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WOMEN'S LEGAL
EDUCATION & ACTION FUND
FONDS D'ACTION ET D'ÉDUCATION
JURIDIQUE POUR LES FEMMES

**FEMINIST EQUALITY RIGHTS LITIGATION:
EVOLUTION OF THE CANADIAN LEGAL
LANDSCAPE**

Executive Summary

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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*.

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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Executive Summary

In 2020, the Women's Legal Education and Action Fund (LEAF) is marking three and a half decades of experience litigating equality rights for women and girls under s.15 of the *Canadian Charter of Rights and Freedoms*. A constitution is built to last indefinitely. It is an enduring, evolving document that sets the bedrock values and rights of a legal system. In that context, at just thirty-five years, s. 15 of the *Charter* is still in its infancy. The project of building a secure legal foundation for equality rights is by no means complete. At the same time, however, over those same thirty-five years several generations of feminists have now developed practical experience litigating equality claims under s. 15. They have won some meaningful advances that make a difference in the real lives of women and girls. Recognizing that the legal fight for equality remains a work in progress, this paper examines how the landscape of Canadian equality rights litigation has evolved since 1985. It looks both at how the legal meaning of equality has evolved and how feminists have developed distinct ways of working to advance equality. This paper examines:

- (i) strengths and successes of feminist litigation;
- (ii) areas in which feminist litigation has not gained traction, has faced resistance or has encountered losses;
- (iii) areas which have yet to be explored or are under-developed and so present opportunities for future action;
- (iv) strategies that various legal and political actors have adopted to push back at feminist litigation;
- (v) changes in legal procedures that affect the availability or effectiveness of different litigation options; and
- (vi) the perpetual concern about resources.

The paper aims to provide a base of information and analysis from which LEAF and equality advocates can think critically and strategically about how to move forward.

Intersectional Feminism

Feminist organizing, advocating and litigating for equality look very different in 2020 than they did in 1985. This evolution has significant implications for LEAF's accountability and credibility as an actor within the broader environment of feminist movements in Canada. Feminist movements in 2020 are increasingly intersectional and decentralized, and ever more so among organizations of younger feminists. Women who are Indigenous, Black, racialized, gender diverse, young and who have disabilities are at the forefront of movements that have the most sophisticated and inclusive analyses of structural and systemic oppression. We have developed decentralized, non-hierarchical structures along with sophisticated practices of allyship, mutual support, collaboration and coalition work. We are networked in ways that enable us to learn from each other quickly and to translate ideas to action quickly. And we have a global vision which understands that systems and structures of power, privilege and inequality operate without regard to national borders. This 21st century understanding of feminism and feminist action is the broader context within which LEAF now operates and within which its strategic vision will unfold and be tested.

Ultimately, intersectional feminism involves a robust, three-dimensional understanding of how power operates, combined with a practice of litigation that shares power and centres the women who are directly affected by systemic discrimination. To do this well requires a personal and organizational commitment to self-reflection and continuous, iterative learning.

LEAF's Theory of Change

LEAF's understanding of discrimination is that it is systemic and that discrimination is anchored in society through laws that reflect those discriminatory beliefs, values, practices and structures. Building from this foundation, LEAF's theory of change assumes that:

- Law can be an effective tool for egalitarian social change.
- Feminist litigators have the capacity to develop fundamental principles of legal analysis that effectively communicate and are responsive to what an experience of

equality looks like from the perspective of women who experience discrimination. These legal principles can be recognized and adopted by judges.

- Adopting feminist legal principles of equality enables the law to change women's lives for the better by providing concrete remedies that redress and/or eliminate the burden of discrimination.
- Broader social change happens because the legal principles of equality that are recognized by the courts will give women the leverage to demand changes to other laws and practices that are discriminatory.
- As feminist legal principles are recognized, courts will incrementally adopt further principles that deepen the protection of equality rights for all women.

This theory of change makes sense to explain the very specialized role that LEAF plays within a broader community of feminist activism. What has not been articulated fully either in LEAF's history or in its present is the relationship between LEAF and the broader feminist movements for equality. How does LEAF's work interact with other efforts towards securing equality for women? How does LEAF maintain credibility with broader feminist movements for equality?

The paper proposes using this theory of change, along with the four lenses of (i) accountability; (ii) developments in the substantive law; (iii) litigation practice; and (iv) sustainability to help assess LEAF's experience to date and its potential future strategies.

With this theory of change in mind, and these potential lenses for assessment, this paper now turns to looking at (1) the substantive state of the law; (2) headwinds to LEAF's progress; (3) alternate venues for legal action; and (4) resources.

Learning from experience

It is undeniable that LEAF has had a profound impact on the substance of equality rights law under the *Charter* from *Andrews* in 1989 to the present. Many core principles argued by LEAF have been adopted in the law. But those principles are applied inconsistently and the law is constantly changing. Articulating legal principles that reflect feminist understandings may be less of a challenge than persuading judges to see and believe women's lived reality that is different from their own experience of the world. Feminist

litigation strategy, then, must address not just the substance of the law, but must simultaneously develop refined practices that can specifically address the resistance of decision-makers collectively and individually.

Looking to the Future

At the same time, the follow five avenues for action present important opportunities to build more complete and robust feminist legal principles of equality:

- (i) **Remember our history:** Feminist litigators can draw on the unique and extensive participation by equality seekers in shaping the language of both s. 15 and s. 28 of the *Charter* and use this history to develop a stronger analysis of s. 15's purpose and scope.
- (ii) **Return to the text of s. 15:** Litigators and judges alike have drifted from the text of s. 15 so that they are applying a self-contained legal test without reference to the scope of the four equality rights that are guaranteed in the *Charter*. Building a richer analysis of the meaning of the four equality rights will help uphold a more substantive meaning for substantive equality.
- (iii) **Reinvigorate stock phrases:** Many phrases, words and sentences in the s. 15 jurisprudence are repeated in rote fashion, case after case, to the extent that they have lost their meaning. It is necessary to bring a sharper, more precise meaning to those core concepts (like "systemic discrimination").
- (iv) **Remind the court of what it knows.** Courts have recognized core substantive equality principles and understandings of the systemic operation of power to oppress in parts of the *Charter* other than s. 15, but have not drawn connections back to s. 15. Feminist litigators need to make those connections explicit.
- (v) **Recognize and activate elements of equality law that remain under-developed.** For example, when the *Charter* was adopted, it was expected that s. 28 would be of paramount importance in litigation, but it has been largely ignored. But s. 28 can do a lot of work to advance substantive equality and should be actively engaged.

Strategic considerations in Litigation Practice

In the practice of feminist litigation, LEAF must strategize about how to address (i) headwinds presented by changes in legal process; (ii) counter-movements that developed in

opposition to LEAF's litigation; and (iii) selecting the forum for litigation that best corresponds to LEAF's substantive objectives in a given case.

While LEAF's litigation practice has emphasized appellate interventions, especially at the Supreme Court of Canada, courts are increasingly scrutinizing leave to intervene applications to ensure interveners can truly make original and productive contributions. The scope of written and oral submissions permitted to interveners is shrinking. While this is still a very important mode of litigation, selecting which courts are productive for intervention, and how counsel can best make an impact, require greater strategic nuance.

Counter-movements that are skeptical or even hostile to equality rights claims have evolved in response to LEAF's success. This has included political undermining of courts through cries of "judicial activism"; creating organizations specifically to intervene in *Charter* cases from a libertarian perspective; and publishing academic works that offer an analysis that counters the existing equality jurisprudence. These organizations are well funded and are increasingly vocal. While LEAF is developing its feminist legal analysis and strategy, it is important to take seriously and understand the arguments that are being presented by other actors in *Charter* litigation, understand why they find traction, and be prepared to respond to them.

LEAF should also evaluate the benefits that may be provided by engaging in litigation in legal venues other than appellate courts. A strategic approach to this will require a precise understanding of (i) the specific objective that LEAF is pursuing through a particular piece of litigation; and (ii) what forum will provide the best conditions for advancing that objective.

Appellate intervention is a good fit where the objective is to make precise submissions about clearly identifiable principles of law, but it does not allow LEAF as an intervener to shape the evidentiary record or the legal questions before the Court. Meanwhile, where there is a significant impediment in judges understanding what systemic discrimination and substantive equality mean, participation in public inquiries, including public inquiries that may be called by human rights commissions, and coroners' inquests present opportunities

that allow for judges to examine issues specifically from a systemic perspective with a rich body of factual evidence. Hosting conferences to deepen analysis around targeted equality law questions, or sponsoring feminist judgment writing projects to help create the vision of equality in practice, are also helpful.

Conclusion

Building secure protection for women's equality rights under the *Charter* requires stability, continuity, a strong institutional memory and a strategic plan for litigation and for LEAF as an institution and as a body that has the ability, and perhaps responsibility, to mentor and build capacity in future generations of feminist litigators.