6-10]
>
> [emphasis added]

35. The persistent reliance on a decontextualized view of "risk management" and other discriminatory views recited above, sends the message to sexual assault complainants that it is their responsibility not to be sexually assaulted, as opposed to the responsibility of the offender not to commit sexual assault. LEAF respectfully submits that these systemic

issues must be addressed and ultimately rejected and the case within provides this Honourable Court with the opportunity to do just that.

Discriminatory Beliefs and Aboriginal Complainants

36. Discriminatory beliefs and stereotypes also perpetuate intersecting inequalities experienced by Aboriginal women. Where women are targeted for sexual assault, Aboriginal women are subjected to staggering rates of assault due to the intersection of colonialism, racism, sexism and discriminatory perceptions of them as sexually available.

37. Any discussion of systemic discriminatory stereotypes and beliefs must acknowledge the endemic racialized and sexualized violence against Aboriginal women and girls. This is particularly so in the case at bar, where the complainant is a young Aboriginal woman from a small Northern community.

38. Aboriginal women face much higher rates of violence than other women. Assaults against Aboriginal women are not only more frequent, they are often particularly brutal. A number of high profile cases have demonstrated how the culpability of white men enacting sexual violence against aboriginal women is often minimized, while complainants and

victims are held responsible for their own violation because they are engaged in "risky" actions such as drinking, partying or getting into cars with a stranger.

Lisa Gotell, "Rethinking Affirmative Consent"

Department of Justice Canada, Bill C-46: Records Applications Post-Mills, A Caselaw Review (June 2004)

Amnesty International, "No More Stolen Sisters: The Need for a Comprehensive Response to Discrimination and Violence Against Indigenous Women in Canada" (October 2009)

39. We have also come to associate violence as normal and inevitable in racialized contexts, such as Winnipeg's North End or Manitoba's Northern communities. As a result, when faced with these discriminatory beliefs and stereotypes, violence against Aboriginal women is perceived to take on a less brutal quality and Aboriginal women pay an unacceptable price.

The influence of discriminatory beliefs and stereotypes that infect the criminal justice process and result in distortions of appropriate criminal law principles and procedures, in particular, the defence of mistaken belief in consent and the *W.(D.)* test.

40. In the case at bar, discriminatory beliefs and stereotypes have operated and continue to operate on appeal to: prevent application of the

W.(D.) test free from sex inequality; misrepresent the defence of mistaken belief in consent; and distort the assessment of the moral culpability of an offender, which individually, or taken together, bring the administration of justice into disrepute.

41. The Crown Respondent has conceded that there ought to be a new trial in this case. They do so on the basis of an assessment that the Learned Trial Judge committed a *W.(D)* error. This raises a question of law alone and one of significant importance to sexual assault prosecutions in general. It is a question of law that an intervener can provide valuable assistance to this court in determining. There is a conviction registered and this Honourable Court is not bound by any concessions of the parties in determining whether or not to set aside that conviction.

42. The Crown's analysis of this case is fundamentally flawed in that they concede the case based upon a misapplication of the legal principles that govern. In particular, the defence of mistaken belief in consent has no air of reality in this case and therefore ought not to have been considered at all by the Learned Trial Judge. The only issue in this case was one of consent or no consent. The Learned Trial Judge's findings of facts, supported by the evidence, led him to expressly conclude, on the

totality of the evidence and beyond a reasonable doubt, that there was no consent. His conclusion that there was no consent was based on the complainant's testimony as significantly corroborated by injuries and to a large extent the evidence of the accused himself.

43. The only issue, then, was whether or not there was a viable mistake defence. On this issue, it is incumbent upon the accused to point to evidence that lends an air of reality to the suggestion that he thought the complainant was consenting when she was not. Whether the accidental rape defence should be considered by a trier of fact is a pure question of law alone. The Learned Trial Judge erred in his assessment of this case in so far as he wrongly considered a defence, though ultimately rejected it, when there was no air of reality to the defence in the first place.

44. Accordingly, any alleged *W.(D)* error is of no moment in this case. The Respondent accepts the Learned Trial Judge's finding of fact that the accused made no inquiry whatsoever of the complainant to ascertain consent, even though she was a stranger that had just rebuffed his sexual advances and asked whether he would kill her. Indeed, these facts are not controverted. The accused's own testimony corroborated each and every finding of fact relied upon by the Learned Trial Judge in making

his assessment of the defence – including that she rebuffed him and was worried he would kill her.

45. Accordingly, it is only the legal significance of these uncontroverted facts that is the proper subject of this appeal. The legal significance of these facts is that, as a matter of law, there was no air of reality to the mistake defence. <u>It was incumbent upon the Learned Trial Judge to consider the absence of any evidence of inquiry with respect to consent in this case when making his threshold assessment as to whether the defence of mistake had an air of reality.</u> Both the Learned Trial Judge and the Respondent appear to be operating on the assumption that the statutory requirement that the accused take reasonable steps to ascertain consent is but one factor to consider in deciding whether to accept or reject the defence ultimately. In fact the law is very clear that this is a threshold question to be determined in assessing whether or not the defence has an air of reality and ought to be considered at all by the trier of fact.

R. v. *Cornejo*, [2003] 68 OR (3d) 117 (ONCA) [Tab 5]

46. Given that there is no suggestion that the accused made any inquiry of the complainant to ascertain that she had changed her mind and was now consenting to sex on the highway, the only issue in the case is a

legal one concerning the application of the air of reality test. In relation to this issue, the Learned Trial Judge made findings of fact based on uncontroverted evidence and therefore any alleged *W.(D.)* error would be of no moment to the analysis. Indeed this Honourable Court is equally situated with the Learned Trial Judge to determine whether as a matter of law the mistake defence had an air of reality or not based upon uncontroverted facts.

47. Further, discriminatory beliefs and stereotypes operate in the context of the *W.(D.)* test to make it likely that nearly all accused could easily produce accounts of an incident satisfying an isolated test of plausibility where the result produced is that believing the complainant is simply not enough. What follows is a re-emergence of a corroboration rule disguised as reasonable doubt; in other words, a wolf in sheep's clothing.

48. LEAF has worked tirelessly to reform sexual assault law making it more consistent with sex equality. LEAF respectfully submits that where the *W.(D.)* test is interpreted to mean that an accused is entitled to an acquittal on the basis of a plausible (though disbelieved) hypothesis only or on the basis that believing a complainant is not enough, as the Appellant has argued, such an interpretation is both inconsistent with s.274 of the

Criminal Code and with the *Charter* constitutional guarantee of equality in section 15, as well the s.7 rights of women to life, liberty and security of the person.

49. LEAF further submits that an impartial trial or appellate judge cannot close their mind to the possibility of inequality in the law relating to the burden of proof in sexual assault trials. In particular, an impartial trial or appellate judge must be cognizant of how susceptible credibility assessments are to problematic and out-dated social assumptions and must not permit the *W.(D.)* test to allow the accused to benefit from a doubt that the fact-finder does not have or the absence of corroboration of a believed complainant. LEAF submits that to do so would be an error in law.

> Christine Boyle, "Reasonable doubt in credibility contests: sexual assault and sexual equality" (Paper presented to the National Judicial Institute conference, November 2007)

50. Where the defence of mistaken belief in consent is concerned, LEAF submits that discriminatory beliefs and stereotypes informed the Learned Trial Judge as to whether the defence of belief in consent had any air of reality.

51. Where discriminatory beliefs and stereotypes are used to purport to advance the defence, LEAF submits that this Honourable Court must consider Parliament's intentions with respect to section 273.2 of the *Criminal Code* and disregard the assertion of such a defence.

52. Assessments of credibility cannot trade on discriminatory beliefs and stereotypes in an end-run around the recognized law of consent in Canada, per *R. v. Ewanchuk*. For example, evidence that a victim could have run away but didn't is not evidence of consent.

53. In the within case, the verdict was reasonable based on the findings of fact that necessitated the conclusion that the Appellant sexually assaulted the complainant. Discriminatory beliefs and stereotypes cannot be used to explicitly challenge the complainant's credibility. In this respect, appellate courts in particular must be cognizant to how susceptible credibility assessments are to out-dated and problematic social assumptions and be vigilant that such discriminatory beliefs and stereotypes do not affect their assessment of the record on appeal.

54. Where the moral culpability of an offender on sentencing is concerned, LEAF submits that, as stated in *R. v. Arcand*, "courts of appeal should not resile from their intended leadership role in sentencing."

R. v. Arcand, 2010 ABCA 363 [Tab 6]

55. While *R. v. Arcand* speaks to the leadership role of appellate courts in sentencing reviews specifically, the role of appellate courts generally cannot be underestimated. LEAF respectfully submits that the appeal within provides this Honourable Court with the opportunity to speak out against the discriminatory beliefs and stereotypes so pervasive within the justice system and so harmful to women's experience of sexual equality.

56. The usefulness of LEAF's proposed submissions, in their totality, is highlighted when one considers the arguments advanced by the parties and the need to place the facts of this particular case outside of the systemic prism which perpetuates discriminatory stereotypes and beliefs in analyzing sexual assault complaints.

REQUEST FOR AN EXTENSION OF TIME IN THE WITHIN MOTION

57. Court of Appeal Rule 46.1(2) states that a motion for intervention shall be filed and served within 30 days after filing the notice of appeal.

Court of Appeal Rules, [Tab 1]

58. Rule 42 allows this Court to extend the time limits set out in the rules for doing any act or taking any proceeding.

Court of Appeal Rules, [Tab 1]

59. An applicant seeking an extension of time of filing a motion for leave to intervene must provide a reasonable explanation to support the extension of time.

Manitoba Métis Federation Inc. v. Canada (Attorney General), [Tab 7]

60. LEAF is an experienced intervener and is always highly sensitive to the need to only address arguments which are not already before the Court. In this case, LEAF was unable to assess whether an intervention would be useful to the Court and would offer a perspective and analysis different than those of the parties until LEAF received the parties' facta, which were originally scheduled to be exchanged in August and September 2011. LEAF acted promptly in filing this motion, following

receipt and review of the facta filed with this Court. A more detailed timeline is as follows.

Parkes Affidavit, paras. 25.

61. On June 7, 2011, LEAF advised counsel for the Respondent that LEAF was monitoring the within appeal and sought information as to when the transcripts, notices of appeal and facta would be filed.

Parkes Affidavit, paras. 26.

62. On July 4, 2011, LEAF further advised counsel for the Respondent that it would need to review the parties' facta and consider the substantive positions of the parties before LEAF would be able to make an informed decision as to whether LEAF could offer distinguishing and unique arguments on the within appeal.

Parkes Affidavit, paras. 27.

63. On August 25, 2011 LEAF requested a copy of any facta that had been filed from counsel for the Respondent and was advised that facta on the conviction appeal had not yet been filed.

Parkes Affidavit, paras. 28.

64. On October 6, 2011, LEAF again requested a copy of the factums from each of the respective parties. LEAF was unable to obtain a copy of the Appellant's factum, previously filed, from the Court Registrar as the files were unavailable. On October 12, 2011, the Respondent filed their factum and LEAF received a copy of the Respondent Factum at that time.

Parkes Affidavit, paras. 29.

65. It was not until October 12, 2011 that LEAF learned the nature of the Respondent's position on appeal and furthermore, it was not until October 17, 2011, that LEAF was advised that the Respondent would not be filing further materials with respect to their cross-appeal on sentence.

Parkes Affidavit, paras. 30.

66. On October 20, 2011, LEAF received a copy of the Appellant's factum from counsel to the Appellant and were able to consider the Appellant's arguments, and in particular, the Appellant's request for a directed acquittal.

Parkes Affidavit, paras. 31.

67. LEAF has consistently sought the information needed in order to make an informed decision as to whether to seek leave to intervene in

this matter, but was not in a position to make that determination until after 30 days for filing a motion for intervention.

Parkes Affidavit, paras. 32.

68. No prejudice has resulted to any party from LEAF's delay in seeking leaving to intervene since LEAF will take no position on the facts, but will offer the Court an important gendered analysis and perspective on the systemic legal issues raised. When it was confirmed that LEAF's submissions as proposed would not be addressed by the Respondent, LEAF acted quickly to prepare the application to intervene.

Parkes Affidavit, paras. 32.

69. It is therefore submitted that the timing of LEAF's motion for leave to intervene is reasonable in the circumstances and LEAF is seeking an order extending the time for the filing of the motion to intervene.

E. CONCLUSION

70. Should the request for an extension of the time for filing the within motion be granted, it is submitted that the arguments advocated by LEAF and summarized herein are useful and distinct from that considered by the Learned Trial Judge and advocated by the parties.

71. If LEAF is not granted leave to intervene, these arguments will not be raised. This prospect justifies granting leave to intervene.

72. Granting intervener status to LEAF will not prejudice the existing parties or the conduct of the appeal.

73. LEAF proposes to intervene with a written submission, oral argument, and accompanying authorities.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 28th DAY OF OCTOBER, 2011.

Thompson Dorfman Sweatman LLP

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Allison E.M. Fenske
Solicitor for the Women's Legal
Education and Action Fund (LEAF)