WOMEN'S LEGAL EDUCATION AND ACTION FUND

SUBMISSIONS TO

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

"Bill S-5: An Act to Amend....the Canadian Human Rights Act"

Joan Dawkins
Catherine Frazee
Carissima Mathen

November 26, 1997

TABLE OF CONTENTS

		page
PART I:	INTRODUCTION	1
A.	The Women's Legal Education and Action Fund	1
B.	The Scope and Purpose of LEAF's Submissions	1
PART II:	CONCEPTUAL FRAMEWORK FOR LEAF'S SUBMISSION	3
A.	The Special Nature of Human Rights	3
B.	The Importance of Promoting and Ensuring Substantive Equality	5
C.	Disability-Based Discrimination	8
PART III:	CONCERNS WITH IMPORTING THE DUTY TO ACCOMMODATE INTO THE CANADIAN HUMAN RIGHTS ACT	11
A.	Overview	11
B.	Problems with the Duty to Accommodate	12
C.	Concerns with Expanding the Duty to Accommodate to all Grounds of Discrimination	14
D.	Conclusion	15
PART IV:	IF THE DUTY TO ACCOMMODATE IS INCORPORATED, THE DEFENSE OF UNDUE HARDSHIP MUST BE STRINGENT	16
A.	Overview	16
B.	Problems with Undue Hardship	16
C.	Problems with the Definition of "Undue Hardship" in the Proposed Subsection 15(2)	20
D.	The Federal's Government's Particular Obligations as Regards Human Rights	22
E.	Concerns with the Regulatory Process: Subsections 15(3)-(7)	23
F.	Conclusion	26

SUBMISSION OF THE WOMEN'S LEGAL EDUCATION AND ACTION FUND: BILL S-5 - AN ACT TO AMEND THE CANADIAN HUMAN RIGHTS ACT

PART I: INTRODUCTION

A. The Women's Legal Education and Action Fund

The Women's Legal Education and Action Fund ("LEAF") was founded in 1985 to promote equality for all women in Canada. LEAF pursues this mandate primarily through litigation and public education, using the equality provisions of the *Canadian Charter of Rights and Freedoms*, and similar provisions found in Canada's various human rights legislation. To date, LEAF has participated in well over one hundred cases, and has acted as Intervenor before the Supreme Court of Canada twenty-seven times.

Although LEAF is closely indentified with equality-rights litigation, LEAF also participates in law reform initiatives. Throughout its history, LEAF has made submissions to various Parliamentary and Senate committees.[1]

B. The Scope and Purpose of LEAF's Submissions

In this brief, LEAF will comment on the following proposed amendments to the *Canadian Human Rights* Act (the "CHRA"), which are contained in *Bill S-5*:

> **2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the**

---

[1] Some examples include: "Submission to the Senate of Canada on the Meech Lake Constitutional Accord" (March, 1988); "Submission to the Royal Commission of Inquiry into the Response of the Newfoundland criminal justice system" (Hughes Commission, June 1990); and "Submission to the Standing Committee on Justice and Legal Affairs on Bill C-46, *An Act to amend the Criminal Code (Sexual Assault)*" (March 1997). LEAF has made specific submissions concerning human rights on two previous occasions: "Submission to the Department of Justice about reform of the *Canadian Human Rights Act*" (June 1986); and "Submission to the Standing Committee on Human Rights and the Status of Disabled Persons concerning the future of the Court Challenges Program" (October 1989).

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. ...

15(2) 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 be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

15(3) The Governor in Council may make regulations prescribing standards for assessing undue hardship.

15(4) Each regulation...shall be published in the *Canada Gazette* and a reasonable opportunity shall be given to interested persons to make representations in respect of it.

15(5) The Canadian Human Rights Commission shall conduct public consultations concerning any regulation...and shall file a report of the results of the consultation with the Minister within a reasonable time after the publication of the proposed regulation in the *Canada Gazette*.

15(6) A proposed regulation need not be published more than once, whether or not it has been amended as a result of any representations.

15(7) The Governor in Council may proceed to make regulations under subsection (3) after six months have elapsed since publication of the proposed regulations in the *Canada Gazette*, whether or not a report described in subsection (5) is filed.

LEAF is concerned that these amendments as currently drafted may serve to undermine the very purpose of the *CHRA*. In particular, LEAF is concerned that the amendments have serious and potentially very negative implications for the equality rights of all Canadians, especially women and women with disabilities.

In its submissions, LEAF will concentrate on the incorporation of the duty to accommodate into the *CHRA* (section 2); and the definition of the defence of undue hardship, including the regulatory process to prescribe standards for assessing undue hardship (subsections 15(2)-(7)). LEAF will stress that the *CHRA* is distinctive among human rights codes because its scope is almost exclusively restricted to government and other entities similar to government. LEAF will submit that the purpose of the *CHRA* is to promote a society in which all persons are treated with dignity and have the right to fully participate, which includes the right to expect positive measures to ensure that participation.

PART II: CONCEPTUAL FRAMEWORK FOR LEAF'S SUBMISSION

A. The Special Nature of Human Rights

In order to understand LEAF's concerns, it is important to see these amendments in the context of human rights legislation overall.

Human rights legislation is recognized as having a unique character. This is because it aims at the removal of and redress for one of the most destructive forces in society, discrimination. The preamble to the *Ontario Human Rights Code* is indicative of the very high goals of human rights legislation:

> WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations:
>
> AND WHEREAS it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of

> the community and able to contribute fully to the development and well-being of the community and the Province...[2]

The development of human rights legislation in Canada may be traced to the earliest recognition - on a society-wide scale - that discrimination against persons because of personal characteristics such as race or religion was a problem requiring measures tailored specifically to redress the harms involved.[3] The recognition included an acknowledgement that the enforcement of human rights requires positive legislative measures. Human rights legislation is the natural successor to antislavery legislation, recognition of equality among religious denominations, extension of the franchise and extension of the right to hold public office.

It is important to recognize the profound effect of human rights legislation in Canada. While the efficacy of certain of the institutional structures to enforce human rights may be debated, it cannot be doubted that the transformation of Canada into a rights-conscious society has occurred, in part, through the enactment of various human rights Codes.

The Supreme Court of Canada has repeatedly recognized the "special nature" of human rights legislation. In *Insurance Corporation of British Columbia* v. *Heerspink*, Justice Lamer (as he then was), wrote:

> When the subject matter of a law is...the comprehensive statement of the "human rights" of the people living in the jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others.[4]

---

[2] R.S.O. 1990, Ch. H-19.

[3] Walter Tarnopolsky, *Discrimination and The Law* (Toronto: Richard De Boo, 1982).

[4] [1982] 2 S.C.R. 145 at 157-58.

In the case of *Ontario Human Rights Commission* v. *Simpson-Sears*, the Supreme Court characterized human rights legislation as quasi-constitutional.[5]

So fundamental are human rights that the Supreme Court, in setting out its first substantive analysis of the equality provisions in the *Charter of Rights and Freedoms*, expressly referred to and incorporated human rights doctrines.[6]

B. The Importance of Promoting and Ensuring Substantive Equality

The Preamble to *Bill S-5* states the following:

> **Whereas the Parliament of Canada affirms the dignity and worth of all individuals and seeks to strengthen their right to make for themselves the kind of life they wish to have through the removal of barriers to their full participation in society;**
>
> **Whereas for individuals and groups that are disadvantaged identical treatment does not always lead to equality, and positive measures to remove discriminatory barriers may be necessary to help to ensure equality...**

LEAF submits that the Preamble is consistent with the spirit of the entire *CHRA* and demonstrates that the Act is founded upon principles of substantive equality. It is therefore necessary to briefly examine the concept of "substantive equality" and its impact upon the analysis of the proposed amendments contained in *Bill S-5*.

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

---

[5] [1985] 2 S.C.R. 536 at 547.

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

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 fifteen 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 is 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.[7] Although 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. LEAF advocates 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 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.

Putting LEAF's concerns about the *CHRA* in substantive equality terms, LEAF believes that the purpose of the *CHRA* is to promote substantive equality, but the effect of the proposed

---

[7] *Andrews* v. *Law Society of British Columbia, supra.*

amendments will be harmful to persons with disabilities, in particular, women. It is therefore necessary to briefly examine the context of disability-based discrimination, so that LEAF's concerns may be properly understood.

C. Disability-Based Discrimination

In a recent decision, the Supreme Court of Canada discussed in depth the problem of disability-based discrimination.[8] 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 status 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.[9]

---

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

[9] 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

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.[10]

It is LEAF's position that the extent of this exclusion cannot be explained by simple reference to individual impairment. As with race and sex, if we reduce the definition of disability to purely biological terms, its actual meaning is greatly distorted. In reality, powerful social, economic and political forces impose devalued status upon the condition.[11]

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 disabilityrelated

---

Industry, Science and Technology, 1995) at 4649.

[10] 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" (1996), 12 *Women's Education des femmes* 45 at 47.

[11] The interplay between the social construction of disability and the exclusion of persons with disabilities has been acknowledged by the Supreme Court of Canada in its decision in *Eaton*': "Exclusion from the mainstream of society results from the construction of a society based solely on 'mainstream' attributes to which disabled persons will never be able to gain access". (6 February 1997), Unreported Decision, Court File No. 24668 (S.C.C.) at para. 66 per Sopinka J.

barriers on the individual rather than on the social institutions which have excluded persons with disabilities by maintaining barriers to their full participation"[12].

The exclusion of persons with disabilities from mainstream society and the attribution of stereotypical characteristics 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 be challenged in the course of our assessment and analysis of statutory schemes for the advancement of equality.

Human rights protections must be rigorously examined within their social, political and legal context. This context is critical to any strategy aimed toward the elimination of disability-based discrimination, for without it, there is a particular risk that the perpetuation of discriminatory barriers will be rendered invisible.

LEAF submits that meaningful human rights protections for persons with disabilities must be rooted in an analysis which focuses on socially constructed difference, as distinct from "functional" difference. The analysis must take as its starting point the recognition that disability stems from the failure of the social environment to adjust to the needs and aspirations of disabled people, rather than from the inability of disabled people to adapt to societal requirements.

---

[12] 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 Promises and the Pitfalls* (1994) at 36.

PART III: CONCERNS WITH IMPORTING THE DUTY TO ACCOMMODATE INTO THE CANADIAN HUMAN RIGHTS ACT

A. Overview

For the purposes of clarity, the amendment dealt with in this Part is the following:

> **2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to 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.** [emphasis added]

This amendment is linked to the following clause in the Preamble to *Bill S-5* which appears to be rooted in the paternalistic construction of disability as a defect:

> **Whereas accommodating the needs of persons with disabilities is particularly important to ensure that they can be full participants in and contributors to Canadian society...**

LEAF is concerned that the proposed amendment to section 2 of the *CHRA* weakens the overall thrust of the legislation by importing into it a particular notion of "accommodation", flowing from caselaw, which has had the effect of minimizing the enforcement of human rights. While LEAF understands that the amendments are motivated by a desire to strengthen human rights, LEAF must conclude that the new section represents a worrisome step backwards for human rights in this country.

Rather than following caselaw which has been criticized as being confusing and uninformed by consistent principles[13], LEAF suggests that these amendments provide an unparalleled opportunity to *respond* to ambivalent caselaw with legislation which clearly sets out the federal government's commitment to substantive equality for all Canadians.

B. Problems with the Duty to Accommodate

LEAF believes that for many disadvantaged groups in Canada, including women with disabilities, accommodation alone will not ensure that they enjoy substantive equality. The wording found both in the Preamble and the proposed section 2 sets out accommodation as an end in itself, as opposed to only one means of achieving substantive equality. Moreover, an exclusive reliance on accommodation suggests an *ad hoc* approach rather than an approach that rethinks basic premises in the pursuit of substantive equality.

It is important to recognize that, while the principle of accommodation may have positive applications, the duty to accommodate analysis springing from it is a limiting concept. This is because the duty to accommodate approach has taken the status quo as given with accommodation conceptualized only as after the fact tinkering. Once accommodation is introduced into the analysis, the focus shifts from the person who has experienced discrimination to the person or entity which originally discriminated, with a view to determining how far that person or entity must go to remedy the discrimination. Any discussion of accommodation necessarily involves, at the outset, an admission that the right to redress from discrimination, that is, the right to equality, is limited.

---

[13]Shelagh Day and Gwen Brodsky, *infra*, note 19.

For persons with disabilities, a fundamental concern with the concept of the duty to accommodate arises from its implicit endorsement of the norms and structures which are at the heart of their historical disadvantage. Equality for persons with disabilities requires challenging the exclusionary impact of mainstream values and norms, not simply making allowances or compensating for those deemed unable to satisfy those norms.

In the context of disability, equality translates into the right of individuals and groups to participate in a society free of the barriers which give "disability" its meaning. Courts and tribunals, however, have generally not interpreted or applied the notion of accommodation in such a way as to challenge majoritarian norms. Thus we encounter in human rights jurisprudence, a tacit acceptance that it is deaf persons (rather than hearing persons) who require sign interpreters or that ramps are for the benefit of mobility-impaired persons (rather than for the benefit of employers, services and housing providers). Accommodations mandated from this perspective reinforce the negative construction of disability, and effectively mask deficiencies in a social order premised upon the assumption that no one has a disability.

LEAF is therefore concerned that the duty to accommodate can operate in ways which are actually antithetical to the meaning of substantive equality. This occurs when accommodation is framed from a mainstream perspective as making 'concessions' to the disadvantaged group. Such an interpretation falls far short of full inclusion. LEAF submits that substantive equality entails much more than simply providing ways or means to "fit" individuals into existing societal norms and structures - leaving unscrutinized those norms and structures themselves. Substantive

equality challenges the very existence of mainstream structural and institutional barriers, including the socially constructed notions of disability which inform them.

For persons with disabilities, equality means the right to participate in an inclusive society. The notion of accommodation must not be limited to a process whereby persons with disabilities are "enabled" to meet nondisabled norms. Instead, our understanding of accommodation must embrace the process of dismantling structural, institutional and attitudinal barriers, including the social construction of disability.

C. Concerns with Expanding the Duty to Accommodate to all Grounds of Discrimination

LEAF wishes to draw the Committee's attention to the fact that, notwithstanding that the Preamble to *Bill S-5* mentions "accommodation" specifically with respect to persons with disabilities, the proposed section 2 expands accommodation to make it applicable to *all* prohibited grounds of discrimination in the *CHRA*. The expansion of accommodation to all grounds is repeated in section 15(2) (the codification of undue hardship) which is discussed in Part IV of this submission.

LEAF believes that, given the conceptual problems with the duty to accommodate, identified above in terms of persons with disabilities, its expansion to all prohibited grounds of discrimination is troubling and represents a significant weakening of the protections offered in the *CHRA*. Historically, the theory of accommodation was developed in cases involving

religious discrimination in the workplace.[14] More recently, the Supreme Court has explored theories of accommodation in *Charter* cases involving disability-based discrimination.[15] However, to LEAF's knowledge, accommodation has not yet applied, in the same degree, to discrimination on the grounds of, for example, sex and race.

It is important to note that LEAF is *not* advocating that different prohibited grounds of discrimination may merit different standards. Such a development would signal a "hierarchy" of grounds in which some are considered more fundamental or worthy of protection than others. LEAF cannot accept such a marked departure from existing equality principles. LEAF believes that all prohibited grounds of discrimination share equal importance in that they are based on personal characteristics which are integral to the humanity of the person who bears those characteristics. Therefore, the issue cannot be resolved by separating out certain prohibited grounds of discrimination for analysis under a different test.

D. Conclusion

LEAF believes that incorporating accommodation as it is constructed in the proposed amendments has serious and negative implications which will ultimately undermine the *CHRA*'s purpose which is to require positive measures to promote substantive equality. Therefore, LEAF urges the Committee to reject this inclusion in the form proposed.

---

[14] *Ontario Human Rights Commission* v. *Simpson-Sears*, *supra*, note 5.

[15] *Brant County Board of Education* v. *Eaton*, *supra*, note 11; *Eldridge* v. *British Columbia*, *supra*, note 8.

PART IV: IF THE DUTY TO ACCOMMODATE IS INCORPORATED, THE DEFENSE OF UNDUE HARDSHIP MUST BE STRINGENT

A. Overview

As stated above, LEAF's position is that incorporating "accommodation" into the *Canadian Human Rights Act* will neither accomplish the goals set out in the Preamble to *Bill S-5* nor result in substantive equality for members of historically disadvantaged groups, including women with disabilities. However, LEAF does not dismiss the possibility that, after consideration has been given to the full range of submissions on this issue, the package of amendments in *Bill S-5* will move ahead, including the accommodation provisions. If that is the path which is chosen, LEAF respectfully submits that the drafting of the amendments must be reconsidered. In particular, we have serious concerns about the inclusion of an undue hardship "defence" to the accommodation requirement and the manner in which that concept is currently described in the proposed amendments to section 15 of the *CHRA.*

The particular amendment dealt with in this section is:

> **15(2) 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 be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.** [emphasis added]

The scheme of the new *CHRA* provisions, as presented in *Bill S-5*, provides that the purpose of the Act is, *inter alia*, to "extend the laws in Canada to give effect, ...to the principle that all individuals should have an opportunity equal with other individuals to ...have their needs

accommodated" (proposed section 2). In general, employers and service providers are prohibited from engaging in discriminatory practices as defined in the Act, unless they can establish that the practice comes within one of the exceptions in section 15(1). Employers or service providers may only rely on the exceptions in 15(1)(a) "bona fide occupational requirement" or 15 (1)(g) "bona fide justification", if they are able to establish "that accommodation of the needs of an individual or class of individuals affected would impose an undue hardship on the person who would have to accommodate those needs, considering health, safety and cost".

Notwithstanding the concerns expressed in Part II of this submission, it is arguable that a duty to accommodate understood in its ordinary sense, *without* the undue hardship limitation embodied in the proposed subsection 15(2) of the *CHRA*, has the potential to provide a significant type of benefit to individuals and classes of individuals which come within its operation. Although it does not offer an adequate response to the underlying causes of inequality, it would achieve tangible results in employment and access to goods and services for members of historically disadvantaged groups. Having accepted that, what, if any, rationale is there for limiting the duty to accommodate by incorporating an "undue hardship defence"?

LEAF asserts that incorporating *any* limitation on the duty to accommodate, however narrowly defined, will compromise the effectiveness of accommodation as an ameliorative tool and bring about a result which is contrary to the stated purpose of the amendments, which includes acknowledging the need for positive measures "to help to ensure equality and to enable members of all groups to participate equally in the workplace and in access to goods, services, facilities and accommodation". In *Bill S-5*, the standard is that accommodation will be required unless

the accommodator establishes "undue hardship, considering health, safety and cost". For reasons which we hope will become clear, LEAF takes the position that in the context of the *Canadian Human Rights Act* this standard is inappropriate and in itself discriminatory.

B. Problems with Undue Hardship

Undue hardship, as a limitation on accommodation, is not a new concept. To date in the human rights field, the duty to accommodate has, without any exception of which LEAF is aware, always been modified or restricted by a defence or limitation most often referred to as undue hardship. It has arisen historically only in cases of adverse impact discrimination; for direct discrimination cases, no duty to accommodate existed, so that a discriminatory practice had to be either justified or eliminated.[16] Often, human rights statutes themselves give little or no guidance as to the meaning of undue hardship; hence its interpretation has been left to human rights decision-makers, and to a lesser extent, courts, to determine in individual cases. Although it seems clear that undue hardship has been included in statutes to permit a balancing of the interests of the accommodators with those of persons seeking to have their needs accommodated, the manner in which this balancing has been done is troubling to LEAF in a number of ways.

Recently, in *Eldridge v. The Attorney General of British Columbia*, Mr. Justice La Forest, speaking for a unanimous Supreme Court of Canada, made the following general statements about accommodation in the human rights field:

> The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field. In *Re Saskatchewan Human Rights*

[16] *Ontario Human Rights Commission* v. *Simpson-Sears*, *supra*, note 5 at 555.

> *Commission and Canadian Odeon Theatres Ltd.* (1985), 18 D.L.R. (4th) 93 (Sask. C.A.), ...the court found that the failure of a theatre to provide a disabled person a choice of place from which to view a film comparable to that offered to the general public was discriminatory...
>
> It is also a cornerstone of human rights jurisprudence, of course, that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation. The obligation to make reasonable accommodation for those adversely affected by a facially neutral policy or rule extends only to the point of "undue hardship".[17]

LEAF is concerned that both the caselaw and commentary suggest that "undue hardship" has been and will be used to water down the duty to accommodate in a way that is very negative for the equality interests of all disadvantaged groups.

For example, the Supreme Court of Canada in the *Central Alberta Dairy Pool* case considered a myriad of factors as appropriate to assessing whether accommodation creates undue hardship for the accommodator:

> . . . financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those that bear it are relevant considerations. [18]

The extreme diversity and vagueness of these factors suggest that the scope of "undue hardship" may be quite broad.

---

[17] *Supra*, note 8 at paragraphs 78-79.

[18] [1990] 2 S.C.R. 489.

Shelagh Day and Gwen Brodsky, in their article entitled "The Duty to Accommodate: Who will Benefit?" express concern about the extent to which economic factors are permitted to determine how far employers and service providers will be required to go to accommodate members of disadvantaged groups:

> Accommodation seems to envision only marginal participation by those who are a little bit "different". People who are very different from dominant norms may be ineligible for accommodation because of the consequent hardship to the accommodators. In other words, some people can be discriminated against because it is considered efficient and economical. Again, this establishes two categories of equality claimants: those whose equality we decide we can afford and those whose equality we decide we cannot.[19]

C. Problems with the Definition of "Undue Hardship" in the Proposed Subsection 15(2)

We now turn our attention to "undue hardship, considering health, safety and cost", set out in the proposed subsection 15(2) as the formula for assessing the nature of the limit to be placed on accommodation. 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, legitimate concerns. When assessing whether these factors will modify or eliminate the duty to accommodate in particular situations, however, it is fundamentally important that the analysis of any risk to health or safety be undertaken from a substantive equality perspective. It is not sufficient, for example, to assess safety risks in the workplace only from the point of view of workers who do not require accommodation. Instead, the analysis must be undertaken in a manner which fully respects the perspective of the person seeking inclusion. To do otherwise is to build discriminatory assumptions into the interpretation of terms like "health", "safety" and

---

[19](1996) Can. Bar Rev. Vol. 75 433 at 464.

"risk". Members of the Committee are urged to consider proposing amendments to the Bill which would ensure that this is the approach taken to the interpretation of these factors. One change the Committee may wish to consider is proposing that **"considering health and safety"** be changed to **"considering *serious risk to* health and safety".**

Even assuming that some reference to undue hardship will ultimately be included in the *CHRA*, cost has no legitimate place in its definition and should not be automatically included as is currently envisioned in the proposed amendments. Cost has been interpreted as including a broad range of economic factors and its codification in the *CHRA* is an open invitation to place a price tag on equality, a result which LEAF finds wholly unacceptable. Imagine for example, a request for accommodation from a pregnant woman who requires an adjustment in her job responsibilities or work schedule as a result of her pregnancy. Permitting her employer to rely on financial hardship to deny her request is repugnant if one adopts a substantive concept of equality. The reasons are simple. As a society, we have systematically discriminated against women in their roles as mothers and as nurturers and care-givers to children. We have failed to value and respect the fundamentally important place women occupy in relation to child-bearing.[20] It is, in LEAF's view, totally inappropriate to suggest that any woman who has overcome so many historically entrenched barriers to enter the workplace in the first place may have her right to be accommodated brushed aside solely on the basis of cost.

---

[20] *Brooks* v. *Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 at 1243-1244.

D. The Federal Government's Particular Obligations as Regards Human Rights

To understand LEAF's adamant position on this issue, it is necessary to consider the unique place occupied by the *Canadian Human Rights Act.* In the provincial human rights context, rights and obligations extend to an extremely broad range of claimants, employers and providers of goods and services. Absent comprehensive provincial programs to provide resources and other assistance to employers and service providers, a credible case may be made for the need to balance the interests of the claimants with those of employers and service providers when an assessment is made of whether accommodation may reasonably be provided in individual circumstances.

In contrast, the *CHRA* applies only to federal government departments, agencies and Crown Corporations and businesses engaged in activities which come within the legislative jurisdiction of Parliament. Examples include Canada Post, chartered banks, national airlines and railways, interprovincial communications and telephone companies and employers/service providers in other federally regulated industries. With few exceptions, this means that the obligation will fall to the federal government and its agencies and a narrow range of large national corporations. Only to a very limited extent will the *CHRA* have any application to smaller, private employers and service providers.

LEAF takes the position that, in these circumstances, no statutory limitation based on cost should be placed on the obligation to accommodate fully the needs of individuals who have historically been excluded and marginalized as a result of the discriminatory assumptions which underlie our societal norms. Instead, the expectation should be that *real* meaning will be given to the concept

of substantive equality for all persons in circumstances which come within the ambit of the *CHRA*. We are of the view that it is both legitimate and appropriate to expect this kind of strong leadership from our federal government in respect of these fundamental rights. To the extent that a particular employer or service provider is unable, for legitimate and compelling reasons, to meet the standard established in the *CHRA*, government programs would be required to provide financial and other assistance to ensure that the Act is fully complied with. Given the enormous challenges faced daily by members of historically disadvantaged groups, LEAF cannot accept, as a matter of principle, that accommodation of their needs should yield to the economic or other interests of government departments, Crown corporations and other federally regulated employers and service providers.

Therefore, LEAF requests that the words **"and cost"** be removed entirely from subsection 15(2).

E. Concerns with the Regulatory Process: Subsections 15(3)-(7)

Supporters of *Bill S-5* may suggest that the concerns expressed by LEAF with respect to the inclusion and meaning of undue hardship need not be addressed in the context of the legislation itself. In particular, it may be suggested that the amendment to section 15 of the *CHRA* which includes, in subsections 15(3) to (7), a mechanism for the promulgation of regulations "prescribing standards for assessing undue hardship", means that "undue hardship" will be appropriately dealt with outside of the *CHRA*.

For the purpose of clarity, the precise amendments read as follows:

15(3) The Governor in Council may make regulations prescribing standards for assessing undue hardship.

15(4) Each regulation...shall be published in the *Canada Gazette* and a reasonable opportunity shall be given to interested persons to make representations in respect of it.

15(5) The Canadian Human Rights Commission shall conduct public consultations concerning any regulation...and shall file a report of the results of the consultation with the Minister within a reasonable time after the publication of the proposed regulation in the *Canada Gazette*.

15(6) A proposed regulation need not be published more than once, whether or not it has been amended as a result of any representations.

15(7) The Governor in Council may proceed to make regulations under subsection (3) after six months have elapsed since publication of the proposed regulations in the *Canada Gazette*, whether or not a report described in subsection (5) is filed.

For the following reasons, this regulatory process does not allay LEAF's concerns or dissuade us from our position concerning *Bill S-5*.

First, we note that the regulation-making authority is that of the Governor in Council. LEAF believes that the drafting of, and consultation concerning, appropriate regulations or guidelines for the interpretation of such an important and potentially damaging provision as undue hardship should, at the very least, be undertaken by the Canadian Human Rights Commission. The Commission has, and has access to, expertise on these matters and an understanding of broader equality concerns which will not readily be available to members of Cabinet.

Second, it is not clear that the consultation process which is envisioned in subsection 15(5) will be accessible to members of historically disadvantaged groups or the organizations which represent their interests. Such broad-based consultation is essential to ensuring that substantive

equality is achieved, but scare resources mean that it will be very difficult for the individuals and groups most affected by these important questions to have a meaningful voice. In our own work, LEAF has come to acknowledge the critical importance of consultation. At the same time, LEAF has experienced the difficulty of facilitating consultations with groups that are often under funded and struggling to meet their own mandates. There is no reason to believe that those groups which are most disadvantaged, and whose opinions are most needed, will actually be heard during the vague consultation process envisioned by the proposed amendments. In contrast, there is little doubt that employers and service providers bound by the provisions of the *CHRA* will have ample access to this process.

Finally, although (minimal) consultation and input is at least permitted by the legislation, there is no indication of what impact these submissions will actually have on the regulatory process. For example, it appears that the Governor in Council is free to act on proposed regulations without a report from the Canadian Human Rights Commission if one is not forthcoming within 6 months (subsection 15(7)) despite the reality that it may be quite impossible to bring a meaningful consultation process to a conclusion within that period. If a representation from an interested person results in a significant amendment to the proposed regulations, it appears that no one will even know about it until it is too late for further input. Once the regulations have been published in their original draft, there is no requirement for further notice of changes, no matter how critical they may be.

LEAF believes that the regulatory process does not at all guarantee that the standards for assessing "undue hardship" will be carried out in a way which respects the principles of

substantive equality and gives real meaning to redress for discrimination. It is therefore critically important that the amendments themselves respect and articulate these principles.

F. Conclusion

LEAF has prepared these submissions because we firmly believe 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 Standing Senate Committee on Legal and Constitutional Affairs has a critical opportunity to ensure that the 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.

LEAF therefore requests, that, if accommodation is to be incorporated into the *CHRA*, its effect should be tempered by making, at the very least, the following change to the proposed amendments:

The last two words of subsection 15(2) "and cost" should be deleted.