

LEAF's Feminist Strategic Litigation Plan

2022-2026



LEAF
FAEJ

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

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LEAF is a national charitable organization that works towards ensuring the law guarantees substantive equality for all women, girls, trans, and non-binary people. LEAF acknowledges the support of Women and Gender Equality for its Feminist Strategic Litigation Project.



Women and Gender
Equality Canada

Femmes et Égalité
des genres Canada

Canada



Background

Over the past 35 years, LEAF has enjoyed considerable success in using litigation to promote substantive gender equality.

Despite LEAF's efforts, however, substantive gender equality has not been achieved. Women, girls, trans, and non-binary people continue to face structural discrimination based on intersecting grounds of oppression.

LEAF's approach to feminist strategic litigation was first developed in the mid-1980s. Until now, it had not been thoroughly re-examined to accurately measure its impact and assess its effectiveness. Nor had it been systematically modified to adapt to 21st century social, economic, and legal realities.

LEAF's Feminist Strategic Litigation (FSL) Project set out to conduct this analysis.

Beginning in 2019, the FSL Project examined the use and impact of feminist strategic litigation to help LEAF, feminists, and gender equality advocates more effectively combat systemic discrimination and oppression.

Project Timeline

2019

01

Consultations

- with LEAF staff, Board and committee members, and volunteers
- with past and current partners
- with feminist lawyers and advocates
- with legal advocacy organizations in Canada, the US, South Africa, and the UK

02

A needs assessment survey

- conducted to learn more about the main areas of need facing women and girls throughout Canada

03

A review of LEAF's cases from 1985 to 2019, including impact case studies on

- consent law
- access to abortion
- income assistance

2020

05

Three discussion briefs on topics key to feminist strategic litigation, including

- intersectionality in law and legal contexts
- using the legal system to advance equality for Indigenous women, girls, and 2SLGBTQQIA persons
- the evolution of the Canadian legal landscape for feminist equality rights litigation

2021

07

Creation of this Feminist Strategic Litigation Plan, which

- takes the lessons learned throughout the Feminist Strategic Litigation Project
- sets out a plan to guide LEAF's litigation work over the next five years

04

A report on feminist strategic litigation, including discussion of

- what feminist strategic litigation is
- how to assess its effectiveness

06

A three day virtual symposium on law and gender justice, bringing together

- activists
- front-line service providers
- lawyers
- academics

2022-2026

08

Implementation of this Feminist Strategic Litigation Plan, through

- fulfillment of its key priorities
- application of decision-making and impact analysis frameworks
- evolution in response to feedback and evaluation

LEAF Mission

LEAF is a national charitable organization that works towards ensuring the law guarantees substantive equality for all women, girls, trans, and non-binary people.

LEAF Vision

LEAF's vision is the realization of substantive equality for all women, girls, trans, and non-binary people.

LEAF Values

- Inclusiveness and openness
- Trust
- Diversity
- Integrity and ethical behaviour
- Respect
- Accountability

Organizational Priorities

LEAF's 2021-2026 Strategic Plan lays out the organization's overarching priorities for our work over the next five years. This FSL Plan speaks to many of these priorities, particularly the four outlined below:

01

Prioritizing reconciliation and working to amplify and affirm Indigenous voices and systems

02

Amplify the voices of those who experience gender-based discrimination

03

Pursue feminist litigation, law reform, and public education

04

Deepen and enrich the LEAF network



Key Lessons

Litigation remains a tool for achieving gender justice

The colonial legal system is based on systemic racism and colonialism, and there are significant barriers to access. At the same time, litigation offers a tool to fight back against oppression. Organizations continue to see law as a useful tool for the communities they serve.

But what feminist advocacy looks like has evolved both in and outside the courtroom

Feminist movements are increasingly intersectional, decentralized, and non-hierarchical. Many have well-developed practices of allyship, support, and coalition. Movement lawyering is on the rise - enabling those with lived expertise to create and lead legal strategy, with support from lawyers.

What this means for LEAF litigation

01

LEAF should strengthen relationships with community-led organizations and movements

- Relationships need to be developed before a case arises, and continue after it ends
- Limited resources mean relationship choices must be intentional

02

LEAF should determine to whom it is accountable, and what that looks like

- This means thinking through the relationship between LEAF and broader feminist movements
- It also requires commitments to be accountable, and following through

03

Where possible, LEAF should address colonialism's ongoing consequences

- This must be done with Indigenous peoples, not for them
- Building cultural competency and reducing harm requires learning and taking the time to form meaningful relationships

04

LEAF should continue to bring intersectional analyses before courts

- Some judges and adjudicators are getting better at incorporating intersectionality into their analysis, but more work is needed
- Structural intersectionality needs to be emphasized, not just identity categories

05

LEAF should strike a balance between being proactive and reactive

- Identifying priority issue areas allows for proactive planning, and helps guide reactive decisions
- At the same time, LEAF cannot control when issues or opportunities arise - and will need to respond when they do

06

LEAF should take a broad and intentional approach to assessing impact

- Impact is not just about what happens in the courtroom
- Both process and outcome matter
- Legal or policy outcomes that benefit one group can have negative consequences for others

07

LEAF should consider different forms of litigation, resources permitting

- Involvement as a party in test cases provides an opportunity to be proactive, establish the record, and help decision-makers understand lived experiences very different from their own
- Trial or tribunal interventions also provide of an opportunity to shape the record
- Commissions, inquiries and inquests allow for broader, systemic arguments

08

LEAF should continue to use appellate intervention to make a difference

- Mentorship and capacity-building can help develop the highly skilled advocates needed to make an impact before appellate courts
- Appellate advocacy presents opportunities to make submissions on particular legal principles, seek incremental change, and defend existing legal gains

Crucially, litigation must be used in tandem with other strategies

Cases must be situated in a broader landscape, accompanying and accompanied by education, awareness-raising, alliance-building, discourse-shifting, and policy reform. It is important to recognize that this deeper and broader approach to litigation takes more time/resources to implement.



LEAF's Feminist Strategic Litigation Priorities (2022-2026)

Prioritizing reconciliation, decolonization of legal and social systems, and harm reduction

- LEAF's litigation work will be one way through which the organization will build sincere, respectful relationships with Indigenous organizations and communities across the country
- LEAF will work alongside Indigenous organizations, women, and 2SLGBTQQIA persons to challenge gender discrimination, anti-Indigeneity, and other intersecting forms of oppression
- LEAF will examine whether it is possible to challenge colonial structures and laws through taking legal positions and, if so, how to do so
- LEAF will take steps to learn about Indigenous legal orders and to understand ways in which the organization could support or amplify recognition and application of Indigenous legal orders through litigation
- LEAF will otherwise take a harm reduction approach to litigation, pursuing litigation where the potential benefits of engaging with the colonial legal system outweigh the potential harms and taking our lead from Indigenous organizations, women, and 2SLGBTQQIA persons

Tackling issues central to substantive gender equality

- LEAF will monitor for and proactively seek out litigation opportunities which allow the organization to advance:
 - Anti-racism:** meaning cases which challenge the racism embedded in our systems of power and institutions – including laws and the justice system more generally
 - Reconciliation and decolonization:** meaning cases which push back against colonial powers and systems by centering Indigenous peoples, Indigenous frameworks, and Indigenous sovereignty*, and those which take a harm reduction approach to engaging with the colonial legal system
 - An end to gender-based violence and violence against women:** meaning cases which respond and work towards ending sexual violence, technology-facilitated violence, and intimate partner violence
 - Reproductive justice:** meaning cases which promote reproductive choice and access to the resources, supports, and conditions needed to have (or not have) children and raise them in safe and healthy environments**
- At the same time, LEAF will remain flexible and ready to respond as other important gender equality issues, opportunities, and cases emerge

Better centering the needs and expertise of those experiencing gender-based discrimination

- LEAF will commit the time required to build lasting relationships and enable real learning with communities, movements, and partners
- LEAF will explore models for deeper collaboration with communities, movements, and partners, including through learning from other organizations with different experiences building these relationships
- LEAF will work with community organizations and individuals facing gender-based discrimination to ground its legal advocacy – including to identify what issues and cases to pursue, and to shape our advocacy strategies
- LEAF will deepen its networks so that its case committees, pro bono litigators, and Law Program Committee reflect the diversity of our communities

Building on our strengths, exploring opportunities for the future

- LEAF will continue to intervene in cases to bring feminist legal analyses to the interpretation of Canadian laws
- LEAF will explore other litigation strategies as opportunities emerge, including trial level advocacy, public inquiries, inquests, and tribunal proceedings
- LEAF will continue to offer its litigation expertise to communities and partners working to achieve gender equality, including in instances where LEAF is unable to directly participate in a case or campaign
- Through its litigation, LEAF will bring together feminists at various stages of their careers to help build the next generation of feminist advocates

Working within the bigger picture

- LEAF will situate its litigation in broader advocacy strategies, including law reform efforts, public education, media advocacy, protest, and others
- Where possible, LEAF will look to use its litigation to complement, build on, and/or support the existing work of grassroots movements, communities, and partner organizations

Section Citations

* Eve Tuck and K. Wayne Yang, “Decolonization is Not a Metaphor” (2012) 1:1 Decolonization: Indigeneity, Education & Society 1-40 at 2-3.

** SisterSong Women of Color Reproductive Justice Collective, “Reproductive Justice” (no date), online: SisterSong <<https://www.sistersong.net/reproductive-justice>>.



Implementing the FSL Plan

Key Milestones

01

Development of an organizational understanding of how our litigation work fits in with reconciliation and decolonization, to the extent that it can, and harm reduction

02

Establishment of relationships with community and advocacy organizations and groups:

- Located in the North and in rural areas
- Working with and for Indigenous women, girls, and 2SLGBTQQIA persons
- Working with and for marginalized women, girls, and gender-diverse persons, including those who are racialized, 2SLGBTQQIA, low-income, and/or live with disabilities

03

Development and implementation of processes for continued involvement in gender equality issues after litigation ends, such as debrief meetings to assess LEAF's impact in a case and potential advocacy efforts moving forward

04

Development and implementation of a mentorship program for junior equality rights lawyers, particularly those living with intersecting grounds of marginalization

05

Development and implementation of diversity and representation plan for case committees, the Law Program Committee, and pro bono counsel

06

Exploring a collaboration model that is not LEAF's standard case committee model (see Appendix B), and learning from that experience

Appendix A: LEAF's FSL Theory of Change

Problem

Women, girls, trans, and non-binary people in Canada do not have substantive equality.

Assumptions

Law can be an effective tool for promoting substantive equality, and FSL is one way to use law to promote substantive equality.

Focus of Change

Women, girls, trans, and non-binary people in Canada – especially those facing multiple intersecting grounds of oppression

Strategy

Feminist lawyers use FSL to present legal principles that communicate and respond to what substantive equality looks like from the perspective of those experiencing discrimination.

Outcome: FSL Creates Change

01

Women, girls, trans, and non-binary people receive concrete remedies which help to redress or eliminate the discrimination they face.

02

Courts adopt and apply principles that advance gender equality rights in cases LEAF is involved in, and more broadly.

03

LEAF and other equality-seeking groups build on positive legal outcomes to advance gender equality in subsequent cases.

04

Negative legal outcomes ground advocacy outside the courtroom, mobilize supporters, and create louder demands for change.

05

Laws and policies that negatively impact gender equality are reversed or removed.

06

Laws and policies that advance gender equality are created, maintained, and/or implemented.

07

Feminist and social movements gain strength, build connections, and mobilize supporters.

08

Public discourse and perception shift, and sensitivity to important gender equality issues increases.

Appendix B: A Case Journey under the FSL Plan

01

LEAF staff **learn about a potential case**, which happens through:

- Conversations with allies and partner organizations
- Reach outs by impacted individuals and communities or counsel
- Monitoring of cases by LEAF staff, Board members, Law Program Committee members, branch members, and volunteers

02

LEAF staff **discuss the case internally**, applying the case selection criteria (see Appendix C) to determine how to present the case to the Law Program Committee for discussion

What is LEAF's Law Program Committee?

LEAF's Law Program Committee provides advice and makes recommendations concerning the litigation undertaken by LEAF. It also advises and makes recommendations concerning LEAF's law reform and policy projects. The Law Program Committee is made up of legal academics and practitioners with diverse subject matter expertise and lived experiences.

03

LEAF staff **present the case to the Law Program Committee** for discussion and debate

Law Program Committee members, with the Case Selection Criteria in mind, **provide their thoughts and perspectives on whether LEAF should get involved** in each case, and if LEAF should partner with another organization or organizations

04

Where LEAF staff and Law Program Committee members decide LEAF should look to become directly involved in a case (i.e., as an intervener, or as a party to a case), LEAF's Executive Director & General Counsel **presents the case to the LEAF Board** to obtain its approval

05

With input from the Law Program Committee, LEAF staff **work with partner organizations, retain counsel, and organize a Case Committee**

Together, LEAF staff, partner organizations (if applicable), the Case Committee, and counsel **determine the goals for the case, put together LEAF's arguments, and brainstorm potential complementary advocacy efforts** (e.g., media engagement, events, etc.)

Counsel **present LEAF's arguments** in court

What is a Case Committee?

Almost all of LEAF's cases involve a Case Committee, made up of individuals with lived experience and subject matter expertise. Case committee members may be academics, lawyers, and/or representatives from community-based or advocacy organizations.

06

LEAF staff, partner organizations (if applicable), the Case Committee, and counsel **assess the impact of the case** using the Effectiveness Assessment Framework (see Appendix D)

LEAF staff, partner organizations (if applicable), and the Law Program Committee **strategize about next steps**, which may include other forms of advocacy

Appendix C: Case Selection Criteria

A note on the use of these criteria

These case selection criteria provide a framework for LEAF to use in deciding whether to take on a particular case. They are not intended to be a checklist, or to reflect a hierarchy of priorities in choosing cases. Rather, the questions listed are intended to spark reflection and discussion about different and important aspects of potential cases. They may also help identify a case's planned indicators for success, which can then be monitored during and after the litigation.

Case characteristics

1. What issues are raised by the case?
 - Does the case address any of LEAF's identified priority issue areas?
 - If not, is the issue important and urgent enough for LEAF to consider involvement nonetheless?
2. What individuals and/or communities are impacted or potentially impacted?
 - Consider both positive and negative potential impacts.
3. How much is the case part of a larger issue?
4. Does the case raise novel issues?
5. Are there facts in the case or characteristics of the relevant party that argue against becoming involved?

Connection to case

1. Does LEAF have expertise in the issue area(s) raised by the case?
2. How much do the issues raised by the case connect to identified LEAF priorities?
3. Are there things that LEAF can contribute that others cannot?
4. Are there other individuals or organizations better positioned to be involved?

Representation

1. Does the case have the potential to impact people facing different and intersecting grounds of oppression?
2. Has LEAF recently been involved in cases in this issue area?
3. Which jurisdiction is the case from, and how recently has LEAF been active in this jurisdiction?

Potential impact

1. What would impact look like to LEAF in this case? Consider:
 - What are the potential benefits or harms to individuals involved in the case?
 - What are the potential benefits or harms for broader communities or groups facing similar challenges?
 - What are the potential benefits or harms for broader communities or groups not directly involved in the litigation?
 - What is the potential impact on legislation, policies, and/or regulation?
 - What is the potential legal impact?
 - What is the potential impact on social movements or empowerment?
2. What is the likelihood of achieving LEAF's desired impact(s) in this case?
3. Is there additional work required outside of the courtroom to achieving LEAF's desired impact(s)?

Practical concerns

1. What are the timelines for becoming involved, and are they feasible?
2. Does LEAF have the necessary funds to become involved?
3. Does LEAF have the internal capacity to take on the case?
4. Are there other organizations which could take on different tasks associated with the case?
5. Are there potential reputational risks to becoming involved in the case?

Other advocacy avenues

1. Is this the moment to become involved, or should LEAF wait until a later moment?
2. Are there ways to be involved other than becoming directly involved in the case?

Appendix D: Effectiveness Assessment Framework

This framework provides a broad list of potential impact areas for FSL, to be used in assessing the impact of a particular case or series of cases. LEAF may customize this list to reflect organizational priorities at a particular moment as well as a case's planned indicators for success, but will keep in mind the potential for areas of unexpected impact.

Case Information

Case name:

Main issues:

Nature of involvement (e.g., party, intervener, background support):

Others involved (e.g., partners, coalitions, committees):

Level of court:

Planned indicators for success:

Related advocacy efforts:

Relevant additional context:

Legal outcome of case:

Impact Assessment

Key considerations:

- Consider impact of both process and outcome
- Consider positive, negative, and neutral impact
- Remember that impact may shift over time, so there may be a need to revisit this assessment

01

Impact on individual(s) involved in the case

Potential information sources: interview with individual(s), media or other coverage quoting individual(s), decision

1. What impact(s) did the judgment and any remedy ordered have on the individual(s)?
2. What impact did the process and being involved in the case have on the individual(s)?

02

Impact on broader communities or groups

Potential information sources: interview with communities or organizations representing communities, media or other coverage quoting members of communities or organizations, follow-up research or studies

1. What impact did the case have on broader communities or groups involved in the litigation or facing similar challenges?
2. What benefits or harms did the case have for broader communities or groups not immediately involved in the litigation?

03

Impact on legislation, regulations, and policy

Potential information sources: decision, media reports on legislative reform processes, Hansard, interviews with individuals or groups impacted by legislation, follow-up research or studies

1. What impact did the case have on existing legislation, regulations, or policy?
 - Did the case contribute to the reversal or removal of legislation, regulations, or policy? How?
 - Did the case contribute to the enforcement or implementation of legislation, regulations, or policy? How?
2. Did the case contribute to the creation of new legislation, regulations, or policy? How?
3. Did the case have other effects on legislation, regulations, and policy?

04

Impact on public discourse and perception

Potential information sources: media reports, social media posts, interviews, academic commentary

1. How did litigation frame or reframe issues?
2. What impact did the case have on public awareness?
 - What kind of media coverage did the case generate?
 - What kind of social media engagement did the case generate?
 - What kind of academic commentary did the case generate?
 - What kind of other engagement did the case generate (e.g. panel discussions, other events)?
3. Did the case generate backlash in public discourse? If so, what kind?

05

Legal impact

Potential information sources: decision, legal or academic commentary, individuals involved in the case

1. What was the outcome of the case?
2. What kind of precedent did it set (good, bad, neutral)? What impact might this have for future arguments?
3. Did the court adopt feminist or substantive equality arguments?
4. What impact did the case have on legal culture (e.g. education, mainstreaming of arguments or evidence)?

06

Impact on social movements and empowerment

Potential information sources: individuals and organizations involved in the case

1. Did the case mobilize support from individuals? Organizations? Other groups?
2. Did the case attract new supporters? Did the case cause a loss of supporters?
3. Did the case build or strengthen connections with individuals or organizations in the feminist movement? In other movements? Did it weaken these connections?
4. Did the case build or strengthen connections with influential actors? Did it weaken these connections?
5. What impact did the case have on organizational capacity?