



## For Immediate Release

### **The Voices of Women with Mental Disabilities will be heard in Court SCC Releases Positive Decision in *R. v. D.A.I.***

**February 10, 2012, Toronto & Montreal** – The Supreme Court of Canada released its judgment today in the case of *R. v. D.A.I.*. The Women's Legal Education and Action Fund (LEAF) and the DisAbled Women's Network Canada (DAWN-RAFH Canada) intervened in the appeal.

“LEAF and DAWN-RAFH Canada welcome the decision as a positive step for women with disabilities and for Canadian society as whole, which is committed to prosecuting sexual abusers who prey on vulnerable women” says DAWN-RAFH Canada President Carmela Hutchison.

“In today's Supreme Court of Canada decision, Chief Justice McLachlin writing for the majority described sexual assault as “an evil” and acknowledged that women with intellectual and other disabilities are targeted for this offence at alarming rates. The Court confirmed the importance of hearing the voices of women with mental disabilities<sup>1</sup> in court. The Court acknowledged that the testimony of women with mental disabilities is essential to stopping sexual abuse and ensuring that sexual offenders are brought to justice” states Joanna Birenbaum, Legal Director of LEAF

The legal question before the Court was how to interpret s.16(3) of the *Canada Evidence Act* which permits witnesses who can “communicate” the evidence but are unable to understand an “oath” or “affirmation”, to testify unsworn on a “promise to tell the truth”. Lower courts had developed a practice of requiring mentally disabled witnesses to explain the meaning of abstract concepts like promise, truth and falsehood. No other category of witness, not even convicted perjurers, are subjected to such a pre-testimonial inquiry.

“The Supreme Court of Canada ruling clarifies that persons with mental disabilities are not required to meet a more onerous test than any other witness before they are even allowed to take the stand” explains Birenbaum. “If a witness can communicate her experiences – if she can describe what happened to her – she can testify after saying that she promises to tell the truth.”

The SCC judgment noted that in the past, people with mental disabilities who are victims of sexual offences “have been frequently precluded from testifying, not on the ground that they could not relate what happened, but on the ground that they lacked the capacity to articulate in abstract terms the difference between the truth and a lie” (SCC Judgment para.66).

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<sup>1</sup> Mental disability would include developmental disabilities, psychiatric disabilities, and chronic non-episodic mental disabilities like brain injury and neurological illnesses such as dementia and multiple sclerosis affecting cognition. “Mental disability” is an enumerated ground under section 15 of the *Charter*.

Without the evidence of sexual assault complainants before the Court, cases often collapse and sexual offenders are acquitted, effectively permitting “violators to sexually abuse [women with mental disabilities] with impunity” (SCC Judgment para.67).

“Women with intellectual and cognitive disabilities experience staggering rates of sexual assault” explains Hutchison, “we are seen as easy targets. Abusers, who are frequently caregivers, believe that disabled women are powerless to complain or will not be believed even if we do complain. The Supreme Court acknowledged this reality and confirmed that our testimony is essential to any “realistic prospect of prosecution,” failing which we become “fair game for those inclined to abuse” (SCC Judgment para.67).

“We are reassured” continues Hutchison, “that the SCC majority recognized that the testimony of women with mental disabilities promotes the truth-seeking function of the criminal process, particularly given the undeniably high rates of sexual assault and the interests of society in the reporting and prosecution of abuse. As the SCC itself said, excluding our evidence would “effectively immunize a category of offenders from criminal responsibility” with devastating harms to the abused women and to society as a whole” (SCC Judgment para.67).

The case involved a woman with an intellectual disability (K.B.) who reported to a teacher that her step-father played “games” with her, which included touching her genitals and breasts. The evidence also revealed that the accused had a photograph of the complainant bare-breasted, stored in a trunk along with another pornographic photograph. The accused alleges that the photograph was taken innocently.

K.B. made a statement to the police and testified at the preliminary inquiry. At trial, her competence to testify was successfully challenged. The Court held that K.B. was unable to adequately explain the meaning of abstract concepts like “truth”, “lie” and “promise”. For example, she was asked “what do you think about the truth”, “what’s a promise” and “if you tell big lies will you go to jail”. K.B.’s evidence was excluded. The trial proceeded without her evidence. The accused was acquitted.

As a result of the SCC ruling today, the acquittal is set aside and a new trial ordered.

The Supreme Court of Canada decision also notes that the questioning of mentally disabled adults may require “accommodation” or individualized supports so that their evidence is best communicated in court.

“This aspect of the ruling is in-step with international law and other international jurisdictions” explains Birenbaum, “the United Kingdom, for example, is currently far ahead of Canada in terms of providing for witness intermediaries who assist persons with communication and/or mental disabilities in accessing the justice system at all stages, from reporting to police to giving evidence in Court. Creating and supporting a roster of witness intermediaries in Canada is a logical next step for the federal government flowing from this decision.”

Hutchison continues that “while the Court did not refer to Canada’s international human rights commitments, the decision is consistent with Canada’s obligations under the UN Convention on

the Rights of Persons with Disabilities (CRPD) and the UN Convention on the Elimination of Discrimination Against Women (CEDAW). Article 13 of CRPD requires Canada to ensure “equal access to justice” and Article 16 of CRPD commits Canada “to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted”. Finally, Article 12 of CRPD recognizes that people have the right to supports in order to exercise their legal capacity.”

LEAF and DAWN-RAFH’s factum and more information can be found at <http://leaf.ca/wordpress/wp-content/uploads/2011/05/2011-R.-vs.DI-Final-Factum.pdf>

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