WOMEN'S LEGAL EDUCATION AND ACTION FUND

SUBMISSIONS TO THE *CANADIAN HUMAN RIGHTS ACT* REVIEW PANEL

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INTRODUCTION:

The Women's Legal Education and Action Fund (LEAF) is a national organization that works to promote substantive equality for women in Canada, primarily through *Charter* litigation and equality based law reform work. LEAF was founded in 1985 specifically to advance women's equality rights in Canada. LEAF's mandate is two-fold: to argue important equality rights cases before Canadian courts on behalf of women, and to provide public education on the issue of sex equality. Through legal action, research and public education, LEAF works to challenge the discrimination experienced by women in Canada and bring about concrete advancements for women's equality rights. It is through this work that LEAF has developed an expertise in the inequality and discrimination that women experience in Canada.

There are three fundamental principles which central to LEAF's equality work and which inform LEAF's submissions to the *CHRA* Review Panel:

1. Women as a group, compared with men as a group, experience widespread and pervasive discrimination.

2. Women who are oppressed on the basis of, for example, their race, class, sexual orientation, religion or disability, experience inequality different in degree and/or kind, in various contexts.

3. Law can be an effective tool for egalitarian social change.[1]

With respect to the first principle, it is a fact that women in Canada, at the close of the twentieth century, continue to experience discrimination so that they are denied the benefits of equality within Canadian society. The reality of sexual inequality in Canada is reflected in the continued experience of violence against women, sexual harassment, pay inequity, low participation rates in non-traditional jobs, inadequate child and day care, economic insecurity in general and inadequate resources to effect reproductive choice, to name but a few examples[2]. Women in Canada still experience direct and intentional discrimination however, generally speaking, the practice of discrimination against women has become less overt and more systemic in nature over time. Rarely is a piece of legislation or an employment policy drafted to include an intentional and direct discriminatory effect upon women, i.e.: "for the purposes of this pension plan 'employee' does not include women". Discrimination against women is more covert today as it is applied in a systemic fashion. Systemic discrimination consists of a web of direct and indirect barriers embedded in the accepted norms shaping rules, policies and practices that have

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[1]Carissima Mathen in Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada. Women's Legal Education and Action Fund. (Toronto: Emond Montgomery Publications Limited, 1996) xix

[2]Alternative Report to CEDAW submitted by Canadian NGOs as represented by the National Action Committee on the Status of Women (NAC), 16th session of CEDAW; January, 1997

the cumulative effect of excluding members of disadvantaged groups from equal access to and treatment in employment.[3]
With respect to the principle of diversity and the experience of compound discrimination, LEAF is committed to advancing an increased appreciation and understanding of these issues in its legal and public education work. Compound discrimination has been described as a term "used to describe the experiential reality of those for whom existing single-axis analyses of oppression are inadequate."[4] LEAF knows that when multiple grounds of discrimination are experienced, the analysis applied to the experience will demand a contexualized and varying response. The advancement of a meaningful analysis of discrimination for those individuals who do not fit neatly into one of the established categories of discrimination must be a priority in order for equality law to maintain any effective relevance.

LEAF's third guiding principle is based upon the belief that the law can be used as an effective tool to bring about social justice. While LEAF recognizes the frustrations and limitations associated with efforts to advance equality through litigation and law reform, LEAF remains committed to the belief that substantive equality can be advanced by these means. The purpose of human rights legislation is to remedy discrimination and achieve substantive equality. While the current efficacy of human rights legislation and the structures that administer the legislation is clearly inadequate, it is LEAF's belief that human rights legislation in Canada contributes positively to Canada's status as a rights-conscious society and assists in the struggle to eliminate discrimination.

LEAF's work to promote women's equality is closely linked with women's human rights, and LEAF has had a significant amount of experience with issues relating to the *CHRA* and provincial human rights legislation. LEAF has intervened in the following human rights related cases: *Vriend* v. *Alberta* (under-inclusiveness of Alberta's *Individual's Rights and Protection Act*); *BCSGEU* v. *PSERC* (examination of "adverse effect discrimination" with reference to the effect of the discriminatory rule and its relation to actual job requirements, rather than accommodation of individual employees which leaves the discriminatory rule intact); and *Ferrel* v. *Ontario* (the constitutionality of the Ontario government's repeal of the *Employment Equity Act (EEA*), and the ineffectiveness of the *OHRC* to resolve claims of systemic discrimination). LEAF is currently intervening in *British Columbia Human Rights Commission et al* v. *Blencoe* (whether delay gives rise to s. 7 *Charter* claims for respondents and complainants). Through its work on *J.G.* v. *The Minister of Health and Community Services (New Brunswick)* (availability of civil legal aid for state guardianship applications) and *Falkiner* v. *Ontario* (discriminatory effect of Ontario's social assistance "spouse in the house" regulations on single mothers), LEAF has developed an interest in the issue of social condition as it relates to the economic discrimination experienced by women. LEAF also participated in the parliamentary consultations on the introduction of Bill S-5, *An Act to Amend the CHRA et al*.; in this process LEAF explained its concern with the introduction of a general duty to accommodate into the *CHRA*.

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[3]*Canadian National Railway v. Canadian Human Rights Commission*, [1987] 2 S.C.R. 1114 at 1124, 1138-39
[4]M. Eaton, "Patently Confused: Complex Inequality and Canada v. Mossop" (1994) 1 Rev. Cons. Stud. 203 at 229

LEAF is interested in the *Canadian Human Rights Act's* potential to promote equality for women in Canada and the operation of the *CHRA* as a legal means to challenge the many forms of discrimination experienced by Canadian women. In the submissions that follow LEAF has identified several priority areas of concern with respect to possible *CHRA* reform; briefly LEAF's priority concerns are as follows: the meaning and effectiveness of the current interpretation of "adverse effect discrimination" and the understanding of "undue hardship"; *CHRA* process issues; the under-inclusiveness of the prohibited grounds of discrimination identified in the Act, especially as it relates to women's economic inequality; and the statutory definition of multiple grounds of discrimination. LEAF 's goal with respect to its submissions is to advance recommendations for reform that will make the *CHRA* a more effective tool to challenge discrimination and achieve substantive equality.

SUBSTANTIVE EQUALITY:

As noted above, LEAF's work , including these submissions to the *CHRA* review panel are informed by a substantive equality analysis. A substantive equality approach arises out of the recognition that there currently exists great inequality in Canadian society. Differences of opportunity, social situation, sex, race, class, and ability (as defined by the majority) mean that many Canadians experience tremendous disadvantage in attempting to make for themselves meaningful and dignified lives. The concept of substantive equality seeks to address this reality by ensuring that the formulation and application of laws will have fundamental, material gains for those persons who are most disadvantaged in Canada.

The concept of substantive equality has been evolving in Canadian jurisprudence for the past fourteen years. As a starting point, substantive equality may be understood in relation to the term it was clearly meant to supercede: formal equality. Formal equality may be traced back to Aristotle's principle of equality: persons who are similarly situated are to be treated similarly, while persons who are not similarly situated may be treated differently to the extent of the difference.

This definition of equality may work in certain narrow situations, for example, when questions of identical application of the law in concerned. But, formal equality is ill-equipped to deal with more fundamental questions concerning how society treats its members. It cannot address how law is made, to whom it applies, its impact on oppressed groups, or its contribution to systemic inequality. More significantly, formal equality cannot provide guidance as to when persons or classes of persons are "similarly situated" or are "different". Because the formal equality test implies that "difference" always justifies less favourable treatment under the law, its inability to satisfactorily address these issues means that it is fatally flawed as an equality-advancing tool.

The importance of adopting a substantive approach to equality analysis was first accepted by the Supreme Court of Canada in the *Andrews* case, in which LEAF was an Intervener.[5] Although

[5] *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143

that was a case occurring under the *Canadian Charter of Rights and Freedoms*, the substantive equality analysis contained therein applies in both a constitutional and human rights context.

One distinctive feature of substantive equality analysis is that it must be *purposive.* That is, the analysis must be cognizant of what equality means, and is intended to achieve, in Canadian society. In its intervention in *Andrews,* LEAF advocated that the purpose of equality is to ensure positive gains for those persons who are most disadvantaged in Canada. Therefore, substantive equality may properly focus on historically disadvantaged groups, for example, women, racial and ethnic minorities and persons with disabilities, and on the positive measures which must be implemented to ensure that they are accorded equal respect and an equal opportunity to fully participate in society.

A second distinctive feature of substantive equality is that the analysis must be *effects-based*. That is, when determining whether a particular law or practice promotes inequality, attention must be paid to the law's effect on the group or individual concerned.

A third distinctive feature is that the analysis must be *contextual*. This involves an exploration of the underlying social, political, and historical context which attends a particular issue.[6]

LEAF's submissions to the *CHRA* Review Panel and its recommendations for reform are grounded in a substantive equality analysis and designed to advance the goal of securing substantive equality for women in Canada.

ADVERSE EFFECT DISCRIMINATION:

Background:

Adverse effect discrimination, or systemic discrimination, is not a novel concept as it was first recognized by the Supreme Court of Canada in 1985 in the decision of *O'Malley v. Simpson-Sears*[7]. In the *O'Malley* case Mr. Justice McIntyre, writing for a unanimous Court, decided the case in favour of the complainant, a Seventh-Day Adventist whose employer, Simpsons-Sears, refused to adjust her full-time schedule to enable her to observe her Sabbath on Friday evenings and Saturdays, and claimed discrimination because of creed. McIntyre J. based his reasoning on the "special nature, not quite constitutional but certainly more than ordinary" of human rights law.[8] McIntyre J. concluded that proof of intent is not required to establish discrimination. It was decided in the *O'Malley* case that adverse effect discrimination occurred:

> ... where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group,

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[6]LEAF submissions to the Standing Senate Committee on Legal and Constitutional Affairs on "*Bill S-5: An Act to Amend ... the Canadian Human Rights Act*"; November, 1997

[7][1985] 2 S.C.R. 536

[8]*Ibid*

> obligations, penalties or restrictive conditions not imposed on other members of the work force.[9]

It was concluded that once a prima facie case of adverse effect discrimination was established, the onus was on the respondent to establish that the rule was rationally connected to the job and that he had taken reasonable steps to accommodate the complainant, short of undue hardship.

In the recent SCC decision in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [10] the Court went some way to addressing the shortcomings associated with the traditional understanding of accommodation as it has been applied with respect to adverse effect discrimination and examined the systemic roots of discrimination.[11] In an unanimous decision released September 9, 1999, the SCC advanced equality law as it relates to adverse effect discrimination and held in *BCGSEU* that the legitimacy of the rule should be the focus of the adverse effect analysis, rather than the feasibility of the accommodation of the individual.

The Duty to Accommodate:

The SCC in its decision in *O'Malley* recognized that intent was not a necessary element of discrimination, and that unintentional, adverse impact discrimination can also give rise to a legitimate claim of discrimination. The Court found that in cases of adverse effect discrimination, the discriminatory impact of a neutral rule could be remedied through accommodation of the individual. The rationale central to the Court's reasoning in *O'Malley* and subsequent adverse effect cases, was that a neutral rule with a discriminatory effect could stand because it has a limited impact, rather than a widespread impact.[12] Adverse effect discrimination was justified under the duty to accommodate test to which a higher degree of scrutiny and justification was attached than was the case with respect to direct discrimination. Even if the rule or policy was found to have a discriminatory effect, the discrimination was remedied on an ad hoc basis through the creation of an exception for the individual complainant. The discriminatory policy itself remained intact.

LEAF argued before the SCC in *BCGSEU* that in order to eradicate systemic discrimination and achieve equality for women it is necessary to scrutinize the dominant norms that have shaped and defined the workplace. For example, LEAF argued that it must be recognized that the concepts of "merit" and "ability" are not neutral and act to perpetuate formal equality, at best.[13]

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[9] *Ibid*

[10] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU,* unreported decision of the Supreme Court of Canada released September 9

[11] *BCGSEU* dealt with an unjust dismissal complaint filed by Tawney Meiorin after she was dismissed from her position as a forest fighter because she failed to successfully complete a performance test that was developed based upon the physical characteristics of male fire fighters.

[12] *O'Malley* at 555

[13] LEAF *BCGSEU* SCC factum pp. 3-4

It is LEAF's position that substantive equality requires that the norms underlying a specific definition of ability be challenged:

> It is not enough simply to have an official policy that all are welcome. The more pervasive question is whether people are, nonetheless, expected to act like men, like whites, like heterosexuals, like middle class, and/or like able bodied people. If people are expected to act as something they are not, they are doomed to failure or robbed of part of their identity.[14]

In *BCGSEU* LEAF argued that individual accommodation of a complainant would not necessarily save a discriminatory rule or policy, especially where the rule has a disparate impact on women, and that allowing the rule to stand does not meet the purpose of human rights law. LEAF argued that the discriminatory rule or policy itself should be struck down in order to secure a remedy that contributes to the goal of eradicating discrimination against women and reduces the barriers to their full and equal participation in the work force.

The Court recognized that traditionally where an otherwise neutral rule is found to have a discriminatory effect, the focus is on the individual, rather than on the legitimacy of the standard.

> ... the distinction drawn by the conventional analysis between direct and adverse effect discrimination may, in practice, serve to legitimize systemic discrimination, ... Under the conventional analysis, if a standard is classified as being "neutral" at the threshold stage of the inquiry, its legitimacy is never questioned. The focus shifts to whether the individual claimant can be accommodated, and the formal standard itself remains intact.[15]

The SCC held that any rule which has the effect of excluding certain groups must be assessed in terms of the rule's rational connection to the job for which it is designed and whether the rule is reasonably necessary to the accomplishment of a legitimate work-related purpose .[16] The Court recognized the problem with the traditional analysis of accommodation in that if the rule is classified as neutral at the threshold stage of the inquiry, its legitimacy is never questioned and the focus just shifts to whether the individual complainant can be accommodated.[17] McLachlin J., wrote the Court's unanimous decision and cited with approval the following passage:

> ... accommodation seems to allow formal equality to be the dominant paradigm, as long as some adjustments can be made, sometimes, to deal with unequal effects. Accommodation, conceived of in this way does not challenge deep-seated beliefs about the intrinsic superiority of such characteristics as mobility and sightedness. In short,

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[14] D. Pothier, "Miles To Go: Some Personal Reflections on the Social Construction of Disability" (1992) 14 Dal. L.J. 526 at 534

[15] *Ibid* para. 39-40

[16] *British Columbia Government and Service Employees' Union v. British Columbia (Public Service Employee Relations Commission)*, unreported decision of the Supreme Court of Canada released September 9, 1999 para. 54

[17] *Ibid* para. 40

> accommodation is assimilationist. Its goal is to try to make "different" people fit into existing systems.[18]

The Court adopted a three step test for determining whether discrimination is justifiable. The employer must demonstrate on a balance of probabilities:

> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
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> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose and
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> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work related purpose. To show that the standard is reasonably necessary it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer.[19]

The Court also found that employers have a duty to be proactive and to review and change workplace rules or policies to ensure that they do not disproportionately exclude protected groups.

Based upon the SCC's decision in *BCGSEU*, LEAF recommends that the *CHRA* be reformed to reflect the redefinition and reformulation of the objectives associated with the principle of accommodation. Specifically LEAF recommends that the *CHRA* should be reformed to reflect the fact that any assessment of a neutral rule or policy should focus on the standard rather than the individual claimant. It is recommended that the current section 15(2) of the *CHRA* be amended to read as follows (recommended amendments in bold):

> For any practice mentioned in paragraph (1)(a) to be considered to be based on a *bona fide* occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a *bona fide* justification, it must **first** be established that **the standard is reasonably necessary and then be established that** accommodation of the needs of an individual or class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

It is LEAF's belief that a reform of the *CHRA*, as recommended above, is necessary to reflect the primacy of the analysis of the discriminatory rule in determining whether discrimination is justifiable.

Undue Hardship:

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[18] *Ibid* para. 41
[19] *BCGSEU* at para. 54

The duty to accommodate is qualified by the defence of undue hardship. The concept of accommodation short of undue hardship was introduced into Canadian jurisprudence as a result of the SCC's decision in *O'Malley*, and expanded upon in *Central Alberta Dairy Pool v. Alberta.*[20] In *Dairy Pool* the SCC found that is was unnecessary to provide a comprehensive definition of what constitutes undue hardship but did list some of the factors that may be relevant to such an appraisal, for example - financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The diversity and vagueness of these factors suggest that the scope of undue hardship may be quite broad and there is therefore concern about the use of the defence to water down the duty to accommodate. Currently the undue hardship provision of the Act is found in section 15(2) and includes a consideration of "health, safety and cost".

Although LEAF is of the view that no limit whatsoever should be statutorily imposed on accommodation, it is arguable that health and safety may be, in a limited range of cases, reasonable concerns. When assessing whether health and safety considerations will modify or eliminate the duty to accommodate in a particular situation, it is fundamentally important that the analysis of any risk to health or safety be undertaken from a substantive equality perspective. The analysis must be undertaken from the perspective of the equality claimant, not the perspective of other employees who do not require accommodation. To do otherwise would be to risk building in discriminatory assumptions into the consideration of health and safety. Because of these concerns, LEAF recommends that section 15(2) be amended so that the language "serious risk" precedes the reference to "health and safety". The section would then read:

> ... it must be established that accommodation of the needs of an individual or class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering **serious risk** to health and safety.

The legal understanding of undue hardship as developed by the courts and as found in the *CHRA* is also problematic because of the inclusion of cost as a factor for consideration. Including the cost factor in the defence of undue hardship means that some people can be discriminated against because it is considered efficient and economical.[21] The idea of placing a price tag on human rights offends the fundamental nature of human rights. Even entering into a discussion of whether or not equality is affordable is offensive and means that human rights are essentially bought and sold through the defence of undue hardship. The offensiveness of the consideration of cost as an influencing factor with respect to undue hardship is compounded by the fact that the *CHRA* applies to federal government departments, agencies and Crown Corporations and businesses engaged in activities which come within the legislative jurisdiction of Parliament. The idea of accommodation and undue hardship

> ... allows an economic limit (in the form of cost considerations) to be placed on the right to equality of those who are considered "different". As accommodation is applied to an

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[20] [1990] 2 S.C.R. 489

[21] Day S. and Brodsky, G., "The Duty to Accommodate: Who Will Benefit?" (1996) 7 *The Canadian Bar Review* 433 at 464

> increasing number of grounds (disability, sex, family status), and because disadvantaged groups are most broadly effected not be direct discrimination but by seemingly "neutral" rules (which are typically descriptions of the practices that suit an institutions traditional participants), the danger is that accommodation is emerging as a new line of analysis which provides a second class version of equality, that will allow economic and other limits to constrain the enjoyment of equality for those who are still disadvantaged.[22]

The SCC has held that human rights legislation should be given a broad and purposive interpretation that accords rights their full recognition and effect.[23] The SCC held in *Zurich Insurance* that "exceptions to such (human rights) legislation should be narrowly construed".[24] Narrow, restrictive interpretations which would defeat the purpose of the legislation, that is the elimination of discrimination, are not acceptable.[25] Clearly the limitation of undue hardship restricts the right to equality and does not serve to dismantle structural discrimination against groups, but rather reinforces it and is antithetical to the broad and purposive nature of human rights.[26]

LEAF submits that the defence of undue hardship should not include a consideration of cost and that the reference to cost should be deleted from section 15(2). In the alternative, LEAF submits that the Act should be amended to make clear that only onerous or palpable cost considerations should be relevant to an analysis of undue hardship. LEAF also submits that because the consultation process associated with the current review of the *CHRA* did not address in sufficient detail the definition of undue hardship, a comprehensive consultation with equality seeking groups should be held to inform the drafting of a new, more detailed, definition of undue hardship to be introduced into the *Act*. In the alternative to the introduction of a new definition of undue hardship, LEAF recommends that regulations be developed which would clarify the definition of undue hardship. In the interim LEAF recommends that the Ontario Human Rights Commission's Guidelines on Accommodation be incorporated into the *CHRA* in order to provide increased definition and certainty with respect to the understanding of undue hardship.

<u>Legislative Recognition of Systemic Discrimination:</u>

Women continue to experience substantial barriers to their full participation in Canadian society. Canadian women are still segregated into specific employment sectors and denied access to "non-traditional" jobs and workplaces. The Supreme Court of Canada has found that the segregation of women in employment is a result of systemic discrimination that acts to prevent the full and equal participation of women in the workplace.[27] The SCC found that systemic

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[22] *Ibid* at 472

[23] *O'Malley*, *supra*

[24] *Zurich Insurance Co. v. Ontario (Human Rights Commission)* (1992), 93 D.L.R. (4th) 246 at 374

[25] *O'Malley* at 546-7; *Canadian National Railway v. Canadian Human Rights Commission*, [1987] 2 S.C.R. 1114 at 1134

[26] Day S. and Brodsky, G., "The Duty to Accommodate: Who Will Benefit?" (1996) 7 *The Canadian Bar Review* at 465

[27] *Canadian National Railway v. Canadian Human Rights Commission*, [1987] 2 S.C.R. 1114 at 1124

discrimination consists of a web of direct and indirect barriers embedded in the accepted norms that shape employment rules, policies and practices that have the cumulative effect of excluding members of disadvantaged groups equal access to and treatment in employment.[28] Because of the contribution that systemic discrimination makes to women's inequality, LEAF submits that the *CHRA* should be amended to include provisions that would clearly recognize the nature of systemic discrimination and clearly articulate the legal test to be applied in an assessment of systemic discrimination.

LEAF recommends that the Purpose of Act section be reformed to include a reference to systemic discrimination and the Act's purpose as it it relates to the eradication of systemic discrimination. It is recommended that the Purpose of Act be amended to include the following language:

> The purpose of this Act is to remedy discrimination, including systemic discrimination, which consists of direct and indirect barriers embedded in the accepted norms that shape rules, policies and practices that have the cumulative effect of excluding members of disadvantaged groups equal access to and treatment both in employment and in society in general.

Currently section 10 of the *CHRA* identifies adverse effect discrimination as a discriminatory practice. The section reads as follows:

> ... for an employer, employee organization or employer organization
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> (a) to establish or pursue a policy or practice, or
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> (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,
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> that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

LEAF recommends that the *CHRA* be amended to include a more developed reference to the right to be free from adverse effect discrimination. It is recommended that the *CHRA* be amended so as to provide for legislative recognition of the understanding of adverse effect discrimination as it has developed in the current jurisprudence, and to clarify that the *CHRA* operates to identify and eliminate adverse effect discrimination in all areas of its application. The following language is recommended for inclusion in the Act to proceed the current section 10:

> It is a discriminatory practice for a requirement, qualification or factor to exist which although it may not appear to discriminate on its face, results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination.

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[28] *Ibid* at 1138-9

THE *CHRA* PROCESS:

Human rights commissions are intended to facilitate the eradication of discrimination and the advancement of equality within Canada. Unfortunately the reality is that the processes administered by human rights commissions, including the CHRC, often act only to frustrate and limit the rights and remedies available to the disadvantaged within Canadian society. It is a well recognized fact that human rights commissions, including the CHRA, are inefficient in their administration and investigation of complaints filed, resulting in the creation of huge backlogs and intolerable delay in the processing of complaints, creating pressure upon Commission staff to dismiss cases in order to reduce backlogs.

Delay:

It is standard for the Canadian Human Rights Commission to take at least 2 years to reach a decision not to deal with a complaint, and if a complaint is referred to a hearing, the final resolution of the complaint can take several additional years.[29] The delay in the Commission's processing of complaints threatens the very legitimacy of the human rights process. Delay may be considered a violation of both the complainants' and respondents' section 7 *Charter* rights to life, liberty and security of the person and a violation of complainants' section 15 equality rights.[30] Delay in the processing of complaints "... works against both claimants and respondents in that evidence suffers, morale declines and costs rise."[31] Delay can mean that the remedy sought is no longer relevant, for example the promotion or job opportunity may no longer be available, or in more extreme cases, one or both of the parties may be dead.

For women who experience sexual harassment, the delay associated with an unremedied complaint often forces a complainant to leave her job, and exacerbates existing and historical social and economic inequalities.[32] Unremedied sexual harassment can increase in severity as men attempt to exercise increased levels of power and control over women, which can have fatal consequences, as in the case of Teresa Vince.[33] The human rights process is an integral, if not the central component of a woman's right to be free from sexual harassment. As sexual harassment as a cause of action is arguably restricted to human rights proceedings and unavailable as a tortious cause of action in Canadian common law civil courts, human rights complaints offer the only avenue available to women to escape the harassment.[34] Sexual harassment victims with complaints arising in the federal context, rely upon the CHRC to provide meaningful and effective service, as do all claimants, and delay in the processing of complaints can mean that a complainants' rights under the legislation are meaningless.

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[29]S. Day and G. Brodsky. "Improving Canada's Human Rights Machinery" p.6
[30]LEAF SCC factum for *Blencoe et al v. Willis et al*; *Blencoe et al v. Willis et al*
[31]Mary Cornish, *Achieving Equality: A Report on Human Rights Reform* 1992 p. 164
[32]S. Welsh, "Gender and Sexual Harassment" *Annual Review of Sociology* 25 1999 169-190
[33]*Sears Canada Inc v. Davis Inquest (Coroner of),* [1997] O.J. No. 124 *per* Adams J. (Div. Ct.)
[34]LEAF factum for *Blencoe et al v. Willis et al* p. 3

Investigations of sexual harassment are often difficult and involved, because of the absence of witnesses other than the complainant and respondent. Sexual harassment investigations may be further complicated because the harassment may be based upon other grounds of discrimination as well as sex.[35] Sexual harassment complaints may be time consuming, but such a reality does not justify delay. LEAF submits that if the CHRC is to continue in its role as a gatekeeper and human rights claimants are to be denied direct access to the Canadian Human Rights Tribunal, the Government must dedicate sufficient resources to allow for the efficient management of the Commission process. In addition, LEAF submits that if the Commission takes longer than 12 months to process a human rights complaint, the claimant should be automatically allowed direct access to the Tribunal. LEAF does not support the establishment of a prioritization of case management based upon a specific ground of discrimination, such as sexual harassment, because such as system would result in the creation of a hierarchy of rights.[36] LEAF submits that it is necessary to dedicate sufficient funding to allow for the efficient processing of all complaints.

CHRC "Gatekeeper" Function:

The "gatekeeper" function refers to the legislative discretion of human rights commissions, including the CHRC, to deny complainants a hearing before the Human Rights Tribunal. The CHRC's gatekeeper authority is found in section s. 44(3)(h)(i) of the Act which provides broad criteria for the dismissal of complaints and a low threshold for the Commission with respect to the justification of dismissals.[37] Section 44(3)(h)(i) provides that the Commission shall dismiss the complaint "... if it is satisfied that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted." The broad discretion afforded the Commission through this statutory language means that judicial reviews by complainants whose cases are dismissed are rarely successful. The Commission's high dismissal rate and low referral rate raises serious credibility questions for the system's stakeholders.[38] Because human rights commissions are under increasing pressure to reduce backlogs and to project an image of efficiency, it is clear that this section is heavily relied upon the CHRC to meet its administrative priority of backlog reduction, with devastating consequences for complainants as the Commission's decision to dismiss is essentially a final one. It is submitted that the Commission is not neutral with respect to its role as a gatekeeper in the pre-hearing stage of the process, but is motivated by the goal of meeting administrative directions to reduce the backlog.

LEAF recommends that the basis upon which the Commission can dismiss cases be more clearly defined and reduced in scope. LEAF also recommends that the *CHRA* be amended so as to make clear that the legislation does not preclude parties from accessing the courts to litigate issues of discrimination.

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[35] *Ibid*

[36] The SCC has found against the creation of a hierarchy of rights in human rights law.

[37] S. Day and G. Brodsky, "Improving Canada's Human Rights Machinery: A Report Prepared for Canadian Human Rights Act Review Panel" October, 1999 pp. 50-52

[38] Only 6% of the 6550 complaints received by the CHRC between 1988 and 1997 were referred to the Canadian Human Rights Tribunal. S, Day and G. Brodsky "Improving Canada's Human Rights Machinery" p. 8

Another issue of concern with respect to the gatekeeper function and the Commission's processing of complaints is the disproportionate disposition of cases based upon the different grounds of discrimination (please see table 1 attached). The low number of cases actually referred to a tribunal are of concern, as are the numbers of cases dismissed by the Commission and the number of discontinued cases. While 8% of sexual orientation complaints were referred to a tribunal by the Commission in 1998 and no sexual orientation complaints were dismissed by the Commission, it is submitted that the Commission's relatively positive record with respect to sexual orientation complaints can be understood to be a reflection of the fact that the addition to the *CHRA* of sexual orientation as a prohibited ground of discrimination is still a relatively recent addition, and sexual orientation discrimination is still a more overt practice than other forms of discrimination, making it difficult for the Commission to dismiss these complaints. Of particular concern relating to the Commission's disposition of cases is the treatment of race discrimination cases: 0% of cases alleging race discrimination and 1% of cases based upon national/ethnic origin discrimination advanced to a hearing in 1998; 18% of race discrimination cases and 18% of national/ethnic discrimination cases were not dealt with or dismissed by the Commission in 1998. There is no explanation in the Commission's annual report to justify these numbers and it is submitted that these numbers demand an explanation.

A related issue of concern is the obtuse reporting provided by the Commission with respect to the disposition of cases. In some annual reports the Commission does not provide any figures at all relating to the disposition of cases, and in the 1998 Annual Report, the numbers relating to disposition are not reported in any central location, making it difficult to synthesize the information. No numbers are provided relating to cases that include allegations of multiple grounds of discrimination. It is therefore recommended that the CHRC provide clear information about the disposition of cases in a central location within every annual report. It is also recommended that the CHRC include within its Annual Reports disposition information relating to complaints alleging multiple grounds of discrimination.

<u>Concerns with Mediation:</u>

Any discussion of the use of mediation in the human rights context must take into consideration the power imbalance that defines relationships of domination and subordination which are characteristic of the complainant-respondent relationship. Relationships defined by inequality are usually premised upon historical experiences of disadvantage and the successful exercise of power and control by the member of the historically advantaged group. Front line service providers who work with survivors of domestic violence have persuasively argued that mediation is inappropriate in that context, and similarly it should be understood that mediation is inappropriate in the human rights context. The power dynamics which characterize a relationship of abuse or discrimination are not suspended at the commencement of mediation. The abuser or discriminator continues to exercise power and influence over the disadvantaged party in a mediation session, often in very subtle ways which may not be apparent to the mediator, e.g.: body language, facial expressions, thinly guised threats of future reprisals ....

The disadvantage experienced by complainants in the human rights context is often compounded by the fact that they usually do not have the benefit of legal representation, while respondents most often do.

LEAF submits that mediation should not be included as part of the human rights process because of the resulting disadvantage experienced by complainants. This disadvantage is compounded with respect to models of early mediation, such as that applied in the Ontario context, in which mediation is attempted prior to an investigation. The practice of early mediation, conducted prior to an investigation, before the facts have been established, means that an objective mediator has no basis upon which to asses the strengths and weaknesses of the case. It is submitted that the administrative pressure to reduce the backlog of complaints is felt by Commission staff who act as mediators. Commission staff cannot act as neutral mediators because their priority is to settle complaints in order to reduce the backlog. Complainants are further disadvantaged by the mediation process as the results of an unsuccessful mediation session and settlement offers are included as part of the information package provided to the Commissioners who use this information in reaching a decision of whether or not to dismiss a complaint. LEAF submits that the mediation process contributes to the perpetuation of the inequality and discrimination experienced by the complainant and that therefore mediation should not be included as part of the human rights process. At the very least, the mediation session and any offers of settlement made before, during or after mediation should be considered entirely confidential and should not be available to the Commissioners.

THE *CHRA* AND EQUALITY:

The Purpose of Act provisions of the *CHRA* are important as they describe the philosophy of human rights underlying the Act and the public policy sought through the legislation. The Purpose of Act provisions also provide judicial guidance with respect to the interpretation of the Act. It is LEAF's submission that the Purpose section of the *CHRA* should be amended in several different ways so as to improve the Act's utility as tool to achieve meaningful recognition of human rights and substantive equality.

Substantive Equality:

As outlined above, the goal of equality law and human rights law is to provide for substantive equality and to provide redress from the inequalities experienced by disadvantaged groups. LEAF submits that the Purpose of Act section should be amended to reflect the judicial recognition of the importance substantive equality and to provide a specific reference to the Act's goal of promoting and ensuring substantive equality. It is submitted that the Purpose section of the Act should be amended to include the following language:

> **The purpose of this Act is to provide recognition of the right of those who have experienced historical disadvantage and to provide a legal mechanism by which the**

right to substantive equality may be claimed and enforced through the provision of remedial relief from discrimination on a systemic basis.

Neutrality of the Act:

Currently the *CHRA* is drafted using neutral language that makes invisible the disadvantage suffered by groups, such as women. Equality and disadvantage under the current *CHRA* is understood in terms of sameness and difference and not in terms of advantage and disadvantage and dominance and subordination. The neutrality of the *CHRA* is apparent upon reading the Purpose of Act section. Within the Purpose section Parliament commits to the following:

> ... the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

LEAF submits that the neutrality of the above noted section contributes to the invisibility of those groups who have historically experienced disadvantage within Canadian society. The neutrality of terms such as "sex" contributes to the problem. The use of the term "sex" provides no recognition of the reality that sex inequality is a disadvantage experienced by women, and rarely experienced by men. LEAF submits that the Act should be revised to include specific reference to historically disadvantaged groups such as women. LEAF submits that the inclusion within the Act of a specific reference to the disadvantage experienced by different groups would be consistent with the federal Government's recognition of the importance of a gender equality and diversity analysis, and its commitment to apply a gender equality and diversity analysis to the impact of its laws, policies and programs.[39] LEAF recommends that a variation of the federal government's commitment to gender equality and diversity analysis be incorporated into the *CHRA*. LEAF recommends that Purpose section of the Act be amended to include the following language:

> **The purpose of the Act is to identify and eliminate political, social and economic disadvantages experienced by historically disadvantaged groups such as women, Aboriginal people, people of colour, persons with disabilities, gays and lesbians and other groups that experience interacting grounds of discrimination and analogous groups**.

Recognition of Canada's Commitment to International Human Rights Instruments:

[39]Department of Justice, Diversity and Justice: Gender Perspectives (Office of the Senior Advisor on Gender Equity: Ottawa, 1998) p. 1

Currently the *CHRA* does not contain any reference to the international human rights instruments which Canada has signed, such as the *International Covenant on Civil and Political Rights*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, the *Convention Against Racism and Racial Discrimination* and the *International Covenant on Economic, Social and Cultural Rights*.

LEAF submits that the Purpose section of the Act should be amended to provide recognition of the federal Government's intention to honour the commitments it has made as a signatory to the above noted international human rights instruments. The recognition of Canada's international human rights commitments within the *CHRA* would be consistent with provincial legislative recognition of these commitments.[40] It is recommended that the Purpose section of the Act be amended to include the following language:

The purpose of this Act is to provide a domestic legal mechanism through which the federal Government's international human rights commitments may be effected. The federal Government has proclaimed its commitment to the following international human rights instruments: the *International Covenant on Civil and Political Rights*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, the *Convention Against Racism and Racial Discrimination* and the *International Covenant on Economic, Social and Cultural Rights*.

INDIVIDUAL VS. SYSTEMIC COMPLAINTS:

The nature of discrimination has changed since human rights legislation was first introduced in Canada, and since the introduction of the *CHRA* in 1977. The practice of discrimination in Canada today is not always as overt and direct as it has been in the past. Generally speaking, laws and policies no longer blatantly exclude persons based upon a prohibited ground of discrimination, for example, restrictive covenants precluding Jews from owning property are no longer legal. The common exception is legislation and policies which still define spouse in heterosexual terms, directly discriminating against gays and lesbian. The practice of discrimination has evolved into a more subtle and covert phenomenon so that it is much more difficult to prove. Discrimination today is often applied through the practice of systemic discrimination. As noted above, systemic discrimination consists of a web of direct and indirect barriers embedded in the accepted norms shaping rules, policies and practices that have the cumulative effect of excluding members of disadvantaged groups from equal access to and treatment in employment. In order to establish substantive equality for all persons in Canada it is necessary to eliminate systemic discrimination.

The *CHRA* was designed originally to address discrimination as experienced by individual complainants. The initiation of a complaint is still generally dependant upon an individual filing a complaint of discrimination with the Commission. While there have been a few examples of

[40]Currently human rights legislation in Prince Edward Island, Manitoba, Ontario, the North West Territories and the Yukon refer to international human rights instruments.

group based, systemic discrimination complaints filed in the past[41], LEAF submits that in consideration of the reality of the practice of systemic discrimination, it is no longer appropriate to rely primarily upon individual claimants to advance complaints in an effort to eradicate discrimination. Prof. Bill Black accurately identified the problems associated with a complaint based system in assessing the B.C. Human rights system as follows:

> A particularly serious concern is that those people who experience the most severe inequality are less likely than others to file a complaint. Past discrimination often has denied these people the education that would give them the skills to use the complaint process. People struggling with poverty may not have the time or resources to make a complaint. For some, discrimination is such an everyday occurrence that a long and strenuous effort to deal with a particular event seems beside the point. Experience with other government programs and institutions sometimes creates distrust of all government agencies, including the B.C. Council of Human Rights.
>
> If a complaint is filed, the investigation may not uncover the underlying cause of the discrimination. The focus of the investigation is almost always on the events directly relevant to the decision about the complainant. Once those facts are determined, there is little incentive to go further. If, for example, the evidence shows that the person who filed the complaint was justifiably rejected for a job, the investigation probably would not examine the selection process to see if it was unfair to other applicants. In addition, the parties may agree to a settlement consisting of a monetary payment, leaving the systemic barriers in place.[42]

Justice Abella identified the problems associated with the traditional complaint based model in an employment context in the "Royal Commission Report on Equality in Employment":

> The traditional human rights commission model, which valiantly signalled to the community that redress was available for individuals subjected to deliberate acts of discrimination, is increasingly under attack for its statutory inadequacy to respond to the magnitude of the problem. Resolving discrimination caused by malevolent intent, on a case by case basis puts the human rights commission in the position of stamping out brush fires when the urgency is in the incendiary potential of the whole forest.[43]

LEAF submits that a greater emphasis should be placed upon systemic discrimination within the Canadian human rights process. LEAF recommends that the *CHRA* be amended to include a specific reference to the Commission's authority and responsibility to initiate systemic complaints. If the *CHRA* is amended so as to allow direct access to the tribunal for complainants, the Commission's central purpose could then become the investigation and

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[41] *Action Travail*

[42] B.C. Human Rights Review: Report on Human Rights in British Columbia. December, 1994 pp. 15-16 as cited in Russel Juriansz "The Effectiveness of Human Rights Commissions and the Need for Jurisdictional Focus Human Rights Law" a paper presented at the Canadian Institute for the Administration of Justice, October 18, 1996 p. 13

[43] R. Abella, Equality in Employment: A Royal Commission Report (1984) p.8

advancement of systemic discrimination complaints. LEAF recommends that the *CHRA* be amended to include the following provision:

> It is the function of the Canadian Human Rights Commission,
>
> (a) to examine and review any statute or regulation, and any program or policy made by or under a statute that appears inconsistent with the intent of this Act and to recommend to the Government the repeal or reform of the inconsistent provision. If the Government fails to follow the Commission's recommendation within 6 months of the Commission's advancement of the recommendation, the Commission shall initiate a complaint and assume responsibility for the carriage of the complaint with respect to the inconsistent provision;
>
> (b) to investigate incidents of and conditions leading or tending to lead to situations of systemic discrimination and to initiate a complaint and assume responsibility for the carriage of the complaint in order to eliminate the source of the discrimination should the result of the investigation support a finding of systemic discrimination;
>
> (c) to initiate investigations into potential situations of systemic discrimination identified by individual members of an historically disadvantaged group and to initiate a complaint and assume responsibility for the carriage of the complaint in order to eliminate the source of the discrimination should the result of the investigation support a finding of systemic discrimination.

In order to ensure that individual complaints retain the right to access the tribunal directly with respect to all forms of discrimination complaints, including complaints of systemic discrimination, LEAF submits that the following provision be included in the *CHRA*:

> Where an individual believes that the right of a person or group under this Act has been infringed, the person may bring a complaint before the Human Rights Tribunal or may file with the Commission a systemic discrimination complaint in a form approved by the Commission.

In addition to statutorily empowering the Commission with the responsibility for systemic discrimination complaints, LEAF submits that the individualistic focus of the *CHRA* must be revised. Reference to a class of individuals does appear in s. 10 of the Act, in which the possibility of a group or class of people being effected by a discriminatory practice by an employer or a union is acknowledged. However, s. 10 does not counteract the overwhelming individualistic focus of the Act. Indeed it seems to reinforce the message that the main focus of the Act is individual treatment.[44] LEAF submits that the *CHRA* be revised, as recommended above, to expressly state that a purpose of the Act is to identify and eliminate discrimination experienced by historically disadvantaged groups and to specifically name the groups that experience such disadvantage such as women, Aboriginal people, people of colour, disabled people .... LEAF also submits that each section in the Act which identifies a discriminatory

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[44]S. Day and G. Brodsky. "Women's Economic Inequality and the Human Rights Act" in Women and the Canadian Human Rights Act: A Collection of Policy Research Reports (Status of Women Canada: Ottawa, 1999) p. 151

practice be revised to recognize the group/systemic dimensions of such discrimination practices.[45]

While LEAF believes that the CHRC must assume a more proactive approach in order to eliminate systemic discrimination, LEAF submits that it is absolutely necessary for individuals to maintain the right to file individual complaints and to have access to the human rights tribunal in order to ensure that the discrimination experienced by individuals, either as a result of direct or systemic discrimination, does not go unremedied.

Employment Equity:

The provisions originally introduced by the federal Government relating to the mandatory establishment of employment equity represented a positive alternative to the complaints based human rights model, although the strength of these provisions was diminished by the lack of an effective enforcement mechanism,. However, LEAF submits that the 1997 revisions to the *Employment Equity Act* that made compliance with the Act voluntary in nature, defeat the promise embodied in the original legislation. There is strong empirical data which shows that voluntary employment equity measures have failed to produce any substantive changes in the prevalence of systemic discrimination in employment.[46] LEAF submits that in order to achieve employment equity, the *EEA* must be amended to provide for mandatory compliance and the *EEA* must be amended to include effective mechanisms for enforcement.

An additional concern with respect to the employment equity is section 54.1(2) of the Act which prohibits a tribunal from making an order requiring an employer to adopt a special program, plan or arrangement containing:

> positive policies and practices designed to ensure that members of designated groups achieve increased representation in the employer's work force; or goals and timetables for achieving that increased representation.

LEAF submits that section 54.1(2) unduly limits the range of effective orders available to a tribunal following a finding of systemic discrimination. LEAF further submits that there is no justifiable reason to prohibit affirmative action-type remedies such as the kind of remedy ordered by the SCC in *Action Travail*. Therefore LEAF recommends that section 54.1(2) should be deleted from the *CHRA*.

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[45] *Ibid* pp. 151-152

[46] H. Jain and R. Hackett, "Measuring Effectiveness of Employment Equity Programs in Canada: Public Policy and a Survey"; and J. Blakely and E. Harvey, "Socioeconomic Change and Lack of Change, Employment Equity Policies in the Canadian Context" as cited in LEAF Ont. CA factum in *Ferrel* p. 19

UNDERINCLUSIVENESS OF THE *CHRA*:

Social and Economic Rights:

The *CHRA* has been largely ineffective as tool to assist women to overcome their actual conditions of inequality in Canada. Some advances have been made in terms of women's equality through human rights legislation, for example the recognition of sexual harassment as a form of discrimination against women, and the recognition of discrimination against pregnant women as sex discrimination. However, human rights legislation has not been helpful as a means to eliminate women's economic inequality.[47] The feminization of poverty is a very real phenomenon in Canada today. In Canada, in every group, community or segment of society, women are poorer than men, and women are disproportionately represented among the poor. The experience of the feminization of poverty is even more severe for women who are disabled, Aboriginal, elderly, lesbian, single mothers, or of colour.[48] Shelagh Day and Gwen Brodsky have identified a number of interlocking factors responsible for women's persistent poverty and general economic inequality:

- the social assignment to women of the role of unpaid caregiver for children, men and old people;

- the fact that in the paid labour force women perform most of the work in the "caring" occupations and that this "women's work" is lower paid than "men's work";

- the lack of affordable, safe child care;

- the lack of adequate recognition and support for child care and parenting responsibilities that either constrain women's participation in the labour force or double the burden they carry;

- the fact that women are more likely than men to have non-standard jobs with no job security, union protection or benefits;

- the entrenched devaluation of the labour of women of colour, Aboriginal women and women with disabilities; and

- the economic penalties that women incur when they are unattached to men, or have children alone.[49]

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[47]S. Day and G. Brodsky, "Women's Economic Inequality and the *Canadian Human Rights Act*" pp. 119-120

[48]National Association of Women and the Law Brief to the *CHRA* Review Panel. November, 1999 p. 2

[49]S. Day and G. Brodsky. *Women and the Equality Deficit: The Impact of Restructuring Social Programs in Canada* (Ottawa: Status of Women Canada, 1998) p. 7

The experience of the feminization of poverty in Canada is one of the most critical forms of discrimination experienced by women in Canada. The feminization of poverty is a result of the systemic discrimination experienced by women in general. LEAF submits that in order to effectively remedy the economic inequality experienced by women in Canada, the *CHRA* should be amended to include economic and social condition as prohibited grounds of discrimination. It is submitted that the inclusion of a prohibition against discrimination based only upon social condition would not be sufficiently broad to provide for equality in the actual conditions of women's lives. It is submitted that the ground of social condition could be interpreted narrowly, as a neutral term, and might not be applied to reference conditions of economic disadvantage.[50] Therefore it is submitted that the ground of economic condition should also be included in the Act. It is recommended that the inclusion of the ground of economic condition, with specific reference to the fact that it is the economically disadvantaged who are intended to benefit from this provision, would assist women in challenging the policies and practices that contribute to women's inequality in Canada. The goal of these amendments would not be just to eliminate discrimination against the poor, but also to eliminate the inequality caused by poverty.

LEAF submits that the federal Government is under an obligation to include social and economic condition as prohibited grounds of discrimination under the *CHRA* in order to comply with its existing international human rights commitments. Canada is a signatory to the *International Covenant on Civil and Political Rights* which obliges signatories to make broad guarantees of equality in law and to provide effective protection against discrimination where it arises. Canada is also a signatory to the *Convention on the Elimination of All Forms of Discrimination Against Women* which obliges Canada to take "all appropriate measures" to eliminate all forms of discrimination against women "in all fields, including the political, economic, social and cultural fields". Canada is also obliged as a signatory to the *International Covenant on Economic, Social and Cultural Rights* to ensure the equal right of men and women to the enjoyment of their economic, social and cultural rights and to ensure that there will be no discrimination of any kind with respect to those rights.[51] LEAF submits that any amendments made to the *CHRA* with respect to the inclusion of the grounds of social and economic condition should referentially incorporate the above-noted international treaties and use language consistent with these treaties.

It is recognized that the inclusion of a prohibition of discrimination because of social and economic condition in the *CHRA* would only partially fulfil Canada's outstanding international commitments to integrate social and economic rights into the domestic legal framework, as many of the most important social and economic rights claims for women fall within provincial jurisdiction. It is also recognized that in addition to the above-noted reforms to the *CHRA*, in order to achieve real economic equality within Canada, the introduction of positive obligations upon the federal Government to provide for social and economic equality would be necessary. However, LEAF submits that the *CHRA* is an ideal place to start with respect to affirming the

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[50]This has been the case in Quebec, the sole jurisdiction in Canada that includes social condition in its human rights legislation - S. Day and G. Brodsky "Women's Economic Inequality and the *Canadian Human Rights Act*" pp. 128-132

[51]*Ibid* pp. 121-122

inherent connection between equality rights and social and economic rights and would provide an opportunity for women to effectively focus their social and economic equality claims.[52]

Language:

LEAF submits that the *CHRA* should be amended to include a prohibition against discrimination because of language. It is LEAF's submission that the current prohibited grounds of discrimination may be insufficient to address situations of discrimination in which language and/or accent are the reason for discrimination. Such a provision would, for example, assist in the protection of Francophones working in non-Francophone communities; immigrants who may speak English or French with an accent; and minority groups within Canada who use distinct geographical dialects.

DISABILITY:

In the *Eldridge* decision, the Supreme Court of Canada discussed in depth the problem of disability-based discrimination.[53] The Court recognized that the history of people with disabilities in Canada is a history of exclusion, marginalization and social devaluation. To a great extent, persons with disabilities have been excluded from the labour force and denied access to social interaction and advancement. Notwithstanding their constitutional and statutory human rights protections, persons with disabilities do not participate equally in Canadian society and are not afforded the respect which such equal statues attracts. Instead, persons with disabilities continue to suffer from paternalistic attitudes of pity and charity, and their participation within the social mainstream invariably requires them to prove that they are " just like" nondisabled persons.

This history has profoundly negative implications in social, economic, political and legal domains. Statistics from 1991 indicate that persons with disabilities, when compared with nondisabled persons have less education, are more likely to be outside of the labour force, face much lower employment rates, and are concentrated at the bottom end of the pay scale when employed. About 60 percent of persons with disabilities have incomes below the Statistics Canada Low Income Cutoff.[54]

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[52]M. Jackman and B. Porter, *"*Women's Substantive Equality and the Protection of Social and Economic Rights Under the *Canadian Human Rights Act"* Women and the *Canadian Human Rights Act*: A collection of policy research reports (Ottawa: Status of Women Canada, 1999) p.66

[53]*Eldridge* v. *British Columbia,* [1997] S.C.J. No. 86 at paragraph 56.

[54]Minister of Human Resources, *Persons with Disabilities: A Supplementary Paper* (Ottawa: Minister of Supply and Services Canada, 1994) at 34 and Statistics Canada, *A Portrait of Persons With Disabilities* (Ottawa: Minister of Industry, Science and Technology, 1995) at 4649.

Women with disabilities experience even more severe socioeconomic disadvantage. In 1991, women with disabilities faced an employment rate that was about one-third less than the rate for nondisabled women and about 15 percent less than the rate for men with disabilities. The poverty rate experienced by women with disabilities is higher than that for both women generally and for men with disabilities. In addition, women with disabilities are at a significantly higher risk of violence.[55]

Like race or sex, disability should occupy a neutral position along the continuum of human experience. Instead, however, it has been socially constructed as a negative: an individual abnormality or flaw, reinforced by stereotypical characterizations of persons with disabilities as unfortunate and/or inferior. This construct "places responsibility for any and all disability related barriers on the individual rather than on the social institutions which have excluded persons with disabilities by maintaining barriers to their full participation".[56]

The exclusion of persons with disabilities from mainstream society and the attribution of stereotypical characteristics to persons with disabilities are mutually reinforcing. Together, both forms of discrimination reinforce the idea that people with disabilities are disadvantaged by "natural forces". LEAF believes that these ideas must challenged in the course of any assessment and analysis of statutory schemes for the advancement of equality.[57]

In the above-noted section on “adverse effect discrimination”, concerns with the vagueness of the undue hardship defence and recommendations for reform have already been outlined. The ill defined nature of the undue hardship defence is of particular concern to women with disabilities seeking accommodation, and therefore LEAF would like to emphasize the importance of those recommendations for reform at this opportunity. However, even with improvements to the definition of undue hardship, tinkering after the fact would continue to define the legal response to issues of disability discrimination, instead of inclusive design from the start, and this reality remains a concern for LEAF. LEAF submits that it would be useful to research the utility of the introduction into the *CHRA* of provisions which mirror the *Americans with Disabilities Act,* and that the Commission should hold a comprehensive consultation with equality seeking groups in order to develop specific recommendations designed to improve the legislative response to disability discrimination.

In addition to concerns with the vagueness of the defence of undue hardship, LEAF has several other concerns about the ability of the *CHRA* to eliminate discrimination because of disability, specifically sections 17(3) and 24(2). Section 17(3) reads as follows:

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[55]Minister of Human Resources, *supra,* at 9; Fine & A. Asch, "Disabled Women: Sexism without the Pedestal", in M.J. Deegan and N.A. Brooks, eds. *Women and Disability: The Double Handicap* (New Brunswick: Transaction Books, 1985) 6 and T. Doe, "The Social Construction of Deaf Women" 91996), 12 *Women's Education des femmes* 45 at 47.

[56]For example, in a barrierfree world, persons who use wheelchairs would not experience mobilityrelated disadvantage. See S. A. Goundry & Y. Peters. *Litigating for Disability and Equality Rights*: *The Promised and the Pitfalls* (1994) at 36.

[57]LEAF submissions to the Standing Senate Committee on Legal and Constitutional Affairs on "*Bill S-5: An Act to Amend ... the Canadian Human Rights Act*", November, 1997

> Effect of approval of accommodation plan - Where any services, facilities, premises, equipment or operations are adapted in accordance with a plan approved under subsection (2), matters for which provides do not constitute any basis for a complaint under Part III regarding discrimination based on any disability in respect of which the plan was approved.

Section 24(2) reads as follows:

> Effect of meeting accessibility standards - Where standards prescribed pursuant to subsection (1) (which allows the Governor in Council to make, "for the benefit of persons having any disability" regulations prescribing standards of accessibility) are met in providing access to any services, facilities or premises, a matter of access thereto does not constitute any basis for a complaint under Part III regarding discrimination based on any disability in respect of which the standards are prescribed.

LEAF submits that both of these sections act to limit the rights of people with disabilities and that such limitations are unjustifiable. These sections serve to protect from review those who may have an accommodation plan approved by the Commission and any regulations introduced by the Governor in Council prescribing standards for accessibility for disabled persons. The concern with respect to accommodation plans approved by the Commission and accessibility regulations introduced by the Governor in Council is that there exists an invitation to approve less than adequate plans, especially given a consideration of cost factors, and that the plans are then immune to review. These sections are paternalistic and deprive disabled people of equal access to the rights guaranteed under the *CHRA*. The presumption inherent in these provisions is that the Commission and the Governor in Council know what is best for disabled people and therefore the disabled people should be prohibited from challenging such decisions. LEAF submits that the provision of legislative immunity for accommodation plans approved by the Commission and accessibility standards introduced as regulations by the Governor in Council, represents a violation of the section 15 *Charter* equality rights of people with disabilities which cannot be justified and that the sections should be repealed.

PRIMACY:

Currently the *CHRA* does not include a primacy provision so as to ensure that the Act prevails over other federal legislation, including federal statutes and regulations. LEAF submits that the *CHRA* should be revised to include a primacy section so that it is clear that all federal jurisdiction and regulations must conform with the *CHRA*. It is recommended that the *CHRA* be revised to include the following language:

> This Act binds the Crown and every agency of the Crown. Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of the Act, this Act applies and prevails.

DAMAGES:

Currently section 53(2)(e) of the *CHRA* legislates a $20,000 maximum award with respect to general damages as compensation for "any pain and suffering that the victim experienced as result of the discriminatory practice". Section 53(3) provides for an additional order not to exceed $20,000 if there is a finding that the respondent has "engaged in the discriminatory practice wilfully or recklessly".

LEAF submits that there should be no legislated maximum on general damage awards under the *CHRA*. LEAF submits that the idea placing a predetermined maximum value on the damages that may result from an experience of discrimination is offensive. The fact that a cause of action for discrimination is arguably restricted to human rights proceedings and unavailable as a tortious cause of action in Canadian common law civil courts compounds the offensiveness of a legislative cap on general damages. As human rights claimants have no other avenues through which to claim compensation for general damages associated with a discrimination claim, it seems unjustifiably restrictive to include a limitation on damages in the Act. Therefore LEAF recommends that the references to caps on damages in sections 53(2)(e) and 53(3) be deleted from the *CHRA*.

MULTIPLE GROUNDS OF DISCRIMINATION:

Section 3.1 of the *CHRA* provides for protection against discrimination based upon multiple grounds of discrimination. The section was introduced into the Act in 1998 and reads as follows:

> For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.

LEAF submits that section 3.1 is abstract and vague in its current form. In order to ensure the appropriate interpretation of this section, by both the Commission and the judiciary, LEAF submits that the section must be expanded to provide for clarification with respect to how various grounds of discrimination interact and how this interaction should be interpreted as a discriminatory practice. Those who experience multiple forms of discrimination, for example, Aboriginal women, or Aboriginal disabled women, are the most vulnerable members of society with respect to experiencing compounded political, social and economic disadvantage. Because of this, every effort must be made to ensure that their rights are fully understood and protected.

The *CHRA*, like all anti-discrimination legislation, identifies separate grounds of prohibited discrimination. The traditional approach to understanding discrimination has been through the

adoption of a "top-down" approach analysed from the perspective of privilege.[58] Nitya Iyer explains:

> The categories (of prohibited discrimination) are separate because they represent a set of possible paths of divergence from the central-group norm. If one is at the centre, one can see divergence in alternative directions - by race (not-white), by sex (not-male), or by religion (not-Christian), and so on. In this way, the various grounds of discrimination contain hidden assumptions about who is likely to invoke them. ... The model upon which each type of discrimination doctrine is based is someone who diverges from the norm in only one respect - a white (adult, able-bodied, and so-on) woman in a sex discrimination case, a racial minority man in a race discrimination case.[59]

The challenge arises with respect to the fact that individuals do not experience their lives in separate identity boxes, they experience their lives as complete, whole beings, and that experience cannot be carved into neat categories for the convenience of judicial analysis. Dianne Pothier in her article "Connecting Intersecting Grounds of Discrimination to Real People's Real Experiences" identifies the failure of the law until only recently, to give recognition to the social construct of the grounds of discrimination.

> Discrimination was a fact of life long before the law decided it should do something about it, and it is the grounds of discrimination that separates out those who had and have the privilege of not having to worry about discrimination.[60]

While a focus on specific grounds of discrimination may be appropriate in cases of discrimination in which a single ground of discrimination is experienced, it is submitted that it is not appropriate to analyse discrimination that involves multiple grounds as the sum of several different compartments or boxes of discrimination as named in the Act. An analysis that applies an additive or compartmentalized approach will not adequately reflect the reality of the experience of the complainant. And, as recognized by the SCC, it is the perspective of the equality claimant that is relevant to an analysis of discrimination.[61]

The understanding of race, sex, disability ... existing as separate, and effectively mutually exclusive categories of discrimination is perpetuated through the complaint process itself. Human rights complaints are filed based upon the identification of the grounds of discrimination identified in the Act. Complainants file a complaint by identifying a ground of discrimination, for example, sex **and** disability **and** race, and boxes are checked next to the relevant grounds of

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[58]N. Iyer, "Disappearing Women: Racial Minority Women in Human Rights Cases" in Women and the Canadian State C. Andrew and S. Roders eds. (Kingston: McGill-Queen's University Press, 1997) p. 253 and K. Crenshaw "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" University of Chicago Law Forum 1989 139 at 151

[59]N. Iyer, "Disappearing Women: Racial Minority Women in Human Rights Cases" p. 253

[60]Dianne Pothier, "Connecting Intersecting Grounds of Discrimination to Real People's Real Experiences" paper presented at West Coast LEAF Forum, November 4-8, 1999; p. 5

[61]*O'Malley, supra*

discrimination. The complaint form provides no room or means for the expression of an experience of multiple forms of discrimination. Thus from the start of the complaint process, the process is inclined towards an understanding of multiple grounds of discrimination which is additive in nature. The result being that Commission staff and adjudicators read the complaint and begin their assessment of the complaint with the inaccurate impression of the experience of compound discrimination existing as the result of several different check marks added together to constitute an allegation of discrimination or several different allegations of discrimination. The Commission's inability to recognize the experience of compound discrimination is further demonstrated by its record keeping, which includes statistics on only the separate grounds of discrimination and includes no provision of statistics with respect to the experience of multiple grounds of discrimination.

The traditional disconnection of equality rights analysis from the experience of real people who experience compound discrimination has significant effects for the complainant. For the complainant, the result is that she often disappears from her own complaint. Nitya Iyer has identified several possible reasons why racial-minority women disappear from their own cases:

> - the cases are presented without considering the whole person of the complainant;
>
> - the complainant is regarded as relevant only to the extent that she falls within a particular category;
>
> - there is virtually no consideration of the complex interactions of race, sex, and the various other grounds of discrimination that are so much a part of the lived experience (as opposed to the legal analysis) of discrimination.[62]

Traditionally the anti-discrimination doctrine has been applied to benefit only those complainants who differ from the dominant group based upon a single characteristic[63]. The best that human right complainants experiencing multiple grounds of discrimination could hope for was the successful resolution of their complaint based upon one of the identified grounds. Dianne Pothier uses the Pitawankwat case to aptly describe the problems associated with the tendency to compartmentalize the grounds of discrimination:

> Mary Pitawanakwat was an employee of the federal Secretary of State at the Regina Regional office. She eventually lost her job, allegedly for incompetence. She filed a complaint with the Canadian Human Rights Commission, [64] initially alleging, as an Ojibway,

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[62]N. Iyer, "Disappearing Women: Racial Minority Women in Human Rights Cases" p. 251-252

[63]*Ibid* p. 254

[64] "The CHRC initially sought to dispose of the complaint under s. 33)b)(i) [now 41(b)] of the *Canadian Human Rights Act* on the basis that the substance of her complaint had already been dealt with by an adjudicator unde the *Public Service employment Act.* who had concluded that her dismissal was for incompetence. The Federal Court of Appeal held that this section of the Act allowed deference only to a proceeding not yet held under another federal statute, not one already completed. The Federal Court of Appeal also said that the race discrimination issue under the *Canadian Human Rights Act* was legally different from how that issue arose under the

only race discrimination. The investigator's report detailed allegations not only of racial discrimination, but also of sexual harassment. Subsequent to the filing of the investigator's report, an amended complaint was filed claiming both race and sex discrimination. The CHRC decided to send the complaint, encompassing both race and sex discrimination, to a Tribunal. The respondent challenged the appointment of the Tribunal on several grounds, including the incorporation of the sexual harassment claim.

Justice Muldoon of the Federal Court, Trial Division, allowed the part of the respondent's claim challenging the inclusion of sexual harassment. According to Justice Muldoon, the sexual harassment claim had to be treated as a separate complaint, not as an amendment. In other words, it could not be treated as a further element of an intertwined story of discrimination. Sex discrimination could not be a dimension of race discrimination. An investigator appointed to investigate race discrimination could not go about "dredging up" sex discrimination claims; that would be a "witch-hunt". That aspect of the investigator's report was therefore invalid, and the CHRC could accordingly not use the powers it exercises upon the filing of an investigator's report as the basis for sending the sexual harassment complaint to a Tribunal. Nor could the CHRC invoke its powers to appoint a Tribunal for the sexual harassment complaint without going through the investigation stage because, as a separate complaint, it was out of time; there was no evidence the Commission had adverted to any considerations justifying an exercise of discretion to grant an extension of time to file a complaint.

All of this is quite unreal; real people do not experience discrimination in the compartmentalized manner assumed by Justice Muldoon. When one is dealing with a longstanding relationship as in an employment setting, events only have real significance in the larger context of complex patterns of interaction. Justice Muldoon's decision to sever the sexual harassment claim forced an artificial truncation of the story to be told to the Tribunal.

The legal technicalities relied on by Justice Muldoon all flowed from his initial assumption that the addition of sexual harassment had to be treated as a new complaint. A holistic understanding of discrimination would have produced a different result. I am reminded of the words of Patricia Monture-Angus:

> Whenever something like this happens in discussion of gender and race, I cannot separate them. I do not know, when something like this happens to me, when it is happening to me because I am a woman, when it is happening to me because I am an Indian, or when it is happening to me because I am an Indian woman.

Public Service Employment Act. The Federal Court of appeal ordered the case be reconsidered by the CHRC. The CHRC's application for leave to appeal to the Supreme Court of Canada was withdrawn in the wake of the SCC's decision not to grant leave to appeal another case raising the identical issue; *Burke v. Canadian Human Rights Commission,* [1987] 2 S.C.R. vi." D. Pothier, "Connecting Intersecting Grounds of Discrimination to Real People's Real Experiences" footnote # 30

> When the Pitawanakwat case did proceed to a Tribunal with only the race complaint before it,[65] the problems of compartmentalization continued. The Tribunal treated poor judgment and racial harassment as mutually exclusive categories, without considering that poor judgment could have racialized effects. The Tribunal in many aspects of the complaint looked only for racial motivation, despite clear law that intention is not necessary. The various aspects of Mary Pitawanakwat's job were segmented and analysed largely in isolation from each other, thus ignoring the fact that people experience things in terms of their cumulative effect. Although partially successful, and ultimately settled, the Pitawanakwat case seems to highlight the difficulties in dealing with multiple discrimination claims.[66]

While there has been no judicial consideration of section 3.1 as of yet, LEAF submits that the section as it currently reads will not cure the problems usually associated with attempts to understand complaints of multiple discrimination. LEAF submits that in order to ensure that section 3.1 of the *CHRA* is applied so that the legal construct of the grounds of discrimination are reflective of the social construct, the section be amended to include the following provisions:

(i) In a consideration of multiple grounds of discrimination the analysis must focus on the experience of the complainant as a whole; the experience of the complainant should not be understood to exist as the sum of several separate grounds of discrimination.

(ii) Grounds of discrimination added to a complaint following the original filing of a complaint shall not be understood to represent additional grounds of discrimination or new complaints of discrimination and timeliness limitations shall not be applied to the additional grounds.

CONCLUSION:

LEAF has prepared these submissions because it firmly believes that the *Canadian Human Rights Act* can and should be an instrument for ensuring that all persons in Canada are treated with dignity and respect in their dealings with the federal government and related organizations. The *CHRA* Review Panel has a critical opportunity to ensure that any proposed amendments to the *CHRA* do not derogate from the promise of the Act, but instead ensure that the Act furthers the goals of substantive equality by guaranteeing that disadvantaged persons may fully participate in Canadian society. To this end LEAF encourages the Panel to adopt the recommendations outlined in these submissions

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[65] *Pitawanakwat v. Canada (Department of Secretary of State)* (1992), 19 C.H.R.R. D/110.
[66] D. Pothier, "Connecting Intersecting Grounds of Discrimination to Real People's Real Experiences" pp. 9-12