File No. 22191

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA)

BETWEEN:

DONALD VICTOR BUTLER

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

FACTUM OF THE INTERVENER WOMEN'S LEGAL EDUCATION AND ACTION FUND

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PART I: STATEMENT OF FACTS

1. LEAF directs this Court's attention to the following facts in the record in order to set the context for the argument that follows.

2. The materials seized and prosecuted in the within action constitute the entire inventory of a pornography store in Winnipeg, Manitoba, and therefore constitute a naturalistic rather than selective sample.

3. The vast majority of the subject materials are visual materials in which actual women are presented as used, hurt or abused for sex for men.

4. In these materials, inter alia, women are presented as being raped. Sometimes they act as if they are enjoying it; sometimes they scream, resist, and try to run. Sex acts are presented being performed on subordinates by superiors or caretakers, including employer on employee, priest on penitent, doctor on nurse, and nurse on patient. Adult women are presented as children, with child-like (shaved) pubic areas, teddy bears, hair ribbons and saddle shoes. Some participants appear to be children. Women are shown having sex with women, as sex for men. An Asian woman is subjected to racist insults as part of forced fellatio and rape. Women are presented as being sexually insatiable. Women are simultaneously or serially penetrated in every orifice by penises or objects. Women are presented as gagging on penises down their throats. Women lick men's anuses. Women are bound with rings through their nipples, and hung handcuffed from the ceiling. Men ejaculate all over women, including on their faces and into their mouths. In these contexts, women are referred to and described as "pussy", "cunt", "split beavers", "hole", "bitch", "hot titties and twats", "dyke meat", and "chocolate box".

> Exhibits 2, 3, 4, 5, 6, 9, 14, 20, 29, 33, 46, 50, 55, 56, 60, 62, 64, 66, 70, 71, 78, 79, 80, 85, 86, 87, 162, 168, 169, 171, 173, 174, 175, 176, 186, 189, and 190.

5. A small number of the subject materials present men engaging in sexual aggression against other men, analogous to the ways women are treated in the materials described above. Men are slapped with belts. A man is anally penetrated with a rifle. Men are presented as being raped. Men's genitals are bound. They are in dog collars and in chains. Men lick other men's anuses and

are forced to lick urinals during anal intercourse. Men are presented as gagging on penises down their throats. Men urinate on men and ejaculate into their mouths. Boys are presented with genitals exposed, surrounded by toys.

Exhibits 11, 22, 4, 7/23, 12, 15, 17, 30, 34, 42, 44, 59 and 76.

PART II: POINTS IN ISSUE

6. The constitutional questions are as framed by this Court pursuant to the Order of Lamer C.J.C. dated January 23, 1991.

PART III: ARGUMENT

I. INTRODUCTION

7. LEAF submits that pornography amounts to a practice of sex discrimination against individual women and women as a group. Historically obscenity law was justified on the basis of morality, a rationale which has been the subject of much criticism and obscures pornography's discriminating effects on women. LEAF submits that the regulation of pornography can be constitutionally justified using a harms-based equality approach which focuses on the actual harms done by and through pornography.

8. LEAF submits that some pornography is not protected by section 2(b) of the Canadian Charter of Rights and Freedoms ("Charter"), either because it constitutes a violent form of expression or because it is a discriminating form of expression proscribed by section 28 of the Charter, which applies to and controls section 2(b). LEAF submits further and in the alternative that under section 1 of the Charter, any infringement of free expression is outweighed by the social interest in equality in society.

II. THE HISTORICAL DEVELOPMENT OF OBSCENITY LAW

9. Originally, obscenity law was meant to prevent moral corruption through exposure to sexually explicit materials. An overlapping but broader purpose was to prevent offence to public sensibilities. Underlying assumptions informing these views were and are that women's naked bodies are indecent, sexual

displays are immodest, unchaste and impure, homosexuality is repulsive and sex outside of traditional marriage or in other than traditional configurations is a sin.

R. v. Sidley (1663), 82 E.R. 1036 (K.B.)

R. v. Curl (1727), 93 E.R. 849 (K.B.)

R. v. Hicklin (1868), L.R. 3 Q.B. 360 (Q.B.)

R. v. Beaver (1905), 9 O.L.R. 418 (C.A.)

R. v. McCormick (unreported, Ont. Co. Ct. January 10, 1980)

Luscher v. Minister of National Revenue (1983), 149 D.L.R. (3d) 243 (Customs app.); reversed on other grounds (1985), 57 N.R. 386 (F.C.A.)

10. The traditional approach went far to obscure the actual harms pornography does to women. No recognition of the impact of pornography on the status and treatment of women was possible when the only harms of pornography were thought to be harms to the morals of consumers and infractions of moral rules. In the result obscenity law, by ignoring the exploitation of women, often implicitly functioned as an instrument to legitimize and enforce women's disadvantaged status.

MacKinnon, C., "Not a Moral Issue", (1984) 2 Yale L. & Policy Rev. 321

11. In Canada, obscenity law has evolved over time to go beyond morality toward a recognition of actual harms. A significant step was taken in 1959 when the law was amended to define obscenity as "crime, horror, cruelty and violence" combined with sex, as well as the "undue exploitation of sex" itself.

12. Notwithstanding this amendment, the way in which obscenity law was judicially interpreted was that "undue exploitation of sex" depended upon sexual explicitness. LEAF submits that the community standards test applied was gender biased insofar as its reference point was male consumers and audiences.

R. v. Campbell (1974), 17 C.C.C. (2d) 130 (Ont. Co. Ct.) at 135-36

R. v. Odeon Morton Theatres Ltd. et al. (1974), 16 C.C.C. (2d) 185 (Man. C.A.) at 197

R. v. Kleppe (1977), 35 C.C.C. (2d) 168 (Ont. Prov. Ct.) at 173-74

R. v. Gray (1982), 65 C.C.C. (2d) 353 (Ont. H.C.) at 355

13. Some courts assiduously and deliberately avoided identifying harm of any kind. Notwithstanding the accumulating evidence of harm, other courts still took the approach of criminalizing "dirt for dirt's sake".

R. v. Coles Co. Ltd., [1965] 2 C.C.C. 304 (Ont. C.A.) at 322-23

R. v. Prairie Schooner News Ltd. (1970), 1 C.C.C. (2d) 251 (Man. C.A.) at 254-55

R. v. Video World Ltd. (1986), 22 C.C.C. (3d) 331 (Man. C.A.) at 342-43; leave denied, [1987] 1 S.C.R. 1255 (S.C.C.)

R. v. Periera-Vasquez (1988), 64 C.R. (3d) 253 (B.C.C.A.) at 269

14. The traditional failure of obscenity law to focus on real harms has also, in LEAF's submission, contributed to a host of problems, weaknesses, and potential legal disabilities for which obscenity law has long been criticized. These include vagueness, subjectivity, gender bias, potential for abuse as a mechanism of censorship, difficulties of proof and effective enforcement, and lack of compelling governmental interest to guide interpretation.

15. As long as obscenity law remained preoccupied with explicitness, it was particularly unable to address the explosion of visual pornography in the 1970s and 1980s. This material features incest, forced intercourse, sexual mutilation, humiliation, beatings, bondage, and sexual torture, in which dominance and exploitation are directed primarily against women. Some of this material does not necessarily contain the degree of explicitness the courts required for obscenity, but causes real harm. For example, in the December 1984 issue of Penthouse (excerpted in Appendix 1) partially or fully naked Asian women are tightly bound and hanging from trees. Some courts convicted while others did not. In LEAF's submission this was because the community standards test was not

properly anchored by a harms-based principle that found harms to women to be determinative.

> R. v. Odeon Morton Theatres, supra, at 198
>
> R. v. Metro News Ltd. (1986), 29 C.C.C. (3d) 35 Ont. C.A.); leave denied November 6, 1986 (S.C.C.)
>
> R. v. Arena Recreations (Toronto) Ltd. (1987), 46 Man. R. (2d) 47 (Man. Q.B.)
>
> R. v. Regina News Ltd. (1988), 39 C.C.C. (3d) 170 (Sask. C.A.)
>
> Cowan, Lee, Levy and Snyder (1988)*
>
> Malamuth and Spinner (1980)*
>
> Dietz and Sears (1987-88)*
>
> [* See full citations in List of Authorities]
>
> Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution, 1985 (Fraser Report), chapter 6

III. THE EMERGING CANADIAN APPROACH: IDENTIFYING REAL HARMS

16. One of the earliest official recognitions in Canada of the gender-related harms of pornography is found in the Report of the Standing Committee on Justice and Legal Affairs, 1978 (MacGuigan Report), as follows at 3-4:

> The clear and unquestionable danger of this type of material is that it reinstates some unhealthy tendencies in Canadian Society. The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles.

17. In sharp contrast with the older cases, but consistent with the legislative purpose, particularly with the language of the 1959 amendment, is a

recent line of Canadian authority which has begun to acknowledge the harms pornography causes to women and to recognize the sex equality interest in its regulation. This line of cases uses the harms of pornography to women to interpret the content, reach, and rationale of the obscenity law. Whereas the traditional approach is concerned with materials deemed scurrilous, disgusting, indecent, and immoral, this line of cases identifies as obscene material which is dehumanizing, degrading, subordinating, and dangerous for women.

> R. v. Doug Rankine Company Ltd. et al. (1983), 36 C.R. (3d) 154 (Ont.Co.Ct.)
>
> R. v. Nicols (1984), 43 C.R. (3d) 54 (Ont. Co. Ct.)
>
> R. v. Ramsingh et al. (1984), 14 C.C.C. (3d) 230 (Man.Q.B.)
>
> R. v. Wagner (1985), 43 C.R. (3d) 318 (Alta. Q.B.); aff'd (1986), 50 C.R. (3d) 175 (Alta. C.A.); leave denied 50 C.R. (3d) 175 (S.C.C.)
>
> R. v. Red Hot Video Ltd. (1985), 45 C.R. (3d) 36 (B.C.C.A.); leave denied 46 C.R. (3d) xxv (S.C.C.)
>
> R. v. Fringe Product Inc. et al. (1990), 53 C.C.C. (3d) 422 (Ont. Dist. Ct.)

18. Illustrative of this line of authority is R. v. Wagner, supra. There the trial court recognized as obscene sexually explicit materials in which pain was overtly inflicted or force used or threats of either were made. The court also recognized as obscene sexually explicit materials which were dehumanizing or degrading, and described this latter class of materials at 331 as follows:

> . . . men and women are often verbally abused and portrayed as having animal characteristics. Women, particularly, are deprived of unique human character or identity and are depicted as sexual playthings, hysterically and instantly responsive to male sexual demands. They worship male genitals and their own value depends upon the quality of their genitals and breasts. Thus in such films professional women, such as nurses and secretaries, are hired solely for the purpose of sexual gratification, without regard for their professional qualifications and abilities.

19. The trial court in Wagner found that repeated exposure to these types of pornography results in social harm, which Shannon J. described at 336 as

"increased callousness toward women on a personal level and less receptiveness to their legitimate claims for equality and respect."

20. Recognizing the context that section 28 of the Charter provides for interpreting obscenity law, Anderson J.A., in Red Hot Video, supra, identified the harms of pornography as follows at 59:

> They constitute a threat to society because they have a tendency to create indifference to violence insofar as women are concerned. They tend to dehumanize and degrade both men and women in an excessive and revolting way. They exalt the concept that in some perverted way domination of women by men is accepted in our society . . .
>
> If true equality between male and female persons is to be achieved it would be quite wrong in my opinion to ignore the threat to equality resulting from the exposure to male audiences of the violent and degrading material described above. As I have said, such material has a tendency to make men more tolerant of violence to women and creates a social climate encouraging men to act in a callous and discriminatory way towards women.

21. In R. v. Butler below, [1991] 1 W.W.R. 97 (Man.C.A.), Helper J.A. in dissent at 141 noted that: "Evidence shows the circulation of such material may lead to an increase in the incidence of aggressive, harmful behaviour and further can lead to attitudinal changes that are antithetical to the Charter, specifically to s.28 of the Charter."

22. These findings and developments in judicial reasoning are consistent with a growing body of legal and social scholarship, evidence, expert and victim testimony and official acknowledgment that pornography is a systematic practice of exploitation and subordination based on sex that differentially harms women.

23. The harms of pornography to women documented in this literature include dehumanization, humiliation, sexual exploitation, forced sex, forced prostitution, physical injury, child sexual abuse and sexual harassment. Pornography also diminishes the reputation of women as a group, deprives women of their credibility and social and self worth, and undermines women's equal access to protected rights.

Fraser Report, supra, at 95-103

Final Report of the Attorney General's Commission on Pornography, (U.S., 1986) at 747-756 and 767-1035

Metro Toronto Task Force on Public Violence Against Women and Children, Final Report (1984) at 66

Report of The Joint Select Committee on Video Material (Australia, 1988) at 185-230

Report of the Ministerial Committee of Inquiry into Pornography (New Zealand, 1988) at 38-45, 59-60 and 79-81

Sexual Offences Against Children: Report of the Committee on Sexual Offences Against Children and Youths, 1984 (Badgley Report), chapter 55

24. This Court in Towne Cinema Theatres Ltd. v. The Queen, [1985] 1 S.C.R. 494, recognized some of the harms of pornography as potentially constituting "undue" exploitation of sex regardless of the community standards test and, LEAF submits, implicitly recognized the avoidance of harm as a purpose of section 163. In the words of Dickson C.J.C. at 505:

> No one should be subject to the degradation and humiliation inherent in publications which link sex with violence, cruelty, and other forms of dehumanizing treatment...
>
> Even if certain sex related materials were found to be within the standard of tolerance of the community, it would still be necessary to ensure that they were not "undue" in some other sense, for example in the sense that they portray persons in a degrading manner as objects of violence, cruelty, or other forms of dehumanizing treatment.

25. Discussing the Towne Cinema decision, one court recently linked the harms of pornography to the real-life context within which women live. In Fringe Product, supra, Charron J. observed at 444 that: "The notion that dehumanization and degradation constitutes 'harm' from which our society has a right to guard itself against is implicit in Towne Cinema Theatres Ltd. v. The Queen ...", and continued: "[this concern] remains pressing and substantial today in a society where, unfortunately, gender inequality and sexual violence exist as social problems."

26. An equality approach to pornography underlies the foregoing line of authority. In LEAF's submission this judicial approach should be made the explicit constitutional basis for the regulation of pornography in Canada.

IV. SOME PORNOGRAPHY IS NOT PROTECTED BY SECTION 2(B) OF THE CHARTER BECAUSE IT IS A VIOLENT FORM OF EXPRESSION.

27. Charter rights, including freedom of expression, are not absolute, but are subject to limitation prior to section 1.

> Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455 at 463 and 467

28. Pursuant to its decision in Irwin Toy Ltd. v. Quebec, [1989] 1 S.C.R. 927, this Court protects from governmental restriction under section 2(b) all activity (including conduct) that has meaning except "violence as a form of expression". This Court stated at 970 that it has not delineated precisely "when and on what basis a form of expression chosen to convey a meaning falls outside the sphere of the guarantee. But it is clear, for example, that a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen." This is so because even though the conduct may express profound meaning, its harm outweighs its expressive value.

29. Expanding on what it is about murder and rape that deprives them of expressive protection, this Court has stated that direct acts of violence involving direct attacks on the physical liberty and integrity of others are not protected by section 2(b), and that violent expression is antithetical to the values underlying the guarantee of free expression.

> Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1123 at 1185-86
>
> R. v. Keegstra, [1991] 2 W.W.R. 1 at 106 (per McLachlin, J. in dissent)

30. Direct physical violence to real people is inflicted in order to make some pornography, particularly visual pornography. Some women are coerced into pornography and sexually assaulted so that pornography can be made of them. This is not the case with most hate propaganda, which, in order to be made, does not

require violence against real people. LEAF submits that where physical harm becomes pornography, not only is the actual force or coercion outside the protection of section 2(b), but so is the resulting pornography.

> Final Report of the Attorney General's Commission, supra, chapters 16 and 17

31. LEAF submits that if anything can violate a person's physical liberty and integrity more than a sexual assault, it is the mass marketing of that assault as sexual entertainment. The pornography market provides a profit motive for physically harming people. It is also a mechanism for proliferating and making permanent the societally imposed stigma of sexual attacks. Pornography which is made from assaults and which exacerbates the injury of those assaults is no more worthy of protection as expression than are the assaults themselves.

> Linda Lovelace, Ordeal, (New Jersey: Citadel Press, 1980)

32. This approach to coerced or violent pornography is consistent with the way the United States Supreme Court treats child pornography. Because using children to make sex pictures is regarded as child abuse, and the harm of their making is exacerbated by their circulation, sex pictures of children are regarded as child abuse. The Court has thus permitted, consistent with freedom of expression, criminalizing the entire chain of sale and distribution, as well as possession, as a means of eliminating these harms. The Court also recognised that in addition to harms to the child victims, harms can occur to third parties; for example, pedophiles may use child pornography to abuse other children.

> New York v. Ferber, 458 U.S. 747, (1982)
>
> Osborne v. Ohio, 110 S. Ct. 1691, 1697 (1990)

33. Threats of violence may also fall outside the protective ambit of section 2(b). LEAF submits that because threats of violence "are coercive, taking away free choice and undermining freedom of action", they should be excluded from the scope of section 2(b).

> R.W.D.S.V. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 at 588

Irwin Toy Ltd. v. Quebec, supra, at 970

Rocket v. Royal College of Dental Surgeons, [1990] 2 S.C.R. 232 at 245

R. v. Keegstra, supra, at 106 (per McLachlin J. in dissent)

34. LEAF submits that when explicit sex and express violence against women are combined, particularly when rape is portrayed as pleasurable or positive for the victim, the risk of violence against women is known to increase as a result of exposure. In particular, it is uncontroversial that exposure to such materials increases aggression against women in laboratory settings, increases attitudes which are related to violence against women in the real world, and increases self-reported likelihood to rape. As a result of exposure, a significant percentage of men, many not otherwise predisposed as well as the 25-35% who report some proclivity to rape a woman, come to believe that violence against women is acceptable. Such materials hence constitute direct threats of violence.

Donnerstein (1984)*

Malamuth and Check (1981)*

Donnerstein and Berkowitz (1981)*

Malamuth (1983)*

Malamuth (1986)*

Malamuth and Check (1985)*

Check and Guloien (1989)*

McManus, Introduction to Report of Attorney General's Commission on Pornography*

[* full citations in List of Authorities]

Exhibits 6, 20, 162 and 178 (examples of "positive outcome rape" scenarios)

V. SOME PORNOGRAPHY IS NOT PROTECTED UNDER SECTION 2(b) BY VIRTUE OF SECTION 28

35. Section 28 of the Charter overrides every other provision therein. It mandates that all rights and freedoms, including freedom of expression, and equality rights, are guaranteed equally to women and men. Therefore, in LEAF's submission, section 28 engages section 2(b) prior to any recourse to section 1 and requires a balancing of speech interests and equality interests. Failure to strike such balance constitutes a breach of section 28.

36. The idea that each provision of the Constitution must be read in the light of the others is a familiar aid to the interpretation of sections 91 and 92 of the Constitution Act, 1867. In defining the various heads of power in sections 91 and 92, the courts have engaged in a process of "mutual modification" in order to accommodate apparently overlapping or conflicting provisions. Thus, the exclusive provincial power over property and civil rights in the province has been narrowed to exclude interprovincial and international trade-matters which come within Parliament's exclusive power over trade and commerce.

> P. Hogg, Constitutional Law of Canada (2nd ed. 1985), at 333

37. Section 28 requires a purposive approach. The whole relationship between freedom of expression and the social role of pornography must be evaluated. The majority approach in Keegstra, supra, noted at 32 that so long as context is maintained, balancing within section 2(b) is not logically precluded. Indeed, McLachlin J. performed such an assessment at 106 in her dissent.

38. Section 15 read with section 28 guarantees women equal access to equality rights. This Court has held that the section 15 equality guarantee "is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the Charter."

> Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 185

39. This Court has inextricably linked the value of equality with the concept of a free society. In R. v. Big M. Drug Mart Ltd., [1985] 1 S.C.R. 295, Dickson C.J.C. stated at 336 that: "A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s.15 of the Charter." Particularly in light of section 28, this suggests that the value of gender equality is imbedded within section 2(b) itself.

40. Constitutional equality, as construed in Andrews, supra, centres on eliminating the disadvantage of historically subordinated groups. This means that the Charter is not neutral on practices which promote inequality, but rather is a constitutional commitment to ending them.

41. Restriction of pornography on a harms-based equality rationale is not regulation because of content, although clearly it is tied to content. The purpose of regulation is not to restrict freedom of expression but rather to prevent harm.

42. It should be observed that just as conduct can express meaning, words can act. LEAF submits that it is unlikely that under section 2(b) this Court would protect sexual harassment, obscene phone calls, child pornography, sex segregated employment advertisements, and similar forms of expression that amount to acts or practices of sex discrimination. Sex discrimination is typically accomplished through such forms of expression, which use words to both express and actualize group inferiority. In the context of pornography which, LEAF submits, is discriminatory, section 28 requires a balancing under section 2(b).

43. LEAF submits that applied to section 2(b), section 28 should also require the Appellant to demonstrate that the subject materials do not limit women's rights before the protection of section 2(b) can be claimed. When in addition, pornography requires coercion or violence to be made, it is further deprived of section 2(b) protection. Coercion or violence were not present in the materials considered in Keegstra, supra, nor was section 28 a factor there.

44. Materials which combine sex with aggression have perceptual effects which disadvantage women in society. They desensitize consumers to rape trauma

and sexual violence. In one study, simulated juries after exposure were less able than the real juries to perceive an account of a rape as an account of a rape.

Malamuth and Check (1980)*

Linz, Donnerstein and Penrod (1984)*

[* full citations in List of Authorities]

45. Other discriminatory effects are documented in the most advanced and recent research (most of which postdates the 1985 Fraser Report), which addresses materials not necessarily taking a violent form but which degrade and dehumanize women. Such material has been shown to lower inhibitions on aggression by men against women, increase acceptance of women's sexual servitude, increase sexual callousness toward women, decrease the desire of both sexes to have female children, increase reported willingness to rape and increase the belief in male dominance in intimate relationships, among other known effects. For high-frequency consumers, these materials also increase self-reported sexually aggressive behaviour. While these effects are not invariant or always immediate, and do not affect all men to the same degree, there is no reason to think that these beliefs are not acted upon, given the pervasiveness of sex inequality and abuse in society.

Zillmann and Bryant (1984)*

Check and Malamuth (1986)*

Zillmann and Weaver (1989)*

Russell (1988)*

Zillmann and Bryant (1988)*

Check and Guloien, supra*

Buchman (1990)*

[* full citations in List of Authorities]

Exhibits 6, 9, 14, 20, 162 and 189

46. These laboratory studies merely document what women know from their lives. Many women report that men abuse them through pornography. For example,

in a study of 105 women staying in battered women's shelters in Ontario, 25% of the women reported being forced to perform acts which their partners had seen in pornography. In another study, specific pornography was spontaneously mentioned by rapists during the course of the rape in 25% of 193 rapes reported by 200 street prostitutes. Further studies find a substantial percentage of all Canadian women report they have been upset by someone trying to do something to them that came from pornography.

> Public Hearings on Ordinances to Add Pornography as Discrimination Against Women, Minneapolis City Council, Government Operations Committee, December 12 and 13, 1983
>
> Cole (1989)*
>
> Senn (1985)*
>
> Sommers and Check (1987)*
>
> Silbert and Pines (1984)*
>
> [* full citations in List of Authorities]

47. LEAF submits that pornography is not only a practice of discrimination which disadvantages women and treats them as second class citizens on the basis of sex, it also uses race and age to discriminate through gender. Pornography sexualizes racism and racial stereotypes and eroticizes the vulnerability of children.

> Exhibits 60, 64, and 80 (see excerpts in Appendix 2)

48. Individual men are also harmed by pornography, although this is exceptional in that this harm does not define the social status and treatment of men as a group. Indeed, there is no systematic data to support the view that men as such are harmed by pornography. However, LEAF submits that much of the subject pornography of men for men, in addition to abusing some men in the ways that it is more common to abuse women through sex, arguably contributes to abuse and homophobia as it normalizes male sexual aggression generally.

> Exhibits 11, 22, 23 and 42

49. Given the role of section 28 and the violent materials in the case at bar, LEAF submits that, unlike in Keegstra, supra, expressive values are appropriately balanced under section 2(b).

50. Pornography furthers none of the values for which expression is protected, as summarized in Irwin Toy, supra, at 976. All the reasons that led this Court in Keegstra not to value hate literature highly in the section 1 balance, apply to pornography in the section 2(b) balance. LEAF submits that pornography is a form of hate propaganda against women. Hate propaganda was found by Dickson C.J.C. in Keegstra, supra, at 41-44 to produce real harms. Additional reasons not to value pornography highly include the use of actual women to make the materials, the strong documentation of the connection between pornography and violence and discrimination, and its pervasiveness and acceptability in society as a medium for entertainment.

51. Pornography is made to produce male sexual excitement, erection and masturbation through the harms outlined above. It is not made to further any search for truth. (This argument should not be confused with the position that pornography has no meaning. LEAF submits that all social practices, however invidious, have meaning.)

52. Contrary to the submission of the Appellant, pornography is not a form of political speech as traditionally protected. It does not present a critique of the status quo or a dissenting but repressed voice. Rather, it entrenches and embodies society's most repressive and anti-egalitarian norms, which is indefensible in a society that has equality as a constitutional guarantee.

53. LEAF submits that pornography lies about women and their sexuality; for example, that women live to be raped, love to be hurt, and are fulfilled by abuse. Pornography silences women's expression and inhibits truth-seeking and works to deprive women of public regard. Sex toys do not generally run for Prime Minister. The pervasive presence of pornography thus deters women's equal access to participation in community life.

54. If the humanity of men "flourishes" through pornography, it is at women's expense.

55. One risk of protecting pornography under section 2(b) prior to upholding its regulation under section 1 is not only dignifying a vicious traffic, but progressively eroding expression rights in favour of the more policy-oriented constitutional calculus performed under section 1.

VI. TO THE EXTENT SECTION 163 IS INTERPRETED TO PROMOTE SEX EQUALITY, ANY RESTRAINTS IT IMPOSES ON EXPRESSION ARE DEMONSTRABLY JUSTIFIABLE IN A FREE AND DEMOCRATIC SOCIETY.

56. LEAF submits, in the alternative, that if this Court does not accept the aforesaid arguments under section 2(b), they apply equally under section 1.

57. This Court has held in Keegstra, supra, at 49-50 that the principles underlying section 15 are integral to the section 1 analysis and that the objective of impugned legislation is enhanced insofar as it seeks to ensure the equality of all individuals in Canadian society.

58. Under section 1 this Court must balance the harms which flow from regulating expression under section 163 against the harms which are actualized through the promotion of women's inequality through pornography. Sex inequality in society provides the "context" in which pornography must be assessed for section 1 purposes. In this context, prohibiting pornography promotes equality.

59. LEAF submits that in addition to the harms described above, pornography promotes systemic discrimination against women through systematic bias and subordination. The status and treatment of women is affected even for those who do not experience abuse related to pornography directly. When reduced to their sexual parts and seen in terms of how they can be sexually used, women are forced to live in a social climate of disrespect, denigration and comparative deprivation of human regard. Women's opportunities for autonomy and self-determination are undermined throughout society.

60. The values embodied in the Charter must be given preference over an interpretation of the statute that would run contrary to them. Where a statute can reasonably bear an interpretation that conforms with the Charter it should be interpreted in such a manner. Section 163 of the Criminal Code should thus be interpreted as in the Wagner line of authority.

> Leroux v. Cooperators General Insurance Co. et al. (1990), 65 D.L.R. (4th) 702 (Ont. H.C.) at 716-17
>
> Re Attorney-General of Manitoba and Metropolitan Stores (MTS) Ltd. et al., [1987] 1 S.C.R. 110 at 125
>
> Dolphin Delivery Ltd., supra, at 602-3
>
> Hills v. Attorney General of Canada, [1988] 1 S.C.R. 513 at 558

61. In Keegstra, supra, this Court observed that the very real harms of hate propaganda, and not its offensiveness, supported upholding legislation against it under section 1. Similarly, the real harms of pornography supports upholding section 163 on an equality rationale rather than in the historical manner which focused on morality and offensiveness.

62. Dickson C.J.C., dissenting in Reference Re Public Service Employee Relations Act (Alta), [1987] 1 S.C.R. 313, recognized at 367 that government intervention, rather than impeding the enjoyment of fundamental freedoms such as freedom of expression, may in some instances protect and enhance their enjoyment. LEAF submits that this analysis applies directly to the freedom of expression of women, which is promoted by section 163, properly interpreted.

63. LEAF submits that if section 28 does not operate under section 2(b), it must be interpreted to control the balancing of interests under section 1 in favour of promoting equality, otherwise section 28 is meaningless.

64. In deciding on the proper balance, this Court is guided by the values and principles essential to a free and democratic society. These include, inter alia, respect for the inherent dignity of the human person, commitment to social justice and equality, and respect for cultural and group identity. This Court has recognized that it may become necessary to limit rights and freedoms in

circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance.

R. v. Oakes, [1986], 1 S.C.R. 103 at 136

Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038 at 1056

65. When interpreted to promote equality, section 163 is neither vague nor overbroad. The compelling and concrete interest in eliminating systemic social subordination provides a clear guide to interpretation and a limit which constrains any potential overreach in the statutory language.

66. Building on the Wagner line of authority to make more explicit the sex equality rationale for the regulation of pornography could sharpen and make more predictable the factual determination of the lower courts, and at the same time make more visible those harms of pornography which have been obscured in the past.

67. In R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, this Court was concerned at 779 to avoid use of the Charter as "an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons." The legislation at bar has such an object; invalidating it would be such a misuse. Without this obscenity law, neither adult nor child pornography will be regulated in Canada.

68. LEAF submits that pornography undermines the pursuit of equality and has little, if any, expressive value. The importance of promoting equality and the absence of any significant infringement of freedom of expression decisively weigh in favour of upholding section 163 under section 1 of the Charter.

PART IV: NATURE OF ORDER SOUGHT

69. LEAF respectfully submits that the constitutional questions posed be answered as follows:

Question #1: No

Question #2: Yes

70. LEAF further requests that this Court reconsider the Order of Stevenson J. made on April 10, 1991 and direct that the Appellant bear his own costs of LEAF's intervention herein as a friend of the Court. In the alternative, LEAF requests an opportunity to make submissions in that regard at a later date.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Linda A. Taylor

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PART V

LIST OF AUTHORITIES

PART VI

APPENDICES

1. Excerpts from Penthouse magazine, December, 1984 at 118-127

2. Excerpts from Exhibits 60, 64 and 80