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FONDS D'ACTION ET D'ÉDUCATION
JURIDIQUE POUR LES FEMMES

INTERSECTIONALITY IN LAW AND LEGAL CONTEXTS

Executive Summary

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Published by

Women's Legal Education and Action Fund (LEAF)

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Toronto, Ontario, Canada M5G 1C7

www.leaf.ca

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.

Special thanks to:

- The FSL Project Steering Committee: Rosel Kim, Elizabeth Shilton, Megan Stephens, Cee Strauss, Adriel Weaver
- The FSL Project Advisory Committee: Estella Muyinda, Jackie Stevens, Karen Segal, Karine-Myrgianie Jean-François, Linda Silver Dranoff, Nathalie Léger, Rachelle Venne, Raji Mangat, Samantha Michaels, Tamar Witelson

The FSL Project is funded by Women and Gender Equality Canada.



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Canada

Executive Summary

Intersectionality describes the unique forms of discrimination, oppression and marginalization that can result from the interplay of two or more identity-based grounds of discrimination. The purpose of this informational brief is: 1) to highlight key ideas from existing research on intersectionality; and 2) to consider the application of intersectionality in law and in legal contexts.

The brief begins in Part 2 by recounting the origins of intersectionality, defining intersectionality with reference to two central ideas, and pointing to some critiques of intersectionality. Building upon a long history of writing by Black and racialized women about multiple oppressions, the term “intersectionality” first attracted widespread attention in the early 1990s through the work of African American law professor Kimberlé Williams Crenshaw. Crenshaw used the idea of intersectionality to explain the unique, composite kinds of discrimination experienced by Black women at the intersection of race and sex. She argued that intersectional discrimination is not captured by American antidiscrimination law, which treats identity categories like “sex” and “race” as mutually exclusive grounds of discrimination. In the thirty years since Crenshaw coined the term, intersectionality has become a significant tenet of contemporary feminist movements, and a hallmark of social justice and anti-oppression movements, advocacy and scholarship of all kinds.

Broadly speaking, intersectionality is based on two key ideas. First, viewing a problem through an intersectional lens reveals the nature of discrimination that flows from the intersection of multiple identities. When oppressions based on two or more identity categories intersect, a new form of oppression is created that is different from the constituent forms of oppression added together. Intersectionality emphasizes that there is no singular kind of marginalization experienced by everyone who shares an intersectional identity, though there may be patterns or similarities between the experiences of individuals located at a particular intersection, in a given context. The second idea connects individual and group experiences of disadvantage based on intersecting identities to broader systems of power

and privilege. In doing so, intersectionality recasts identity categories not as objective descriptors of an individual's innate characteristics, but as socially constructed categories that operate as vectors for privilege and vulnerability within our social, cultural, political, economic and legal power structures. Ultimately, intersectionality has as its goal the transformation of systems of intersectional disadvantage.

As intersectionality has gained traction across contexts, there has been a rise in the mistaken idea that intersectionality requires only the expansion of identity categories to include an infinite number of differently situated subjects. In light of this trend, intersectional scholars and activists have called for a refocusing of intersectional arguments away from groups and identities and toward structural intersectionality, centring the systems of power and exclusion from which individual experiences of identity-based oppression and discrimination flow.

Finally, the rise of intersectionality has sparked a variety of critiques. For example, one stream of critique argues that intersectionality prioritizes the intersection of race and sex at the expense of other identity-based vectors of privilege and disadvantage like sexuality, gender identity, language and class. Others have pointed out that intersectionality fails to capture the complexities of cross-border dynamics and does not engage with the ways that colonialism undergirds intersecting systems of power and privilege. Another group of critiques centres on intersectionality's reliance on identity categories, arguing, for example, that by focusing on the complexity of relations between identity categories, intersectionality does not fully capture the diversity of experience within individual identity categories. Finally, some argue that through its proliferation, intersectionality has become depoliticized, and in practice amounts to little more than a nod to inclusivity, broadly conceived.

Part 3 of the brief turns from the theory of intersectionality to the practice, looking at how lawyers and advocates can bring the insights of intersectionality to their engagements with variously located clients. Intersectionality highlights the importance of understanding power differentials between lawyers and clients not only in terms of unequal access to legal

language and knowledge, but also in respect of the complex identities and resulting privileges and vulnerabilities of both a lawyer and their client. Positionality and allyship are particularly important to operationalizing intersectionality in the lawyer-client relationship.

Positionality refers to the ways that our individual identities – including factors such as race, gender, sexuality, class, and ability status – situate us as having relatively more or less power within our social, cultural, economic, political and legal contexts. Positionality is concerned with how our identities, and the privileges and dis-privileges that flow from them, influence our perspectives and ways of being in the world. In representing clients who face intersecting forms of oppression, legal advocates must be cognizant of how our positionality impacts our understanding of the client's issues and shapes the decisions we make in representing a client including, for example, the kind of legal argument that we craft on a client's behalf. More broadly, legal advocates must be aware of the many ways that the legal system, of which we are a part, operates as an instrument of colonization and race-based oppression and has differential impacts for differently positioned people.

The term ally refers to a person in a position of relatively more privilege who stands in solidarity with individuals and/or communities in positions of relatively less privilege in a given context. Allyship is an active, on-going process of listening, learning, unlearning, accepting criticism, and continuing to show up and offer various forms of support to relatively less privileged people and communities. The concept of allyship has been subject to critique on the basis that, in the name of allyship, members of relatively more privileged groups sometimes situate themselves as “rescuers” of less privileged communities, centering their notions of justice and valorizing their involvement in the liberation of others. Instead, allyship is based on interconnectedness and the understanding that we each have a stake in the equality of all. Practicing allyship in legal advocacy, where a lawyer occupies a relatively privileged position vis-a-vis their client, includes centring the voice, experience and choices of the client, and self-educating on the social and historical context within which the client's legal issues arise.

Part 4 looks to the relationship between intersectionality and antidiscrimination law, recounting intersectionality's critique of antidiscrimination law, mapping the ways that intersectionality is beginning to infiltrate Canadian antidiscrimination law, and identifying some avenues for improving the reception of intersectionality in antidiscrimination law. As noted above, the term "intersectionality" originated in the context of Crenshaw's critique of antidiscrimination law in the United States. That critique is equally relevant here in Canada. Our antidiscrimination laws – codified in the *Charter of Rights and Freedoms (Charter)*, the federal *Canadian Human Rights Act* and the 13 provincial and territorial human rights acts and codes – all establish mechanisms for redressing discrimination based on a list of prohibited grounds of discrimination, including (but not limited to): race, national or ethnic origin, colour, religion, sex, age and disability. To date, cases based on an alleged infringement of these antidiscrimination provisions have overwhelmingly been analyzed on the basis of a single prohibited ground of discrimination. Crenshaw calls this a "single-axis" model of assessing discrimination, because it treats each ground of discrimination as exclusive from the rest.

The shortcomings of single-axis frameworks are at the core of intersectionality's critique of antidiscrimination law. First, single-axis frameworks artificially simplify the complexities of people's lives, making the stories of those with intersectional social identities, like older Black women, or Indigenous lesbians, impossible to tell. Second, single-axis approaches essentialize the experiences of everyone who falls into a given category, concealing diversity within groups. Third, single-axis frameworks tend to understand identity categories in a limited way, ignoring the complex role of power in creating identity categories and in structuring relationships of inequality. The result is that single-axis models distort the true nature of intersectional antidiscrimination claims. As a result, courts may simply fail to see intersectional discrimination and will be unlikely to offer a meaningful remedy. Additionally, single-axis frameworks for addressing discrimination have limited ability to target the systemic dimensions of marginalization and oppression from which individual experiences of discrimination flow.

Notwithstanding the persistence of single-axis analyses, there are signs that intersectionality is beginning to infiltrate antidiscrimination law in Canada. Intersectional arguments are being made in Canadian courtrooms, with lawyers and advocacy organizations working to advance their clients' stories in ways that are true to the complexities of their lives and circumstances. Nevertheless, intersectionality has not made significant inroads in antidiscrimination law, in part because judges and adjudicators have not consistently engaged intersectional arguments or analyses. For example, the Supreme Court of Canada has never adjudicated a discrimination claim based on multiple grounds, despite acknowledging the possibility of bringing intersectional claims pursuant to the equality guarantee in the *Charter* and receiving submissions by various parties and intervenors in numerous equality cases on the importance of an intersectional approach. When an argument based on multiple grounds is advanced, judges and adjudicators often choose to evaluate the case with reference to one ground alone, saying nothing about the other(s), or take an "additive" approach, analyzing evidence about each ground of discrimination separately and then tallying them up.

However, there are indications that some courts and tribunals adjudicating antidiscrimination cases are willing and able to incorporate more robust understandings of intersectionality into their decisions. For example, in *Turner v Canada (Attorney General)*, the Federal Court of Appeal concluded that the Canadian Human Rights Tribunal had erred in failing to consider the case on appeal as one of intersectional discrimination involving both race and perceived disability. In doing so, the *Turner* court confirmed that in cases of compound discrimination, intersectionality is necessary to make visible instances of discrimination on multiple grounds that might not be apparent if each ground is analyzed separately. *Turner* and other, similar cases demonstrate that the proliferation of intersectionality is having some impact in sensitizing judges and adjudicators to the inadequacies of single-axis analyses and the importance of intersectionality in antidiscrimination contexts.

While it is clear that intersectionality is beginning to infiltrate Canadian antidiscrimination law, its introduction has raised some specific tensions about how to better operationalize intersectionality within the boundaries of established statutory regimes and legal doctrines. The project of fully incorporating intersectionality into antidiscrimination law will require fundamental recalibrations of every aspect of the latter. In the meantime, however, there exist important opportunities for more deeply incorporating intersectionality into existing antidiscrimination doctrine and practice. This brief identifies three such opportunities.

First, engagements with intersectionality in legal arguments and decisions must go beyond recounting a claimant's story with reference to multiple identities to include structural intersectionality as an analytical framework. This shift requires express connection of individual experiences of discrimination with the systems of power and exclusion that breed discrimination. Second, the shift towards structural intersectionality will necessitate a re-thinking of grounds of discrimination. Conventionally, grounds are treated in a formalistic, often cursory manner, requiring little more than asking whether a claimant is a member of the group identified by the ground upon which the discrimination claim is based. Structural intersectionality requires in-depth engagement with grounds as markers of systems of power. Operationalizing this insight could involve, for example, moving toward an expansive view of grounds focused on how our identities, and the power or vulnerability that flow from those identities, impact our relationships with others in a given context.

Third, while grounds are often identified as the key challenge to better incorporating intersectionality in antidiscrimination law, they are not the only stumbling block to achieving this goal. For example, recognizing the wrongs of intersectional discrimination requires a meaningful conception of substantive, rather than formal, equality. Because formalism requires comparison between two individuals who are alike in every way except for the protected characteristic (race, class, etc.), formal equality generally results in single-axis analyses. Additionally, the incorporation of intersectionality into antidiscrimination law requires careful attention to the question of evidence. Since intersectional discrimination

flows from social structures and norms, evidence must focus on demonstrating widespread patterns of marginalization and vulnerability, not individual experiences of discrimination. Courts and adjudicators must also be realistic about the quantitative evidence that can reasonably be expected of a claimant, since, for example, statistical evidence of systemic disadvantage may not always be available or accessible to a claimant in an antidiscrimination case.

Part 5 briefly considers the role that intersectionality has played in three other legal domains in Canada: criminal law, family law and immigration and refugee law. There is some evidence of attempts to adopt a holistic approach to criminal law that is attentive to the context within which certain people, communities and behaviours are disproportionately criminalized. For example, the *Criminal Code* requires sentencing judges to consider all reasonable sanctions other than imprisonment, and to have particular regard to the unique circumstances of criminalized Indigenous people. Yet intersectional trends, including, for example, the feminization and criminalization of poverty and the over-policing of racialized communities, continue to contribute to the overrepresentation of poor, young, racialized and Indigenous women in Canadian prisons.

Intersectional arguments have long been made in family law cases, including, for example, arguments at the intersection of gender and class that connect the gendered nature of domestic labour and caregiving and the feminization of poverty. Family law advocates have also called attention to the gendered impacts of family law legislation, particularly as it relates to Indigenous women at the intersection of family law and Aboriginal law. Intersectionality has had a particular impact in immigration and refugee law, where, for example, a failure to address the intersection of various risk factors faced by a refugee claimant is an error warranting judicial review. While intersectionality is having some influence in criminal law, family law and immigration and refugee law, courts and tribunals adjudicating claims in these areas have yet to fully adopt intersectional frameworks.

Part 6 of the brief flags the proliferation of intersectionality in law and legal contexts beyond Canada: in international law, in the United States, the United Kingdom and Australia, and in the work of the European Court of Human Rights. International law has made significant strides in incorporating intersectionality into the text of some conventions including, for example, the *Convention on the Rights of Persons with Disabilities*, and in the interpretation of other, seemingly single-axis conventions like the *Convention on the Elimination of Discrimination Against Women*, which has been construed with a view to the various intersectional forms of discrimination faced by women around the world.

As in Canada, intersectionality has a mixed record in other Anglo-common law jurisdictions. For example, in the United States, courts adjudicating claims of discrimination tend to look for evidence of intention, which generally cannot be demonstrated in cases of intersectional discrimination based on systemic disadvantage. In the United Kingdom, some courts have recognized the shortcomings of single-axis analyses but have rarely gone further to incorporate full intersectional assessments into their decisions. Intersectionality faces a unique challenge in Australia, where federal antidiscrimination laws do not include a general prohibition against discrimination, but are instead codified in four distinct acts, each centred on a single prohibited ground of discrimination: race, sex, disability, and age. Finally, intersectionality more frequently informs the work of the European Court of Human Rights, as in the case of *BS v Spain*, where the specific vulnerability of African women in Europe was expressly and intersectionally acknowledged by the Court.

While inroads are being made, these comparative examples reveal that, as in Canada, antidiscrimination law across jurisdictions is generally resistant to moving beyond a single-axis approach. Where intersectionality is considered, it is often understood thinly, as a vehicle for recognizing that discrimination can occur on the basis of multiple identities and for acknowledging the shortcomings of single-axis analyses, with less attention paid to the systemic dimensions of vulnerability and marginalization that structural intersectionality requires.

The brief concludes in Part 7 by recounting its key takeaways and affirming the importance of continuing to pursue the challenging, transformative work of incorporating intersectionality into law and legal contexts.