LEAF FAEJ

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

Written by: Fay Faraday

FARADAY LAW

www.faradaylaw.com

fay.faraday@faradaylaw.com

Published by

Women's Legal Education and Action Fund (LEAF)

180 Dundas Street West, Suite 1420

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.

Women and Gender Equality Canada Femmes et Égalité des genres Canada Canada

Contents

Executive Summary 4
I. Introduction 10
Ii. Bedrock Frameworks 11
A. Intersectional feminism 11
B. LEAF's Theory of Change 15
III. The State of Equality Rights Law in Canada 22
A. Learning from experience 22
B. Looking to the Future 26
IV. Strategic Considerations in Litigation Practice 34
A. Headwinds in litigation process: The future of appellate intervention 35
B. Counter-movements 39
C. Aligning Legal Forum with Strategic Objective 41
V. Conclusions 42

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.

I. Introduction

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.[1] 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.

This review 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.

[1] While the *Charter* was proclaimed in effect in 1982, section 15 did not come into effect until three years later, on 17 April 1985, to give governments time to review their legislation and bring it into compliance with the new constitutional right to equality.

Ii. Bedrock Frameworks

Before embarking on the analysis outlined above, this section explains two frameworks that inform the rest of this paper: (a) intersectional feminism; and (b) a theory of change.

A. 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.

While feminist movements with long political, mobilizing and intellectual traditions have always existed across the breadth of communities in Canada, not all women and gender diverse people advocating for equality have had the political, economic, social and legal power and resources to shift the law. As LEAF acknowledges, its "founding board and staff were white middle class professional women".[2] They had political and financial connections which enabled them to establish the organization, fundraise and build a meaningful public profile quickly. They "relied heavily on their traditional networks" with the result that "the composition of both the working committee and the board remained homogenous in character."[3] The centralized women's movement in the 1980s was also overwhelmingly white. In its institutions and analysis, LEAF in the 1980s was only beginning to recognize that a theory of equality that claimed to speak for all women could not in fact accommodate the multitude of ways in which women experience sex discrimination.[4]

---

[2] Women's Legal Education and Action Fund, *Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada* (Toronto: Emond Montgomery, 1996) at xxi. As Sherene Razack observes in *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto: Second Story Press, 1991) at 47, LEAF's original working committee was made of up 17 professional white women, 11 of whom were either lawyers or human rights professionals.

[3] Razack, *Canadian Feminism and the Law*, above note 2 at 46-47

[4] LEAF, *Ten Years of Feminist Advocacy*, above note 2 at xxi; Nancy Ruth, "Work Women Did to Make Constitutional Rights Work for Women", (2015-2016), 37.2 (1) *Atlantis* 126 and 130-131

In reality, different communities of women experience sex discrimination dramatically differently. For example, Indigenous women are resisting colonialism, healing from laws and policies aimed at their genocide, rebuilding Indigenous cultures and legal systems, while also facing continuing colonialism, deep sexism and racism against Indigenous people, and violence directed specifically at Indigenous women.[5] Meanwhile, women with disabilities experience the discrimination of living within social, economic, cultural, political and legal structures that are designed for, reflect and support the lives of people without disabilities while pervasively devaluing the lives of women with disabilities. Other women experience anti-Black racism, systemic racism, Islamophobia, anti-immigrant hatred and violence, religious discrimination, oppression based on their sexuality, gender identity and gender expression, age discrimination and many other exercises of power that harm them as women and gender diverse people. The contours of each form of gendered discrimination are unique. But they do not operate in isolation.

These multiple dynamics of discrimination collide with each other in the lives of individual women and communities of women who embody multiple characteristics that are used to discriminate. Kimberlé Crenshaw compared this experience to a collision in a traffic intersection. When the different dynamics collide in the middle of the intersection, they meld into each other and create new, amalgamated experiences of discrimination; it is impossible to untangle which harms came from which direction.[6] Because of that metaphor of the collision in an intersection, the experience of multiple forms of discrimination colliding in one person's experience of the world is now known as **intersectional discrimination**. Accordingly, visions and practices of feminism which account for the collision of

[5] National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019)
[6] Kimberlé Crenshaw was the first to explain this experience as "intersectionality" in her landmark 1989 paper "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 1:8 *University of Chicago Legal Forum* 139-167. See also: Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991), 43 *Stanford Law Review* 1241; Kimberlé Williams Crenshaw, "Twenty Years of Critical Race Theory: Look Back to Move Forward" (2011), 43:5 *Connecticut Law Review* 1253.

discriminations that affect women in all their diversity are known as **intersectional feminism.**

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.[7] Generations of activists have grown up since the 1980s without ever experiencing the infrastructure of a centralized "women's movement" and 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.

This changed context has implications for understanding best practices that LEAF can adopt. Litigation, by its very nature, takes place in the courts and must operate within the hierarchical institutions, systems and networks that have caused harm to women and girls who experience the deepest forms of discrimination and oppression under the law. Law requires specialized knowledge and training which is overwhelmingly available only to people with social and economic privilege. And law uses language and follows rules that are alien and alienating to people who are not lawyers. Leaders of LEAF's founding generation have acknowledged that while their privilege enabled them to establish LEAF and secure resources to ensure its operation within short order, that strength also reflected LEAF's core weaknesses. That homogeneity and privilege inhibited LEAF's ability to build relationships with other communities of women. Moreover, this exclusivity produced legal arguments and

[7] See, for example, the leadership of movements in Canada like Idle No More, Black Lives Matter, $15andFairness

ways of working that were not able "to reflect women's diverse realities in a respectful and meaningful way" and "that were insufficiently attentive to the impact of LEAF's positions on more marginalized women."[8]

Recognizing these shortcomings, by 1990 LEAF adopted a diversification policy and actively sought to broaden the inclusiveness and accountability in its governance structures, in its case selection and in its working practices.[9] As one measure, LEAF broadened the range of women who participate in the legal subcommittees that develop arguments on any single legal case to include women who are directly affected by discriminatory laws being challenged, community groups and leaders of movements of these directly-affected women, and other women who are not lawyers who can bring the political and intellectual traditions of these communities of directly-affected women into the legal analysis. In addition, LEAF adopted a practice of intervening in coalition with organizations of women directly affected by the laws being challenged in a given case. In this way, LEAF acknowledges the expertise of these women and uses its privilege to open space for other feminist voices and organizations in a hostile legal environment.

These practices of legal/community collaboration are now common in well-run public interest litigation beyond LEAF. LEAF may have been an early adopter and leader in honing this practice. But challenges persist in ensuring that collaborative practice is genuine, commits the time necessary to build lasting relationships of trust in community, and commits the time for real learning and co-creation of ideas. It is also important to acknowledge that as models of genuine collaboration in equality litigation continue to evolve, particularly led by generations for whom cross-movement collaboration is the norm, LEAF can learn from other organizations which have taken this practice much further. For example, *Charter* litigation by advocates for the right to housing embraced a legal strategy that was generated and lead by

[8] LEAF, *Ten Years of Feminist Advocacy*, above note 2 at xxi; Nancy Ruth, "Work Women Did", above note 4 at 130-131; Marilou McPhedran, "Creating Trialogue: Women's Constitutional Activism in Canada", (2006) 25:3/4 *Canadian Woman Studies/Les Cahiers de la Femme* 5 at 10-11

[9] LEAF, *Ten Years of Feminist Advocacy*, above note 2 at xxii; Razack, *Canadian Feminism and the Law*, above note 2 at 54-58

those who were homeless and precariously housed. This is a significant qualitative shift from a practice that invites those with lived experience into a pre-existing space to inform a legal strategy generated by legal specialists.[10] For housing advocates, this roots-up style of practice produced an intertwined legal and community mobilizing strategy that operated on several legal fronts simultaneously and, even within the confines of appellate advocacy, produced an extremely broad intersectional coalition of mutually supportive interventions.[11]

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.

B. LEAF's Theory of Change

The second critical framework that grounds this paper is LEAF's **theory of change**. That is: how does LEAF as an organization believe that social change happens? Why does LEAF think that law, and in particular litigation, are an important part of social change strategies? Where does litigation sit in relation to the other necessary elements within that theory of change? While these may seem like basic questions, they must be answered with precision for LEAF to effectively map a forward-looking vision of feminist litigation. Have LEAF's decades of experience shifted its understanding of its role and/or capacity for impact? Has its experience revealed a need to sharpen its theory of change?

As noted in its 10th anniversary reflections, LEAF "was founded to contribute to the goal of advancing women's equality in Canada".[12] LEAF understood itself as "just one of many

[10] See, for example, Fay Faraday, Tracy Heffernan and Helen Liu, "Winning the Right to Housing: Critical Reflections on a Holistic Approach to Public Interest Litigation" (2019), 90 Supreme Court Law Review, Second Series 31-63.
[11] Faraday, Heffernan and Liu, "Winning the Right to Housing", above note 10 at 39-40 list the 8 interventions and intervener coalitions, encompassing 16 well established equality advocacy organizations that supported the litigation; and at 46-58 discuss the risks of litigation and practices of allyship.
[12] LEAF, *Ten Years of Feminist Advocacy*, above note 2 at xi

organizations and individuals advancing the goal of women's equality" and it "chose a specific role for itself within the women's movement and the legal system".[13] LEAF was born out of years of active political advocacy to ensure the *Charter* protects equality rights. But even before the *Charter* was adopted, LEAF's founders recognized that any constitutional amendment they won would not be the end of the road but just the beginning. Without law reform and litigation, the new constitutional protection would not be activated. As Sherene Razack wrote, "Rights on paper mean nothing unless the courts correctly interpret their scope and application."[14] In light of this, plans for a litigation fund modelled on the NAACP were being formed as early as 1981.[15]

The rest of this section attempts to map the theory of change that emerges from LEAF's own writings and commentary about LEAF.

The nature of the problem

As a starting point, it is helpful to articulate how LEAF understands the nature of discrimination:

1. **Discrimination is not just a matter of isolated intentional actions. Instead, women experience systemic discrimination "as a pervasive social and legal condition".**[16]

Systemic discrimination refers to discrimination that exists in all systems that shape our society. Systemic discrimination is made up of the discriminatory beliefs, values, practices and institutions of our society that have been shaped over generations by exercises of power that devalue and marginalize women.

---

[13] LEAF, *Ten Years of Feminist Advocacy*, above note 2 at xi
[14] Razack, *Canadian Feminism and the Law*, above note 2 at p. 36; also Jane Craig, "Tories nip LEAF equity program in the bud" (1992), 6:2 *Herizons* 15 quoting Helena Orton: "Without access to the courts to get the benefits of equality rights, the guarantee of equality is hollow."
[15] M. Elizabeth Atcheson, Mary Eberts and Beth Symes, *Women and Legal Action: Precedents, Resources and Strategies for the Future*, (Canadian Advisory Council on the Status of Women, 1984) at 1-6, 163-164; LEAF, *Ten Years of Feminist Advocacy*, above note 2 at xi, xvi,
[16] LEAF, *Ten Years of Feminist Advocacy*, above note 2 at xix

2. Systemic discrimination is anchored in society through laws that reflect those discriminatory beliefs, values, practices and structures.

Feminist movements continually debate whether it makes sense to engage in litigation because law is so often the mechanism that creates, perpetuates and enforces discriminatory norms. There are many important reasons that feminists are skeptical about whether litigation can drive social change.[17] But at the same time, regardless of whether women choose to engage with law, law exerts significant power in sustaining relationships that discriminate against women. In this context, LEAF's theory of change recognizes that litigation is necessary because if women do not participate in shaping how laws are interpreted and applied, those laws will be interpreted and applied in ways that continue to harm them. Accordingly, in 1998, Lynn Smith's strategic discussion paper for LEAF concluded that

> the [strategic] discussion is really about how to conduct litigation, not whether, and the arguments by the *Charter* critics pointing out the risks of litigation should inform the litigation strategy and tactics which are adopted rather than lead to paralysis.[18]

How social change happens

Beyond the defensive rationale for engaging in litigation noted above, LEAF's theory of change embraces a positive vision of the power of litigation to advance social change. The

[17] See Kaitlin Owens, *This Case is About Feminism: Assessing the Effectiveness of Feminist Strategic Litigation* (Toronto: LEAF, 2020) and Lynn Smith's 1998 strategic report to LEAF: *Equality Litigation for Women in Canada*. On the academic side, see Brenda Cossman, "Dancing in the Dark" (1990) 10 *Windsor Yearbook on Access to Justice* 223; Judy Fudge, "What do we mean by law and social transformation?" (1990) 5 *Canadian Journal of Law and Society* 47. For a more recent intersectional feminist and transnational perspective on the question, see Radha D'Souza, *What's Wrong with Rights?: Social Movements, Law and Liberal Imagination* (London: Pluto Press, 2018).

[18] Smith, *Equality Litigation for Women*, above note 17 at 4-9

following points are not stated as facts. Instead they set out some assumptions that underlie LEAF's rationale for engaging in litigation.[19]

3. LEAF's founding belief is that **"Law can be an effective tool for egalitarian social change".**[20]

Embedded in point #3 is the assumption that LEAF can identify cases that have the potential to break new legal ground or establish legal precedent that affect the collective interests of women.

4. **Feminists 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.**

5. **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.**

Embedded within points #4 and #5 is the further assumption that these feminist legal principles can be recognized as a legitimate part of the existing legal system, its forms of logic and its way of understanding relationships. This means the step from the existing law to the proposed feminist legal principles is not so great that the principles would be considered alien to the existing legal system. It assumes that judges need and want this assistance. It also assumes that the legal principles once stated will be acted upon and that remedies can be enforced.

6. **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.**

---

[19] LEAF, *Ten Years of Feminist Advocacy*, above note 2 at xvii-xx
[20] LEAF, *Ten Years of Feminist Advocacy*, above note 2 at xix, xxiii

Embedded within point #6 is the assumption that court rulings have an educational impact in society and affect the behaviour of people beyond the immediate parties to a case. It assumes that actors across society – whether they are governments, businesses, groups or individuals – change their behaviour in response to principles of law set out by the courts. It also assumes that courts will be consistent in applying the law so that legal principles that have been won in court have enduring effect.

7. **As feminist legal principles are recognized, courts will incrementally adopt further principles that deepen the protection of equality rights for all women.**

Mapping out LEAF's theory of change in this way is valuable because it provides a template to return to in assessing the impact of LEAF's work. It enables one to assess whether LEAF's actions advance progress in accordance with the theory of change. If they do not, this template can help to identify where the blockages occur and why. It also enables one to assess whether the theory of change itself has shortcomings that need to be amended based on the evidence of experience.

This theory of change makes sense to explain the very specialized role that LEAF plays within a broader community of feminist activism. As noted by Lynn Smith, "LEAF is the only Canadian organization whose *raison d'être* is pursuing gender equality through a litigation strategy".[21] This remains true today. LEAF has an important set of skills that can be exercised at points of real power and influence.

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? This theory of change sets LEAF's actions at arms length from broader feminist movements. But in practice, LEAF cannot operate in isolation without returning to a position where its practice and substantive ideas do not reflect the real needs of women affected by the law. Accordingly, LEAF's theory of change must be elaborated upon to articulate how it sees itself as part of the

[21] Smith, *Equality Litigation for Women*, above note 17 at 20.

broader feminist movements. What kind of relationships does LEAF need to develop with other organizations within the broader feminist movements – beyond short term collaboration on specific interventions – for this theory of change to be effective? How can this theory of change be elaborated upon to account for those relationships and interactions? How, in concrete terms, do those relationships lead LEAF and other movement actors to influence each other's ideas and practices in mutually supportive ways?

Emerging from the existing theory of change, this paper identifies four lenses which may help assess LEAF's experience to date and its potential future strategies.

Lens 1: Accountability

Because litigation engages principles of constitutional law that affect women broadly, it is important to ask: "To whom is LEAF accountable?" Who is benefiting from the laws that LEAF challenges? Who is left out? Who has a voice in prioritizing issues and shaping analysis? Is LEAF accountable to broader feminist movements? If so, how, in concrete terms, is that accountability ensured? How does LEAF develop real relationships of trust with women directly affected by discriminatory laws who may have their own, distinct goals or theories of change? What does allyship mean to LEAF and how does LEAF act as an ally within the broader movements for equality? How do these factors affect LEAF's credibility as an organization that advocates for equality broadly? The question of accountability is an overarching one which informs each of the other lenses. It has, however, not been a focus of academic study since the early 1990s. As noted above, this aspect of LEAF's theory of change is under-developed. As such, it remains a matter that LEAF must articulate for itself in assessing its future strategies and aspirations.

Lens 2: Developments in the substantive law

This may be the most straightforward lens as it is possible to measure LEAF's impact on developing legal principles and track how those legal principles translate into further legislative or policy change. While these changes will take place over periods of years and decades, legal and policy research can provide a reasonable mapping of the impact. Key

questions to consider are whether the changes advance equality in practice, for whom and to what extent? It is also possible to research how LEAF's vision of equality is adopted and shared in educational settings, in the media, and in the public discourse to have an impact beyond the sphere of litigation.

Lens 3: Litigation practice

In assessing its litigation strategy, it is necessary to reflect on what forms of litigation, in what contexts, enable LEAF to be effective and why. LEAF has focused its energies on appellate litigation, particularly at the Supreme Court of Canada because this allows for precise interventions, at relatively lower cost, that aim to secure legal wins with the strongest precedential value. But, if this forum and mode of litigation is not receptive to the arguments that LEAF is raising, what forum has characteristics that are better tailored to ensuring stronger reception?

Lens 4: Sustainability

Sustainability is a concept that should be broadly conceived. It can, of course, encompass the perpetual concern about availability of financial and human resources. But sustainability can also encompass examining what is needed in order for LEAF as an organization to sustain its credibility with actors and decision-makers in the legal system that has been based on its deep expertise and ahead-of-the-curve legal analysis. How does LEAF maintain a cutting edge understanding of experiences, practices and principles of equality where these are always evolving? Sustainability can also relate back to questions of accountability. How does LEAF sustaining credibility, trust and relevance within the broader community of feminist movements?

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.

III. The State of Equality Rights Law in Canada

A. Learning from experience

It is undeniable that LEAF has had a profound impact on the substance of equality rights law under the *Charter*. LEAF's impact traces back to the Supreme Court of Canada's first s. 15 ruling in *Andrews v. Law Society of British Columbia*[22] which adopted core principles recognizing that

(i) the *Charter* protects equality in the substance of the law (**substantive equality**) rather than formal equality (treating likes alike and those who are different, differently);

(ii) the *Charter* operates in a social context that is already marked by inequality which means that different treatment that counteracts the existing inequality is often needed to achieve equality in the substantive protection and benefit of the law;

(iii) the *Charter* is concerned with the effect of laws upon equality rights claimants, not intent to discriminate;

(iv) discrimination is primarily systemic rather than isolated and intentional;

(v) the Court can recognize "analogous" grounds of prohibited discrimination beyond those listed in the *Charter*; and

(vi) the analysis of substantive equality rights must be kept separate from the government's burden to justify breaches of s. 15 under s. 1 of the *Charter*.

These principles remain the foundation of *Charter* equality to this day. But the journey from *Andrews* to the present is by no stretch as placid as that continuity would suggest.

The most significant feature of s. 15 *Charter* jurisprudence is the chaotic inconsistency and whiplash-inducing swings in the law, even at the Supreme Court of Canada. As a result, claimants in virtually every s. 15 *Charter* case must fight to re-establish foundational legal

[22] [1989] 1 SCR 143

principles about equality. This thumbnail review of the SCC's equality jurisprudence over its first 35 years gives a taste of that challenge:

> Since *Andrews*, the Court has made at least seven foundational renovations to the section 15 legal test and sustained a four-year period from 1995 to 1999 during which there was no majority position whatsoever on the legal test. That interregnum was followed by 19 years during which three core equality concepts ["human dignity", "mirror comparators" and a test based on "stereotype and prejudice"] were adopted by a unanimous or majority Court, only to be explicitly rejected in very short order. These reversals were then situated within a new characterization of the relationship between sections 15(1) and 15(2) of the *Charter*, only to have the Court restore the original relationship a decade later. With every section 15 case, the Court states the legal test for equality rights with a slightly different nuance, leaving litigators and scholars alike struggling to parse the significance, if any, of minute variations in wording.[23]

This inconsistency contributes to a public discourse which is distrustful of equality rights litigation and which devalues the credibility of equality claims. As a practical matter, it encourages respondent governments to continue making legal arguments which have been repeatedly rejected by the courts because they still hold traction with a minority of judges. The convoluted history of equality rights jurisprudence means that it takes significant effort for an equality rights litigator to explain to a judge who is unfamiliar with equality jurisprudence why certain tests or analyses are no longer good law. This means that feminist litigators must spend significant energy protecting past wins rather than moving legal principles forward.

The extent to which long-rejected principles resurface in the jurisprudence is reflected in the Supreme Court of Canada's most recent s. 15 cases: *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*,[24] and

---

[23] Fay Faraday, "One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada" (2020< 94 *Supreme Court Law Report* (2d) 201 at 302-303 [footnotes omitted]. See also Jennifer Koshan, "The continual reinvention of section 15 of the *Charter*" (2013), 64 *UNB Law Journal* 19

[24] 2018 SCC 17

Centrale des syndicats du Québec v. Quebec (Attorney General).[25] [26] The cases were decided by slim margins. *Alliance* was decided in favour of the s. 15 claimants by a 6-3 margin. In *CSQ*, the Court ruled 5-4 that there was a violation of s. 15, but then ruled 8-1 that the violation was justified under s. 1. In these cases, the dissenting judges on s. 15

(i) failed to follow the basic principles that s. 15 claims must be assessed from the perspective of the claims, instead analyzing the claims from the perspective of the government respondents;

(ii) applied a rigid formal equality analysis despite giving lip service to the principle of substantive equality;

(iii) refused to hold governments accountable for the discriminatory impacts of the law on the basis that sex discrimination existed in society before the impugned law, so the government did not 'cause' the discrimination;

(iv) refused to subject the legislation to a full s. 15 analysis on the theory that the validity of the legislation in question – provincial pay equity legislation – was a political decision that is beyond the jurisdiction of the court not a matter of enforceable constitutional equality claims; and

(v) cautioned against subjecting legislation to *Charter* scrutiny because it would discourage governments from addressing disadvantage in society.[27]

It is important to stress that judges' inability to adhere to the simplest legal principles in s. 15 jurisprudence is not normal; this is not reflective of *Charter* jurisprudence generally. The history of most *Charter* litigation reveals that the foundational principles for *Charter* rights have generally been established early with little controversy and followed consistently. The exceptions are the rights to equality under s. 15, the freedom of association under s. 2(d) and the question of whether socio-economic rights are protected as an element of "security of the person" under s. 7 of the *Charter*. What these three rights have in common is that they directly implicate the redistribution of power in society from those who are privileged in favour of those who have been systemically oppressed and marginalized.

[25] 2018 SCC 18

[26] LEAF intervened in these two cases in coalition with the Equal Pay Coalition and the New Brunswick Pay Equity Coalition.

[27] Faraday, "One Step Forward, Two Steps Back", above note 23 at 327-330

When held up against LEAF's theory of change, these experiences are revealing.

LEAF has successfully articulated legal principles that reflect a feminist understanding of how discrimination operates in a systemic manner. The majority of the Supreme Court of Canada (and occasionally the unanimous Court) has been persuaded by these arguments and women have received meaningful remedies as a result. However, the tenuousness of judges' grasp on these principles, even after 35 years, points to a deeper concern. 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. In this respect, it is not that feminist legal principles are inherently incompatible with a fair interpretation of *Charter* rights; it is more that at a personal level these principles and the reality they disclose destabilize judges' sense of how the world "normally" works and so judges default to decision-making based on deeply rooted beliefs based on social location and their own lived experience rather than on legal reasoning. As Colleen Sheppard writes, the liberal rights of the *Charter* sit on top of a conservatism that "accepts and justifies social inequality": "it implicitly accepts the dominant world view as universal".[28] This does not mean that LEAF should back away from articulating robust feminist legal principles. As Sheila McIntyre writes: "When equality claims are really substantive, they should challenge privileged understandings of the world and privileged players' understandings of themselves."[29] Instead, what it calls for is refined strategies to ensure those robust feminist legal principles are solidified in the law.

LEAF may not have anticipated the "stickiness" of discriminatory norms and structures – the extent to which they are difficult to dislodge even in the face of coherent and rigorous legal analysis. LEAF may have had more faith 35 years ago that articulating a clear and convincing legal doctrine would translate into legal precedents that are applied

[28] Colleen Sheppard, "Equality, Ideology and Oppression: Women and the *Canadian Charter of Rights and Freedoms*" (1986), 10 *Dalhousie Law Journal* 195 at 198, 223

[29] Sheila McIntyre, "Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination", in *Making Equality Rights Real: Securing Substantive Equality under the Charter*, Fay Faraday, Margaret Denike and M. Kate Stephenson, eds. (Toronto: Irwin Law, 2006) at 108.

consistently. Instead, this experience reveals how feminist litigation strategy 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. This is not to suggest that judicial resistance to equality principles arises from bad faith. Rather, it suggests that while the legal principles that LEAF has won attract majority support, for a significant minority of judges the ideas are too dissonant with their personal understanding of the world and so find no point of purchase; they remain a leap too far.

That this judicial divide and legal instability persist is important. It leaves the legal principles of equality vulnerable to minor shifts in judicial appointments. It also continues to invite strategic challenges from respondents for whom a close decision signals that they have at least a facially plausible basis to continue raising narrowly defeated legal principles, no matter how many times, over how many decades, those principles have been rejected.

Moreover, to the extent that judges continue to decide equality cases by slim margins, it undermines the ability of feminist litigation strategy to convert litigation wins into broader proactive legislative or policy change. There have been longstanding concerns that government policy development and litigation occur in silos which prevent the translation of substantive equality principles into legislation and policy.[30] But the longer these judicial solitudes persist, the more political cynicism is fueled which enables governments in their litigation and legislative strategies to ignore legal principles articulated by the Courts.[31]

B. Looking to the Future

At the same time that a review of academic literature and case law discloses how friction in the legal system slows the momentum of feminist legal principles, it also discloses

[30] Pearl Eliadis, "Inscribing Charter Values in Policy Processes", in *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms*, Sheila McIntyre & Sanda Rodgers, eds. (Butterworths: 2006) at 229-250; cf Elizabeth Shilton, "Charter litigation and the policy processes of government: A public interest perspective" (1992), 30:3 *Osgoode Hall Law Journal* 653

[31] Faraday, "One Step Forward, Two Steps Back", above note 23 at 330-333

important opportunities to build more complete and robust principles. These opportunities are found where

(i) feminist litigation has forgotten the significance of its history;

(ii) litigators and judges alike have drifted from the text of s.15;

(iii) stock phrases have lost their meaning and need to be sharpened;

(iv) courts have recognized core principles in parts of the *Charter* other than s. 15 but have not drawn connections back to s. 15; and

(v) elements of equality law remain under-developed.

1. Remembering our history

Perhaps the most remarkable part of the *Charter*'s history, is the phenomenal extent to which feminist and other equality-seeking groups participated directly in shaping the language of s. 15. This matters profoundly. Yet, it is not mentioned or analyzed in the jurisprudence in a meaningful way.

As Kerri Froc reminds us, at the outset of the *Charter*'s development, there was "staunch provincial opposition to *any* guarantee against discrimination" being included in the *Charter* and the initial draft of s. 15 was framed as "anti-discrimination" protection, similar to the discredited formalism of the *Bill of Rights*, rather than a protection of equality rights.[32] Marilou McPhedran underscores that women lost *all* the sex discrimination claims under the *Bill of Rights* even in the face of discrimination that was "rampant in Canadian women's daily lives".[33] This frustration fed the intense grassroots equality rights activism in the *Charter*-drafting process before the Special Joint Committee of the House of Commons and the Senate:

> …The Joint Committee process transformed the draft *Charter* 'by passing [it] through the refiner's fire of the testimony of Canadians.' The amount of public participation in relation to the hearings was truly remarkable. Over 900 groups

[32] Kerri Froc, "A Prayer for Original Meaning: A History of Section 15 and What it Should Mean for Equality", (2018) 38 *National Journal of Constitutional Law* 35 at 37.
[33] McPhedran, "Creating Trialogue", above note 8 at 7-10, esp. at 8

> and individuals made submissions, and the Joint Committee heard from 100 witnesses in over 50 days of testimony, which included those from organizations representing women, minority language speakers, persons with disabilities, labour organizations, Indigenous organizations, sexual minorities, anti-poverty organizations, and some that traversed these identifiers (such as Native Women's Association of Canada and Indian Rights for Indian Women).
>
> Because of their input, the government agreed to dozens of changes based on citizens' own experiences of rights and their own conceptions of what they needed to live more freely and equally. Even after these initial amendments instigated by the Joint Committee hearings, citizen groups capitalized on their momentum and continued their advocacy for constitutional transformation through media campaigns and grassroots advocacy efforts. For instance, the Ad Hoc Committee of Canadian Women on the Constitution held a February 1981 Conference attracting 1300 women from across Canada and launched a successful lobbying campaign that ultimately resulted in a late amendment to the Charter to ensure women's equal rights, s. 28.[34]

This history matters because the legislative history of the *Charter* is not simply told through what politicians intended. It is told much more so through the demands of equality-seeking organizations and their analysis of the flaws with the *Bill of Rights*. This civic participation in constitution-making changed the heading of s. 15 from anti-discrimination to equality rights signaling a qualitatively different guarantee than the *Bill of Rights*; expanded the list of enumerated grounds in s. 15; reframed the list of prohibited grounds of discrimination to be non-exhaustive rather than closed; and importantly introduced four distinct rights to equality: the guarantees of "equality before and under the law and the right to equal protection and equal benefit of the law".[35] These changes were made to signal a sharp break with the formalism of the *Bill of Rights* and to introduce what *Andrews* recognized was a "compendious expression of a positive right to equality in both the substance and the administration of the law".[36]

Returning to that history in earnest can give life to what it means to conduct a "purposive" analysis of the *Charter* right to equality by connecting the legal interpretation to

---

[34] Froc, "A Prayer for Original Meaning", above note 32 at 36-37
[35] Froc, "A Prayer for Original Meaning", above note 32 at 38
[36] *Andrews v. Law Society of British Columbia*, above note 22 at 170-171; Froc, "A Prayer for Original Meaning", above note 32 at 79

the "original public meaning" of s. 15.[37] As Bruce Porter observes, the *Charter* embodied a new social contract. A purposive analysis of that social contract should take account of what equality seeking groups who participated in the *Charter*'s drafting

> expected from the right to equality as a framework for new entitlements of citizens and obligations of government … [as] critical to an assessment of whether the new social contract has been properly implemented by governments and correctly interpreted and applied by courts.[38]

This reinvigorated purposive analysis can also build a more robust analysis of what "substantive equality" means. It can help enrich the analysis of how socio-economic rights relate to the equality rights and the extent to which *Charter* rights are intended to encompass socio-economic rights. Again, Porter writes that the expectation of equality groups participating in the constitution-making process was that interpretations of equality would be

> linked to the social and political goals of equality-seeking communities and anchored in an emerging international human rights jurisprudence, not simply in the area of civil and political rights but also, and perhaps more centrally, economic, social and cultural rights.[39]

2. Reading the text of section 15

Meanwhile, Mary Eberts and Kim Stanton highlight that feminist litigators and the courts have not explored what the four distinct equality guarantees in s. 15 mean.[40] As noted, *Andrews'* accepted that these four equality guarantees embody a positive right to equality in the substance and administration of the law. This led the Court to recognize that the *Charter* right to equality has two dimensions: promoting equality and remedying the effects of

---

[37] Froc, "A Prayer for Original Meaning", above note 32 at 41
[38] Bruce Porter, "Expectations of Equality" in *Diminishing Returns*, above note 30 at 25
[39] Porter, "Expectations of Equality", above note 38 at 29; Froc, "A Prayer for Original Meaning", above note 32 at 40
[40] Mary Eberts and Kim Stanton, "The Disappearance of the Four Equality Rights and Systemic Discrimination from Canadian Equality Jurisprudence", (2018) 38 *National Journal of Constitutional Law* 89

discrimination.[41] But despite the repetition of the promotional and remedial aspects of s. 15's purpose, the Court has engaged in surprisingly little legal analysis of what this *means*. Instead, the focus of s. 15 jurisprudence has been on the words "without discrimination". However, it is the very focus on the words "without discrimination" that allows the Court to retreat back into formal analysis and an anti-discrimination rather than equality rights mindset.[42] As Anne Bayefsky cautioned as early as 1985, it would "be a mistake to try to put the weight of the substance of 'equality rights' on the shoulders of the words 'without discrimination'."[43] Eberts and Stanton propose that refocusing on the four equality rights would

> rebalance interpretation of s. 15 of the *Charter* to focus on the concept of equality, in the sense of substantive equality, as well as on discrimination. This would bring the section back to the focus originally sought for it by activists who convinced the government of Canada to change the term 'non-discrimination' to 'equality' in the heading above s. 15 in 1981.[44]

3. Reinvigorating stock phrases

As the above analysis shows, the repetition of stock phrases in the equality jurisprudence has stripped them of real meaning. As Jennifer Koshan and Jonnette Watson Hamilton write, while the Courts repeatedly cite important concepts and phrases like "purposive analysis", "substantive equality" and "systemic discrimination" these words have lost their power; they have become "meaningless mantras"[45] because they are recited in a *pro forma* way without the Court's subsequent analysis demonstrably tracking and implementing those rights in practice. In this context, the onus is on feminist litigators to bring more rigour

---

[41] *Andrews v. Law Society of British Columbia*, above note 22 at 171. See also *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 53-54; *R. v. Kapp*, [2008] 2 S.C.R. 483 at para. 15; *Law v. Canada*, [1999] 1 S.C.R. 497 at para. 42, 43, 47, 51

[42] Eberts and Stanton, "Disappearance of the Four Equality Rights", above note 40 at 116

[43] Anne Bayefsky, "Defining Equality Rights" in *Equality Rights and the Canadian Charter of Rights and Freedoms*, Anne Bayefsky and Mary Eberts, eds (Toronto: Carswell, 1985) 1 at 27

[44] Eberts and Stanton, "Disappearance of the Four Equality Rights", above note 40 at 117

[45] Jennifer Koshan and Jonnette Watson Hamilton, "Meaningless mantra: Substantive equality after *Withler*" (2011), 16:1 *Review of Constitutional Studies* 31

to the analysis of those concepts and to think strategically about how they can be given new life.

Looking at *CN v. Canada (Canadian Human Rights Commission)*[46] provides an example of this problem. This case is an excellent decision. More than three decades later it remains the leading case on systemic discrimination and systemic remedies and the case that has provided the strongest protection against systemic discrimination. The decision itself provides an analysis of Justice Abella's concept of systemic discrimination in her 1985 Royal Commission Report and an in-depth analysis of how systemic discrimination operates and can be remedied in practice. In a pithy statement, the Court summarizes the notion of systemic discrimination in an employment context as "discrimination that results from the simple operation of established procedures … none of which is necessarily designed to promote discrimination."[47] That pithy summary has then been picked up to encapsulate what systemic discrimination means. But does this do an injustice by erasing the supremacist logic that underpins systemic discrimination and the material reality of who benefits from the persistence of systemic discrimination.

As another example, beginning with *Andrews* the Court has routinely cited that "the promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration".[48] But what practical assistance has this phrase delivered in equality rights litigation? How different is that passive highly abstract and aspirational framing from something like this: "the right to equality means the right to <u>not</u> live in institutionalized and normalized conditions of oppression".[49] In what ways can we be more precise in our language to better communicate what we intend to communicate and to better bring to the surface the ways in which power actually operates to deny equality?

---

[46] [1987] 1 SCR 1114
[47] *CN v. Canada (Canadian Human Rights Commission)*, above note 46 at 1138-1139
[48] *Andrews v. Law Society of British Columbia*, above note 22 at 171
[49] To be clear, this is not a quotation. It is a phrase I wrote specifically for illustrating this example.

As a strategic matter then, this point of reflection provides an opportunity to identify which words, phrases and concepts are ripe for reconsideration, recommitment or reinvention. How can feminist litigators crack through the rote repetition of these phrases to describe with more accuracy – and more subjects and verbs[50] – how these concepts are the products of operations of power that privilege some and oppress others?

4. Reminding the Court of what it already knows

The Supreme Court of Canada has been much more open to identifying the corrosive operation of power in meting out privilege or oppression when interpreting *Charter* rights *other than* s.15. But that knowledge of how power operates in society has not been incorporated into its analysis of s. 15 resulting in an internally inconsistent approach to the *Charter*. But this does open the strategic opportunity to remind the Court of what it already knows to be true, in contexts that are more palatable to the decision-makers, and appeal to a need for consistency in their logic. Where the leap from existing law to feminist legal principles is too far for some judges, this strategic approach may provide the bridge. At a conceptual level, though, in its own right it affords opportunity to deepen feminist legal principles themselves.

For example, the Court has long recognized the operation of systemic oppression in the form of colonialism in criminal law sentencing of Indigenous people.[51]

Since 1987, the Court has also recognized that a purposive analysis of freedom of association is precisely about protecting those who are more marginalized from the abuse of power by those "with whom their interests interact, and perhaps conflict".[52] In this context, the Court has recognized that the guarantee of freedom of association

> functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, **individuals are able to prevent**

[50] McIntyre, "Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination", above note 29.
[51] *R. v. Ipeelee*, [2012] 1 S.C.R. 433; *R. v. Gladue* [1999] 1 S.C.R. 688.
[52] *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, per CJC Dickson at 365-366; *Mounted Police Association of Ontario v. Canada (Attorney General)* 2015 SCC 1 at para. 57

> more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society.[53]

This is a more substantive understanding of equality than the Court has expressed under the *Charter*'s equality guarantee.

Meanwhile, under s. 32 of the *Charter*, discussions about the nature of government may nurture protection of socio-economic rights under s. 15 and s. 7. In *Mckinney v. University of Guelph*[54], analysing what "government" means for the purposes of applying the *Charter*, Wilson J. (in dissent) found that "government regulation and intervention has long been part of the political, social and economic culture of Canada" and that "interventionist activities of the Canadian state have taken many forms".[55] She further wrote that

> Canadians recognize that government has traditionally had and continues to have an important role to play in **the creation and preservation of a just Canadian society**. The state has been looked to and has responded to demands that Canadians be **guaranteed adequate health care, access to education and a minimum level of financial security** to name but a few examples.[56]

Where this intervention is such a well-established part of how government operates, it is contradicatory under s. 15 and s. 7 to retreat to neo-liberal ideas of government as a hands-off entity that has no positive obligations to create and preserve a just and equal society.

5. Overlooked parts of the Charter: Section 28

Finally, the evolution of equality rights litigation in Canada reveals how s. 28 of the *Charter* has been virtually forgotten in the constitutional jurisprudence. While it is rarely thought of in building legal arguments today, when women successfully fought for its inclusion in the *Charter* in 1981 and through the 1980s, it was envisioned to be *the* critical tool for advancing women's rights to equality under the *Charter*. The Canadian Advisory Council

---

[53] *MPAO v. Canada*, above note 52 at para. 58
[54] [1990] 3 S.C.R. 229
[55] *Mckinney v. University of Guelph*, above note 54 at 355-356
[56] *Mckinney v. University of Guelph*, above note 55 at 356

on the Status of Women believed that s. 28 would be a "significant point of leverage" in s. 15 litigation.[57] Maureen McTeer referred to s. 28 as being of "paramount" importance.[58] Returning to the anticipated role of s. 28 and engaging in serious development of feminist legal principles in relation to section 28 can offer new, deeper insights into equality analysis. In particular, Kerri Froc sets out a comprehensive analysis of how s. 28 can bring a gendered analysis to s. 1 of the *Charter* to ensure that s. 1 is not used as a vehicle to reimport discriminatory norms that were rejected at the s. 15 stage of a Court's analysis.[59]

Section 28 is expressed in binary terms of ensuring that the rights in the *Charter* are "guaranteed equally to male and female persons" and it may be argued that it essentializes gender as the primary frame for discrimination. However, bringing a 21st century intersectional analysis may also hold promise in expanding the understanding the scope of s. 28's protection.

IV. Strategic Considerations in Litigation Practice

Having identified both the strategic impediments in judicial interpretation of s. 15 and the strategic opportunities for developing future feminist legal principles, this paper turns to consider how those strategic objectives connect with strategic choices about the form of and forum for litigation. This paper identifies three key themes: (i) headwinds presented by changes in legal process; (ii) counter-movements that developed in opposition to LEAF's litigation; and (iii) considerations about how to align LEAF's litigation strategies to best correspond to its substantive objectives. While it is important to have a proactive strategic plan for litigation, it is also important to recognize that LEAF will always be called upon to engage in a responsive way as LEAF cannot control when issues of importance or strategic opportunities arise that are not of LEAF's creation.

---

[57] Atcheson, Eberts and Symes, *Women and Legal Action*, above note 15 at 5.
[58] Maureen McTeer, "New law for women's equality" (April 1985) *Chatelaine* at 36
[59] Kerri Froc, *The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms*, PhD Thesis, Queen's University Faculty of Law (2015)

A. Headwinds in litigation process: The future of appellate intervention

As noted above, intervention in the appellate courts, particularly before the Supreme Court of Canada, has been LEAF's primary mode of effecting change in substantive equality rights in Canada. While LEAF sponsored some test case litigation by initiating legal claims in its earliest days, after its first five years "it embarked on a strategy of intervening only in the Supreme Court of Canada, with limited exceptions, in order to maximize the impact of its work in a context of constrained resources".[60] At the time, the Supreme Court of Canada took an expansive approach to granting leave to intervene in *Charter* cases. An intervener could file a 20-page factum (written legal submissions) and make oral argument of a length that was at the discretion of the Court. Typically, an intervener would be granted 15 to 20 minutes for oral argument.

Over the years both the length of intervener facta and the time for oral argument were gradually shortened. In 2020, interveners at the Supreme Court of Canada are typically granted leave to file a factum of not more than 10 pages. An intervener is also no longer guaranteed the right to make oral argument. After reviewing all the written submissions that have been filed with the Court, including the facta of the appellants, respondents and all interveners, the Court unilaterally issues an order identifying whether it wishes to hear oral argument from an intervener and if so, which specific intervener(s). There may be multiple interveners in a case but the Court may decide to hear from some of them. When interveners are granted the right to make oral argument, they are now granted just 5 minutes.

A strategic question arises about whether LEAF can make a difference with such a limited window for advocacy. The answer is, yes it can. LEAF's interventions, in coalition with the Equal Pay Coalition and New Brunswick Pay Equity Coalition, in *CSQ* and *Alliance*,

[60] Smith, *Equality Litigation for Women in Canada*, above note 17 at 5

involved 10-page facta and 5-minute oral arguments. Yet, LEAF's analysis and phrasing from its facta and oral argument provide a foundation for the Court's rulings in both cases.[61]

So, the question isn't *whether* LEAF should intervene, but *how* it intervenes. These changes mean that the *nature* of intervener advocacy at the Supreme Court of Canada has changed dramatically. Making a powerful impact in just 10 pages requires precision and sharp focus in written advocacy. LEAF must have an equally precise understanding of its strategic purpose for the intervention. What specific advances in the jurisprudence does it aim to make? Meanwhile, influencing the decision-making of nine judges in just five minutes requires a high degree of expertise in the law, a highly developed capacity to "read the Court" during the hearing, and the ability to improvise and deliver surgically precise analysis in real time. What is being asked of interveners' counsel is some of the most difficult and sophisticated forms of advocacy. This should prompt LEAF to reflect seriously on how to build the skills and capacity of current and future feminist litigators to meet these high demands. It may also feed into LEAF's selection of counsel and co-counsel to meet the demands both of advocacy and of mentoring emerging feminist litigators.

Provincial appellate courts are also gradually restricting the scope of written and oral argument by interveners but the constraints at this level are not as tight as at the Supreme Court. For example, at the Ontario Court of Appeal, it is still possible to be granted leave to file a 20-page factum and make 20-minutes of oral argument although this allotment is never guaranteed. The shift in style of advocacy at all levels of court is happening because courts are increasingly emphasizing the written materials filed by counsel over oral argument. Oral argument is increasingly shifting towards a forum in which to respond to questions from a bench of judges who are relying heavily on the parties' written submissions.

Across most appellate courts, the legal test for intervention remains broadly stated. However, the Courts are looking with more rigour for evidence of whether the intervener does

[61] The intervener facta are posted on the Supreme Court of Canada website. The Coalition factum in *CSQ* is here and in *Alliance* is here.

have a genuine interest in the subject matter of the litigation, does have genuine expertise that will be of assistance to the court, and will in reality make submissions that are distinct from those of the other parties. This last point – making unique and helpful submissions – is of paramount importance. The strategic implications for LEAF in the context are that LEAF must ensure its submissions are unique and finely tailored for the case before the court. In circumstances where there may be multiple interveners, it is increasingly important for broadly aligned interveners to coordinate before filing motions for leave to intervene to ensure that each intervener or intervening coalition is able to make strong and unique contributions without overlap. Failure to do this may result in all interveners being denied leave to intervene.

The Federal Court of Appeal, however, has taken a very different and very strict approach to intervention. In *Pictou Landing Band Council v. Canada (Attorney General)*, 2014 FCA 21, Justice Stratas articulated a new legal test for intervention which is a departure from the law on intervention before other courts. At para. 11 in *Pictou*, he set out a five-part test as follows:

> I. Has the proposed intervener complied with the specific procedural requirements in Rule 109(2)? Is the evidence offered in support detailed and well-particularized? If the answer to either of these questions is no, the Court cannot adequately assess the remaining considerations and so it must deny intervener status. If the answer to both of these questions is yes, the Court can adequately assess the remaining considerations and assess whether, on balance, intervener status should be granted.
>
> II. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?
>
> III. In participating in this appeal in the way it proposes, will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?
>
> IV. Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important and

> complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court? Has the proposed intervener been involved in earlier proceedings in the matter?
>
> V. Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?

In June of this year, in *Teksavvy Solutions Inc. v. Bell Media Inc.*[62] Stratas J.A. went further and issued directions to the prospective interveners on how they should prepare their materials to streamline the intervention process. At para. 11 in *Teksavvy*, he described his direction to interveners as follows:

> The direction warned potential interveners that our approach differs from that of some other courts. We have strict criteria governing leave to intervene in Rule 109 and we insist they be fulfilled. Unlike some other courts, for reasons of judicial economy we do not admit all who apply to intervene. This is especially so if most favour one side of the debate. We do not want to create the appearance or the reality of a court-sanctioned gang-up … We also warned potential interveners that, if admitted, they will have to take the issues set by the appellant and as disclosed in the reasons of the Federal Court and neither add to them nor add to the evidentiary record … We reminded them that we are running a court of law, not a court of policy, and, still less, a legislature, and so those who want to make freestanding policy submissions should wander down the street to lobby a politician for legislation…

In that case, Stratas J.A. went further. While granting leave to intervene to six intervener groups, he ruled that "allowing all six to intervene separately with separate counsel would result in lack of economy and duplication" and so ordered the interveners to combine into three different groups and for each group to submit only one factum.[63] Without regard to whether the parties wanted to make submissions together, he ruled that they must and that "Counsel for parties grouped with other parties will have to work out who does what."[64]

---

[62] 2020 CA 108

[63] *Teksavvy v. Bell Media*, above note 61 at para. 17

[64] *Teksavvy v. Bell Media*, above note 61 at para. 19

Finally, Stratas J.A. criticized interveners who rely on international legal instruments to interpret the *Charter*:

> All too often interveners assert or imply, without demonstration, analysis or particulars, that Charter protections are automatically coextensive with whatever is found in some international instrument and that a relevant provision of domestic law, regardless of its authentic meaning, must automatically conform with that instrument. Both propositions are wrong. The Charter is not "an empty vessel to be filled with whatever meaning we might wish from time to time", including whatever meanings can be plucked from international law in support of a cause…[65]

This attitude towards interveners, the *Charter* and international law are out of step with rulings from the Supreme Court of Canada. The Federal Court of Canada has always taken a much narrower black-letter-law approach to its judgments rather than a purposive analysis. But this announces an antipathy to public interest intervention that appears to run deeper. Interventions at the Federal Court of Appeal will be unlikely therefore to be the most productive investment of resources. To date the Federal Court of Appeal's approach remains an outlier but this will have to be monitored.

B. Counter-movements

For many years, conservative academics, policy makers and media have denounced intervention in constitutional cases as illegitimate interference by "interest groups" and "lobbyists" who are seeking undue influence over the Courts. They have viewed LEAF's interventions, in particular, as political lobbying. They have also cast the Court's willingness to accept interventions by public interest groups as a power grab by the Court to enable the Court to pursue "judicial activism" under the *Charter*, "placing no significant limits on its own powers to review government actions and replace the judgment of government officials with its own".[66]

---

[65] *Teksavvy v. Bell Media*, above note 61 at para. 20

[66] Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (New York: SUNY Press, 2002) at 48. See also Ian Brodie, "Interest group litigation and the embedded state: Canada's Court Challenges Program" (2001), 34:2 *Canadian Journal of Political Science* 357; Rainer Knopff and F.L. Morton, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000); Christopher P. Manfredi, *Feminist*

These attacks on public interest intervention and litigation under the *Charter* have influenced courts towards greater conservatism and more importantly have become part of the public discourse in ways that, by design, undermine the legitimacy of the Courts themselves.

As the *Charter* endures, these anti-*Charter* counter-movements have evolved their own strategies. For example, the Canadian Constitutional Foundation was formed as a libertarian opposition to the public interest interventions by those who experience discrimination. It describes itself as "a registered charity, independent and non-partisan, whose mission is to defend the constitutional freedoms of Canadians through education, communication and litigation."[67] It is important to note the Canadian Constitutional Foundation is also a registered charity under US law.[68] This Foundation has supported Ontario lawyers who opposed the Statement of Principles recognizing lawyers' obligations to comply with Rules of Professional Conduct and the law prohibiting discrimination. It has also intervened in support of privatized health care. It will be important to track its litigation activities and the substantive arguments that it is making.

At the same time, in the wake of the Supreme Court of Canada's ruling in *Trinity Western University* academic books on the *Charter* have also been published which set out an alternate vision of what *Charter* rights mean.[69]

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.

Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund (Vancouver: UBC Press, 2004); Christopher P. Manfredi, "Judicial power the *Charter*: Reflections on the activism debate" (2004), 53 UNB *Law Journal* 1.

[67] https://theccf.ca/ (accessed 10 October 2020)

[68] https://theccf.ca/about-us/ (accessed 10 October 2020)

[69] Derek BM Ross and Sarah Mix-Ross, eds. *Canadian pluralism and the Charter: moral diversity in a free and democratic society* (Toronto: LexisNexis, 2019)

C. Aligning Legal Forum with Strategic Objective

LEAF has traditionally focused on appellate intervention as the key strategy for advancing women's equality rights under the *Charter*. However, it is important to evaluate the benefits that may be provided by engaging in litigation in other legal venues. A strategic approach to selection of forum 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. Appellate intervention does not allow LEAF as an intervener to shape the evidentiary record or the legal questions before the Court. But appellate advocacy typically does not delve deeply into the facts. Because the advocacy is focused on principles of law and is concerned with their application as principles that bind parties well beyond those to appeal, this forum is well suited for advocacy where what is sought is incremental change to legal principles or defence of existing legal principles.

However, as noted above, sometimes a Court will not be able to understand or appreciate the significance of a legal principle precisely because the judges are struggling to overcome the gap between their experience of the world and the claimant's reality. The more deeply a rights claimant is subjected to dynamics of oppression, the further their experiences stand from those of dominant classes, the more difficult it is for judges from those dominant classes to find the claimant's evidence credible or to appreciate what the evidence signifies. This is a significant impediment in enabling courts to understand what systemic discrimination and substantive equality mean. Sometimes it is possible to overcome that difference by relying on legal principles alone. But sometimes a much more detailed or different evidentiary record is needed in order to bring a decision-maker on the journey from their lived experience to that of the rights claimant. In these contexts, it would be valuable to look at the benefits of legal proceedings that unroll more slowly and with an extended focus on the facts. Sponsoring cases is one option although it is admittedly a lengthy and expensive

endeavour to sponsor a case which may go through multiple levels of appeal. However, participation in public inquiries, including public inquiries that may be called by human rights commissions, and coroners' inquests present opportunities that allow judges to examine issues specifically from a systemic perspective with a rich body of evidence.

As noted above, there are important areas of legal analysis where feminist legal principles remain under-developed. Hosting conferences to deepen analysis around targeted questions or topics would be an appropriate forum to respond to this concern. It will also ensure that Canadian feminist scholarship on equality rights continues to evolve and be responsive to realities of systemic discrimination.

Finally, in some situations, the legal principles, the scholarship and the evidence are available but the leap to a feminist vision of equality is too far. Because concrete examples of feminist realities of equality do not exist in the law, feminist judgment writing projects are an extremely valuable exercise. They engage in the leap of imagination which is missing for judges who are not equality experts and are able to demonstrate by example what a judgment that understood a feminist vision of equality would look like. Feminist judgment writing projects rewrite existing Court judgments, using existing scholarship, case law and evidence, to re-imagine how the case would be decided by a feminist court. The merits of this form of scholarship were confirmed in 2019 as the Supreme Court of Canada in *R. v. Goldfinch*,[70] cited Jennifer Koshan's judgment for the *Women's Court of Canada*[71] in its decision.

V. Conclusions

This paper aims to provide a framework and foundation for understanding how women's equality rights under the *Charter* have evolved in the 35 years since LEAF's

[70] 2019 SCC 38 at para. 45

[71] Jennifer Koshan, "Marriage and Advance Consent to Sex: A Feminist Judgment in R v JA" (2016), 6:6 *Oñati Socio-legal Series* 1377

founding. While the paper proposes numerous strategic questions for consideration, it does not propose to provide recommendations for action as the paper intends to begin, not conclude, a conversation. A concluding observation however is that the possibilities for feminist litigation strategy will always be subject to the constraints of available funding and resources. While 35 years is a long time in the life of a litigator, it is a blink in the life of a constitution. As outlined above, there is a lot of work left to do in building secure protection for women's equality rights under the *Charter*. This requires stability, continuity, a strong institutional memory and strategic plan not for just for litigation but 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.