



Women's Legal
Education and
Action Fund | Fonds d'action et
d'éducation juridiques
pour les femmes



November 14, 2018

**The Right Honourable Justin Trudeau, P.C., M.P.
Prime Minister of Canada
Langevin Block
Ottawa, Ontario
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By email: justin.trudeau@parl.gc.ca

**The Honourable Jody Wilson-Raybould, P.C., M.P.
Minister of Justice and Attorney General of Canada
House of Commons Ottawa, Ontario
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By email: Jody.Wilson-Raybould@parl.gc.ca

Dear Prime Minister and Minister:

LEAF and the Barbra Schlifer Clinic write to provide their support for the amendment to Bill C-51 introduced by Senator Kim Pate with regard to the provisions addressing capacity to consent.

Founded in 1985, LEAF is a national organization dedicated to promoting substantive equality for women through litigation, law reform and public education. LEAF's expertise in the inequality and discrimination experienced by women in Canada encompasses considerable expertise in addressing legal responses to sexual violence against women. LEAF has been involved in nearly every significant change to the law of sexual offences in the past 30 years and has intervened in almost every Supreme Court of Canada case that has set a precedent in this area of law, advocating for complainants' rights in the sexual assault trial to equality, privacy, and dignity. In supporting Senator Pate's amendment, LEAF draws on this robust experience advocating for women's equality in sexual assault law.

The Barbra Schlifer Commemorative Clinic (the "Clinic") is the only clinic of its kind in Canada. Since 1985, the Clinic has provided legal representation, counselling and language interpretation to over 60,000 women who have experienced all forms of violence. Currently, we assist more than 4,000 women each year. We work in over 200 languages, provide a variety of innovative counselling services and are go-to for community mobilization, public legal

education/information, law reform activities, and legal representation for gender-based violence (GBV). The Clinic consults broadly with all levels of government on policy or legislative initiatives. The Clinic's experience over the last 30 year shows that the legislative amendment proposed by Senator Pate would further the Canadian government's stated commitment to ensure victims of sexual assault and gender-based violence are treated with the utmost respect and compassion.

Senator Pate's amendment is critical to ensure that the law of sexual assault in Canada provides meaningful protection for all women. LEAF's submissions to the House of Commons Standing Committee on Human Rights and Justice and the Senate Committee on Legal and Constitutional Affairs on Bill C-51 provides a detailed explanation of this position. It explains that the current language of Bill C-51 risks establishing unconsciousness as the threshold for incapacity in sexual assault law, which will make women who are conscious, but severely intoxicated or otherwise incapable of consenting to sexual contact, significantly more vulnerable to sexual violence and less likely to receive justice for this violence in the legal system. Senator Pate's amendment, in contrast, would provide greater protection for these women and would provide essential and much-needed clarity in this area of the law.

As worded, the bill would include the following provision:

(2.1) Paragraph 273.1(2) (b) of the Act is replaced by the following:

For the purposes of this section, no consent is obtained if

(a.1) the complainant is unconscious;

(b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1).

Section (a.1) adds nothing new to the law of sexual assault. It is uncontroversial that a woman who is unconscious cannot consent. This point is so obvious that the Nova Scotia Court of Appeal has recently said in *R v Al-Rawi*, "Of course, an unconscious complainant lacks the capacity to consent."

What is controversial in law is the question of when a person who is conscious, but impaired, is capable of consenting. Put another way; judges have a very difficult time deciding what level of disability or intoxication renders a person incapable of providing consent. Even under the current law, in which unconsciousness is clearly not the legal threshold for incapacity, judges are reluctant to find incapacity where the complainant had some bare level of consciousness during the sexual activity. In cases in which the complainant was conscious during the sexual contact, but was unable to stand up, remember their address, or was vomiting profusely, judges have found that the complainant was capable of consenting. This makes intoxicated women, who are particularly targeted by sexual violence, vulnerable to predatory sexual behaviour. This is the legal issue in need of clarification from this government.

However, rather than address this pressing issue, Bill C-51 likely will confirm and perpetuate the judicial focus on “consciousness” as the relevant issue in determining capacity to consent. It risks being interpreted as governmental direction that unconsciousness is the bright line between capacity and incapacity. The dangers of such an approach are apparent in the Nova Scotia trial decision of *R v Al-Rawi*, when the judge found that, because the extremely intoxicated complainant may have been conscious at the time of the sexual activity (despite subsequently losing consciousness), she may have had the capacity to consent.

Further, the issue of incapacity does not only arise in the context of intoxicated complainants. Women with mental disabilities are also disproportionately targeted for sexual violence. Like intoxicated complainants, women with disabilities are targeted in part because perpetrators know that they are less likely to be believed. In both kinds of cases, courts desperately need direction as to how the incapacity assessment should be undertaken. The case law makes clear that judges are struggling with this issue and often resolve it in favour of finding capacity, to the detriment of women’s equality.

Senator Pate’s amendment would provide that guidance and therefore would meaningfully improve and clarify the law of sexual assault. Senator Pate proposes that a complainant is incapable of consenting where the complainant is:

- (i) unable to understand the nature, circumstances, risks and consequences of the sexual activity in question,
- (ii) unable to understand that they have the choice to engage in the sexual activity in question or not, or
- (iii) unable to affirmatively express agreement to the sexual activity in question by words or active conduct.

This proposal should be uncontroversial to a feminist government. If a woman lacks the capacity to appreciate the essential features of the sexual activity she is engaging in, cannot understand the risks of the activity, does not understand that she has the choice to engage in it or not, or is unable to communicate consent or communicate her withdrawal of that consent, it would be dangerous for a court to find that she is capable of providing voluntary consent. An accused person who proceeds with sexual activity in the face of such conditions is committing sexual assault.

Sexual assault of intoxicated women is a very significant problem in Canada. The tragic case of Rehtaeh Parsons demonstrates the relationship between intoxication and sexual violence. This is a context where women’s equality demands legislative action. This government should be very careful to ensure that any legislative changes do not exacerbate the existing barriers to justice faced by women who are sexually exploited while incapacitated. We urge you to use this opportunity to make a meaningful change to the law that will protect women from sexual violence.

Finally, a point of clarification about *R v JA*. While we are not against codifying the ruling in *JA* in principle, Bill C-51 does not do so. *JA* was significant in that it found that a person cannot provide *advance* consent to sexual touching – i.e., consent given to touching to happen at a later time is invalid because consent must be contemporaneous with the sexual activity. Including a statement that unconscious people cannot consent to sexual activity fails to capture the important principle decided in *JA*.

We urge you to adopt Senator Pate’s proposed amendment, in the name of the equality and security of the personal rights of women and girls in Canada. Thank you for considering our views.

Yours truly,



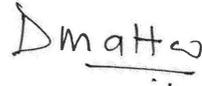
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