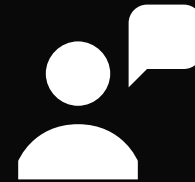


# Women's Legal Education and Action Fund (LEAF)

Impact Case Studies  
Volume 1: LEAF and Consent Law



# LEAF FAEJ



Trigger Warning: This publication contains descriptions of sexual and intimate partner violence.



**LEAF  
FAEJ**

LEAF is a national, charitable, non-profit organization, founded in 1985. LEAF works to advance the substantive equality rights of women and girls in Canada through litigation, law reform and public education using the Canadian Charter of Rights and Freedoms. For more information, visit [our website](#).

This publication was created as part of LEAF's Feminist Strategic Litigation (FSL) Project. The FSL Project examines the use and impact of feminist strategic litigation to help LEAF, feminists, and gender equality advocates more effectively combat systemic discrimination and oppression.

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Women and Gender  
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**Canada**

# Why Measure Impact?

Choosing how we measure impact helps us identify our goals and examine our value judgments about who and what we prioritize

Measuring impact helps us to figure out whether litigation has achieved our goals, and what additional work needs to be done

Measuring impact can help us make strategic decisions moving forward, thinking about whether litigation is appropriate in a particular case and how to increase the effectiveness of our efforts

# Looking for Impact

Below are five key levels of impact for feminist strategic litigation, and potential sources of impact to consider. When looking at these levels of impact, it is important to keep in mind that:

- Impact can be found in the process and the outcome of the case
- Impact can be positive, negative, or neutral
- Impact can change over time
- Litigation is rarely the only form of advocacy in play, so identify other forms of advocacy being used - both by your organization and by other actors - and think about their impact



## Impact On Individuals and Broader Communities

Impact of the remedy

Impact of any policy changes

Impact of the process and being involved

Impact on communities involved or facing similar challenges

Impact on communities not immediately involved



## Legal Impact

Outcome of the case

Precedent set

Feminist or equality arguments adopted

Impact on legal culture



## Impact on Legislation, Regulations, and Policy

Reversal or removal of policy

Enforcement of existing policy

Creation of new policy



## Impact on Public Discourse and Perception

Framing or reframing of issues

Media coverage

Social media engagement

Academic commentary

Other engagement

Backlash



## Impact on Social Movements

New supporters or relationships

Connections with movement actors

Connections with influential actors

Impact on organizational capacity or credibility

# Consent Law Cases Timeline



**R. v. M. (M.L.)**  
LEAF Intervention  
Supreme Court of  
Canada

**R. v. J.A.**  
LEAF Intervention  
Supreme Court of  
Canada

**R. v. Al-Rawi**  
Avalon and  
LEAF Intervention  
Nova Scotia  
Court of Appeal

**1994**

**1999**

**2011**

**2017**

**2018**

**2019**

**R. v. Whitley  
and Mowers**  
LEAF Intervention  
Supreme Court of  
Canada

**R. v. Gagnon**  
LEAF Intervention  
Supreme Court of  
Canada

**R. v. Ewanchuk**  
DAWN Canada and  
LEAF Intervention  
Supreme Court of  
Canada

**R. v. Barton**  
IAAW and  
LEAF Intervention  
Alberta Court  
of Appeal

**R. v. Barton**  
IAAW and  
LEAF Intervention  
Supreme Court of  
Canada

# R. v. M. (M.L.) (1994)

**Facts:** A 16-year-old girl was sexually assaulted by her step-father. She did not verbally object to the sexual contact, or physically resist. A jury convicted the step-father of sexual assault. The Nova Scotia Court of Appeal overturned the conviction, finding that the Crown had not proven that the complainant did not consent to the sexual activity. The Crown appealed to the Supreme Court of Canada.

**Main issue:** Does a lack of resistance to sexual activity mean that a person consented to that activity?

# LEAF Intervention

**Advocacy:** LEAF intervened before the Supreme Court of Canada and argued that lack of resistance was not the same as consent. This interpretation was rooted in harmful rape myths. It denied the personhood of complainants, and provided the least protection from sexual assault to those most vulnerable to such assault.

**Outcome:** The Court held that a lack of resistance to sexual activity does not mean that a person consented to that activity – in other words, silence does not mean yes. As there was enough evidence for the jury to have convicted the step-father, the Supreme Court restored the conviction.



## Impact On Individuals and Broader Communities

No documented impact on individuals or broader communities



## Legal Impact

Although the reasons are short, they had a significant impact on consent law in Canada: silence, a lack of resistance, or ambiguous conduct cannot legally be used to find a person had consented to sexual activity

This case set an important precedent for future legal cases, and would be relied on in cases such as *R. v. Ewanchuk*



## Impact on Legislation, Regulations, and Policy

No documented impact on legislation, regulations, and policy



## Impact on Public Discourse and Perception

No documented impact on public discourse and perception



## Impact on Social Movements

No documented impact on social movements

# R. v. Whitley and Mowers (1994)

**Facts:** Percival Whitley, Timothy Mowers, and a third man were convicted of the gang sexual assault of a woman. They argued that they mistakenly believed that the woman had consented because she did not object or offer physical resistance. The Ontario Court of Appeal dismissed their appeals. They then appealed to the Supreme Court of Canada.

**Main issue:** Is a person guilty of sexual assault even if they honestly, but mistakenly, believed that another person consented because they did not object or physically resist?

# LEAF Intervention

**Advocacy:** LEAF intervened before the Supreme Court of Canada. LEAF argued that the defence of mistaken belief in consent could not be used where the accused had made a mistake about the legal requirements of consent – for example, where the accused believed that the complainant had consented because she had not said no.

**Outcome:** The Supreme Court dismissed the appeal. The Court did not directly address whether the defence of mistaken belief in consent should have been available in this case. Instead, the Court said that, even if the defence should have been put to the jury, their verdict showed that they would have rejected the argument.



## Impact On Individuals and Broader Communities

No documented impact on individuals or broader communities



## Legal Impact

While the outcome of this case was positive, the decision did not provide the analysis LEAF wanted. The Court did not directly address LEAF's arguments, and did not adopt feminist or equality arguments



## Impact on Legislation, Regulations, and Policy

No documented impact on legislation, regulations, and policy



## Impact on Public Discourse and Perception

No documented impact on public discourse and perception



## Impact on Social Movements

No documented impact on social movements

# R. v. Ewanchuk (1999)

**Facts:** The 17-year-old complainant attended a job interview in Mr. Ewanchuk's van, where he made numerous sexual advances, getting more aggressive each time. Frightened that she would be hurt, the complainant attempted to appear relaxed and comfortable. The trial judge acquitted Mr. Ewanchuk. Even though he believed the complainant had not consented, her failure to say she was afraid and her attempts to seem at ease meant that her subjective lack of consent did not matter. The Alberta Court of Appeal upheld the acquittal. The Crown appealed to the Supreme Court of Canada.

**Main issue:** Is there a defence of "implied consent" in sexual assault law?

# DisAbled Women's Network (DAWN) Canada and LEAF Intervention

**Advocacy:** DAWN and LEAF argued that the trial judge's definition of consent undermined women's constitutional rights to equal protection and benefit of the law, meaningful security of the person, and equal access to justice. "Implied consent" created a default that required complainants to protest, rather than placing the responsibility on men to obtain full and express consent.

**Outcome:** The Supreme Court held that there is no defence of implied consent – either the complainant consented, or she did not. To be legally effective, consent needed to be freely given. The Court allowed the Crown's appeal, and convicted Mr. Ewanchuk of sexual assault.



## Impact On Individuals and Broader Communities

Some judges have used this case to counter myths, while others have relied on those same myths or emphasized "no means no" instead of "only yes means yes"

Judges do not always correctly apply consent rules, especially in cases with Indigenous complainants, complainants with disabilities, and/or complainants assaulted by long-term partners



## Legal Impact

This continues to be the leading case on the elements of sexual assault, including that there is no implied consent, and that "only yes means yes"

These consent rules push back against harmful myths and stereotypes, affirm the dignity of individual women, and value women's ability to control their sexual capacities



## Impact on Legislation, Regulations, and Policy

No documented impact on legislation, regulations, and policy



## Impact on Public Discourse and Perception

Debate focused mostly on how the Supreme Court (especially Justice L'Heureux-Dubé) had adopted a radical feminist approach, and much less on the frequency of gender-based violence (GBV), the need for survivor supports, and steps needed to end GBV

Media articles featured victim blaming and harmful myths and stereotypes



## Impact on Social Movements

Backlash against Justice L'Heureux-Dubé's concurring judgment sent a broader message against feminism and judges taking feminist positions

# R. v. J.A. (2011)

**Facts:** The complainant's common law spouse strangled her into unconsciousness. When she awoke, she found herself bound and being anally penetrated with a dildo. The accused argued that the complainant consented "in advance" to the strangulation and the anal penetration that would take place while she was unconscious. The trial judge convicted J.A. of sexual assault. A majority of the Ontario Court of Appeal allowed J.A.'s appeal and set aside the conviction. The Crown appealed to the Supreme Court of Canada.

**Main issue:** Can a person consent in advance to sexual activity that occurs while they are unconscious?

# LEAF Intervention

**Advocacy:** LEAF argued that, by definition, there could be no consent to sexual activity when a woman was unconscious and unable to say "no". Accepting "advance consent" would re-introduce the discredited notion of "implied" consent into Canadian law. LEAF also situated the strangulation and unconscious penetration of the complainant in the context of domestic abuse and systemic violence against women.

**Outcome:** A majority of the Supreme Court held that a person could not give advance consent to acts committed while they were unconscious. As a result, they restored J.A.'s conviction.



## Impact On Individuals and Broader Communities

Some felt that LEAF's submissions erased the sexual agency of women, particularly those who chose to participate in BDSM

Others felt the case supported the sexual integrity of women



## Legal Impact

The case confirmed that consent is ongoing and cannot be given in advance for sexual activity while a person is unconscious

It did not say whether individuals may consent to bodily harm during sexual activity

The Court did not explicitly acknowledge LEAF's arguments or cite feminist publications



## Impact on Legislation, Regulations, and Policy

No documented impact on legislation, regulations, and policy



## Impact on Public Discourse and Perception

LEAF's involvement helped change the narrative from a case about a narrow legal issue related to "kinky sex" to one that highlighted the prevalence of intimate partner violence and the risks of advance consent



## Impact on Social Movements

No documented impact on social movements



# R. v. Barton (2017, 2019)

**Facts:** Cindy Gladue died as a result of a wound inflicted on her by Mr. Barton, who was charged with first degree murder. He argued that Ms. Gladue had consented to “rough sex”, or that he had honestly believed she did. Throughout the trial, Ms. Gladue was dehumanized. Mr. Barton also testified about his previous sexual activity with Ms. Gladue. The jury acquitted Mr. Barton. The Crown appealed to the Alberta Court of Appeal, then Mr. Barton appealed to the Supreme Court of Canada.

**Main issue:** What does consent mean in sexual assault law? The case also considered the devastating use of racist and sexist stereotypes about Indigenous women in criminal trials.

## Institute for the Advancement of Aboriginal Women (IAAW) and LEAF Intervention

**Advocacy:** IAAW and LEAF argued that the trial judge should not have admitted evidence of Ms. Gladue’s sexual history, that the judge failed to properly instruct the jury on consent law, and that the errors raised discriminatory myths about Indigenous women and consent. The judge also did not inform the jury that consent to a given form of sexual touching does not extend to the use of any degree of force. Ms. Gladue's dehumanization is unavoidably connected to the disproportionate violence faced by Indigenous women in Canada.

**Outcome:** The Alberta Court of Appeal ordered a new trial for Mr. Barton on the charge of first degree murder. The Supreme Court of Canada ordered a new trial on manslaughter alone.



### Impact On Individuals and Broader Communities

The decision cannot bring back Cindy Gladue, nor can it make up for the indignity she suffered

While Cindy Gladue's mother expressed gratitude that there would be a new trial, the process is retraumatizing

The decision did not go far enough to address the dehumanization done by the trial or ensure no Indigenous woman ever has to face such treatment again



### Legal Impact

Both Courts accepted and adopted IAAW and LEAF's submissions on consent, systemic discrimination, and the need for jury instructions to counter racism against Indigenous persons

The Court did not consider whether consent includes to the amount of force used

The case represented a shift towards allowing more interventions in criminal cases



### Impact on Legislation, Regulations, and Policy

The Canadian Judicial Council revised its jury instruction on sexual assault in 2018, at least in part in response to this case, although problems remain



### Impact on Public Discourse and Perception

This case benefited from the many rallies and protests held following the 2015 acquittal

It also benefited from the significant work done by Indigenous women and organizations, as well as Indigenous media outlets, to publicize the case



### Impact on Social Movements

The work of Indigenous women, feminist legal interveners, and community advocates was fundamental to the Courts' recognition of this atrocity

These include: Aboriginal Legal Services, The Women's Equality and Liberty Coalition, the National Inquiry into MMIWG, the Assembly of First Nations, and the Women of the Métis Nation

# R. v. Al-Rawi (2018)

**Facts:** Police found the complainant in the back seat of Mr. Al-Rawi's taxi, unconscious, naked from the waist down and with her legs propped up on the front seat. She had no memory of getting into the taxi or of anything that had happened in the taxi. The trial judge found that Mr. Al-Rawi had touched the complainant in a sexual manner by removing her pants and underwear, but found that the Crown had produced "no evidence" of a lack of consent and so acquitted Mr. Al-Rawi. The Crown appealed to the Nova Scotia Court of Appeal.

**Main issue:** Does a person intoxicated to the point of being unconscious have the capacity to consent? Does circumstantial evidence need to be considered by the judge when assessing capacity to consent?

# Avalon Sexual Assault Centre and LEAF Intervention

**Advocacy:** Avalon and LEAF argued that the meaning of consent and its application in the specific context of an intoxicated complainant needed to be informed by s. 15 of the *Charter* and the *Charter* values of equality and autonomy. Capacity to consent must be context- and situation-specific. Where a complainant cannot recall her state of mind at the time of an alleged assault, courts may use circumstantial evidence to establish non-consent.

**Outcome:** The Nova Scotia Court of Appeal allowed the Crown's appeal and ordered a new trial for Mr. Al-Rawi. The Court also stated that circumstantial evidence could be used to prove non-consent and incapacity to consent due to intoxication.



## Impact On Individuals and Broader Communities

The complainant felt "vindicated" after the decision and thought it was important to set a precedent for cases moving forward, although she noted that she wanted to move on



## Legal Impact

The court affirmed that circumstantial evidence can be used to prove non-consent and incapacity to consent

The court provided some clarification on the legal standard for capacity to consent

The court did not address discredited and harmful myths and stereotypes about complainants



## Impact on Legislation, Regulations, and Policy

The outrage following the trial decision led the government of Nova Scotia to hire two special prosecutors to handle sexual assault cases



## Impact on Public Discourse and Perception

This case benefited from the outrage expressed by sexual assault centres, advocates for survivors, and members of the public



## Impact on Social Movements

No documented impact on social movements

# R. v. Gagnon (2018)

**Facts:** Warrant Officer Gagnon, a senior military official, was accused of sexually assaulting his colleague. He argued that he believed the complainant was consenting because she was silent, opened her mouth, and moved her hips slightly. The complainant testified that she was not asked for her consent, and she told the accused she did not want to proceed, but he digitally penetrated her and attempted intercourse.

The court martial panel was allowed to consider whether Warrant Gagnon had honestly but mistakenly believed the complainant had consented. The panel acquitted him. The Crown appealed and the Court Martial Appeal Court of Canada ordered a new trial. Warrant Officer Gagnon appealed.

**Main issue:** What is required to show reasonable steps to obtain consent?

# LEAF Intervention

**Advocacy:** LEAF argued that there needs to be an “air of reality” to all requirements of the "honest but mistaken belief" defence – including that the accused took reasonable steps to make sure the complainant was consenting. To satisfy this requirement, the accused needs to have taken active, positive steps to confirm consent. He cannot rely on the surrounding circumstances, ambiguous conduct or passivity by the complainant, or consent to a prior or different sexual act. In addition, where there is a power imbalance between the accused and the complainant, more substantial steps are required.

**Outcome:** The Court dismissed the appeal, holding that there was no evidence that Warrant Officer Gagnon had taken reasonable steps to determine that the complainant was consenting.



## Impact On Individuals and Broader Communities

No documented impact on individuals and broader communities



## Legal Impact

The case established that an accused must have taken reasonable steps to ensure the complainant was consenting, or he cannot say he honestly but mistakenly believed the complainant was consenting

The Supreme Court of Canada would rely on this decision in its analysis in *R. v. Barton*, discussed earlier



## Impact on Legislation, Regulations, and Policy

No documented impact on individuals and broader communities



## Impact on Public Discourse and Perception

No documented impact on individuals and broader communities



## Impact on Social Movements

No documented impact on social movements

# Moving Forward



## Positive Takeaways

LEAF and other feminist organizations have seen significant success in the courtroom and in law reform in the areas of consent law

Courts have been forced to confront some of their internalized stereotypes and biases, even where they have not wanted to

Positive changes to law have been defended



## Remaining Challenges

Every year, we continue to see case after case where judges simply do not understand what consent means

Statistics on decision-making by police and prosecutors suggest that myths and stereotypes still influence what happens when a survivor reports a sexual assault

While rates of sexual violence remain high, reporting rates remain low

Many argue that changes to law will not solve problems that stem from ignorance of the law and how to apply it, or misuses of discretion



## Key Lessons

Law is an important tool, but is not enough on its own

Important work must be done outside of the courtroom, including to educate the public and those involved in decision-making processes, and to change social attitudes

Otherwise, legal victories are unlikely to translate into improved lived experiences and realities

# Resources Consulted

- Ashifa Kassam, “Canada sex assault acquittal signals ‘open season on incapacitated women’”, (7 March 2017), online: [the Guardian](#)
- Constance Backhouse, “Chilly Climate for Women Judges: Reflections on the Backlash from the Ewanchuk Case” (2003) 15:1 Can J Women & L 167
- Elaine Craig, “Ten Years after Ewanchuk the Art of Seduction is Alive and Well: An Examination of the Mistaken Belief in Consent Defence” (2009) 13:3 Can Cr L Rev 247
- Elaine Craig, *Putting Trials on Trial* (Montreal & Kingston: McGill-Queen's University Press, 2018)
- Elizabeth A Sheehy & Julia Tolmie, “Feminist Interventions: Learning from Canada” (2019) 3 NZWLJ 201
- Eugene Meehan, Marie-France Major & Thomas Slade, “Getting in, Getting Heard, Getting Practical: Intervening in Appellate Courts across Canada” (2016) 46:3 Advoc Q 261
- Janine Benedet, “Sexual Assault Cases at the Alberta Court of Appeal: The Roots of Ewanchuk and the Unfinished Revolution” (2014) 52:1 Alb L Rev 127
- Jean Laroche, “Nova Scotia to hire 2 special prosecutors to handle sexual assault cases”, (7 March 2017), online: CBC
- Jennifer Koshan, “Consciousness and Consent in Sexual Assault Cases”, (17 June 2011), online: [ABlawg.ca](#)
- Joanne Wright, “Consent and Sexual Violence in Canadian Public Discourse: Reflections on Ewanchuk” (2001) 16:2 Can JL & Soc 173
- “Les Femmes Michif Otipemisiwak – Women of the Métis Nation pleased Supreme Court of Canada has ordered a new trial of man accused of murdering Cindy Gladue, but issues remain” (24 May 2019), online: [newswire.ca](#)
- Lise Gotell, “Thinly Construing the Nature of the Act Legally Consented to: The Corrosive Impact of R v Hutchinson on the Law of Consent” (2020) 53:1 UBC L Rev 53
- Lucinda Vandervort, “Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory” (2012) 23:2 Colum J Gender & L 395
- Pamela Palmater, “The justice system still fails to protect Indigenous women and girls”, (6 June 2019), online: [rabble blogs](#)
- Paul M Alexander & Kelly de Luca, “The Mens Rea of Sexual Assault: How Jury Instructions Are Getting It Wrong” (2019) 42:3 Man LJ 39
- Rakhi Ruparelia, “Does No ‘No’ Mean Reasonable Doubt? Assessing the Impact of Ewanchuk on Determinations of Consent” (2006) 25:1, 2 Canadian Women Studies 167
- Renu Mandhane, “Efficiency or Autonomy: Economic and Feminist Legal Theory in the Context of Sexual Assault” (2001) 59:2 U Toronto Fac L Rev 173
- Richard Jochelson & Kirsten Kramar, “J.A. and the Intervention of L.E.A.F.” (2012) 30:1 Windsor Y B Access Just 77
- Taylor SJ, “Reclaiming our justice system and media: Lessons from Cindy Gladue”, (16 April 2015), online: [rabble blogs](#)
- Ummni Khan, “Take My Breath Away: Competing Contexts Between Domestic Violence, Kink and The Criminal Justice System in R. v. J.A.” (2016) 6:6 Oñati Socio-legal Series 1405
- Interviews with Avalon Sexual Assault Centre staff, Elizabeth Sheehy, Emma Cunliffe, Jane Bailey, Kim Stanton, Megan Stephens, and Rachelle Venne