

# BeLEAFs

Spring 1999  
Volume 1 Number 3

## “NO MEANS NO” *R. v. Ewanchuk*

It was a victorious day for LEAF on January 25, 1999, the date the Supreme Court of Canada unanimously affirmed that “no means no” in the case of *R. v. Ewanchuk*. Steve Brian Ewanchuk was charged with sexually assaulting a 17-year-old woman during a job interview. Ewanchuk, a 49-year-old carpenter, invited the young woman into his trailer to view his work. Once inside, he began groping her. The woman said “no” to Ewanchuk’s sexual touching at least three times. However, the Court of Appeal held that because the woman did not struggle, scream or attempt to escape she had “implied consent”. In effect, she did not resist Ewanchuk strongly enough. The woman testified that she tried to remain calm out of fear of antagonizing him and repeatedly said “no” in response to his assaults. Nevertheless, the Alberta Court of Appeal acquitted Ewanchuk because of the woman’s failure to clearly resist his assaults.

The case was appealed to the Supreme Court of Canada in 1998. LEAF, in coalition with DAWN Canada: the DisAbled Women’s Network Canada, intervened to argue that there is no defence of “implied consent” in sexual assault law. LEAF also argued that no one has the right to sexually touch another unless that person clearly communicates con-

sent. These principles have been incorporated into our criminal law in order to ensure respect for personal autonomy and bodily integrity.

This case exposed the insidious nature of commonly-held misconceptions about women and sexual assault. For example, Justice McClung, of the Court of Appeal remarked that the woman “did not present herself in a bonnet and crinolines when she entered [the accused’s] trailer”. McClung’s comments sparked heated national debate among women’s groups, the legal community and the public.

*R. v. Ewanchuk* presented a clear example of the negative stereotypes about women that are still deeply entrenched in the legal system and society at large. Justice McClung made reference to irrelevant details about the complainant, from her state of dress (T-shirt and shorts) to the fact that she was an unwed mother living with her boyfriend and another couple, before acquitting the accused. Many defence counsel have used these kinds of irrelevant details to discredit complainants in sexual assault trials.

The Supreme Court’s unusual decision to convict Ewanchuk of sexual assault was an unambiguous victory for LEAF and for all women. The Court held that the idea of “implied consent” to sexual assault does not

exist in Canadian law.

The Supreme Court decision sends a strong message that consent to sexual activity must be voluntary and communicated. It cannot be given by a third party, or motivated by fear or abuse of authority. It must relate to each and every instance of sexual activity. The Court stat-

ed that this approach is necessary to protect everyone's personal autonomy and bodily integrity.

LEAF was featured on national television, radio and in print.

Diane Oleskiw and Ritu Khullar were counsel

## COURT DECISION PENDING...

British Columbia Government and Service Employees' Union v. the Government of the Province of British Columbia as represented by the Public Service Employee Relations Commission (*BCGSEU v. PSERC - Tawney Meiorin Grievance*) - Sex Discrimination

The Supreme Court of Canada heard the case of Tawney Meiorin who alleged sex discrimination against the B.C. government after being laid off as an initial attack forest firefighter. LEAF, in coalition with the Canadian Labour Congress and DAWN Canada, intervened in this case on February 22, 1999, to show how a fitness test discriminates against women. Ms. Meiorin worked as a forest firefighter for more than two years and performed her job well, to her supervisor's satisfaction.

In 1994, she was required to take a fitness test. The test was comprised of four components. Three components were strength tests and the fourth was an aerobic test, requiring a 2.5 kilometre run in 11 minutes. Ms. Meiorin passed all the strength tests but, despite intensive training, she failed the running component with a time of 11:49 and was laid off from her job.

She later made a formal complaint about her dismissal, arguing that the test is discriminatory because it is based on male physiology and disproportionately excludes women from firefighting work. The outcome of this case will have a direct impact on women entering historically male-dominated careers. This case marks the first time that the Supreme Court of Canada will consider the extent of an employer's duty to

review and change workplace rules or policies in the context of sex discrimination. The Court reserved its decision. Kate Hughes and Melina Buckley were counsel.

*L.C. v. Mills* - Constitutional Challenge of Bill C-46 (an Act to amend the Criminal Code disallowing production of records in sexual offence proceedings)

On January 19th, the Supreme Court of Canada heard the Alberta case of *L.C. v. Mills*, a constitutional challenge to Bill C-46. Bill C-46, passed in 1997, amended the Criminal Code to provide guidelines for the production of personal records to the accused in sexual assault trials. LEAF intervened in this case because of its importance for the equality rights of all women in Canada.

Brian Joseph Mills is charged with the sexual assault and sexual touching of a 13-year-old child (L.C.). He is challenging the constitutionality of Bill C-46 because he was denied access to the victim's medical records. LEAF's intervention in Mills is but the latest step in LEAF's long-standing work on the issue of defence applications for women's personal records. LEAF also participated in the drafting and consultation process which led to the passage of Bill C-46.

LEAF counsel were Anne Derrick and Peggy Kobly.

LEAF held a news conference at the National Press Gallery in Ottawa on Monday, January 18, 1999. LEAF extensive national media coverage on this case. The Court reserved its decision.

***J.G. v. the Minister of Health and  
Community Services (N.B.)*** – Civil Legal Aid  
for Wardship Applications

J.G., a poor woman from New Brunswick, is appealing a lower court's decision to deny her legal aid where the state is seeking temporary wardship of her three young children. As a result, J.G.'s children were removed from her home for approximately 15 months. LEAF, in coalition with the National Association of Women and the Law (NAWL) and DAWN Canada, intervened in this case to argue that the state's failure to pay for legal representation for parents in temporary wardship cases is a failure to provide access to justice for the poor. Such failure can result in an unfair trial with the potentially devastating result that children are removed from their families.

On November 9, 1998, the Supreme Court of Canada heard the appeal. Please note that pursuant to an order by the Chief Justice, the plaintiff in the case may only be identified by her initials. The Court reserved its decision. Carole Curtis and Anne Dugas-Horsman were counsel.

***M v. H*** – Spousal Support for Same-sex  
Couples

LEAF is still awaiting a decision from the Supreme Court of Canada in this important case concerning spousal support for same-sex couples. "M" attempted to sue "H" for spousal support using provisions of the Family Law Act after their 10-year relationship ended. The Supreme Court heard this appeal on March 18, 1998. Carol Allen was counsel.

**NEW CASE**

***Darrach v. The Queen – Constitutional  
Challenge to Amendments to the Criminal  
Code***

LEAF and its coalition partners: the Canadian Sexual Assault Clinics (CASAC), DAWN Canada and the National Action Committee on the Status of Women (NAC), intervened in this sexual assault case at the Ontario Court of Appeal in

1997. Darrach was appealing his conviction for sexually assaulting a woman with whom he'd had a previous relationship. In his defence, Darrach claimed that two sections of the Criminal Code prevented him from having a fair trial. The two sections dealt with the definition of "consent" and the admission and use of a woman's sexual history. The Court of Appeal upheld Darrach's conviction.

Now, Darrach is appealing to the Supreme Court of Canada. This time he is challenging amendments to the Criminal Code which limit the use of a woman's sexual history as a defence in sexual assault trials. Once again, LEAF and its coalition partners, is intervening to argue that these sections of the Criminal Code are essential to safeguard women's right to equal protection and benefit of the law when they are complainants in sexual assault trials. A date for the Supreme Court hearing has not been set. Counsel are Carissima Mathen and Elizabeth Thomas.

**BRANCH NEWS**

*Congratulations to Our First Three Branches!*

Edmonton, Saskatoon and Sudbury are the first areas to become formal Branches under the new LEAF structure. All provinces and territories, except British Columbia, can now form one Branch per municipality under this structure. Last fall, LEAF National sent Branch kits to assist interested groups in this process. If you've been waiting for word from LEAF National to become a Branch, then the wait is over: you can act now! We're hoping that most of our current Chapters and event committees will form into Branches by the end of May 1999. This date is to ensure that Branches in the geographical regions can meet and select a representative to sit on the National Board of Directors.

## New Branch Liaison Coordinator

The Board of Directors and the program plan for the coming year, 1999/2000, both emphasize increased support to and communication with Branches. One of the steps in accomplishing this is to develop a staff position called Branch Liaison Coordinator. Suzanne Carroll has been appointed to this position on an interim basis to initiate Branch support. Suzanne has been the Administrative Assistant in the National Office for three and a half years. We anticipate that that experience will give her a head start in this new position.

Branch and Breakfast/event-related questions and concerns may be directed to Suzanne. It will probably take a few weeks before this position is fully functioning, but once it is, you can expect to hear from the National Office on a regular basis. Suzanne can be reached at extension 238.

## Persons Day Breakfasts

Now's the time to start planning your Person's Day event for October 1999! Contact Suzanne Carroll at (416) 595-7170 ext. 238 or 1(888) 824-5323 for more information.

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## A WORD TO OUR READERS...

Tell Us How We're Doing!

BeLEAFs was created in response to our LEAFLines Reader Survey 1998 to provide an update of LEAF cases for our readers. LEAFLines is produced twice a year and is a full-scale newsletter complete with national branches, cases, volunteers and donors information. Please let us know if we are bringing you the case information you want in BeLEAFs and in the format that most suits your needs by answering a few questions.

1. Does BeLEAFs provide a useful overview of the most recent LEAF cases? What should we add or take out?
2. LEAFLines Reader Survey respondents asked that we develop a smaller newsletter dedicated to LEAF case information. What other information would you like us to include in BeLEAFs?
3. What do you like about BeLEAFs?
4. What don't you like about BeLEAFs?

Name: \_\_\_\_\_ Address: \_\_\_\_\_

Fax: \_\_\_\_\_ Email: \_\_\_\_\_

Thanks for completing this questionnaire. We will use your feedback to improve this resource. Please write your answers on a separate page and mail it to: LEAF National, 415 Yonge Street, Suite 1800, Toronto, ON M5B 2E5. Or fax it to: (416) 595-7191.

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The Women's Legal Education and Action Fund (LEAF) is a national non-profit organization which promotes equality for women through legal action and public education. Using the equality guarantees in the Canadian Charter of Rights and Freedoms, LEAF intervenes in court cases to challenge discrimination against women. LEAF is committed to working for women's equality in Canada through legal intervention. Please note: LEAF is not a law firm or legal clinic. LEAF does not represent clients and cannot provide any legal advice.

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BeLEAFs is the new sister publication of LEAFLines and is available twice a year. The smaller format provides LEAF supporters with case updates and national LEAF news.

Please address all correspondence and/or articles to: LEAFLines/BeLEAFs Editor, LEAF National, 415 Yonge Street, Suite 1800, Toronto, ON M5B 2E7 or  
e-mail: [leafcomm@interlog.com](mailto:leafcomm@interlog.com) or call (416) 595-7170 ex. 223.  
Please note: all submissions are subject to editing.

Editor: Rosemarie Stewart

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