



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

Submission to the Standing Committee on Justice and Human Rights

Reinstatement of the Court Challenges Program

May 30, 2016



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I. Introduction

1. The Women's Legal Education and Action Fund (LEAF) appreciates the invitation to make submissions to the Standing Committee on Justice and Human Rights with respect to the proposed renewal and modernization of the Court Challenges Program of Canada (CCPC).
2. LEAF respectfully submits that:
 - A. First, the equality rights program of the CCPC must be fully re-instated, in order to facilitate compliance with Canada's constitutional and international obligations.
 - B. Second, the equality rights program must be properly resourced. The *Charter* guarantees equality rights, and those rights cannot be realized for those disadvantaged groups intended to be the beneficiaries of that guarantee unless they have access to the resources necessary to enforce and protect them.
 - C. Third, a modernized CCPC would benefit from expanding its criteria to include cases in provincial and territorial jurisdiction, and cases which implicate sections of the *Charter* not covered by the previous program.

II. Background and Expertise of LEAF

3. LEAF is a national, non-profit organization founded in April 1985 to promote women's equality through test litigation, law reform and public education.
4. Over the past three decades, LEAF has intervened in over a hundred cases in Canadian courts, including at least fifty equality rights cases before the Supreme Court of Canada. Our litigation work has been recognized internationally, and scholars have credited LEAF's work at the Supreme Court level with an important role in establishing a constitutional and legal basis for a comprehensive theory of substantive equality in Canadian law.
5. Our organization represents a diversity of women across Canada and has particular expertise concerning equality law and constitutional litigation.

III. Importance of the Court Challenges Program to Achieving Equality Rights in Canada

6. From 1985 to 2006, the Court Challenges Program of Canada made a very significant contribution to LEAF's litigation work. LEAF was one of the most

frequent – perhaps *the* most frequent - recipient of CCPC funding. Louise Arbour, a former Supreme Court Justice, has stated that both LEAF and the Court Challenges Program have “led the way for the evolution of the *Charter* as a solid instrument of social progress in Canada”.¹ Without the assistance of funding from the program, it is fair to say that LEAF would have been significantly less active in the courts, to the detriment of the equality rights of women and girls.

7. LEAF’s position on some of the key issues this Committee should address in considering the renewal and updating of the program are provided in more detail below.

IV. LEAF’s Recommendations for the CCPC

A. Restoring the Equality Rights Program

8. The creation of the equality rights program of the CCPC coincided with the coming into force of s.15, the core equality rights provision of the *Charter* – LEAF and that program grew up together. The program acknowledged the critical importance of the equality guarantees to Canadian society and Canadian values. Public litigation funding recognized that the individuals and groups intended to benefit from equality guarantees were often the least likely to have the resources to participate in litigation. Their adversaries in court were likely to be governments, able to draw on public funds. More powerful social groups would be able to participate in constitutional litigation by drawing on their own resources. The government of the day, concerned to ensure that members of disadvantaged groups would also have a meaningful voice in the evolution of constitutional equality rights, made the responsible decision to provide modest amounts of funding to support their participation in key test cases.
9. It might reasonably be asked whether equality rights have now become so well understood by the courts that there is no more need for test cases. The answer to that question is a resounding “no”. The job that LEAF and other equality-seeking groups set out to do – and the job the equality rights program of the CCPC set out to support – is very far from finished. The Supreme Court’s 1989 decision in *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 – a case in which LEAF intervened and made influential arguments – was an important and early breakthrough, in which the Court rejected the old Aristotelian concept of formal equality and adopted an approach in which equal protection and equal benefit of the law must be assessed by taking into account the real life situations not just of the privileged and powerful, but also of disadvantaged groups. Since *Andrews* was decided, however, the Supreme Court’s approach to equality rights has been far from consistent. Numerous important test cases came forward between 1985 and 2006; in many of these, LEAF interventions

¹ Louise Arbour and Fannie Lafontaine. “Beyond Self-Congratulations: The Charter at 25 in an International Perspective.” 45:2 *Osgoode Hall Law Journal* (2007) 239-275 at 245.

were assisted by funding from the CCPC. These cases did not stop coming forward in 2006. In Canada, where the constitution is quite properly understood to be a “living tree”, there will always be test cases exploring its meaning in the context of current social conditions.

10. Funding for the equality rights program was crucial when the *Charter* and section 15 were new, and continues to be badly needed if individuals and groups traditionally excluded from power and from the courts are to have a realistic prospect of effective involvement in the evolution of our *Charter* rights. Overall, the equality rights program was a great Canadian success story. Its loss has been a significant barrier to accessing the courts for members of the very disadvantaged groups section 15 of the *Charter* was intended to protect.

B. Funding the Program: Litigating Equality Rights Demands Adequate Resources

11. Litigation never comes cheap; indeed, that is the very reason that the CCPC was instituted in the first place. Basic litigation costs have been climbing since its birth in 1985. There is grave concern throughout legal circles generally about the extent to which legal costs operate as a significant barrier to access to justice, and considerable policy energy is being directed throughout Canada to finding solutions. The cancellation of the Court Challenges Program in 2006 exacerbated this problem with respect to constitutional litigation; reinstatement is an obvious, if partial, solution.
12. The costs of test case constitutional litigation can be very high, particularly for test cases which begin at the trial or tribunal level and are sponsored all the way to the Supreme Court of Canada. This is the ideal type of test case litigation, but over our 30-year history, LEAF has had to learn some hard practical lessons about how to carry out its mandate with scarce resources. LEAF quickly learned that its ideal strategy of carefully choosing “ideal” plaintiffs and ideal sets of facts was too expensive and too slow in most cases. Out of necessity, LEAF began to employ an “intervention strategy”, bringing its expertise in substantive feminist analysis of constitutional questions before the courts in cases brought by others at higher court levels. This intervention strategy is considerably less expensive on a per case basis, and allows LEAF to respond more nimbly to emerging issues.
13. At the same time, good and effective intervention does not come cheap. And one of its consequences is to “decontextualize” issues, turning fact situations into abstractions resolvable only by legal analysis. This is a serious problem in equality litigation, since it is essential that courts understand how their decisions will affect real people – from LEAF’s perspective, how they will affect women and girls in the real-world contexts in which they live their lives. To convey these realities to courts, LEAF has increasingly made it a practice over the years to consult widely with front-line organizations with valuable experience and perspectives to share on the differential impact of legal analysis on diverse

groups of women, and to work in coalition with such organizations where possible. This mode of operation significantly enriches LEAF's ability to assist courts in understanding how decisions might affect racialized or disabled women differently than they affect women in positions of relative social and economic privilege – a crucial concept known as “intersectionality”. However, forming coalitions, working within coalitions, consulting broadly on novel and difficult legal issues, all take more human and financial resources than more traditional forms of legal work, but they are essential to ensuring the courts have the full picture in addressing equality issues.

14. The equality rights program of the CCPC deserves great credit for supporting this kind of collaborative litigation practice – an approach which itself reflects values of inclusion as opposed to the often more combative models of conventional legal practice. The program provided direct funding for litigation, but it also provided crucial funding for case development, and follow-up funding – “impact funding” – to address the results of court decisions. Careful studies of how program funds were spent show that the program was cost-effective, well-designed and well-managed. It unquestionably had a positive impact on equality litigation in Canada.

C. Program Expansion

15. Questions have been raised about whether the CCPC program should be expanded beyond a narrow range of *Charter* provisions previously envisioned as worthy of public litigation support, to encompass *Charter* rights more broadly. LEAF fully endorses this kind of expansion. In our experience, a truly substantive approach to equality recognizes the close links of section 15 to other substantive rights and freedoms protected by the *Charter*. Many LEAF interventions have asked courts to consider the impact of equality rights on other *Charter* rights: for example, to take account of the equality rights of women who are victims of sexual assault in giving meaning to fair trial rights in sexual assault cases. The old program often took these links into account; much could be gained by acknowledging them more formally by expanding the program's criteria.
16. Questions have also emerged on whether the program should be expanded to include issues raised by provincial and territorial law. LEAF would support this expansion too. In our experience, equality issues do not always divide into neat packages that track the division of powers under Canada's *Constitution Act*. If the program does remain exclusively federal, it will be important to take a broad view of what types of issues are of national importance, and have impact on federal law even if they do not directly involve federal law.
17. In connection with the question of expanded criteria, however, we must not lose sight of the fact that if the program is expanded beyond equality rights or federal issues, there will be more individuals and groups seeking to draw on the program. This will necessarily require more funding. The answer is not to place more stringent caps on individual applications. The costs of litigation have

increased substantially since 1985, and cases must be adequately funded if the money allocated to the program is going to be used effectively. This must include sufficient funding to enable adequate consultation and coalition building, in order to achieve both the economies of scale that flow from group litigation, and the inclusion of diverse perspectives on particular cases.

V. The Continued Urgency of this Work

18. In discussing legal concepts of equality rights and constitutional jurisprudence, LEAF is acutely aware of the danger of making legal concepts sound like abstractions. Let us conclude by emphasizing that LEAF's work has been anything but abstract. LEAF's cases have involved women's equality rights relating to issues of sex discrimination, sexual violence, pay inequity, spousal and child support, reproductive health, violence against Indigenous women, religious freedom, and access to justice, among others. Much of this work was supported by the CCPC. These cases name – and place in constitutional context – the challenging and often brutal realities of the lives of Canadian women and girls. These realities persist.

VI. Conclusion

19. In LEAF's view, an updated and properly resourced CCPC will serve Canada well in the days ahead, as our dynamic country and its communities grapple with the equality issues that will inevitably flow from changes in demography, language patterns, family status, immigration, evolving gender relations at work and at home, and much else. We respectfully submit that Canada needs a restored and modernized CCPC to continue the successful development and flourishing of our citizens' equality rights. The program began as a critical and innovative tool for access to justice in Canada. It can and should be again.

All of which is respectfully submitted,

The Women's Legal Education and Action Fund

Appendix A

Selected LEAF Cases funded by the Court Challenges Program (1985-2006)

1. **Canadian Newspaper Co v Canada (Attorney General)**, [1988] 2 SCR 122: Does the mandatory ban in the Criminal Code on the publication of the identity of a complainant in a sexual assault case violate freedom of the press as protected in the *Charter*?

A woman sexually assaulted by her husband invoked her right to have a publication ban on the use of her name in his criminal proceedings. Canadian Newspapers Co challenged this right, arguing that it violated freedom of expression under the *Charter*. LEAF intervened to argue that the provision was necessary to protect the equality rights of sexual assault victims. The Supreme Court upheld the right to the publication ban.

2. **R v Seaboyer; R v Gayme**, [1991] 2 SCR 577: Do the rape shield provisions contained in the Criminal Code violate the right to a fair trial as protected in the *Charter*?

Two men charged with sexual assault challenged the *Criminal Code* provisions (the so-called the 'rape shield' provisions) restricting cross-examination of sexual assault survivors about their past sexual history and sexual reputation. LEAF intervened to argue that sexual assault trials should focus on the conduct of the accused, rather than the behaviour of the women and children who had been sexually assaulted. The Supreme Court upheld the "shield" with respect to sexual reputation, but struck it down as it applied to evidence of past sexual history. Our work on this case was then repurposed toward law reform to address this critical issue.

3. **R v Butler**, [1992] 1 SCR 190: Do pornography laws violate freedom of expression?

Butler, a Manitoba video store owner, was convicted under the *Criminal Code* obscenity law for distributing pornographic videos. He claimed his constitutional right to freedom of expression was violated. LEAF intervened to argue that pornography harms women and children and furthers sex inequality. The Supreme Court agreed and upheld the obscenity laws as a justifiable restriction on freedom of expression.

4. **Thibaudeau v Canada**, [1995] 2 SCR 627: Does the requirement to pay income tax on support payments violate the equality rights of low income single mothers?

Suzanne Thibaudeau, a divorced mother of two, filed a *Charter* challenge against regulations in the *Income Tax Act* requiring her to pay income tax on her child support payments, while permitting her ex-spouse to deduct the payments from his

taxable income. LEAF intervened in support of Thibaudeau's position. The Supreme Court ruled against her.

5. **Goertz v Gordon**, [1996] 2 SCR 27: Mobility rights of custodial mothers

A court order allowing Janet Gordon, a Saskatchewan mother, to relocate with her daughter to Australia to take up a new job was challenged by her ex-husband on the ground that it would limit his access to the child. LEAF intervened at the Supreme Court of Canada to argue that the equality rights of custodial mothers supported their right to relocate with their children, even if this restricted the fathers' right to convenient access. The Supreme Court held that the custodial mother should be allowed to relocate.

6. **R v RDS**, [1997] 3 SCR 484: Did judicial recognition of racial bias in the administration of justice demonstrate bias sufficient to over-turn a verdict acquitting the accused?

This case involved comments by Nova Scotia's first black judge when acquitting a racialized young person of assaulting a white police officer, in which she acknowledged racism in Halifax, including racism by police officers. LEAF intervened at the Supreme Court of Canada with the National Organization of Immigrant Visible Minority Women of Canada to uphold the importance of acknowledging inequality in the justice system and permit judges to take it into account in carrying out their functions. The Supreme Court upheld the original verdict and found no bias or appearance of bias in her remarks.

7. **R v Ewanchuk**, [1999] 1 SCR 330: Is there such a thing as "implied consent" in Canadian sexual assault law?

A 17-year-old woman was subjected to unwanted sexual touching by a 49-year-old man during a job interview. The trial judge concluded that she had given "implied consent" to the would-be employer. LEAF intervened to argue that there is no such thing as "implied consent", that myths and stereotypes about sexual assault complainants are inappropriate in a court of law, and that only affirmative, ongoing consent should be recognized as consent. The Supreme Court declared that no defence of implied consent to sexual assault exists in Canadian law.

8. **R v Mills**, [1999] 3 SCR 668: What access should accused persons have to the personal records of victims in sexual assault trials?

This case challenged the limitations imposed under the *Criminal Code* on an accused person's access to personal records in sexual offense proceedings, enacted by parliament in the wake of the Supreme Court's decision four years earlier in *R v O'Connor*, [1995] 4 SCR 411. LEAF intervened to argue that the rights of the accused must be balanced against the equality rights of victims, and the new law should be upheld. The Court agreed.

9. ***Boston v Boston***, [2001] 2 SCR 413: Spousal support after retirement

This case involved an appropriate adjustment of spousal support payments after the husband had retired and derived much of his income from his pension. The core issue was whether his pension, which had already been capitalized and “split” in the original divorce proceeding, should be excluded from the calculation. LEAF, concerned about the availability of spousal support for elderly women, particularly those who, like Shirley Boston, had worked within the home during marriage and had no pension of their own. LEAF argued that the Court should avoid imposing a strict rule against including pension in calculation of income, and should instead analyse spousal support on a case-by-case basis. The Supreme Court did not accept this argument; the majority excluded consideration of that portion of Mr. Boston’s pension income that was considered to have been “equalized”.

10. ***R v Darrach***, [2002] 2 SCR 443: Constitutional challenge to the new “rape shield” law put into place by parliament after *Seaboyer*.

In a constitutional challenge to the reconstituted “rape shield” law, LEAF (in coalition with the Canadian Association of Sexual Assault Centres, the DisAbled Women’s Network, and the National Action Committee on the Status of Women) intervened to argue that using women’s sexual past as evidence in a sexual assault violated the equality rights of victims on the basis of sex. The Supreme Court of Canada unanimously upheld the new provisions.

11. ***R v Shearing***, [2002] 3 SCR 33: Access to victim’s personal records in sexual assault cases

This case raised once again the issue of what access accused persons should have to the personal records of victims in cases involving sexual offences. The case involved multiple charges of sexual assault concerning women and children involved in a religious cult of which the accused was leader. He was convicted of assault on seven teenage girls. The record at issue was a diary of one of the girls; defence counsel had sought to cross-examine on why the sexual abuse was not recorded in her diary. LEAF argued that the diary was properly ruled off limits by the trial judge because any such cross-examination would inevitably have invoked sexist rape myths which have no place in a truth seeking process. Unfortunately, the Supreme Court of Canada did not agree.

12. ***Miller v Canada***, [2002] FCJ No. 1375: Discrimination relating to access to maternity benefits under the *UI Act*.

At issue in the case was whether provisions of the federal *Unemployment Insurance Act* which result in the reduction or loss of regular unemployment insurance benefits when women who have received maternity or parental benefits (special benefits) lose their jobs violate s.15 of the *Charter*. The Federal Court of Appeal upheld the provisions on the ground that they were a special ameliorative program, and

rejected the argument that the provisions perpetuated and entrenched stereotypes regarding women, work and family. The Supreme Court of Canada denied leave to appeal.

13. **Canada (AG) v Lesiuk**, 2003 FCA 3: Discrimination under the *EI Act* for part-time female employees who do not meet the minimum hour requirement.

Like *Miller*, LEAF's intervention in this case attacked gender-based stereotypes built into the eligibility criteria for benefits available under the federal *Employment Insurance Act* that effectively prevent part-time workers, a predominantly female group, from receiving employment insurance benefits. The Federal Court of Appeal rejected this position, and leave to appeal to the Supreme Court of Canada was again denied.

14. **Blackwater v Plint**, [2005] 3 SCR 3, 2005 SCC : Compensation for survivors of residential schools

This case involved the principles under which compensation would be determined for Indigenous residential school survivors subjected to multiple forms of abuse. LEAF intervened in coalition with the Native Women's Association of Canada (NWAC), and the DisAbled Women's Network (DAWN) Canada. LEAF argued that survivors should be compensated both for sexual assault and for physical and mental abuse and loss of Indigenous language and culture. The Supreme Court of Canada agreed in part.

15. **DBS v SRG**, [2006] SCC 37: Retroactive child support

DBS v. SRG concerns the issue of child support and the entitlement of recipient spouses, predominantly mothers, to increased child support following an increase in the income of payer spouses, who are predominantly fathers. The jurisprudence on retroactive child support had developed inconsistently across the country and had the potential to disadvantage women and children, leaving women at an increased risk of poverty following relationship breakdowns. LEAF was denied leave to intervene in this case, but had nevertheless benefited from Court Challenges funding to develop a factum which was subsequently published in the *Canadian Journal of Women and the Law*.

Appendix B

LEAF Supreme Court of Canada Cases, 1985-2016

1. *Canadian Newspaper Co v Canada (Attorney General)*, [1988] 2 SCR 122
2. *Andrews v The Law Society of British Columbia*, [1989] 1 SCR 143
3. *Borowski v The Attorney General for Canada*, [1989] 1 SCR 342
4. *Brooks v Canada Safeway Limited*, [1989] 1 SCR 1219
5. *Janzen and Govereau v Platy Enterprises Ltd.*, [1989] 1 SCR 1252
6. *Tremblay v Daigle*, [1989] 2 SCR 530
7. *R v Keegstra*, [1990] 3 SCR 697
8. *R v Andrews and Smith*, [1990] 3 SCR 870
9. *Taylor v Canadian Human Rights Commission and the Attorney General of Canada*, [1990] 3 SCR 892

10. *R v Sullivan*, [1991] 1 SCR 489
11. *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577
12. *R v Butler*, [1992] 1 SCR 190
13. *Canadian Council of Churches v Her Majesty the Queen and the Minister of Employment and Immigration*, [1992] 1 SCR 236

14. *Norberg v Wynrib*, [1992] 2 SCR 226
15. *Schachter v The Queen*, [1992] 2 SCR 679
16. *M (K) v M (H)*, [1992] 3 SCR 6
17. *Moge v. Moge*, [1992] 3 SCR 813
18. *Conway v Her Majesty the Queen (aka Weatherall v Canada)*, [1993] 2 SCR 872

19. *R v M (ML)*, [1994] 2 SCR 3
20. *R v Whitley* [1994] 3 SCR 830

21. *Thibaudeau v Canada*, [1995] 2 SCR 627
22. *The Queen v O'Connor*, [1995] 4 SCR 411
23. *A (LL) v B(A)*, [1995] 4 SCR 536
24. *Gordon v Goertz*, [1996] 2 SCR 27

25. *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624
26. *Winnipeg Child and Family Services (Northwest Area) v G (DF)*, [1997] 3 SCR 925
27. *R v RDS*, [1997] 3 SCR 484
28. *Vriend v Alberta*, [1998] 1 SCR 493
29. *R v Ewanchuk*, [1999] 1 SCR 330
30. *M v H*, [1999] 2 SCR 3
31. *British Columbia Government and Service and Employee's Union (BCGSEU) v British Columbia (Public Service Employee Relations Commission) [aka Meiorin Grievance]*, [1999] 3 SCR 3
32. *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46
33. *R v Mills*, [1999] 3 SCR 668
34. *Blencoe v the British Columbia (Human Rights Commission)*, [2000] 2 SCR 307
35. *R v Darrach*, [2000] 2 SCR 443
36. *Little Sisters Book & Art Emporium v Canada (Minister of Justice)*, [2000] 2 SCR 1120
37. *Boston v Boston*, [2001] 2 SCR 413
38. *R v Shearing*, [2002] 3 SCR 33
39. *Newfoundland (Treasury Board) v NAPE*, [2004] 3 SCR 381
40. *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, [2004] 3 SCR 657
41. *Blackwater v Plint*, [2005] 3 SCR 3
42. *DBS v SRG*, [2006] 2 SCR 231
43. *Dickie v Dickie*, [2007] 1 SCR 346
44. *Honda Canada Inc v Keays*, [2008] 2 SCR 362
45. *R v Caron*, [2011] 1 SCR 78

46. *Withler v Canada (Attorney General)*, [2011] 1 SCR 396
47. *R v JA*, [2011] 2 SCR 440
48. *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, [2011] 2 SCR 670
49. *LMP v LS*, [2011] 3 SCR 775
50. *R v DAI*, [2012] 1 SCR 149
51. *R v NS*, [2012] 3 SCR 726
52. *R v Ryan*, [2013] 1 SCR 14
53. *Quebec (Attorney General) v A*, [2013] 1 SCR 61
54. *Saskatchewan (Human Rights Commission) v Whatcott*, [2013] 1 SCR 467
55. *R v Kokopenace*, [2015] 2 SCR 398
56. *R v Borowiec*, 2016 SCC 11