LEAF ≡ FAEJ
WOMEN'S LEGAL EDUCATION AND ACTION FUND
FONDS D'ACTION ET D'EDUCATION JURIDIQUES POUR LES FEMMES

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STATEMENT

TO THE

SENATE OF CANADA COMMITTEE OF THE WHOLE

ON THE

MEECH LAKE CONSTITUTIONAL ACCORD

March 16, 1988

CHECK AGAINST DELIVERY

I. Introduction

Women in Canada, throughout this century, have played an important role in the development of the Constitution. We have challenged it, and been challenged by it. We, representatives of the Women's Legal Education and Action Fund/Fonds D'Action et D'Education Juridiques Pour Les Femmes (LEAF/FAEJ), appear today before the Committee of the Whole on the Meech Lake Constitutional Accord, to speak to why our experience with the development of equality rights for women convinces us, and should convince you, that amendments to the Accord are essential.

While we accept that the decision to hear almost all of the national women's groups in the Submissions Group was made in good faith, it is symbolic of the place accorded women's point of view. The debate on the Accord, particularly but not exclusively at the federal level, has been in part a struggle about the right to be heard in constitution-making. We regret that the Senate Committee of the Whole will not hear from other national women's groups on this important matter.

We appreciate the opportunity to be heard in the Senate. In our view, the Joint Committee did not do justice to the presentations made by the five national women's organizations who appeared before it. Starting from the point that the women who appeared for these organizations had "fears" and the men who appeared as individuals had "opinions", the Report of the Committee "re-stated" the points raised by us and, in doing so, shifted the terms of the debate.

In our view, LEAF is uniquely qualified to put these issues before the Senate. Our "job description" may be found in our case selection criteria:

1. The case must substantially promote equality for women.

2. Preference will be given to cases arising under the Canadian Charter of Rights and Freedoms, or, in Quebec, the equivalent provisions of the Quebec Charter of Rights and Liberties (although LEAF is prepared to sponsor a case under, for example, a provincial Bill of Rights, if it is otherwise a good case).

3. It must be a test case. A test case involves breaking new ground: challanging a discriminatory law or securing from the courts an interpretation of equality that fulfils the promise of the Charter of Rights. LEAF recognizes that many women are involved in litigation

that would benefit from support by LEAF, but due to its limited resources, LEAF's mandate must be restricted to test case litigation.

4. The case must present strong facts. We do not want to lose a case simply because it is not clear, on the facts, that our interpretation of the law is the appropriate one.

5. The case must be of importance to women. Ideally, a LEAF case will result in significant gains for women, or gains for a significant number of women.

6. LEAF is particularly interested in helping women who are doubly disadvantaged. "Double disadvantage" describes the situation where, in addition to being disadvantaged by sex discrimination, women are also subject to discrimination on the basis of race, religion, marital status, age, disability, sexual orientation, economic status or other grounds.

Since LEAF began in April 1985, it has opened 250 files, and has adopted 51 cases. We have appeared in cases in the superior trial and appeal courts of ten out of twelve provinces and territories -- some on several occasions -- and the Federal Court of Canada. We have been granted intervenor status in 5 major equality cases before the Supreme Court of Canada.

The areas of law implicated by the inquiries cover a broad range of issues. The most common area of concern has been family law matters, followed by employment-related issues. The next largest group of inquiries has involved welfare issues, criminal law matters and simple requests for information or referrals. Remaining inquiries relate to a wide variety of other areas, including tax law, education, immigration, wills, insurance and reproductive rights.

Experience has taught LEAF that a wide consultation process is necessary in the development of a case. Originally, it was expected that most sex equality cases coming forward in the early years of sections 15 and 28 of the Canadian Charter of Rights and Freedoms would concentrate on attacking instances of explicit discrimination against women. In fact, there have been relatively few of these straightforward cases. Instead, the cases have raised a variety of complex issues, including indirect discrimination and the validity of legislative measures aimed at combating women's equality. These cases involve complicated issues of policy and sometimes present in microcosm the larger political debates within the women's movement and society generally. Developing case strategy requires a sure

vision about the meaning of equality and how that theory should be made concrete in any particular instance, a vision that cannot be arrived at in isolation.

All of these features of our caseload have caused LEAF to widen the net of its consultation process, to include community groups concerned with the subject matter of particular cases, as well as experts in the theory of equality, in substantive areas of the law and in other disciplines like sociology and economics.

LEAF operates this way because equality issues are theoretically and practically complex, many communities share an interest in any one issue and it is very difficult to correct any mistakes once before the courts. The way in which the Accord was drafted and publicly presented (and perhaps negotiated) suggests that these realities were ignored.

Our first ministers indulged in the conventional exercise of adjusting federal and provincial powers in order to achieve what The Honourable Senator Lowell Murray has called "equality of the provinces", not simply the entry of Quebec into our "constitutional family" as is often stated. Apart from the broader political debate as to whether the Accord overall is desirable, the Constitution is no longer a matter of the distribution of decision-making power, nor is it the sole preserve of the first ministers.

II. Equality Rights and the Charter

Development of women's rights in Canada may be broadly divided into three phases of reform. In the first phase, the struggle was for formal legal equality between men and women, that is, the removal of explicit common law or statutory distinctions between men and women. The result was legislation granting women the right to vote; to hold public office; to participate in the professions; to hold, use and enjoy property on the same basis as men during and outside marriage, and to equal custody and guardianship of their children.

In a case particularly relevant to this Chamber, the Chief Justice of Canada stated that it would be a "vast" constitutional change to hold that women

were "persons" who could be eligible to sit in the Senate. A different view was taken in the Judicial Committee of the Privy Council, where Lord Sankey, L.C. stated, significantly for our constitutional development, that the Constitution is a "living tree capable of growth and exansion within its natural limits." We speak of the "Person's Case", decided almost sixty years ago.

The achievement of formal legal equality, however, is only a first step, and the subsequent steps do not necesssarily follow swiftly and surely. Take, for example, (and to continue a theme relevant to the Senate), the experience of women in public life. Women are underrepresented in the Senate, the House of Commons and provincial legislatures. Accordingly, women are underrepresented at the Cabinet level. No woman is the leader of a major party at the federal level; only two provincial parties have had a woman leader. No woman has ever been a prime minister or provincial premier.

In the second phase of reform, the struggle was for equal opportunity as protected, for example, under federal and provincial anti-discrimination codes. Codes are directed to individual instances of discrimination and generally have failed to address the deeply-rooted and pervasive factors in society which result in lack of equal opportunity for groups defined by certain characteristics.

The Canadian Bill of Rights, of course, was implemented contemporaneously with the anti-discrimination codes with, from women's point of view, negligible if not negative effect, given the reasoning of the Supreme Court of Canada in two significant cases. In A.G. of Canada v Lavell, Isaac et al v Bedard (1973), the Court considered the case of Jeanette Lavell who lost her Indian status under section 12(1)(b) of the Indian Act which provided that an Indian woman who marries a non-Indian loses her Indian status. A similar excommunication is not created for the male Indian who marries a non-Indian. The majority of the Court held that the equality before the law guarantee applied only to ensure equality in the administration of the law and not equality in the content of the law. The second case was Bliss v Attorney General of Canada (1978). Stella Bliss had returned to work after the birth of her child and was subsequently fired. When she was unable to find work, she applied for, and was refused, unemployment insurance benefits. Because she had been pregnant, she could only collect pregnancy benefits, for which

she did not qualify, the qualifying period for prenancy benefits being longer than that required for ordinary benefits. She was caught in a "Catch-22" situation. The Court held that Bliss was refused benefits not because she was a woman, but because she had been pregnant and that the legislation was adopted for a "valid federal objective".

Faced with the demonstrable limitations on formal legal equality and equal opportunity, the women of Canada considered the equality rights provision in the 1980 version of the Canadian Charter of Rights and Freedoms and rejected it because it was very similar to that contained in the Canadian Bill of Rights. We lobbied before Parliament, with other equality seekers, for a tougher guarantee of equality rights and, in January 1981, the Minister of Justice announced amendments to the proposed Charter, including amendments to section 15. On February 14, 1981, over 1000 women made their way to Ottawa to launch an historic lobby for further strengthening of the provisions of the Charter governing gender equality, with the result that section 28 of the Charter was introduced.

In 1982, with the proclamation of the Constitution Act, 1982, we entered the third phase of reform, the struggle for substantive constitutional equality rights. Given the enhanced role of the courts in this third phase, women prepared for constitutional ligation and founded LEAF.

An understanding of why we take the approach we do to the Meech Lake Constitutional Accord can be reached only if you can appreciate, as we do, the lessons of this history.

> We have sought reform for more than a century: progress is achingly slow and tentative.
>
> Broadly-stated legal guarantees are the beginning, not the end: the guarantees must be tested against real-life situations and found useful or wanting.
>
> Women are often multiply disadvantaged: for instance, in the case of Jeanette Lavell, the discrimination was based on sex and race.
>
> We cannot rely exclusively on political or on judicial remedies: the accessibility and the dynamics of both change over time and the two spheres are interactive, not isolated.

> Even if you resist the thought that governments act unconstitutionally, consider the number of cases in our constitutional history which they have been found to do that.

It is an insult, unfounded and undeserved, to suggest that the women's organizations and the individual women who have questioned parts of the Accord seek to undermine the rights of others, including those who live in Quebec. What we seek is clarity - for governments, for courts, for our own communities -in how rights, should they come into conflict, will be balanced. Women sought nothing less in 1980-81.

The Supreme Court of Canada has yet to interpret sections 15 and 28 directly and fully. However we may view Charter jurisprudence to date, the simple fact is that we do not know how the Court will interpret section 15 or section 28 and how they will relate these sections to section 1, the limitations clause.

III. Equality Litigation

Whatever the outcome of the political debate about the Accord, if it becomes law it will be interpreted by the Courts of Canada. Equality litigation has some features which must be understood and addressed in political consideration of the Accord.

Much effort has been expended by the Minister Responsible for Federal-Provincial Relations, The Honourable Senator Lowell Murray, senior officials of the Department of Justice and the Joint Committee, to convince us that the Accord does not override, or supersede, the Charter. The very same Department of Justice has argued the opposite in court. In the case taken by the Yukon Territorial Government arguing that the rights of persons in the Yukon Territory would be adversely affected by certain amendments in the Accord, it was argued on behalf of the Government of Canada that the Charter could not be invoked to invalidate another part of the Constitution.

While we appreciate the assurance and will certainly record it in case it is needed in the political future, our experience tells us that the Government of

Canada, for whatever reason, is answering the wrong question. The right question is: what direction will the Constitution, as amended by the Accord, give to the courts in deciding equality rights cases where at least one of the parties relies on section 2 of the Constitution Act, 1867 (i.e., section 2 of the Accord). The only possible answer is: no one knows. We may all speculate on the matter, but we cannot avoid the reality that no one knows.

LEAF's concern is increased by the following factors:

1. The generality of the concepts in section 2 promises that it will be invoked often in cases inside and outside Quebec.

2. The party initiating the Charter action plays the primary role in framing the issues of the case and the remedies sought. The respondent(s) or intervenor(s) then must operate in that framework. In short, governments' views about how section 2 will be argued will not be determinative.

3. Courts must determine cases on the basis of the evidence placed before them. Important decisions may be based on badly-argued cases.

4. Even if an issue is under review politically, it can be forced into the courts, thereby pre-empting a political solution.

5. Saying "let the courts decide" is a denial of the considerable monetary and personal costs borne by the individuals and groups who must go to court either to advance their rights or to protect their rights. In fact, since section 15 of the Charter came into effect in 1985, women have more often been forced to act in defending their existing rights, as opposed to advancing their rights.

IV. Charter Analysis and the Accord

The nature of Charter jurisprudence is complex; it does not simply consist of the mechanical application of rules and principles. Similarly, the Charter itself is complex; it is in the interrelationship between various of its sections, including inevitably section 1, that the answer to a particular question will be found.

Thus, as a basic proposition, we say that to add new elements to the Constitution by the Accord will inevitably affect and change what is there now.

We outline below various reasons why we say women's equality guarantees will be affected by the Accord. First, we emphasize why we believe that the appropriate standard to be applied in this discussion is whether the equality guarantees will be "affected." Such emphasis is necessary because of suggestions that merely showing that they are affected will not bring about the will to change the Accord; rather we must show that they are overridden.

LEAF argues that it should be sufficient to show that equality rights are affected by Meech Lake because "affect" is the standard which already appears in the Accord. In particular, section 16 provides that nothing in section 2 affects sections 25 or 27 of the Charter, or section 35 of the Constitution Act, 1982 or class 24 of section 91 of the Constitution, 1867. The framers thus clearly show their intention to help these rights from being affected. It would be invidious to require a showing that other rights would be more than affected before they could be included in section 16 or otherwise preserved in the Accord.

The main problem with section 16 is that it preserves from being affected only certain of the provisions of the Charter dealing with some minority rights. By specifically mentioning provisions dealing with aboriginal and multiculural rights, the section by implication excludes rights dealing with equality which are spelled out in sections 15 and 28. Importantly, these equality rights do not receive protection at common law, like some of the other interests guaranteed as well in the Charter. They are solely dependent on the Charter for substantial protection. This Charter protection was achieved only a short while ago. Thus, women see the refusal to protect these rights from being affected by the Accord as an unjustified step backward from a hard-won status quo. While other rights receive additional constitutional recognition, equality rights are being diminished in importance.

In effect, saying that aboriginal and multicultural provisions will not be affected by section 2 implies that courts are free to find that, and allow, equality rights to be affected by section 2. A hierarchy of rights is thus created. This

ranking, this preference for aboriginal and multicultural rights, may likely weigh these preferred rights over sex equality rights in cases of conflict, may restrict the progressive use of analogies between adjudications on these issues and sex equality issues, and may affect the comparative attitude of gravity toward sex equality cases across the board.

Many witnesses before the Committee have pointed out that the proposed new section 2 added to the 1867 Act by the Accord will figure in analysis under section 1 of the Charter in determining whether a particular limit on a Charter right is a reasonable one and justifiable in a free and democratic society. LEAF suggests that the fundamental principles of section 2 might indeed be read into section 1, so that the Charter section reads "in a free and democratic society where linguistic duality and the distinct society are accepted as fundamental principles". If the concepts in section 2 are thus taken up into section 1 of the Charter, then it is reasonable to predict that the qualifier on these concepts which is founded in section 16 will also be incorporated. The special reservation of rights for these groups thus arguably informs section 1 analysis under the Charter, to the detriment of all those whose rights do not have such pride of place.

The Joint Committee took the position in its report that this type of impace was not worth becoming alarmed about. It's just "constitutional business as usual", they wrote, arguing that any provision of the Charter or Constitution would have this impact on any other. Section 15 was already subject to qualification by the other provisions of the Constitution, and no new curb on equality rights was being effected.

Such a justification ignores the simple mathematical fact that a right qualified by a certain number of factors becomes more qualified when more factors are added to the pool of qualifiers. Progressive addition of more qualifications on equality rights will dilute them, even if it does not change the basic analysis applied to Charter questions. It also ignores the issue of weight. It is quite likely that a court will give substantial weight to the language of the proposed section 2 even if it is styled a principle of interpretations have given considerable weight to the principle enunciated in section 27, dealing with multiculturalism, even though it is "just" an interpretive clause. Moreover, the sense of occasion and significance

imparted to Meech Lake by governments themselves may enhance its weight in court; in the Bill 30 case, for example (the case considering extension of funding to separate schools in Ontario), the Court attached great significance to the fact that section 93 was part of a fundamental constitutional compromise. Thus this new factor added to the pool of potential qualifiers of equality rights is a serious one. Although the Report of the Joint Committee purported to give us the "true meaning of the Bill 30 case, only the Supreme Court of Canada can do so in decisions of the future.

Another telling fact remains. The government's argument that section 2 adds no new threat to existing rights breaks down in the face of section 16 of the Accord. That clause explicitly provides that nothing in section 2 "affects" aboriginal and multicultural provisions of the Charter and Constitution Act. Obviously, it was contemplated by the Meech Lake framers that section 2 would have some effect beyond constitutional business as usual or they would not have included this clause. There has never been a satisfactory explanation for protecting aboriginal and multicultural provisions from the reach of section 2, but not protecting equality rights. Consider this consummate illogic from the Joint Committee:

> Many of the constitutional experts that appeared before us testified that section 16 is unnecessary. Certainly it generates more heat than light. Adding section 28 of the Charter to it would accomplish little because section 28 only guarantees equal application to men and women of rights and freedoms referred to elsewhere in the Charter. But reaching into section 15 of the Charter to add gender equality rights to the 'protected list' while leaving all other Charter rights 'unprotected' would be even more arbitrary. What about religious discrimination? Freedom of expression? Religious freedom? Recial discrimination?

Implicit in the use of the term "even more arbitrary" is the acknowledgement that section 16 as it now stands is, indeed, arbitrary.

V. National Shared Cost Programs

The current shared-cost programs cover a wide range of social programs of particular concern to Canadian women, including: health care, social assistance, pensions, post-secondary education, job education and training, legal aid, public housing, compensation to victims of violent crimes, and young offenders. The existence of and access to these programs is of particular importance to those women who are doubly disadvantaged by their race, national or ethnic original, colour, religion, age or mental or physical disability, as these women tend to be the poorest in Canada and the most in need of these programs and services. Moreover, Canadians are very mobile: each year one in seven moves within the province and one in twenty moves between provinces.

LEAF has been involved in litigating entitlement and access to these programs for women across Canada. These cases include:

* Challenging the government' s attempt to limit women's access to health care services such as abortion in Saskatchewan.

* Challenging eligibility rules for social assistance in Ontario.

* Challenging the division of pension credits in Manitoba, Ontario and Newfoundland.

* Representing women who are victims of violence in Ontario and Quebec.

* Challenging lack of employment for women in post-secondary education in Alberta.

* Representing women's interests in challenges to maternity provisions in Manitoba and Ontario.

From this experience, it is clear that the existence and substance of shared-cost programs are of critical importance to Canadian women.

Clause 7 of the Accord provides:

> The Government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the Government of Canada after the coming into force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives. (emphasis added)

This clause is of concern to LEAF in that it will permit a province to opt out of programs of national importance without financial penalty, and to replace them with provincial programs or initiatives which may be inferior in content and in coverage to the national one, thereby enabling diversion of the federal funds to other purposes. Moreover, the clause lacks clarity and definition. LEAF'S equality litigation experience informs our view that the following changes must be made.

First, the term "national shared-cost program" is not defined. Currently there are a variety of fiscal arrangements in which the federal government contributes money in whole or in part to finance programs in the area of exclusive provincial jurisdiction. Is it intended that all of these schemes will be covered by clause 7? Do the provisions apply only to the development of new programs, such as a national childcare program or to amendments or additions to existing programs such as the Canada Health Act?

Secondly, the terms "national objectives" is not defined. While it connotes goals, the term "national objectives" does not necessarily include the concept of standards. By comparison, immigration provisions of the Accord (clause 3) set national standards and objectives. Missing from clause 7 are any minimum or basic requirements of the provincial program to ensure a nation-wide "safety net". LEAF recommends that clause 7 be amended to include "national standards and objectives which shall include the minimum criteria of:

(1) public administration on a non-profit basis
(2) comprehensiveness
(3) universality
(4) portability

(5) accessibility on uniform terms and conditions

(6) provision of information on the operation of the program."

Thirdly, clause 7 provides that the provincial programs or initiatives be "compatible" with the national objectives. The term "compatible" may merely require that the provincial programs or initiatives not be inconsistent with or repugnant to the national program thereby allowing lesser and varied standards. LEAF joins the National Association of Women and the Law in requiring that clause 7 be amended to ensure universal coverage of high standard throughout Canada. In order to advance toward the goal of equality, disadvantaged Canadians must not be penalized on the basis of where they happen to live.

VI. Recommendation

To accept the Accord in its current form is to condone the process by which it was developed and to launch Canadians on a constitutional pattern which threatens the integrity of equality rights in unpredictable ways.

A "round" for one set of interests, and then a "round" for another set of interests and so on will simply ensure that equality seeking groups will spend their energies addressing shifting political agendas set by others. In reality, protection of equality rights is not divisible into "rounds".

If our committment to equality rights in this country is genuine, then let us reflect that in the Accord by, at the very least, adding sections 15 and 28 of the Charter to section 16 of the Accord and by adding the minimum criteria stated above to section 7 of the Accord. We request that the Senate make and actively pursue such amendments.