LEAF FAEJ

WOMEN'S LEGAL EDUCATION AND ACTION FUND • FONDS D'ACTION ET D'ÉDUCATION JURIDIQUES POUR LES FEMMES

LEAF LITIGATION YEAR ONE

A Report By

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ACKNOWLEDGEMENTS

We salute those whose cases are discussed in this report. These women, children, and men are making a significant contribution to the development of rights for every one in Canada, often at personal inconvenience and expense, sometimes even at great risk. We have already learned, and benefitted, so much from working with them, and hope that by our combined efforts, we can help them achieve their hope for equality, for themselves and others.

We extend our thanks to those lawyers and other LEAF volunteers who give so generously of their time and expertise to bring these cases forward. The response of the legal profession to LEAF has been very rewarding and encouraging.

We also thank Leslie Blain, Marsha Clare, Lucie Lapalme, Kim Smith and Debra Walker of Toronto, for their technical help with the preparation and printing of this report.

(b) Justine Blainey/C.A.A.W.S.

The Ontario Human Rights Code provides that it is wrongful discrimination to deny on the basis of sex access to services and facilities. Subsection 19(2) of the *Code* grants an exemption from that ban to amateur sports organizations. Thus, in Ontario, it is legal for amateur sports opportunities to be withheld from girls and women.

Justine Blainey, a twelve year old girl who had been chosen to play on a first class hockey team in the Metro Toronto Hockey League, and barred from play by the Ontario Hockey Association, brought a challenge to subsection 19(2) of the Ontario Human Rights Code. Her application, heard in the Supreme Court of Ontario in September 1985, was assisted by LEAF, with Mary Eberts appearing in court to argue the *Charter* points. The application was unsuccessful, and an appeal taken to the Court of Appeal. On the Appeal, LEAF provided counsel to the Canadian Association for the Advancement of Women in Sport, which was given leave to intervene by Associate Chief Justice MacKinnon. Counsel was Don Brown.

The initial issue in the *Blainey* case was, again, a question of explicit differentiation in a statute: discrimination on the basis of sex, but not on the basis of several other characteristics protected by the *Code*, was permitted in sports organizations. In attempting to defend this distinction as a reasonable one demonstrably justifiable in a free and democratic society, the Ontario Hockey Association argued that it was necessary in order to prevent women's hockey from being integrated. The premise behind this argument is that sex equality must in every instance be perfectly symmetrical. The argument ignored the force of subsection 15(2) of the *Charter*, which protects any law program or activity designed to ameliorate the condition of persons disadvantaged because of sex. Thus one of the main thrusts of the argument in *Blainey* was the effect of subsection 15(2), in particular the question of whether it could shelter women's hockey while women were, with the aid of section 15 of the *Charter,* achieving integration of men's hockey.

Another issue in the case was the question of whether the *Charter* applies directly to the Ontario Hockey Association. If the application were to fail to establish this point, but resulted in subsection 19(2) being struck down, Justine Blainey's case would be referred to the Ontario Human Rights Commission for investigation, attempted settlement and adjudication. LEAF research disclosed that the shortest time for the Commission's process, based on past cases, would be a year. More likely, the case would take three years to be disposed of. Such a delay would, of course, be fatal to Justine's hockey aspirations.

The judge hearing the initial application turned it down, using most remarkable reasoning. He states at page 18 of the reasons for judgement:

> *On the plain reading of s. 19(2), it is an infringement of s. 15(2), because it purports to permit athletic organizations to be restricted to persons of the same sex. Both the purpose and the effect of s. 19(2) are in violation of s. 15(1) of the* Charter....

Yet he upholds s. 19(2) of the *Code* relying on s. 1 of the Charter, saying at page 22:

> *...there is ample evidence to support the provisions of s. 19(2) which permit the voluntary development of athletic sports by private organizations for the benefit of the groups that they serve rather than jeopardizing those very groups by the wishes of an individual.*

The appeal has not yet been decided, although it was argued in January 1986.

LEAF is hopeful that the Ontario Court of Appeal will recognize the invalidity of subsection 19(2), and the legitimacy of the argument based on subsection 15(2) of the *Charter*. A favourable decision on these issues would be of enormous benefit in at least one other case which is now pending before the Ontario Divisional Court: a challenge to the exclusively female membership base of LEAF's substantial benefactor, the Federation of Women Teachers' Associations of Ontario.

(2) Beginning to Attack Indirect Discrimination

By far the largest proportion of discrimination against women is indirect. Though a statute or program may be neutral on its face, it has a disparate impact on women, because of how they are situated. Attacking this type of differentiation is more complex than attacking discrimination which is apparent on the face of the statute. One must establish that the courts can take cognizance of indirect discrimination, that it is within the reach of section 15, and one must also establish on the evidence that there is a disparate impact on women.

Several cases brought by LEAF in its first year are ones involving indirect discrimination. In Ontario, the Attorney-General has announced that Crown lawyers would not object to arguments solely because they allege indirect discrimination. Thus, in the Ontario cases, the threshold issue of whether this type of impact can present a justiciable issue will not have to be confronted. However, not all the cases which LEAF now has in hand arise in Ontario.

(a) Spouse in the House Rule

In the *Beaudette* and *Horvath* cases, LEAF challenges the constitutional validity of the requirement in Ontario's family benefits legislation that a person be living "as a single person" in order to be eligible for assistance.

Almost all of the recipients of family allowance are single mothers. A few male parents are included in the ranks of recipients. A long-standing practice of welfare administration in the province is to refuse benefits to a woman who has any kind of relationship with a male, using the rationale that because of her relationship she is not living as a single person.

accused except in certain restricted circumstances and unless a *voir dire* is first held - in the absence of the public and the jury - to determine the relevance of the questions. Section 246.7 makes evidence of the complainant's sexual reputation inadmissible.

Mr. Justice Galligan of the Ontario Supreme Court ruled that these provisions offend the right of the accused to a fair trial guaranteed by section 11 of the *Charter*. The Attorney-General of Ontario appealed the decision to the Ontario Court of Appeal.

LEAF applied to intervene on the appeal, to argue that the provision is constitutional. Austin Cooper had agreed to represent LEAF should it be granted intervenor status, and Mary Eberts argued the leave application on the basis of materials prepared by Gwen Brodsky and Sharyn Langdon.

Ontario Chief Justice Howland granted the application, saying in his written reasons:

> *The right to intervene in criminal proceedings where the liberty of the subject is involved is one which should be granted sparingly. Here no new issue will be raised if intervention is permitted. It is a question of granting the applicant a right to intervene to illuminate a pending issue before the Court. While counsel for LEAF may be supporting the same position as counsel for the Attorney General for Ontario, counsel for LEAF, by reason of its special knowledge and expertise, may be able to place the issue in a slightly different perspective which will be of assistance to the Court.*

This is the first criminal case of which we are aware in which leave has been granted to a public interest group to argue that a provision of the Criminal Code should be upheld as constitutional. LEAF research disclosed several cases where a group was permitted to intervene on behalf of an accused but could find no situation exactly like this one.

Of significance in the success of the application was the fact that LEAF had received intervenor status in *Shewchuk*, discussed above, and had been involved in cases in several provincial Superior Courts.

LEGISLATIVE WORK

In addition to appearing in court, LEAF has made presentations to legislative committees or Commissions, on areas within our particular expertise.

(a) The Boyer Committee

On April 17, 1985, a LEAF delegation comprised of Shelagh Day, Hélène LeBel, Jane Shackell, and Jan Hatch, appeared before the Equality Rights Sub-Committee of the federal Standing Committee on Justice and Legal Affairs. Their presentation occurred on the first day of hearings of the sub-committee, which was chaired by M.P. Patrick Boyer.

The LEAF delegation argued that the Committee should take a broad approach to the task assigned to them, namely the examination of federal laws, regulations and programs for compliance with the *Charter*, and the recommendation of changes. The LEAF position was an important one, because the federal document which formed the basis of the Boyer Committee mandate, *Equality Issues in Federal Law: A Discussion Paper*, omitted from consideration a number of key issues for women. This paper declared, for example, that the questions of pension reform (including C.P.P.), the reform of the criminal law, and discrimination in the tax system were beyond the scope of the examination at hand because they were being reviewed in other processes.

Other concerns raised by LEAF focussed on the poverty of the Canadian women, and emphasized the need for:

- broad, practical, effective, results-oriented interpretations of equality
- equal pay for work of equal value legislation, and
- access to daycare.

On June 18, 1985, at the invitation of the Boyer Committee, LEAF made a second presentation. On behalf of LEAF, Shelagh Day made the following points:

- section 15 imposes an obligation on governments to actively pursue the goal of equality through reform of laws and government practices
- in order to comply with the requirements of the section 15 guarantees, it is essential that effective, mandatory affirmative action programmes be implemented
- in order to exercise their equality rights, women must have access to litigation funds.

In addition, LEAF challenged the Department of National Defence's policy and practice of discriminating against its lesbian employees.

The Boyer Committee reported in October, 1985. Its report, *Equality for All* was responsive to several of the concerns raised by LEAF. *Equality for All* endorsed a broad and generous interpretation of section 15, and made positive recommendations for reforms in the areas of pay equity, day care, affirmative action and legal rights for lesbians and gays. The report also supported the provision of funds for equality rights to litigation.

(b) Bill C-31

Mary Eberts and Beth Symes, legal committee members, prepared a brief on the equality implications of Bill C-31, the federal government's amendment to the *Indian Act*. This bill addressed, among other problems, the celebrated inequality which was at issue in the *Bedard* and *Lavell* cases: Indian women, but not Indian men, lost status upon marriage to non-Indians. The brief was submitted on behalf of the group, Indian Rights for Indian Women, to the Parliamentary Committee Studying the bill and on April 23, 1985, Mary Eberts and Beth Symes appeared as expert witnesses before the Senate Standing Committee on Legal and Constitutional Affairs, to testify during its consideration of the bill. They pointed out that the bill left disparities in status between the descendants

of men and women restored to Indian status, and contained the potential for denial of equality unless adequate safeguards of constitutional rights are observed during the administration of the reinstatement process.

(c) Forget Commission

In February 1986, LEAF was invited by the Forget Commission to participate in a consultation with women's groups on issues of special interest to women in the Unemployment Insurance Plan. Mary Eberts represented LEAF.

The primary concern voiced by LEAF was that the Commission appeared to have devoted very few resources to its own research in areas of concern to women. The Commission members present did not have an entirely satisfactory answer to this charge, and discussions have continued about this problem with Commission officials following the consultation.

The groups present stressed several basic themes: that women would not accept the re-characterizing of unemployment insurance into a welfare program, that pregnancy and parental leave should continue as an integral part of the scheme, and the the Commission should be sensitive to the problems of structural discrimination in the program. An example of the latter is the fact that rules against Unemployment Insurance for part-time work have a disproportionately heavy impact on women, who form a majority of part-time workers.

LEAF pointed out that section 15 of the *Charter* is meant to reach indirect, as well as direct, discrimination. If the legislation as recommended by the Commission includes instances of disparate impact, it could face a constitutional challenge.

(d) Provincial Legislative Developments

On February 19, 1986 LEAF representatives Shelagh Day and Gwen Brodsky appeared before the Ontario Legislative Standing Committee on Administration of Justice and the Equality Rights Amendment Act (Bill 7).

Bill 7 includes an amendment to repeal subsection 19(2) of the Ontario Human Rights Code, discussed above in the context of the *Blainey* case. One of the central recommendations of LEAF to the Standing Committee was that the legislature proceed with the proposed amendment to repeal section 19(2). Although the Committee members seemed convinced of the logic of LEAF's submissions, concern was expressed about the opposition of some sports groups. LEAF pointed out that sport-related discrimination complaints are allowed on all grounds listed in the Code, except sex: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, marital status, family status or handicap.

LEAF also proffered some remarks about other provisions which are not in Bill 7 but which should be included in an equality rights audit. The scope of the Committee's mandate was not completely clear, but the Committee listened to all of LEAF's recommendations. The main recommendations were as follows:

- an amendment to the Human Rights Code to include pregnancy as an aspect of sex in the definition of sex discrimination, so that discrimination on the basis of pregnancy or pregnancy-related illness is prohibited;
- an amendment which would either make open-ended the list of prohibited grounds of discrimination in the Code or add specifically sexual orientation and political belief as prohibited grounds of discrimination, to bring the Code into line with the Charter and to avoid the anamolous situation wherein people have certain rights guaranteed by the Charter but overlooked by the Code;
- an amendment to the Code to ensure that the words "bona fide occupational requirement" are not interpreted in such a way as to relieve employers and service providers of the obligation to try reasonably to accommodate individual differences.

The Attorney-General of British Columbia has asked the West Coast LEAF group for its views on what further legislative action is necessary to comply with section 15 of the *Charter*. LEAF's submissions are currently in preparation.

CONCLUSION

LEAF has accomplished a number of significant objectives in its first year of existence, all of which accomplishments will have a positive bearing on its continued effectiveness as an advocate.

It has won two cases at the provincial Superior Court level. Given the timing of legal cases, even to finish these within the year would have been significant. To win them is an added achievement. One of these, *Paul*, is an important first building block in achieving a sensible approach to remedies.

It was a significant achievement to be granted standing in two Court of Appeal matters, *Shewchuk* and *Seaboyer*. In the *Seaboyer* case, LEAF may have broken new legal ground. Appearances before the Boyer Committee and Forget Commission, arranged in large part by invitation, reflect that LEAF has in one year entered the ranks of Canada's leading national women's organizations.

LEAF is pleased that so much of the litigation undertaken in its first year is for the benefit of women who are particularly vulnerable. Domestic workers are among the most unprotected of workers; mothers on social allowance payments are at the bottom of the economic scale. Women prisoners in federal institutions are among the forgotten.

In addition to the cases discussed above, LEAF acted successfully in three cases to obtain relief for older women being forced to retire. In two cases, a year's extension of employment was secured, in the one case

from the provincial and in the other from the federal civil service. In a third, involving Toronto worker Ivy Tyson, LEAF's efforts resulted in the establishment of a company pension plan, as well as a satisfactory resolution of the individual case.

LEAF also supported efforts by the Canadian Association for Community Living and several other groups to block the court sanctioned sterilization of a 12 year old retarded girl from British Columbia, the Infant K. This case, which involved an emergency application to the Supreme Court of Canada by lawyers Mary Eberts and Geoffrey Creighton, on behalf of Victoria counsel David Vickers, was ultimately unsuccessful: the girl's parents proceeded with the surgery just three hours before an application to stay the Order permitting it was to have been heard by the Supreme Court of Canada. In spite of the tragic result of the case, the cooperation between LEAF and several organizations acting on behalf of the mentally handicapped was a good beginning for LEAF.

The older workers and mentally retarded girl in these LEAF cases suffer from a double disadvantage. In several other LEAF cases, the applicants also have double disadvantage problems. In *Beaudette*, *Horvath*, and *Lapointe*, the applicants are disadvantaged not only because they are women, but also because of their marital status. In the *OSSOMM* case, the plaintiffs suffer not only the denial of equality on the basis of sex, but also the deprivation, because they are wives of military personnel, of basic civil liberties. In *Letwyn*, the women's "traditional" female occupation has attracted a real financial penalty.

A final observation can be made. All of these cases are test cases, not service cases, but it will be noted that there may be more than one case in a particular area. For example, there are two cases dealing with the spouse in the house rule of welfare, two involving domestics' rights, and several involving names. Three cases, which settled, involved challenges to compulsory retirement. The cumulation of cases in a particular area is by no means an abandonment of the commitment to test cases. Rather, it reflects LEAF's desire to approach change in the law incrementally, by using victories in one area as building blocks. A case is won, a point or doctrine consolidated, and then the next stage of developing the law is undertaken. Given the complexity of the litigation process on the national scale, this type of step-by-step consolidation cannot be conducted in perfectly linear form. However, it can proceed quite effectively in clusters, and across provincial boundaries.

In this way, too, do we strive to ensure that the LEAF litigation strategy is truly national in scope, reflecting shared expertise and experience across jurisdictional lines.

APPENDIX A

LEAF CASES WHICH HAVE BEEN DECIDED BY COURTS

1. *Suzanne Cowan (a.k.a. Suzanne Bertrand) v. The Commissioner of the Yukon Territory*, 15 May 1984, judgement without reasons (Y.T.S.C. registry #153.85)

2. *Catherine Paul and David Wright v. The Registrar General, Vital Statistics Act and The Minister of Consumer and Commercial Relations*, 9 Dec. 1985, judgement without written reasons (Ont. S.C., Toronto registry #2618/85).

3. *Justine Blainey v. The Ontario Hockey Association and the Ontario Human Rights Commission* (1986), 52 O.R. (2d) 255 (Ont. S.C.) under appeal, leave to intervene on appeal granted to the Canadian Association for the Advancement of Women and Sports, 19 Dec. 1985, unreported (in Chambers, Ont. C.A., Toronto registry #630/85).

4. *Vicki Louise Shewchuk v. Jerry Ricard*, 29 Aug. 1985, unreported (B.C.S.C. Vancouver Registry # CC851229), 18 Dec. 1985 unreported (B.C.C.A. Vancouver Registry # C.A. 004826), appeal heard 20 March, 1986).

5. *R. v. Seaboyer and Gayme*, 22 Nov. 1985, unreported (Ont. S.C. Toronto Registry) leave to intervene granted to LEAF on appeal, 26 Feb. 1985, unreported (In Chambers, Ont. C.A. Toronto registry # 985/85, 986/85) appeal date not yet set).

APPENDIX B

LEAF APPEARANCES BEFORE PARLIAMENTARY AND LEGISLATIVE COMMITTEES

As an aspect of its public education mandate LEAF has made submissions to parliamentary and legislative committees concerning the meaning of equality rights guarantees contained in the *Charter* and the specifics of equality rights issues raised by existing and proposed government laws and practices. LEAF appearances before such committees include:

1. The Parliamentary Sub-Committee on Equality Rights (The Boyer Committee), April 17, 1985 and June 18, 1985.

2. Senate Standing Committee on Legal and Constitutional Affairs, Re Bill C-31, April 23, 1985.

3. The Forget Commission on Unemployment Insurance, February 12, 1986.

4. The Ontario Standing Committee on Administration of Justice (Equality Rights Statute Amendment Act), February 9, 1986.