WOMEN'S LEGAL EDUCATION AND ACTION FUND

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Women's Legal Education and Action Fund Inc.

Fonds d'Action et d'Education Juridiques Pour les Femmes Inc.

B R I E F

to the

Joint Committee of the Senate and of the House of Commons

on

The 1987 Constitutional Accord

September 1987

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of government power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individuals rights and liberties. Once enacted, its provisions cannot easily be repealed or amended.

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Dickson, J. (as he then was)
Hunter et al v. Southam Inc. et al, [1984] 2 S.C.R. 145, at p. 155

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1.0 Introduction

Representatives of the Women's Legal Education and Action Fund Inc. ("LEAF") appeared before the Joint Committee of the Senate and of the House of Commons on the 1987 Constitutional Accord ("Committee") on the second day of the Committee's hearings (August 5, 1987). The purpose of this brief is to reiterate LEAF's opinion on the significance of the 1987 Constitutional Accord, as drafted, given the approach already taken by Canadian courts to the adjudication and resolution of constitutional disputes. This brief, which has been further informed by the national public debate on the Accord throughout the last month, augments our oral presentation.

LEAF's history, purpose and activities are testimony to the fact that, as women of Canada, we recognize the critical place which a constitution holds in the spirit and governance of the country, and therefore the critical importance of the inclusion of Quebec in the Constitution. Just as we shall strive to hear, understand and accept views from within Quebec and across Canada, one fact is undeniable: the shape and force which constitutional equality rights will have are not clear at this early stage. A developed interpretation of section 15 will not be in place for some years. It is only in the fall of this year that the Supreme Court of Canada will hear its first major case on section 15 of the Charter. No one can know with certainty what lies behind the door which will open with this case.

LEAF obviously does not suggest that the full participation of Quebec in Canada's constitution await the development of equality jurisprudence. Rather, let clear direction be given to Canadians and Canadian courts that indeed we remain committed, as we were in 1982, to effective guarantees of equality.

2.0 Consultation Process

2.1 LEAF's Activities

Upon learning of the Quebec Government's intention to ratify the Accord, the Executive and National Legal Committees of LEAF moved quickly by sending a telegram on June 22, 1987 to each of the First Ministers expressing concern about the implications of the Accord for equality rights and urging an amendment. A copy of this telegram, together with all responses received to date, are attached as Appendix A.

On July 30, 1987, LEAF joined representatives of the National Association of Women and the Law and the Ad Hoc Committee of Canadian Women on the Constitution in a meeting with the Minister Responsible for the Status of Women, The Honourable Barbara MacDougall, followed by a press conference at the Parliamentary Press Gallery. (Press release attached as Appendix B)

The national board of directors of LEAF approved the content of its presentation to the Committee on August 4, 1987. Prior to and since that time, members of LEAF's board and its branches have carried out extensive consultations with other equality seeking groups and individuals knowledgeable about equality issues, including participation in those organized by the Canadian Advisory Council on the Status of Women and The Honourable Barbara MacDougall.

2.2 Equality Coalition

Consistent with its concern about the equality rights of all Canadians, LEAF initiated a telephone consultation which has resulted in a coalition of a wide cross-section of community group. On August 27, 1987, the coalition, representing women, the handicapped, racial minorities, workers and human rights advocates, delivered an open letter to the Premiers meeting in Saint John that any undermining of the Charter is unacceptable. A copy of the letter is attached as Appendix C.

2.3 Independent Opinions

Although the Committee has already had the benefit of LEAF's expertise derived from its leadership in equality rights litigation, the board of LEAF has determined

that it would further assist in the Committee's deliberations by seeking written opinions from acknowledged academic authorities on equality rights in the constitutional context.

LEAF is grateful to Robin Elliot and Catherine MacKinnon whose credentials followed by their opinions can be found in Appendices D and E.

3.0 Women, The Charter And The Courts

3.1 History of LEAF

LEAF was incorporated, and received charitable status under the Income Tax Act of Canada, in April 1987. One of LEAF's primary objectives is to achieve equality for women by means of litigation using the guarantees of the Canadian Charter of Rights and Freedoms. These guarantees comprise not only section 15, but also section 28.

LEAF grew out of the awareness that the guarantees would mean little to women if restrictively interpreted, or ignored, by the courts given the enhanced role of the courts resulting from the implementation of the Charter. The establishment of LEAF reflects the willingness of the women's community to add litigation to its traditional ways of seeking change. It is well understood that litigation will sometimes be the only, or the best, way of advancing women's interests.

3.2 Organization of LEAF

LEAF is governed by a board of directors which includes at least one representative drawn from its branches in every province and territory of Canada.

The board meets three or four times every year and, between times, the working of LEAF is carried on by committees of the national board and branches of LEAF.

3.3 LEAF's Cases

LEAF's case selection criteria, administered by the National Legal Committee, are provided in Appendix F. Our criteria reflect one of our principal concerns, confirmed by our cases, i.e. that women often suffer discrimination not only on the basis of sex, but also on the basis of the other grounds enumerated in section 15.

LEAF's second year of operation has been increasingly busy. Our national office and branches receive an average of 30 substantive inquiries each month.

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 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.

Since LEAF began in April 1985, this process of intake and review has generated the opening of 201 files, 83 in LEAF's second year. LEAF has adopted 39 cases to date which will substantially promote equality for women in Canada.

3.4 LEAF in the Courts

LEAF has already been in the courts of eight out of ten provinces, including Quebec, and one of the territories. Its representatives have argued before several provincial courts of appeal. LEAF has achieved important victories in the courts, and by way of negotiated settlements with governments.

LEAF has been granted standing to appear as an intervenor in three cases to be heard by the Supreme Court of Canada. Its success in gaining standing in court has enhanced its ability to litigate equality issues, and provides an encouraging sign about judicial willingness to permit interventions -- an area that had been a matter of grave concern in the equality-seeking community. It has forged valuable links with other groups advocating equality; together, these groups have taken a high-profile role in recalling governments to the commitment represented by the Charter.

4.0 LEAF'S Legal Analysis

4.1 Substantive Concerns About the Accord

In assessing whether a limit on a Charter right is nonetheless acceptable under section 1, courts will examine a number of factors, including the nature of the right at issue. In determining the nature of the right (and thus the degree of weight it will bear in the analysis), the courts can look at the history of the right, whether it was protected at common law, and the total constellation of references to the right which may appear in the Charter and Constitution.

Thus, no one provision of the Charter stands alone. It is always considered in its constitutional environment. Any alteration in that environment is bound to affect the way courts interpret the right, and the balance they strike between it and other constitutionally protected values.

Because the Meech Lake Accord will alter the constitutional environment in which equality rights have been interpreted (and in which they would continue to be interpreted in the absence of the Accord), LEAF is concerned that women's equality rights will inevitably be affected by it. This basic concern, arising from the very structure of the Constitution and the methodology of constitutional adjudication, is reinforced by the language of the Accord itself. There is nothing in the Accord to assure us that its recognition of some rights and interests will not diminish women's rights. In fact, the language of the Accord goes in the opposite direction. In this part, we examine the reasons for our concern.

4.2 "Bill 30" Case

This decision of the Supreme Court of Canada, rendered after the signing of the June 3 Accord and its ratification by Quebec, deals with the constitutional validity of Ontario legislation extending full funding to Roman Catholic schools in the province. The province sought to uphold the legislation on the basis of section 93 of the Constitution Act, 1867, supported by section 29 of the Charter of Rights and Freedoms. Challengers agreed that it infringed the equality guarantees of section 15 and the freedom of religion provisions of paragraph 2 (a) because funding was available only to Roman Catholic schools.

Several passages in the Court's reasoning give cause for concern. The first is from the judgement of Madam Justice Wilson, for herself and Dickson, C. J. and McIntyre and LaForest, JJ. She rules that section 29 of the Charter is not required to make the rights and privileges protected by section 93 (1) immune from Charter review. She says:

> I believe it (section 29) was put there simply to emphasize that the special treatment guaranteed by the Constitution to denominational, separate or dissentient schools, even if it sits uncomfortably with the concept of equality embodied in the Charter because not available to other schools, is nevertheless not impaired by the Charter. It was never intended, in my opinion, that the Charter could be used to invalidate other provisions of the Constitution, particularly a provision such as s. 93 which represented a fundamental part of the Confederation compromise. Section 29, in my view, is present in the Charter only for greater certainty, at least insofar as the Province of Ontario is concerned.
>
> To put it another way, s. 29 is there to render immune from Charter review rights or privileges which would otherwise, i.e. but for s. 29, be subject to such review. The question then becomes: does s. 29 protect rights or privileges conferred by legislation passed under the province's plenary power in relation to education under the opening words of s. 93? In my view, it does although again I do not believe it is required for this purpose. The Confederation compromise in relation to education is found in the whole of s. 93, not in its individual parts. The s. 93(3) rights and privileges are not guaranteed in the sense that the s. 93(1) rights and privileges are guaranteed, i.e. in the sense that the legislature which gave them cannot later pass laws which prejudically affect them. But they are insulated from Charter attack as legislation enacted pursuant to the plenary power in relation to education granted to the provincial legislatures as part of the Confederation compromise. Their protection from Charter review lies not in the guaranteed nature of the rights and privileges conferred by the legislation but in the guaranteed nature of the province's plenary power to enact that legislation. What the province gives pursuant to its plenary power the province can take away, subject only to the right of appeal to the Governor General in Council. But the province is master of its own house when it legislates under its plenary power in relation to denominational, separate or dissentient school. This was the agreement at Confederation and, in my view, it was not displaced by the enactment of the Constitution Act, 1982.

She then accepts a statement of Ontario Court of Appeal that the incorporation of the Charter into the Constitution Act, 1982 "does not change the original Confederation bargain."

Mr. Justice Estey for himself and Beetz, J. states as follows:

> The role of the Charter is not envisaged in our jurisprudence as providing for the automatic repeal of any provisions of the Constitution of Canada which includes all of the documents enumerated in s. 52 of the Constitution Act, 1982. Action taken under the Constitution Act, 1867 is of course subject to Charter review. That is a far different thing from saying that a specific power to legislate as existing prior to April 1982 has been entirely removed by the simple advent of the Charter. It is one thing to supervise and on a proper occasion curtail the exercise of a power to legislate; it is quite another thing to say that an entire power to legislate has been removed from the Constitution by the introduction of this judicial power of supervision. The power to establish or add to a system of Roman Catholic separate schools found in s. 93(3) expressly contemplates that the province may legislate with respect to a religiously-based school system funded from the public treasury. Although the Charter is intended to constrain the exercise of legislative power conferred under the Constitution Act, 1867 where the delineated rights of individual members of the community are adversely affected, it cannot be interpreted as rendering unconstitutional distinctions that are expressly permitted by the Constitution Act, 1867.

There is no indication in either judgement that the immunity from Charter review is confined to legislative powers granted in the 1867 Act itself, as opposed to those added later to the 1867 Act, or granted in any of the later Constitution Acts, e.g., those admitting other provinces to the union. One can suggest, for example, that reasoning similar to that of Justice Wilson in the Bill 30 case might render immune from Charter review Newfoundland legislation providing for denominational schools, although Newfoundland's power to establish or continue denominational schools was not enacted until well after 1867.

If, then, the words of the Bill 30 judgement are not confined to the 1867 Act proper, it becomes important to consider what a court would identify as a "fundamental constitutional compromise". Critics of the Bill 30 judgement point out that this phrase could conceivably cover all sections granting legislative power to one level of government or another, because they all constitute part of the compromise that permitted Confederation. We agree that such a wide reading would be absurd. However, we do think that the Meech Lake Accord would clearly be considered part of the fundamental compromise of Confederation, given the history of patriation

from 1980 to 1987, and the significance of the Accord in bringing Quebec fully into Confederation.

The Bill 30 case is disturbing for another reason. Section 32 of the Charter provides that the Charter applies to Parliament, provincial legislatures, and governments, with respect to all matters within their legislative authority. These words seems to apply the Charter to the exercise of all legislative power distributed by the Constitution Acts. The Bill 30 case seems, on the other hand, to create a sort of judicial exemption to section 32, in the case of some kinds of legislative powers (like those conferred by section 93 and class 24 of section 91).

The danger in creating any such exemption is underlined by looking at the decision of the Supreme Court of Canada in Caldwell v. Stuart, [1984] 2 S.C.R. 603. There, the protection for denominational schools in the Constitution was held to support the exclusion from provincial human rights law of the Vancouver School Board's decision to fire a teacher because of her marriage, in a civil ceremony, to a divorced person. This case, and others which permit the propagation of Catholic doctrine and norms about life-style to take precedence over women's employment opportunities, show clearly that women can suffer when other group rights are furthered. The point is also illustrated by the case of A. G. Can. v. Lavell, Isaac v. Bedard, [1974] S.C.R. 1349 where Indian rights under class 24 of section 91 took precedence over the rights of Indian women.

It has been argued that the proposed new section 2 does not actually grant legislative power; it is merely a principle of interpretation. In our view, this does not provide an answer to the concerns about the impact of the Bill 30 case.

We point out that there is no provision in the draft section 2 equivalent to section 31 of the Charter. This provision states that nothing in the Charter extends the legislative powers of any body or authority. Such a "cap" on the extension of legislative authority does not appear at all in the new section 2; subsection 2(4) merely stipulates that nothing in the section derogates from the powers of Parliament, the legislatures, or governments.

Even if it is "merely" a principle of interpretation, we think that the impact of section 2 could be substantial. It will be used as an extra justification for legislation passed under other provincial or federal heads of power -- i.e. restrictive day care

legislation, or limited access to abortion or job training programs for women. Legislation in these areas can be supported by grants of legislative power under sections 91 and 92. However, section 2 can provide yet another rationale for these laws, and thus serve to insulate them, wholly or partially, from Charter review. All that is necessary for a government to invoke section 2 is for the restriction that excludes women to somehow also be related to language (in any jurisdiction) or culture (in the distinct society). If, for example, children of parents with neither English nor French as a first language were given priority access to daycare, a woman whose child was excluded would have to overcome the argument that her right to equality under the Charter (which might otherwise be used to broaden the access to daycare) is subject to her government's role in preserving linguistic duality. And we stress that this type of conflict could occur not only inside Quebec, but in all Canadian jurisdictions. Moreover, because of the nature of our jurisprudence, decisions made about section 2 in one province will be considered by courts in other provinces when interpreting the provision.

4.3 The Accord And Charter Analysis

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 Meech Lake 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 1867 Act. 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 multicultural 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 dimished 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 weight 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 analyses 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 found 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.

4.4 Clause 7 of the Accord: Spending Powers/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 origin, 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. (Mobility Status: Publication #92907 Statistics Canada, 1981, Census Data).

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.

5.0 In Conclusion

After extensive consultation with equality seekers and constitutional experts, LEAF can confidently assert that the case has been made that the Meech Lake Accord will affect equality rights guarantees. The attached legal opinions from Robin Elliot and Catherine A. MacKinnon clearly support this contention. The opinion by John Laskin and Mary Eberts prepared for the Ad Hoc Committee of Canadian Women and the Constitution 1987 also supports this conclusion.

LEAF came to the Special Joint Committee to give a legal analysis based on our expertise in equality rights litigation. We do so within an urgent and broader reality. The Governments in Canada have forged a Constitutional Amendment which excludes equality guarantees for women and minorities. Ratification by each signatory is occurring amidst hurried hearings and statements of firm resolution not to allow any amendments to the Accord.

As noted in the opening quotation of our brief, the nature and purpose of a constitution is to set a course that rises above political swings and fashions, to guarantee that the future for all Canadians is soundly based on fundamental values and rights. Canadian women want the assurance, enshrined in the Constitution, that our equality is of the utmost importance to the Canadian state.

> The damage done to women's rights in Canada at this point in this process would be particularly acute if no remedial action were taken, the omission having been so expressly raised. Lack of action would squarely pose the question whether sex equality is, indeed, basic to the Canadian polity, seriously undermining the compact the Charter made between women and the Canadian state.
>
> Catharine MacKinnon
> (Appendix F)

Canadian women await the results of the Joint Committee's deliberations, and the answer to the question whether the Government of Canada will live up to its commitment to full equality for women.

APPENDICES

A. Telegram to First Ministers and Responses (June 22, 1987)

B. Press Release (July 30, 1987)

C. Open Letter to Premiers (August 27, 1985)

D. Opinion of Robin Elliott, Associate Professor, Faculty of Law, U.B.C.

E. Opinion of Catherine MacKinnon, Visiting Professor, University of Chicago Law School and Visiting Scholar, Institute for Research on Women and Gender at Stanford University

F. LEAF Case Selection Criteria

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SUBJECT: WOMEN'S EQUALITY AT RISK

LEAF (WOMEN'S LEGAL EDUCATION AND ACTION FUND), A NATIONAL NON-PROFIT ORGANIZATION WHOSE PURPOSE IS RESEARCH, EDUCATION AND LITIGATION OF EQUALITY ISSUES FOR CANADIAN WOMEN, WELCOMES THE FACT THAT THE MEECH LAKE ACCORD RECOGNIZES QUEBEC AS A DISTINCT SOCIETY AND THE IMPORTANCE OF THE PARTICIPATION OF ALL THE PROVINCES IN MUTUAL DECISION MAKING. HOWEVER, AS A NATIONAL ORGANIZATION WHICH HAS WORKED CLOSELY WITH QUEBEC WOMEN TO SAFEGUARD THEIR RIGHTS UNDER THE CHARTER, WE ARE SOUNDING THE ALARM THAT THE EQUALITY RIGHTS OF WOMEN AND MINORITIES HAVE BEEN FORGOTTEN IN THE ACCORD.

WHILE WE APPLAUD THE RECOGNITION GIVEN TO ABORIGINAL PEOPLES AND TO THE MULTICULTURAL HERITAGE OF CANADIANS IN THE ACCORD, THE OMISSION OF SIMILAR RECOGNITION FOR WOMEN AND MINORITIES JEOPARDIZES OUR HARD WON CONSTITUTIONAL RIGHTS.

THIS INJUSTICE MUST BE RECTIFIED BEFORE THE ACCORD IS RATIFIED BY ANY GOVERNMENT. THE SOLUTION IS SIMPLE: (1) INSERT SECTIONS 28 AND 15 OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS INTO SECTION 16 OF THE ACCORD, THEREBY ENSURING THAT ALL CANADIANS WHEREVER THEY LIVE HAVE GUARANTEED EQUALITY RIGHTS AND (2) DELAY RATIFICATION UNTIL WOMEN AND MINORITIES ARE PROTECTED IN THE ACCORD.

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- - - C O N F I R M A T I O N - - -

TITRE: LES CANADIENNES CRAIGNENT POUR LA PLEINE RECONNAISSANCE DE LEURS DROITS A L'EGALITE

LE F.A.E.J. (FONDS D'ACTION ET D'EDUCATION JURIDIQUE POUR LES FEMMES) EST UN ORGANISME CANADIEN A BUT NON LUCRATIF. SA MISSION CONSISTE TANT A FOURNIR AUX CANADIENNES DES SERVICES D'EDUCATION ET DE RECHERCHE QUE DU SUPPORT AUX CAUSES TYPES DANS LE BUT QUE SOIT RECONNU LEURS DROITS A L'EGALITE DEVANT LES TRIBUNAUX.

LE F.A.E.J. EST HEUREUX QUE L'ENTENTE CONSTITUTIONNELLE DU LAC MEECH RECONNAISSE LE CARACTERE DISTINCT DE LA SOCIETE QUEBECOISE ET L'IMPORTANCE DE LA PARTICIPATION DE L'ENSEMBLE DES PROVINCES AU PROCESSUS DE DECISION. CEPENDANT, PARCE QU'IL TRAVAILLE DEJA DE CONCERT AVEC LES QUEBECOISES DANS LE BUT QUE SOIT RECONNU LEURS DROITS A L'EGALITE, LE F.A.E.J. TIENT A EXPRIMER SON INQUIETUDE DEVANT LA FACON DONT CETTE ENTENTE A NEGLIGE DE GARANTIR EXPLICITEMENT AUX CANADIENNES ET AUX MINORITES LES DROITS A L'EGALITE.

BIEN QUE LE F.A.E.J. SE REJOUISSE DE LA RECONNAISSANCE DANS L'ENTENTE CONSTITUTIONNELLE DE L'HERITAGE MULTICULTUREL DU CANADA ET DES DROITS DES PEUPLES AUTOCHTONES, IL ESTIME QUE L'ABSENCE D'UNE TELLE RECONNAISSANCE DES DROITS A L'EGALITE DES CANADIENNES ET DES MINORITES MET EN PERIL DES DROITS CONSTITUTIONNELS DUREMENT ACQUIS.

Société canadienne des postes

EN CONSEQUENCE, LE F.A.E.J. ESTIME QUE L'ENTENTE CONSTITUTIONNELLE NE DOIT PAS ETRE RATIFIEE PAR QUELQUE GOUVERNEMENT AVANT QUE:

- LES ARTICLES 28 ET 15 DE LA CHARTE CONSTITUTIONNELLE DES DROITS ET LIBERTE NE SOIENT INTEGREES A L'ARTICLE 16 DE L'ENTENTE DANS LE BUT DE GARANTIR LES DROITS A L'EGALITE A TOUS LES CANADIENNES ET CANADIENS OU QU'ILS OU ELLES SE TROUVENT.

LEAF/F.A.E.J.

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BOITE 2000, CHARLOTTETOWN, PEI C1A 7N8
10- HON. BIRAN PECKFORD, PREMIER MIN. NF
CONFEDERATION BUILDING, ST.JOHN'S NF A1C 5T7

NNNN

PRIME MINISTER PREMIER MINISTRE

Ottawa, K1A 0A2
July 31, 1987

Dear Ms. Atcheson:

Thank you for your telex of June 23 on the Constitutional Accord. I welcome the interest of your association on this issue.

I would like to assure you that nothing in the June 3 Constitutional Accord affects the equality rights in the Canadian Charter of Rights and Freedoms or the equal application of those rights to male and female persons.

It could be argued that the recognition of Canada's linguistic duality and Quebec's distinct society, which deal primarily with matters of language and culture, might affect aboriginal rights and our multicultural heritage. To make it clear that this would not be the case, section 16 was added to the Constitution Amendment, 1987.

Recognition of Canada's linguistic duality and Quebec's distinct society is not premised upon the gender of Canadians or Quebecers. Therefore, this recognition could not be used to discriminate on the basis of sex. The linguistic and cultural values encompassed by section 2 of the Constitution Amendment, 1987 apply to all individuals.

Ms. Beth Atcheson,
Women's Legal Education
and Action Fund,
Suite 403,
244 Bloor Street West,
Toronto, Ontario.
M5S 1W9

Moreover, section 28 of the Charter makes it clear that, notwithstanding anything in the Charter, all of these rights are guaranteed equally to men and women. I am of the view that this section, combined with the substantive guarantee of equality in section 15, offers a very strong protection to women which should not be affected in any way by the recognition of Canada's linguistic duality and of Quebec's distinctiveness.

I hope that this elaboration might help allay some of your concerns.

Yours sincerely,

Brian Mulroney

Alberta

ATTORNEY GENERAL
FEDERAL AND
INTERGOVERNMENTAL AFFAIRS

Office of the Minister

403/427-2339 - 427-2585
Room 320 Legislature Building
Edmonton, Alberta, Canada T5K 2B6

August 20, 1987

Ms. Beth Atcheson
Vice President
Cassels, Brock & Blackwell
Suite 2300
130 Adelaide Street West
TORONTO, Ontario
M5H 3C2

Dear Ms. Atcheson:

Thank you for your recent telex regarding equality rights and the June 3 Constitutional Accord. Premier Getty has forwarded your letter to me for a response.

In your telex you suggest that the proposed constitutional amendments contained in section 2 and section 16 of the Constitutional Accord could undermine the equality provisions in the Charter of Rights and Freedoms. While I appreciated being informed of your views, I should state that we do not share your concern. In our view, there is nothing in the Constitutional Accord which would diminish or in anyway affect the equality rights for women and minorities guaranteed by the Charter of Rights and Freedoms.

I can assure you that the Government of Alberta is committed to protecting and promoting the equality provisions afforded by section 15 and 28 of the Charter. We would not support any constitutional amendments which would diminish those equality and non-discrimination guarantees.

Once again, thank you for informing us of your views on this important matter.

Yours very truly,

James D. Horsman
Minister

JDH/nyr

c.c. The Honourable Don R. Getty
Premier

Christie Jefferson
Director, Cassels, Brock & Blackwell

Saskatchewan

Premier
of Saskatchewan

Legislative Building
Regina, Canada
S4S 0B3

(306) 787-6271

July 20, 1987

Women's Legal, Education and Action Fund
344 Bloor Street West
Suite 403
Toronto, Ontario
M5S 1W9

To whom it may concern:

Thank you for your telex of June 23, 1987, in relation to the recent constitutional settlement. I appreciate your views on this important subject.

Saskatchewan participated in the constitutional discussions with the objective of finding a set of constitutional reforms which would be beneficial not just to Quebec, but to all of Canada. I believe that the amendment agreed to by First Ministers on June 3, 1987 achieves these objectives. The amendment recognizes the linguistic balance within Canada, and does so without altering the federal-provincial division of powers. Furthermore, it will give provinces an enhanced role in the area of immigration and in appointments to both the Supreme Court of Canada and to the Senate. I believe, too, that the effect of the spending power provision will be to ensure a significant degree of consultation with provinces before the federal government initiates new national shared-cost programs in areas of provincial jurisdiction. The inclusion of an annual First Ministers' Conference on the Economy, as well as one on the constitution, guarantees that provinces will have a forum, at the highest political level, to make known their needs and concerns to the federal government.

I note your concern about the rights of women and minority groups, but in my view these rights are not affected by the proposed constitutional amendment. The possibility that Section 2 of the proposed amendment, dealing with Canada's linguistic duality and Quebec's place within Canada, will in some way affect women's equality rights and the rights of minorities appears so remote as not to require further safeguards.

. . . 2

Moreover, I am concerned that any attempt to add new elements to the amendment at this time could mean risking failure, at very significant costs to Canada. As you know, Quebec has recently put forward its constitutional resolution in the Quebec National Assembly, and has approved this resolution. In so doing, Quebec has indicated its good faith in the negotiations by adhering to the amendment agreed to by all First Ministers on June 3. Attempts by other governments to introduce new matters into the amendment at this time, could be interpreted by Quebec as an indication of bad faith in negotiations by other jurisdictions in Canada.

Thank you again for writing to me in this regard. I trust that the constitutional amendment agreed to recently by First Ministers will be one that all Canadians will view as evidence that, through dialogue, goodwill, and a spirit of accommodation, Canada can successfully resolve the problems which lie before us.

Yours sincerely,

Grant Devine
Premier

cc Beth Atcheson
Chritie Jefferson

Saskatchewan

Premier
of Saskatchewan

Legislative Building
Regina, Canada
S4S 0B3

July 20, 1987

JUL 30 1987

Women's Legal, Education and Action Fund
344 Bloor Street West
Suite 403
Toronto, Ontario
M5S 1W9

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Yours sincerely,

Grant Devine
Premier

cc Beth Atcheson
Christie Jefferson

THE PREMIER OF MANITOBA
WINNIPEG
R3C 0V8

July 17, 1987

Ms. Susan Tanner
National Chairperson
Women's Legal Education and
Action Fund
344 Bloor Street West, Suite 403
Toronto, Ontario
M5S 1W9

Dear Ms. Tanner:

I am writing in response to the June 23rd telegram sent to me by L.E.A.F., outlining your organization's concerns regarding the safeguarding of the rights of women and minorities under the Meech Lake Accord.

The relationship of the Canadian Charter of Rights and Freedoms to the Constitutional Accord is among the issues that concern government, and I continue to seek the advice of constitutional law experts on this and other matters. Preliminary opinions at this time are that the Meech Lake Accord does not derogate from rights as they now exist under the Charter.

As you know, one of Manitoba's priorities on entering the June conference on the accord was the assurance that national public hearings would be held to enable Canadian citizens to make known their views. We were successful in securing this commitment, and will also be holding such hearings in Manitoba. We will be working with the federal government to ensure that these two processes will complement each other. I encourage your organization to utilize these hearings to present your concerns.

The equality of women and protection of the rights of minorities are long-standing priorities of my government. I thank you for raising this issue and look forward to your continued contribution to this historic national process.

Yours sincerely,

Howard Pawley

INTERGOVERNMENTAL AFFAIRS SECRETARIAT
EXECUTIVE COUNCIL
NEWFOUNDLAND AND LABRADOR

P. O. Box 4750
Confederation Building
St. John's
Newfoundland
A1C 5T7

JUL 10 1987

July 2, 1987

Ms. Beth Atcheson,
Vice-President,
Women's Legal Education and Action Fund,
344 Bloor Street West, Suite 403,
Toronto, Ontario.
M5S 1W9

Dear Ms. Atcheson:

Thank you for your correspondence of June 23, 1987, addressed to Premier Peckford, outlining the views of your organization on the Quebec Constitutional Accord and Women's Rights.

As I am sure you are aware, the Government of Newfoundland and Labrador strongly supports the Quebec Accord. It is our belief that this historic agreement will benefit all Canadians, and that the terms of the Accord will not derogate from the existing equality rights of women or minorities.

Again, thank you for your views.

Yours sincerely,

H. H. Stanley,
Deputy Minister.

cc: Ms. Lucie La Marche
Ms. Christie Jefferson

Prince Edward Island

Premier's Office
95 Rochford Street, P.O. Box 2000
Charlottetown, P.E.I. C1A 7N8

Telephone: (902) 368-4400
Telex: 014-44154

JUL - 0 1987

June 26, 1987

Ms. Beth Atcheson
Women's Legal Education and Action Fund
Rue 344 Bloor Street W.
Suite 403
Toronto, Ontario
M5S 1W9

Dear Ms. Atcheson:

This will acknowledge receipt of the message sent to me and other First Ministers from The Women's Legal Education and Action Fund through the firm of Cassels, Brock and Blackwell, Barristers and Solicitors.

I share your concerns about the recognition in The Constitution of the rights of women and minorities along with those of the aboriginal people and of multicultural groups. As you point out, Sections 15 and 28 of the Charter deal with the equality rights which are the basis for your concern about the effects of The 1987 Constitutional Accord. The Accord does not in any way detract from Sections 15 or 28 even if they are not explicitly mentioned in Section 16 of the Accord. Your suggestion that the sections be brought together is what is intended to take place. While The 1987 Constitution Amendment will have influence of its own, its various sections will be largely consolidated into The Constitution Act, 1867 and The Constitution Act, 1982, as amendments to those acts.

In my view your use of the word "injustice", preceding your suggestion for change, is quite inappropriate as no existing rights are threatened. In fact, the opposite argument can be made. With Quebec as a full partner in the recognition and application of The 1982 Constitution Act, its provisions for women and minority groups are greatly legitimatized and strengthened.

.../2

I would hope that the members of your group, as advocates for significant social concerns, will come to accept that all Canadians but especially minorities, benefit from a stronger and more united country.

Sincerely,

Honourable Joseph A. Ghiz
Premier of Prince Edward Island

JAG/dpm

APPENDIX B

LEAF FAE.J
WOMEN'S LEGAL EDUCATION AND ACTION FUND
FONDS D'ACTION ET D'EDUCATION JURIDIQUES POUR LES FEMMES

Charitable Registration
#0699991-21-13
Numéro d'Enregistrement

344 RUE BLOOR ST. W., SUITE 403, TORONTO
CANADA M5S 1W9 416-963-9654

WOMEN'S RIGHTS LITIGATION ENDANGERED BY ACCORD

What's wrong with this Accord?

According to LEAF (Women's Legal Education and Action Fund), based on an analysis of recent Supreme Court decisions and the Constitution Acts of 1867 and 1982, it is clear that effective and successful litigation for women's rights will be severely hampered by the Accord because there is no mention of equality rights.

The equality guarantees in sections 15 and 28 of the Charter were secured by historically unprecendented women's lobbying in 1981. Many of those women founded LEAF, which is now litigating cases across Canada at all levels of courts, including the Supreme Court of Canada.

Lucie Lamarche of LEAF states: **"We applaud the recognition given to Quebec, aboriginal peoples and the multicultural heritage of Canadians. However, the First Ministers' failure to recognize women and others included in section 15 jeopardizes our hard-won constitutional rights."**

LEAF joins with NAWL and the Ad Hoc Committee of Canadian Women in expressing their concerns. Beth Atcheson of LEAF challenges the First Ministers: **"If indeed there was no intent to breach the constitutional trust of 1981 between women and their governments, then you must replace your words with action."**

What should be done now?

In answer to the question "what do women want?" Marilou McPhedran of LEAF says **"The Constitution of Canada must be amended, in strong and clear terms, to prevent the First Ministers from trading off equality rights and to direct the courts to ensure that equality rights remain a priority."**

Contact:

Marilou McPhedran (416) 963-9654

Lucie Lamarche (514) 286-9135

July 30, 1987

APPENDIX C

AUG 28 1987

TELEPOST
TTA642 AUG 27 1142 EST
CNCPMS TRN

TS447 TT5669
DEL
TPTA TORONTO ON 27 1053

WOMENS LEGAL EDUCATION AND ACTION FUNI
344 BLOOR ST W STE 403
TORONTO ON
M5S 1W9

HEREWITH CONFIRMATION OF MESSAGE SENT TO:

FIRST MINISTERS 0144737A
HILTON INTERNATIONAL HOTEL
77 SMYTHE STE
ST JOHN NB
BT
DEAR FIRST MINISTERS,
AS REPRESENTATIVES OF WIDELY DIVERSE COMMUNITY ORGANIZATIONS FROM ALL PARTS OF CANADA WE HAVE COME TOGETHER TO EXPRESS OUR DEEP CONCERN WITH THE MEECH LAKE CONSTITUTIONAL AMENDMENT.
FIRST, WE WISH TO MAKE CLEAR THAT WE ARE IN COMPLETE SUPPORT OF BRINGING THE PROVINCE OF QUEBEC VOLUNTARILY INTO THE CONSTITUTION AND THE RECOGNITION OF QUEBEC AS A DISTINCT SOCIETY.
THE CONSTITUTION OF CANADA IS NOT ONLY THE SUPREME LAW OF THE LANDS, BUT EVEN MORE, THE ENSHRINEMENT OF THE DEEPEST VALUES WE INTEND TO UPHOLD AS A COUNTRY. IT REPRESENTS A SERIOUS NATIONAL COMMITMENT AND WILL AFFECT THE LIFE OF EVERY CANADIAN.
AS GRASS ROOTS ORGANIZATIONS REPRESENTING WOMEN, MINORITIES, PERSONS WITH A DISABILITY, HUMAN RIGHTS GROUPS, WORKING PEOPLE, WE DO NOT ACCEPT, AND WILL NOT ACCEPT, THE UNDERMINING OF EQUALITY RIGHTS AND OTHER BASIC RIGHTS INCLUDED IN THE CANADIAN CHARTER OF RIGHTS AND

FREEDOM,
WOMEN, PERSONS WITH A DISABILITY, ABORIGINAL PEOPLES, AND MINORITY GROUPS WHERE NOT ORGINALLY NEEDED OR INCLUDED IN THE FRAMING OF THE CONSTITUTION IN 1981. WE RAISED OUR VOICES THEN AND INSISTED THAT OUR CONCERNS BE HEARD AND RECOGNIZED IN THE CONSTITUTION.
WE WILL DO THE SAME NOW.
THE MEECH LAKE CONSTITUTIONAL AMENDMENT CLEARLY JEOPARDIZES EQUALITY RIGHTS. IT ALSO THREATENS EFFECTIVE NATIONAL PROGRAMMES. THIS IS UNACCEPTABLE TO US. WE WILL NOT BE SATISFIED UNTIL OUR LEGITIMATE CONCERNS ARE ADDRESSED AND THE AMENDMENTS CLEARLY SPELLED OUT THAT RIGHTS UNDER THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS ARE NOT WEAKENED AND THAT NEW NATIONAL PROGRAMMES WILL NOT BE JEOPARDIZED.
OUR SECOND CONCERN RELATES TO THE PROFOUNDLY UNDEMOCRATIC PROCESS THAT HAS BEEN USED.
ONE OF THE FUNDAMENTAL FREEDOMS PROTECTED IN THE CANADIAN CHARTER IS FREEDOM OF EXPRESSION. THIS RIGHT MEANS VERY LITTLE IF REAL OPPORTUNITY TO PARTICIPATE IN A MEANINGFUL WAY IS DENIED.
YET THIS IS WHAT HAS HAPPENED WITH THE PROPOSED AMENDING OF CANADAS MOST FUNDAMENTAL LAW. WE REQUIRE IMMEDIATE ANSWERS TO THE FOLLOWING QUESTIONS:
1. DO YOU AGREE THAT CANADIANS HAVE THE RIGHT TO FULL PUBLIC DEBATE ON AMENDMENTS TO OUR CONSTITUTION, AND IF SO, THAT IT IS THE RESPONSIBILITY OF GOVERNMENT TO PROVIDE THE FORUM?
2. WILL YOU AS FIRST MINISTERS AGREE ON BEHALF OF ALL CANADIANS TO PRESS THE FEDERAL GOVERNMENT TO SLOW DOWN ITS RATIFICATION PROCESS AND TO ALLOW MORE TIME AND OPPORTUNITY FOR PUBLIC ANALYSIS AND DEBATE OF THE ACCORD.
3. WILL YOU COMMITT YOUR GOVERNMENT TO A FULL AND OPEN PUBLIC DEBATE?
WE AWAIT WRITTEN RESPONSES AND THE RESULTS OF YOUR DELIBERATIONS ON THESE QUESTIONS AT YOUR TWO DAY MEETING, AND LOOK FORWARD TO WORKING WITH YOUR GOVERNMENTS ON AMENDING THE ACCORD. YOURS TRULY
KATHLEEN RUFF, EDITOR CANADIAN HUMAN RIGHTS ADVOCATE
R.R. 1, MANIWAKI QUEBEC, J9E 3A8
COALITION OF PROVINCIAL ORGANIZATIONS OF THE HANDICAPPED (C.O.P.O.H.)
CANADIAN ETHNO-CULTURAL COUNCIL
LA LIGUE DES DROITS ET DES LIBERTES DU QUEBEC
NATIONAL UNION OF PROVINCIAL GOVERNMENT EMPLOYEES
CANADIAN RIGHTS AND LIBERTIES FEDERATION
CANADIAN ASSOCIATION FOR COMMUNITY LIVING
URBAN ALLIANCE ON RACE RELATIONS
WOMENS LEGAL EDUCATION AND ACTION FUND (LEAF)
AD HOC COMMITTEE ON WOMEN AND THE CONSTITUTION
(END OF PART ONE, PART TWO TO FOLLOW)

TTA592 AUG 27 1024 EST
CNCPMS TRN

RN452 613 CFN TDTN TORONTO ON 27 1118

AUG 28 1987

WOMENS LEGAL EDUCATION AND
ACTION FUND
344 BLOOR ST W STE 403
TORONTO ON
M5S 1W9

CONFIRMATION

FIRST MINISTERS
HILTON INTERNATIONAL HOTEL
77 SMYTHE STE
ST JOHN NB
(PART TWO OF TWO)
LE 27 AOUT 1987
MESSIEURS LES PREMIERS MINISTRES,
C'EST EN TANT QUE REPRESENTANTS D'ORGANISATIONS COMMUNAUTAIRES, DE TOUS LES HORIZONS ET DE TOUTES LES REGIONS DU CANADA, QUE NOUS NOUS SOMMES REUNIS POUR VOUS EXPRIMER LA PROFONDE INQUIETUDE QUE NOUS CAUSE L'AMENDEMENT CONSTITUTIONNEL DU LAC MEECH.
EN PREMIER LIEU, NOUS TENONS A INSISTER SUR LE FAIT QUE NOUS APPROUVONS ENTIEREMENT L'ENTREE VOLONTAIRE DE LA PROVINCE DU QUEBEC DANS LA CONSTITUTION ET LA RECONNAISSANCE DU QUEBEC COMME SOCIETE DISTINCTE.
LA CONSTITUTION DU CANADA EST NON SEULEMENT LA SEULE LOI SUPREME DE LA NATION, MAIS AUSSI, PLUS, C'EST L'ECRIN CONTENANT LES VALEURS LES PLUS PROFONDES DE NOTRE PAYS, VALEURS QUE NOUS AVONS BIEN L'INTENTION DE SAUVEGARDER. IL S'AGIT LA D'UN ENGAGEMENT NATIONAL TRES SERIEUX QUI TOUCHERA LA VIE DE TOUS LES CANADIENS.
NOUS, EN TANT QU'ORGANISATIONS POPULAIRES REPRESENTANT LES FEMMES, LE GROUPES MINORITAIRES, LES HANDICAPES, LE GROUPES DEFENDANT LES DROITS DE LA PERSONNE ET LES GENS QUI TRAVAILLENT, N'ACCEPTONS PAS ET N'ACCEPTERONS PAS QUE LES DROITS A L'EGALITE ET D'AUTRES DROITS FONDAMENTAUX QUE CONTIENT LA CHARTE DES DROITS ET DES LIBERTES SOIENT MINES.
EN 1981, DANS LA CONSTITUTION, ON N'AVAIT PAS D'ABORD TENU COMPTE DES FEMMES, DES HANDICAPES, DES PEUPLES AUTOCHTONES A DES GROUPES MINORITAIRES, COMME ON NE LES Y AVAIT PAS INCLUS NON PLUS, A
L'EPOQUE, NOUS NOUS SOMMES FAIT ENTENDRE

CONSTITUTION EN FASSE ETAT.
NOUS COMPTONS AUJOURD'HUI AGIR DE LA MEME FACON.
L'AMENDEMENT CONSTITUTIONNEL DU LAC MEECH MET CLAIREMENT EN PERIL LES DROITS A L'EGALITE ET RISQUE DE PORTE EN ATTENTE A DES PROGRAMMES NATIONAUX EFFICACES. NOUS NE POUVONS ACCEPTER CELA. NOUS NE SERONS SATISFAITS QUE LE SOUR OU ON SE PENCHERA SUR NOS PREOCCUPATIONS, QUI SONT LEGITIMES, ET QU'L'AMENDEMENT EN NON CERA CLAIREMENT QUE LES DROITS EN VERTU DE LA CHARTE DES DROITS A DES LIBERTES NE SONT PAS DIMINUES ET QUE LES NOUVEAUX PROGRAMMES NATIONAUX NE SERONT PAS MIS EN PERIL.
NOTRE DEUXIEME PREOCCUPATIONS A TRAIT AU PROCESSUS PROFONDEMENT ANTI-DEMOCRATIQUE QUI EXISTE A L'HEURE ACTUELLE.
L'UNE DES LIBERTES FONDAMENTALES QUE PROTEGE LA CHARTE CANADIENNE EST CELLE DE LA LIBERTE D'EXPRESSION. SE DROIT N'A PLUS GRANDE SIGNIFICATION SI ON N'A PAS UNE REELLE POSSIBILITE DE PARTCIPER DE FACON CONSTRUCTIVE.
ET POURTANT, C'EST BIEN CE QUE S'EST PRODUIT AVEC L'AMENDEMANT QUI A ETE PROPOSE A LA LOI CANADIENNE LA PLUS FONDAMENTALE. NOUS EXIGEONS IMMEDIATMENT DES REPONSES AUX? SUIVANTES:
1. ETES-VOUS D'ACCORD QUE LES CANADIENS ONT DROIT A UN DEBAT PUBLIC EXHAUSTIF LORSQU'IL S'AGIT D'AMENDEMENTS A LA CONSTITUTION ET, SI OUI, QU'IL REVIENT AU GOUVERNMENT DE L'ORGANISER.
2. EN TANT QUE PREMIERS MINISTRES' ACCEPTEREZ-VOUS, AU NON DE TOUS LES CANADIENS' DE POUSSER LE GOUVERNEMENT FEDERAL A RELENTIR SON PROCESSUS DE RATIFICATION ET A PERMETTRE QU'ON DISPOSE DE PLUS DE TEMPS ET D'OCCASIONS POUR ANALYSER ET DEBATTRE PUBLIQUEMENT L'ACCORD?
3. ENGAGEZ-VOUS VOTRE GOUVERNEMENT DANS UN DEBAT PUBLIC EXHAUSTIF ET FRANC?
NOUS ATTENDONS QUE VOUS NOUS FASSIEZ PART PAR ACRIT, DES RESULTATS DES DISCUSSIONS QUE VOUS ALLEZ AVOIR SUR CES QUESTIONS AU COURS DE VOS DEUX JOURS DE RENCONTRE ET ESPERONS COLLABORER AVEC VOS GOUVERNEMENTS A L'AMENDEMENT DE L'ACCORI
JE VOUS PRIE DE CROIRE, MESSIEURS LES PREMIERS MINISTRES, A L'EXPRESSION DE MES SENTIMENTS RESPECTUEUX.
KATHLEEN RUFF, REDACTRICE DU CANADIAN HUMAN RIGHTS ADVOCATES
R.R. 1, MANIWAKI QUEBEC J9E 3A8
COALITION OF PROVINCIAL ORGANIZATIONS OF THE HANDICAPPED (C.O.P.O.H.)
CONSEIL CANADIEN ETHNO-CULTUREL
LA LIGUE DES DROITS ET DES LIBERTES DU QUEBEC
NATIONAL UNION OF PROVINCIAL GOUVERNMENT EMPLOYEES
FEDERATION CANADIENNE DES DROITS ET DES LIBERTES
CANADIAN ASSOCIATION FOR COMMUNITY LIVING
URBAN ALLIANCE ON RACE RELATIONS
FONDS D'ACTION ET D'EDUCATION JURIDIQUES POUR LE FEMMES

APPENDIX D

OPINION OF PROF. ROBIN ELLIOT

Robin Elliot is an Associate Professor in the Faculty of Law at the University of British Columbia. He teaches, and nas written exclusively, in the areas of constitutional law and civil liberties. He has sat on several tribunals under provincial and federal human rights legislation and acted as director under provincial and federal human rights legislation and acted as Director of Legal Research to the Special Committee on Pornography and Prostitution. He co-edited Righting the Balance: Canada's New Equiality rights (1986). He is currently editing another book on the Charter.

THE UNIVERSITY OF BRITISH COLUMBIA

FACULTY OF LAW

(604) 228-3151

1822 EAST MALL
VANCOUVER, CANADA V6T 1Y1

August 28, 1987

Ms. Beth Symes
#500 - 210 Dundas St. West
Toronto, Ontario
M5G 2E8

Dear Ms. Symes:

You have asked me for my opinion on the implications, if any, for sections 15 and 28 of the Charter of the proposal to incorporate in the the Constitution Act, 1867 a new section 2, which reads as follows:

> 2. (1) The Constitution of Canada shall be interpreted in a manner consistent with;
> (a) The recognition that the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada; and;
> (b) The recognition that Quebec constitutes within Canada a distinct society;
> (2) The role of the Parliament of Canada and the provincial legislatures to preserve the fundamental characteristic of Canada referred to in paragraph (1)(a) is affirmed;
> (3) The role of the Legislature and Government of Quebec to preserve and promote the distinct identity of Quebec referred to in paragraph (1)(b) is affirmed;
> (4) Nothing in this section derogates from the powers, rights or privileges of Parliament or the Government of Canada, or of the legislatures or governments of the provinces, including any powers, rights or privileges relating to language.

Your concern that this proposal might have negative implications for sections 15 and 28 is based, as I understand it, on the following considerations:

(1) the recent decision of the Supreme Court of Canada in

Reference re Bill 30, An Act to amend the Education Act to

provide full funding for Roman Catholic Separate High Schools (June 25, 1987, unreported);

(2) the fact that the new section 2 does not contain, as the new section 95B relating to "Agreements on Immigration and Aliens" does, an express provision indicating that the Charter applies to action taken pursuant to it; and

(3) the fact that section 16 of the Constitution Act, 1987 fails to include sections 15 and 28 of the Charter in the list of provisions of the Constitution of Canada which the new section 2 is said not to affect.

I will examine each of these considerations separately:

(1) The Bill 30 Reference

For present purposes, the important holding in this case is that provincial legislation enacted under section 93 of the Constitution Act, 1867 for the purpose of enhancing the rights and privileges of minority denominational schools cannot be attacked under the Charter. According to Wilson J., who wrote for four members of the Supreme Court, this holding was compelled by the need to protect "a fundamental part of the Confederation compromise" (p. 48). According to Estey J., who wrote for the other two members of the Court who took part in the judgment, the Charter could not be interpreted "as rendering unconstitutional distinctions that are expressly permitted by the Constitution Act, 1867" (p. 11).

Your fear insofar as this case is concerned is that it might lead to a court holding that legislation enacted by the Quebec Legislature

"to preserve and promote the distinct identity of Quebec" was immune from challenge under the Charter. On the face of it, that fear would seem to be well-founded. The new section 2 can, with some justification, be said both to be a fundamental part of a new "Confederation compromise" and, if not expressly, at least by necessary intendment, to authorize distinctions that might otherwise be thought to offend the provisions of the Charter.

However, I doubt very much that this line of reasoning is going to appeal to Canadian judges. For one thing, it would mean that Quebec legislation impinging on the minority language educational rights set forth in section 23 of the Charter would be immune from challenge (assuming, as I think one can, that such legislation would be designed "to preserve and promote the distinct identity of Quebec"), and that is something that no court is going to accept. For another, the fact that section 16 of the Constitution Act, 1987 stipulates that the new section 2 is not to "affect" section 27 of the Charter precludes the possibility that legislation justified on the basis of the new section 2 will be held to be immune from Charter attack. To hold that it was immune would be to "affect" section 27 because it would preclude section 27 from having any effect: in order for section 27 to operate, the Charter must continue to operate.

(2) Absence of Express Provision

For convenience, I reproduce in its entirety the new section 95B of the Constitution Act, 1867:

> 95B. (1) Any agreement concluded between Canada and a province in relation to immigration or the temporary admission of aliens into that province has the force of law from the time it is declared to do so in accordance with Subsection 95C(1) and shall from that time have effect notwithstanding Class 25 of Section 91 or Section 95.
>
> (2) An agreement that has the force of law under Subsection (1) shall have effect only so long and so far as it is not repugnant to any provision of an Act of the Parliament of Canada that sets national standards and objectives relating to immigration or aliens, including any provision that establishes general classes of immigrants or relates to levels of immigration for Canada or that prescribes classes of individuals who are inadmissible into Canada.
>
> (3) The Canadian Charter of Rights and Freedoms applies in respect of any agreement that has the force of law under Subsection (1) and in respect of anything done by the Parliament or Government of Canada, or the legislature or government of a province, pursuant to any such agreement.

Your fear is that the courts might draw from the fact that the new section 2 does not include a counterpart to the new section 95B(3) the inference that action taken pursuant to the new section 2 was not intended to be subject to judicial review under the Charter. Again at first glance, this fear would appear to be well-founded. Courts often draw inferences about legislative intent on the basis of comparisons of this kind.

However, I think it highly doubtful that the courts would be inclined to draw this particular inference from this particular comparison. If they did they would be permitting the new section 2 to "affect" section 27 of the Charter since, as I have noted above, to hold that the Charter does not apply to legislation enacted "to preserve and promote the distinct identity of Quebec" would be to deny section 27 any role in relation to such legislation.

(3) Section 16

Again for convenience, I set forth in its entirety section 16 of the Constitution Act, 1987:

> 16. Nothing in Section 2 of the Constitution Act, 1867, affects Section 25 or 27 of the Canadian Charter of Rights and Freedoms, Section 35 of the Constitution Act, 1982, or Class 24 of Section 91 of the Constitution Act, 1867.

Here the fear is that the courts will draw the inference that, because provisions like sections 15 and 28 of the Charter are not mentioned in the list of provisions of the Constitution of Canada that the new section 2 is not to "affect", the new section 2 can "affect" them. In my view, it would be impossible for the courts not to draw that inference.

The real question is, what would the consequences be for sections 15 and 28 if that inference were drawn? Those consequences would depend on the role the new section 2 would be likely to play in Charter litigation. As I see it, the new section 2 would be used primarily by the Government of Quebec either as the sole basis of, or to provide additional support for, attempts to justify under section 1 of the Charter legislation that has been found to violate one or more of the rights and freedoms for which the Charter provides. A good example of a situation in which the new section 2 would be expected to perform this role is in response to a challenge to legislation requiring that the French language be used in business signs in the province of Quebec. On the assumption that such legislation was found to offend section 2(b) (the freedom of expression provision) or section 15, the Government of Quebec would no doubt invoke the new section 2 in its attempt to justify the legislation.

Viewed in that light, it seems to me to be clear that the consequences of having the new section 2 "affect" provisions like sections 15 and 28 can only be negative since they will be pitted against each other. The Government of Quebec would use the new section 2 to cut back on the scope of such provisions. Insofar as women's rights are concerned it has been suggested that, given the record of the Government of Quebec in the last decade or so, women have little to fear; that government is unlikely to act in such a way as to harm their interests. It may also be suggested that even if the Government of Quebec did act to harm those interests, it is difficult to see how it would be able to justify such action on the basis of the new section 2; to do so it would have to show that such action was taken "to preserve and promote the distinct identity of Quebec", which would, one hopes, not be easy. And finally, it may be suggested that even if such action were taken, and even if the new section 2 could be relied upon by the Government of Quebec, the courts would still decline to uphold the legislation - they would prefer the combined effect of sections 15 and 28 to the new section 2 when they balanced these competing interests under section 1.

All of these predictions may hold true, but one cannot be sure that they will. If the Constitution Act, 1987 remains in its current form it is impossible not to conclude that there is a risk that women's rights will be adversely affected by it. That risk may be small, but it is real.

Before concluding this opinion, I think it important to say a word or two about statements made by some of the participants in the process that led to the Constitution Act, 1987 to the effect that those who

fear that its provisions might place at risk the provisions of the Charter have nothing to worry about. I have in mind in particular the statements made by Senator Lowell Murray, who appeared before the Joint Committee on behalf of the federal government. In his submission to the Committee, he said that "This Accord leaves all individual rights intact. The Charter of Rights and Freedoms has not been amended, nor is there anything in this Accord that overrides it" (p. 3), and that "This Accord does not jeopardize the fundamental equality of male and female persons" (p. 21).

The first comment I would make in respect of these statements is that, given the decision of the Supreme Court of Canada in Reference re Section 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486, it is unlikely that they would be given much weight by the courts. The second is that, even if the courts wished to give these statements considerable weight, it is not clear what they would make of them.

Does Senator Murray mean to suggest that the provisions of the Constitution Act, 1987, and in particular the new section 2, are to be ignored altogether by the courts when they interpret and apply the Charter? That hardly seems likely. The new section 2(1) provides that the "Constitution of Canada", which clearly includes the Charter, "shall be interpreted" in accordance with its prescriptions. And section 16 of the Constitution Act, 1987, which lists the provisions of the Constitution of Canada which the new section 2 is not to "affect", leaves no doubt but that the new section 2 is intended to be available to the courts to assist them in interpreting and applying the great majority of the Charter's provisions. In fact, given the mandatory language of the new section 2(1), the courts will have to have recourse

to the new section 2 in interpreting and applying those provisions (assuming, of course, that the new section 2 is relevant to their interpretation).

If Senator Murray does not mean to suggest that the provisions of the Constitution Act, 1987 are to be ignored in Charter cases, then what does he mean? Does he mean that, even though the new section 2 would play a role in the interpretation and application of the Charter, it is not intended to "affect" any of the rights and freedoms for which the Charter provides? It is difficult to see how that could be if the role of the new section 2 in Charter litigation is to be as I have described it above. In any case, as already noted, section 16 makes it clear that the new section 2 can "affect" provisions of the Charter other than section 25 and section 27.

I suspect that what Senator Murray was doing when he made these statements was expressing an opinion on what the courts would be likely to do if they were asked to uphold an infringement on a Charter right or freedom on the basis of the new section 2. He seems to be confident that the courts would not use the new section 2 to cut back on the scope of any rights and freedoms. But it is merely an opinion that he is expressing. As such, the courts are likely to pay it even less heed than they would if it were a statement of intent.

Yours truly,

Robin Elliot
Associate Professor

RE:rn

APPENDIX E

OPINION OF PROF. CATHARINE MacKINNON

Catharine A. MacKinnon, J.D., Ph. D., is a teacher, lawyer, and writer. Her Sexual Harassment of Working women, (Harvard University Press, 1979) designed the legal claim for sexual harassment as a form of sex discrimination. Her theoretical articles have appeared in Signs, and a collection of her speeches appears in Feminism Unmodified: Discourses on Life and Law (Yale University Press, 1987). She has taught constitutional law and sex equality at Yale University, Harvard University, the University of Minnesota, University California at Los Angeles, and Osgoode Hall Law School. She consults and serves as an expert witness in the U.S., Canada, and the EEC on litigation, legislation and administration specializing in issues of sex equality. She is currently visiting Professor at the University of Chicago Law School and Visiting Scholar at the Institute for Research on Women and Gender at Stanford University.

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INSTITUTE FOR RESEARCH ON WOMEN AND GENDER
SERRA HOUSE
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6 September 1987

Women's Legal Education and Action Fund
344 Bloor St. W., Suite 403
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To LEAF:

You have requested my opinion as a Constitutional lawyer and political scientist on the impact of the "Meech Lake Accord" on women's equality rights.

Comparatively viewed, the Canadian Charter of Rights and Freedoms ("Charter") is advanced beyond any comparable instrument in the world today in promising women full citizenship. Its combination of equal protection of the laws with specific nondiscrimination guarantees, together with its substantive recognition of disadvantage and support for affirmative relief, lays the legal foundation for some of the most significant advances in sex equality ever to be made for women under law. The Canadian commitment to diversity, with the political mobilization of the women's community the Charter occasioned, have produced an equipoise among the various bases for nondiscrimination under Section 15 and throughout the Charter, one that need not divide women's interests between those based on sex on the one hand and those rooted in language, nation, culture, religion, ethnicity and race on the other. A unitary approach to social inequality is thus structural to the Charter.

The "Meech Lake Accord" ("Accord"), in the same comparative perspective, disturbs this equality among equality rights and threatens to qualify, limit, and undermine both the Charter's distinctive legal contributions and the climate of political will so crucial to a realistic delivery on their promise.

In the United States, sex equality has constitutional dimension essentially by analogy. The equal protection clause of the fourteenth amendment, passed to respond to white America's history of chattel slavery, social segregation, and disenfranchisement of Black Americans, is gender neutral on its face and does not mention sex. Attempts to add an express sex equality guarantee to the U.S. Constitution -- thus removing at least the question of whether the government is committed to sex equality under law from the contingencies and vicissitudes of shifting political winds and majorities -- have failed. In 1971, the equal protection clause was first applied to gender and has been used increasingly since, largely moving forward through the uneven and often inadequate process of analogizing sex to race. The difficulties of attempting to achieve sex equality through analogical method has highlighted the dangers for all women, including minority women, of the elevation of some bases for prohibited treatment over others.

Entering the field of equality rights selectively, as the "Meech Lake Accord" does by recognizing aboriginal and multicultural rights and not others, creates an inequality among equality rights. It makes some equality rights more equal than others. This poses concerns for the effective pursuit of sex equality, for the vitality of Section 15's protections from discrimination on the basis of race, ethnicity, nation, handicap, age, and others (including unenumerated) so crucial to women's advancement, for the coherent and predictable

development of Section 15 jurisprudence, as well as for balances to be struck under Section 1 or otherwise in cases of potential conflict when some bases are given more constitutional weight than others. For example, were a significant advance to be made in an area covered by the Accord, analogies to areas it does not mention would not necessarily be available, as would be usual in case law. If a significant advance were made in recognition of cultural rights, and an analogy were sought to support a parallel initiative for women's rights, both being threatened by the dominant culture, the Accord would be persuasive in undercutting the full applicability of the analogy as precedent.

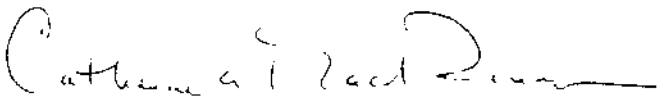
Most broadly, by choosing to reaffirm some interests and not to include gender, the Accord makes some rights structural to Canadian federalism in a way that excludes gender from a comparable structural place. The record for women under the U.S. Constitution makes all too clear that neglecting to mention women's rights at constitutive moments is predictably not gender-neutral in its effects. Facial gender neutrality in a non-gender neutral world does not itself guarantee gender neutrality, far less actual sex equality.

Perhaps the deepest cause for concern is the effect of the Accord on the social process of constitution-building: the relationship between the Charter's political culture and its actual delivery of promised rights. In addition to being law, the Accord works politically to set priorities and agendas, affect resource allocations and provide an edge in close cases. Such a document is a political act. It enters into the atmosphere that surrounds the seriousness of commitment to equality rights on the day-to-day level that is the level on which a constitutional right either becomes meaningful or dies as a piece of paper. On this level, a constitution

affects outcomes from family court to rape trials to Human Rights adjudications; it shapes women's fortunes in board rooms and at the bargaining table, in the home and on the street, in places where the Charter itself would seldom formally venture. A political act like the Accord supports or detracts from a climate of concern in a way that affects the results of particular cases, shifts the ground beneath legal arguments, determines what becomes persuasive. It gives life to law. On this level, constitutional process begins as politics but ends as law. The status of sex equality itself as a fundamental commitment of a society is thus as much constituted by such documents as it is reflected in them.

The damage done to women's rights in Canada at this point in this process would be particularly acute if no remedial action were taken, the omission having been so expressly raised. Lack of action would squarely pose the question whether sex equality is, indeed, basic to the Canadian polity, seriously undermining the compact the Charter made between women and the Canadian state.

Respectfully,



Catharine A. MacKinnon

APPENDIX F

LEAF 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: Challenging a discriminatory law or securing from the courts an interpretation of equality that fulfills 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 signficant 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.

Adopted by the Board
June 13, 1987