

SUBMISSION TO THE STANDING COMMITTEE ON
HUMAN RIGHTS AND THE STATUS OF
DISABLED PERSONS,
HOUSE OF COMMONS
BY
WOMEN'S LEGAL EDUCATION AND ACTION FUND

October 3, 1989.

In 1985 the Federal Government took the historic step of establishing a fund for test case litigation based on the equality provisions of the Charter of Rights and Freedoms. The Canadian Council on Social Development was mandated to set up the Court Challenges Program to be available upon application on a case by case basis.

The same year the Women's Legal Education and Action Fund (LEAF) became a registered charitable organization. LEAF was created to promote equality for Canadian women through sponsoring test cases utilizing the constitutional equality provisions and to undertake public education regarding sex equality guarantees in the Charter. In over four years LEAF has undertaken 70 constitutional cases, including interventions in nine cases before the Supreme Court of Canada. LEAF has over 250 active files of cases in some form of development, a number of which would be eligible for funding under the Court Challenges Program.

LEAF has found the Court Challenges Program to be an essential source of support in promoting equality for women within a federal legislative, policy or program context. Often with other women's groups as joint applicants, LEAF has received approval for case development or litigation covering a wide range of areas in which women are disadvantaged. A total of 13 cases have received approval for some form of financial aid, whether for case development, research, litigation or intervention in key

cases.

Support has been provided for cases undertaken by LEAF to challenge laws or policies which discriminate against women. These include the following:

- a case challenging the prohibition against spouses of military personnel from organizing to deal with community issues ranging from the quality of education to alcoholism within the family;
- a joint Charter challenge with the Centre for Spanish Speaking People of the regulations and policies governing the Federal Language Training Program;
- two systemic discrimination cases regarding federally sentenced women offenders, one challenging the discriminatory effects of the provincial transfer agreements, and the other challenging the inequitable facilities and programs for federally sentenced women;
- a case addressing inequities in the Income Tax Act where Canadians who receive family and spousal support payments are fully taxed on this income, but do not qualify for standard child care deductions.

LEAF also intervenes in cases in order to uphold legislation or programs which promote women's equality by citing the Charter's equality provisions. Such cases include:

- an intervention as part of a coalition of community groups in a Supreme Court case in which two men accused of rape are

seeking to have the Criminal Code provisions, restricting the kind of questions to which a rape victim can be subjected, struck down;

-the initial intervention in the Schachter case concerning maternity and parental leave. LEAF as an intervenor was given full party status at the trial and presented a recommendation to the Court to protect maternity provisions for biological mothers and to extend parental leave to natural parents, which was fully adopted. Funding for our continued intervention in this case has been approved;

-an intervention in the Borowski case to put forward a sex equality argument on the difficult issue of fetal status;

-an intervention by a coalition in the Canada Newspapers case concerning a challenge to the Criminal Code provisions which give a victim of sexual assault control over whether or not her identity will be made public. The Supreme Court decided in an unanimous decision to uphold these provisions.

This overview of cases funded by the Program indicate the depth and breadth of inequality women still face in Canada. Most of our cases are in the early stages of development and will take several years to be fully litigated; most cases will likely be appealed to the Supreme Court of Canada given their precedent setting nature.

Funding the Court Challenges Program is a very cost-effective way for the Federal government to show leadership in

ensuring public access to pursue Charter equality rights. Funding does not begin to cover full costs and yet is an essential contribution with real dollar value. For every dollar invested in equality through the Program, two to four dollars is generated in direct contributions or donated services.

Cases addressing women's economic, and social disadvantages are essential to carry out the Charter's promise of equality. LEAF is only just beginning. Many groups who represent other disadvantaged people in Canada are just beginning as well. Indeed, some of Canada's most disadvantaged people are only just discovering that there is a Charter of Rights and Freedoms and that there is a Court Challenges Program. One of the ways they are discovering this is the proactive approach the Program has taken to do outreach to educate those who are ignorant of Canada's guarantees of equality.

Many groups, particularly those representing our most disadvantaged citizens, will be unable to assert their Charter rights, or to participate in the development of the meaning of equality in Canada if the Court Challenges Program is not renewed.

LEAF supports the continuation of the role of the Canadian Council on Social Development (CCSD) as the administrators of the fund, and the notion of an independent panel determining which cases to sponsor. The "arm's length" arrangement was one which Parliament saw as essential to the funding program. The Secretary

of State of the day, the Honorable Benoit Bouchard, stated during the Commons debate that "...the Government, in addition to offering Canadians financial assistance in this very vital area, has done so in such a way that it can no longer be construed as in any way affecting the content of these court challenges...Were one to assume that the federal Government will directly administer this program, one might very well suggest there is a conflict of interest if the government were to decide which challenges against itself should be funded." (Hansard, September 25, 1985, page 6964) The government showed great wisdom and foresight in providing litigation funding through an independent body.

CCSD has carried out its mandate in accordance with the generally accepted concepts of equality as endorsed not only by those representing disadvantaged groups, but as defined by the Supreme Court of Canada in the Andrews decision of February 2, 1989. This was the first Section 15 case considered by the highest court of Canada and has set the framework for a Canadian legal definition of equality. The Court noted that s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society. It is appropriate for the federal funding available to citizens and groups to challenge federal laws and policies to be limited to those who are disadvantaged. It would, conversely, be inappropriate for government funds to be used to promote the interests of those who are at best not a member of the disadvantaged group, or, at

worst, are seeking to undermine the equality of disadvantaged persons.

We are at a cross-roads in Canada with regard to our constitutional equality provisions. As we know from the recently released report by the Canadian Advisory Committee on the Status of Women, most Charter cases to date have not had the interests of our less advantaged citizens as the focus; indeed, many have sought to attack the few advances designed to promote equality for disadvantaged people.

Our unique heritage and long-term public policy that ensures access to justice as a cornerstone to our democratic system required the establishment of the Court Challenges Program. At the time of extending the Court Challenges Program funding to cover Sections 15, 27 and 28 of the Charter, the Honorable Benoit Bouchard noted to the House of Commons that "our government is committed to promote social justice and equality for all Canadians and this new expanded court challenges program is one way to achieve our purpose." (Hansard, September 25, 1985,, 6965) Canada's disadvantaged groups need to have this Program continued to ensure fairness, equal access to the courts, and that those for whom the equality provisions were devised will be able to participate in the development of the Canadian meaning of equality.