



WOMEN'S LEGAL EDUCATION AND ACTION FUND

FONDS D'ACTION ET D'EDUCATION JURIDIQUES POUR LES FEMMES

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**Submissions to the Standing Committee on Justice and Human Rights  
re: the Elimination of the Court Challenges Program**

Fiona Sampson, Director of Litigation  
October 27, 2006

The Women's Legal Education and Action Fund (LEAF) respectfully submits that the Federal government should reverse its decision to eliminate the Court Challenges Program (CCP) and restore funding to this critical program that provides limited funding for selected equality test cases. The restoration of funding to CCP would be in compliance with the federal government's obligation under section 15 of the *Charter of Rights and Freedoms* to promote and protect the equality rights of disadvantaged persons in Canada.

LEAF is a national, federally incorporated, non-profit organization founded in April, 1985 to secure equal rights for Canadian women as guaranteed by the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). To this end, LEAF engages in equality rights litigation, law reform and public education relating to women's inequality.<sup>i</sup> Commencing with LEAF's work in the Supreme Court of Canada case of *Andrews v. British Columbia*,<sup>ii</sup> LEAF has contributed to the development of equality rights jurisprudence and the meaning of substantive equality in Canada. LEAF has developed and advocated equality rights arguments in contexts where sex inequality is compounded by other prohibited grounds of discrimination such as race, class, aboriginal status, sexual orientation and/or disability. LEAF has intervened in over 140 equality rights related decisions in the areas of sexual violence, pay inequity, socio and economic rights, spousal and child support, reproductive freedom, and access to justice, to name a few.

LEAF has historically been an innovator of creative and progressive section 15 equality rights analyses,<sup>iii</sup> and assumed a leadership role with respect to the advancement of section 15 intervener litigation in Canada.<sup>iv</sup> Interveners play a critical role in equality rights litigation, acting as third parties to make arguments that would not otherwise be made, to assist the court in its deliberations. LEAF prides itself on advancing analyses that fuse women's experiential realities with the lessons learned from legal theory that are essential to the evolution of equality rights jurisprudence. Many cases in which LEAF has intervened have been funded by the CCP (attached as "Appendix A" please find a list of some of LEAF's CCP funded interventions). Without CCP's support, it is unlikely that LEAF would have been as effective as it has been in advancing women's equality rights in Canada. The elimination of CCP will have a serious impact on LEAF's future ability to continue its work advancing women's equality rights through section 15 intervener litigation.

The opportunity for an organization such as LEAF to intervene before the courts in equality related cases is an excellent way to ensure access to justice for disadvantaged persons. The CCP is fundamentally a program that provides for access to justice. To protect the integrity and legitimacy of the legal system and to give full meaning to the constitution that supports it, everyone in Canada must have access to the courts. For people at the lowest income levels in Canada, a disproportionate number of whom are women, access to the courts is often an impossibility. Access to justice raises section 15 and section 7 issues, especially for disadvantaged persons (see *New Brunswick (Minister of Health and Community Services) v. G.J.*)<sup>v</sup>. The *Charter*, the common law, and the rule of law that underpins our democracy all support the right to access to justice. Access to justice really deals with the most fundamental of human rights for disadvantaged persons.

Disadvantaged persons, and groups representing disadvantaged persons, often need CCP support to protect and promote their equality rights. To deny this support operates to perpetuate the inequality and oppression experienced by disadvantaged persons. The CCP has been cited by international human rights committees as evidence of Canada's partial compliance with its international human rights obligations.<sup>vi</sup> As recently as May, 2006, the federal government itself referenced the CCP in its submissions to a U.N. Committee as evidence of its commitment to human rights.<sup>vii</sup> Indeed, the federal government has relied upon its support for the programme as the cornerstone of its domestic implementation of social, economic, and cultural rights in the courts, in the absence of any other enforcement mechanism. The equality rights guaranteed in section 15, that Canada considers as central to its standing in the international community as a human rights leader, are empty if the persons guaranteed protection under section 15 cannot access the rights.

The Supreme Court of Canada has repeatedly endorsed section 15's dual purpose to prevent discrimination **and** to promote substantive equality. At the heart of substantive equality is the recognition that differential treatment, by itself, is not a violation of equality rights, and that sometimes differential treatment is necessary to achieve substantive equality. The CCP promotes substantive equality by providing modest amounts of funding to support selected section 15 equality rights test cases. By providing some limited access to justice for disadvantaged groups, the CCP helps the federal government to fulfill its obligation to prevent discrimination and to promote substantive equality. To eliminate this program is to turn back Canada's equality clock.

CCP does not provide funding for universal access to justice relating to equality rights claims. It only provides funding to challenges which allege section 15 violations by the federal government. Inequality perpetuated by the federal government is especially problematic because it sends the message that discrimination is acceptable. The Supreme Court of Canada has described discrimination practiced by government as "evil":

Discrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant. The worst oppression will result from discriminatory measures having the force of law. It is against this evil that s.15 provides a guarantee.<sup>viii</sup>

The CCP provides an important vehicle through which to identify and correct the discriminatory effects of the federal government's sometimes discriminatory laws. It also provides an important opportunity to address the power (and financial) disadvantage that exists between disadvantaged persons and the federal government.

The Supreme Court has recently reaffirmed its long standing commitment to the idea that while it is the responsibility of governments to govern, governments are obligated to govern in accordance with the rights and freedoms guaranteed in the *Charter*.<sup>ix</sup> Government action or inaction that violates a *Charter* right or freedom must be measured against principles and values of substantive democracy to determine whether or not

government action or inaction is constitutional. It is essential not to conflate the constitutional requirements of democracy with government action that is taken in the name of majoritarian democracy. Access to the courts is essential for equality seeking groups, precisely because they are most often the minority, subject to the sometimes discriminatory effects of majority rule. LEAF submits that to fulfill its commitments under s. 15 of the *Charter*, the federal government is obligated to provide for both substantive equality and substantive democracy, as described above. To ensure substantive equality and democracy, disadvantaged persons and the groups that represent them must have access to justice and the means and ways to challenge discrimination.

It is difficult to imagine a legitimate reason to justify eliminating the CCP as it constitutes an equality promoting program that operates to fulfill the government's section 15 equality rights obligations. This was confirmed by the recent program review of the Court Challenges Program, conducted by independent evaluators for Heritage Canada. In these times of fiscal surplus, there is no reasonable justification for such a decision.

LEAF respectfully submits that the decision to eliminate CCP be reversed and that CCP's full funding be restored immediately.

All of which is respectfully submitted,

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Fiona Sampson  
LEAF Director of Litigation

Date

## APPENDIX “A”

The following is a list of some of LEAF’s CCP funded cases:

1. *DBS v. SRG*, [2006], S.C.C. 37  
Retroactive child support
2. *Barney v. Canada and the United Church of Canada*, [2005] S.C.J. No. 59  
Compensation for survivors of Aboriginal residential schools
3. *Miller v. Canada*, [2002] F.C.J. No. 1375  
Discrimination relating to access to maternity benefits under the *UI Act*.
4. *R. v. Shearing*, [2002] 3 S.C.R. 33  
Access to victim’s personal records in sexual assault cases
5. *Boston v. Boston*, [2001] S.C.R. 43  
Spousal support after retirement and pensions as property
6. *Lesiuk v. Canada (Employment Insurance Commission)*  
Sex based discrimination under the *EI Act* for those who do not meet the minimum hour requirement, i.e. part-time female employees
8. *R. v. Ewanchuk*, [1999] 1 S.C.R. 330  
The definition of consent in sexual assault
9. *L.C. v. Mills*, [1999] 3 S.C.R. 668  
Access to personal records of victims in sexual assault trials
12. *R. v. R.D.S.*, [1997] 3 S.C.R. 484  
Judicial bias relating to race
13. *R. v. Darrach*, [2002] 2 S.C.R. 443  
Constitutional challenge to the “rape shield” law
14. *Goertz v. Gordon*, [1996], 2 S.C.R. 27  
Mobility rights of custodial mothers

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<sup>i</sup> The extent of women's inequality in Canada was documented most recently in the Statistics Canada report "Women in Canada: A Gender-based Statistical Report" released in March 2006.

<sup>ii</sup> (1989) 1 S.C.R. 892

<sup>iii</sup> This work started with LEAF's intervention in *Andrews*, referred to above.

<sup>iv</sup> Radha Jhappan, "Introduction: Feminist Adventures in Law" in *Women's Legal Strategies in Canada*, Radha Jhappan, ed. (Toronto: University of Toronto Press, 2002) at 9; see also Razack, Sherene, *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto: Second Story Press, 1991) and Christopher Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and Women's Legal Education and Action Fund* (Vancouver, University of British Columbia Press, 2004); Diana Majury, "The Charter, Equality Rights, and Women: Equivocation and Celebration" (2002) 40 Osgoode Hall L.J. 297; Diana Majury, "Women's (In)Equality Before and After the Charter" in *Women's Legal Strategies in Canada*, Radha Jhappan, ed. (Toronto: University of Toronto Press, 2002) at 101

<sup>v</sup> [1998] 2 S.C.R. 534; see also the LEAF factum in this case dated October 19, 1998 available at: [www.leaf.ca](http://www.leaf.ca)

<sup>vi</sup> See for example Committee on the Elimination of Discrimination Against Women, Twenty-eighth Session, January 31, 2003, Draft Report on Canada's Fifth Periodic Report at para. 31 available at: <http://www.un.org/womenwatch/daw/cedaw/cedaw28/ConComCanada.PDF>. The Committee expressed concern that the CCP applies only to federal laws and programs.

<sup>vii</sup> United Nations Economic and Social Council, Thirty-sixth Session, Geneva, May 1-19 2006, "Replies of the Government of Canada to the List of issues to be taken up in connection with the consideration of the fifth periodic report of CANADA concerning the rights referred to in articles 1-15 of the International Covenant on Economic, Social and Cultural Rights" (E/C.12/CAN/5) available at:

<http://72.14.205.104/search?q=cache:rbrS5tJNZQ0J:193.194.138.190/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/34e379700ec479b1c1257195005b4c22/%24FILE/G0641551.DOC+%22It+is+not+possible+for+the+government+to+support+all+court+challenges,+but+this+uniquely+Canadian+program+has+been+successful+in+supporting+a+number+of+important+court+cases+that+have+had+direct+impacts+on+the+implementation+of+linguistic+and+equality+rights+in+Canada.+%22&hl=en&gl=ca&ct=clnk&cd=6>

<sup>viii</sup> *Andrews v. Law Society of British Columbia*, supra, at 172

<sup>ix</sup> *NAPE v. Newfoundland*, [2004] 3 S.C.R. 381