BEFORE A HUMAN RIGHTS PANEL
PURSUANT TO THE *HUMAN RIGHTS, CITIZENSHIP AND MULTICULTURALISM ACT*, R.S.A. 1980, c. H-11.7 and amendments thereto

BETWEEN:

HARVEY KANE and THE JEWISH DEFENCE LEAGUE OF CANADA
Complainants

- and -

ALBERTA REPORT, LINK BYFIELD, MICHAEL BYFIELD, and TED BYFIELD
Respondents

SUBMISSION OF THE INTERVENOR
THE WOMEN'S LEGAL EDUCATION AND ACTION FUND
("LEAF")

Chivers Greckol & Kanee
Barristers & Solicitors
#101, 10426 – 81 Avenue
Edmonton, Alberta T6E 1X5
Phone: (780) 439-3611
Fax: (780) 439-8543
Lawyer in charge: Jo-Ann R. Kolmes

I. INTRODUCTION

A. LEAF

1. The Women's Legal Education and Action Fund ("LEAF") is a national, federally incorporated, non-profit organization founded in April, 1985, to secure equal rights for Canadian women as guaranteed by the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 (the "Charter"). To this end, it engages in litigation, research and public education.

2. Through its numerous interventions, LEAF has contributed to the development of equality rights jurisprudence including the legal meaning of substantive equality. As a result of its litigation, public education and advocacy, LEAF has developed expertise in articulating the relationship between the law and the inequalities experienced by women and other historically disadvantaged groups in a variety of contexts.

3. LEAF was granted intervenor status by and made submissions to the Court in the Special Case Application arising from the within complaint. The Opinion of the Court of Queen's Bench in *Re Kane*, [2001] A.J. No. 915 is at **TAB 1**.

4. LEAF sought the opportunity to intervene in this Panel hearing because:
   (a) the interpretation of s. 2 of the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7 ("*HRCMA*") (**TAB 2**) will be at issue before this Panel, and this involves important questions regarding the interplay between freedom of expression, equality, and the right to be free from discrimination (*Charter* excerpts are at **TAB 3**);
   (b) the interpretation of a number of other human rights statutes, as well as the hate propaganda provisions in the *Criminal Code*, could be affected by the outcome of this hearing;

(c) a fundamental objective of LEAF is to further equality rights for women and other historically disadvantaged groups, including through the use of human rights statutes and procedures; and

(d) communication that is likely to expose a person or class of persons to hatred or contempt has a complex and critical impact on equality rights.

5. LEAF submits that the Opinion by the Court of Queen's Bench in this matter is binding on the Panel. The submissions by LEAF support and further the analysis provided by the Court.

6. LEAF takes no position on the facts of the complaint. Similarly, LEAF makes no submission on whether a contravention of the *HRCMA* has occurred in the circumstances of the complaint.

B. The harm caused by discriminatory expression

7. Courts, tribunals, public policy commissions, and academic analysts have articulated the harm effected by discriminatory expression or expression that exposes persons to hatred or contempt because of gender, gender identity, race, religious beliefs, colour, physical or mental disability, age, sexual orientation, place of origin, marital status, source of income or family status.

a. *R. v. Keegstra* (1990), 77 Alta. L.R. (2d) 193 at 234 (S.C.C.) (**TAB 4**):

> The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.

b. *Canada (Canadian Human Rights Commission) v. Taylor* (1990), 75 D.L.R. (4th) 577 at 594 (S.C.C.) ("*Taylor*") (**TAB 5**):

> It can thus be concluded that messages of hate propaganda undermine the dignity and self-worth of target group members and, more generally, contribute to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality.

c. British Columbia Human Rights Commission, "A Call for Action: Combatting Hate in British Columbia," November 16, 1999, at pages 5, 16 (**TAB 6**):

> Hatred against First Nation's people, Blacks, Jews, Chinese, other visible minority immigrants, gays and lesbians, religious minorities and women, has unfortunately, been an enduring legacy of the Canadian experience.
>
> ...
>
> A core principle from the beginning of human rights legislation has been that a violation of an individual's rights is more than a mere private wrong. Discrimination harms the community. Through the passage of laws to deal with discrimination and hatred, the community has said to the victims of discrimination that we will stand with you and get involved in your problem, because your problem is ours too. Discrimination undermines the very essence of our idea of community that has, at its core, the acceptance of all people as equally deserving of concern and respect.

d. *Saskatchewan Human Rights Commission v. The Engineering Students' Society* (1984), 5 C.H.R.R. D/2074 at D/2089, paras. 17722 – 17724), appeal allowed on other grounds, (1986), 7 C.H.R.R. D/3443 (Sask. Q.B.), aff'd (1989), 56 D.L.R. (4th) 604 (Sask. C.A.), leave to appeal to S.C.C. refused June 8, 1989, 57 D.L.R. (4th) viii (all at **TAB 7**):

> 17722 A stereotypical image of a certain protected class of persons, namely women, is presented when they are consistently depreciated as ridiculous objects and when sexual violence and other forms of discriminatory depictions and descriptions are directed at them because of their sex. The class consisting of this gender is then ridiculed, and belittled and their dignity affronted. Discrimination like this jeopardizes their opportunity to obtain equality rights including employment, education and security of their persons on an equal footing with the dominant gender grouping.
>
> 17723 The effect of such representations is to reinforce and legitimate prejudice against women. It prolongs the existence of hangovers of prejudice against equal female participation in education, work, aspects of social life and the professions.

> 17724 This material promotes a consistent image of women as less than human. Once a protected class, in this case women, is represented as a less than equal member of the human family with impunity the grave evil exists that they may be treated as such. Material of this kind in these newspapers serves to perpetuate a social climate discriminatory to women who are already targets of manifold discrimination and horrible violence. No social interest is served by tolerating the free expression of such material.

e. M. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," (1989), 87 Michigan L. Rev. 2320 at 2332 – 2335 (**TAB 8**), also published in M. Matsuda, C. Lawrence III, R. Delgado and K. Crenshaw, *Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Boulder: Westview Press, 1993) at 17 - 51:

> In addition to physical violence, there is the violence of the word. Racist hate messages, threats, slurs, epithets, and disparagement all hit the gut of those in the target group. The spoken message of hatred and inferiority is conveyed on the street, in schoolyards, in popular culture and in the propaganda of hate widely distributed in this country. Our college campuses have seen an epidemic of racist incidents in the 1980s. The hate speech flaring up in our midst includes insulting nouns for racial groups, degrading caricatures, threats of violence, and literature portraying Jews and people of color as animal-like and requiring extermination.
>
> ...
>
> From the victim's perspective, all of these implements inflict wounds, wounds that are neither random nor isolated. Gutter racism, parlor racism, corporate racism, and government racism work in coordination, reinforcing existing conditions of domination. Less egregious forms of racism degenerate easily into more serious forms.

8. See also:

   - *Association of Black Social Workers v. Arts Plus* (1994), 24 C.H.R.R. D/513 (N.S. Bd. of Inq.) (**TAB 9**).

   - *Rasheed v. Bramhill* (1980), 2 C.H.R.R. D/249 (N.S., Bd. of Inq.) (**TAB 10**).

II. SUBMISSIONS ON LAW

A. General principles of interpretation of human rights statutes

9. Two general principles provide a foundation for the analysis of the Panel.

10. First, human rights legislation is given a purposive interpretation. Protected rights receive a broad interpretation, while exceptions and defences are narrowly construed.

    - *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City)* (2000), 185 D.L.R. (4th) 385 at 401 – 402 (S.C.C.) (**TAB 11**).

    - *Kane v. Church of Jesus Christ Christian-Aryan Nations* (1992), 18 C.H.R.R. D/268 at D/288 – D/289 (Alta. Bd. of Inq.) ("*Aryan Nations*") (**TAB 12**).

11. Such purposive interpretation should be guided by considerations including the Preamble to the Act.

    - *Vriend v. Alberta* (1998), 156 D.L.R. (4th) 385 at 425 (S.C.C.) (**TAB 13**).

12. The Preamble to the *HRCMA* states (**TAB 2**):

> WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all persons is the foundation of freedom, justice and peace in the world;
>
> WHEREAS it is recognized in Alberta as a fundamental principle and as a matter of public policy that all persons are equal in: dignity, rights and responsibilities without regard to race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status [or sexual orientation];
>
> WHEREAS multiculturalism describes the diverse racial and cultural composition of Alberta society and its importance is recognized in Alberta as a fundamental principle and a matter of public policy;
>
> WHEREAS it is recognized in Alberta as a fundamental principle and as a matter of public policy that all Albertans should share in an awareness and appreciation of the diverse racial and cultural composition of society and that the richness of life in Alberta is enhanced by sharing that diversity;
>
> WHEREAS it is fitting that these principles be affirmed by the Legislature of Alberta in an enactment whereby those equality rights and that diversity may be protected; ...

13. Secondly, where competing *Charter* rights are at issue, a hierarchical approach, which places one right above another is to be avoided. When protected rights come into conflict, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.

- *R. v. Mills* (1999), 180 D.L.R (4^{th}) 1 at 19, para. 17, at 39, para. 61 (S.C.C.) (**TAB 14**).

- *Dagenais v. Canadian Broadcasting Corp.* (1994), 120 D.L.R. (4^{th}) 12 at 37 (S.C.C.) (**TAB 15**).

B. Section 2 of the *HRCMA*

14. Section 2 of the *HRCMA* provides as follows (**TAB 2**):

> 2(1) No person shall publish, issue or display or cause to be published, issued or displayed before the public any statement, publication, notice, sign, symbol, emblem or other representation that
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> (a) indicates discrimination or an intention to discriminate against a person or a class of persons, or
>
> (b) is likely to expose a person or a class of persons to hatred or contempt
>
> because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status [or sexual orientation] of that person or class of persons.
>
> (2) Nothing in this section shall be deemed to interfere with the free expression of opinion on any subject.
>
> (3) Subsection (1) does not apply to:
>
> (a) the display of a notice, sign, symbol, emblem or other representation displayed to identify facilities customarily used by one gender,
>
> (b) the display or publication by or on behalf of an organization that
>
> (i) is composed exclusively or primarily of persons having the same political or religious beliefs, ancestry or place of origin, and
>
> (ii) is not operated for private profit,
>
> of a statement, publication, notice, sign, symbol, emblem or other representation indicating a purpose or membership qualification of the organization, or

(c) the display or publication of a form of application or an advertisement that may be used, circulated or published pursuant to section 8(2),

if the statement, publication, notice, sign, symbol, emblem or other representation is not derogatory, offensive or otherwise improper.

C. The Opinion of the Court of Queen's Bench

1. The Opinion of the Court should be considered as binding.

15. The Court of Queen's Bench provided its Opinion on five questions submitted by the Panel (**TAB 1**). The Opinion is a thorough and careful interpretation of aspects of s. 2 of the *HRCMA*, by a superior court, based on the questions referred by the Panel. LEAF submits that the Opinion of the Court is binding on the Panel.

16. The Panel in *Chow v. Mobil Oil*, February 17, 2000 (**TAB 16** at page 5), followed the Opinion of the Court which had been requested under s. 27 of the *HRCMA* (*Chow v. Mobil Oil* (1999), 72 Alta. L.R. (3d) 108 (Q.B.) (**TAB 17**). The Panel had sought the Court's Opinion on three interrelated matters:

(a) whether one can release a current or future complaint for an alleged past act of discrimination under the Act;

(b) whether the Human Rights and Citizenship Commission has jurisdiction to determine a complaint where a release has been executed, and to determine whether it is a valid and enforceable release; and

(c) whether the Commission has any remaining jurisdiction to determine any other issue, if the release is valid and enforceable.

17. The questions arising from Ms. Chow's complaint stemmed from the fact that a settlement and apparent general release had been executed by Ms. Chow at the time of her separation from employment with Mobil. Ms. Chow thereafter filed a complaint under the *HRCMA* concerning allegations of discrimination which arose during the period of her employment with Mobil.

18. The Court gave its Opinion that the answers to these questions are (a) "yes"; (b) "yes" (qualified); and (c) "no" (at page 112, para. 2, and at page 139).

19. After the Opinion of the Court was issued, the complaint went to hearing before a Panel. The Panel stated the applicable principle from the Opinion of the Court, recognizing its authoritative nature. However, it then noted that at the hearing, the respondent, Mobil, took the position that it did not wish to rely on the release executed by Chow. The Panel therefore proceeded to the merits of the complaint without first deciding on the validity of the release (**TAB 16**, page 5).

20. There are sound policy reasons for considering an Opinion of the Court under s. 27 of the *HRCMA* as binding. The policy reasons for consideration of an Opinion as binding are analogous to the policy reasons underlying the principle of *res judicata*. The principle of *res judicata* provides that a court shall not try any suit or issue in which the matter has been directly and substantially dealt with in a former suit between the same parties. The principle is grounded on two principles of public policy: first, that the state has an interest that there should be an end to litigation; and secondly, that no individual should be sued more than once for the same cause.

    – J. Sopinka, S.N. Lederman, A. W. Bryant, *The law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at 1068 – 1069 (**TAB 18**).

21. Here, there are similar public policy reasons for consideration of the Opinion as binding. The Panel has sought the thorough and authoritative Opinion of the Court on complex questions of law. There is a public policy interest in efficiency and finality. It would be wasteful of judicial resources and would give rise to uncertainty in the law for the same questions of law to be re-opened at the Panel hearing. The parties should not be subject to relitigating before the Panel the questions of law put to the Court.

22. The purpose of s. 27 of the *HRCMA* is for the Court to provide clarity and direction to a Panel, when the Court's Opinion has been sought. This purpose would be

completely undermined, and the s. 27 process would be rendered superfluous, if the Opinion of the Court were not considered binding on the Panel.

2. Summary of the Opinion of the Court

23. Five questions were stated by way of special case application to the Court:

> **Question 1**
> Is the fact that an individual holds either a position on the Board of Directors or as an officer of an entity that is alleged to have breached section 2(1) of the Act sufficient reason to name that individual as a respondent to the complaint? If it is sufficient reason to name the individual, would any finding of liability be based on the individual having "caused" the offending materials to be published, issued or displayed?
>
> **Question 2**
> Is it necessary for a statement, publication, notice, sign, symbol, emblem or other representation to be phrased, designed or structured in any particular way in order to constitute an "opinion" within the meaning of section 2(2) of the Act?
>
> **Question 3**
> Can a breach of section 2(1) of the Act be found in the face of a defence based on section 2(2) of the Act? That is, does section 2(2) of the Act bar the Panel from finding a breach of section 2(1) of the Act when the alleged wrongdoer can establish that he/she is freely expressing his/her opinion?
>
> **Question 4**
> If section 2(2) of the Act is not a bar to finding a breach of section 2(1) of the Act, can section 2(2) be used after a finding of breach of section 2(1) in order to justify that breach?
>
> **Question 5**
> What standard must the Panel apply to determine whether a representation "is likely to expose a person or a class of person to hatred or contempt"? Are different considerations applied to questions of "contempt" as opposed to questions of "hatred"?

a. **Question 1: Is the fact that an individual holds either a position on the Board of Directors or as an officer of an entity that is alleged to have breached section 2(1) of the Act sufficient reason to name that individual as a respondent to the complaint? If it is sufficient reason to name the individual, would any finding of**

liability be based on the individual having "caused" the offending materials to be published, issued or displayed?

24. The Court's answer to this question was (**TAB 1**, para. 39):

> An individual who is a director or officer of an entity that is alleged to have breached s. 2(1) may be named as a respondent where there is *prima facie* evidence on the face of the complaint, or upon investigation, which demonstrates that he or she is causally connected, directly or indirectly, to the publication, issuance, or display, of the allegedly prohibited material. In so doing the term "cause" should be given a broad definition. It is a question of fact in each case.

b. **Question 2: Is it necessary for a statement, publication, notice, sign, symbol, emblem or other representation to be phrased, designed or structured in any particular way in order to constitute an "opinion" within the meaning of section 2(2) of the Act?**

25. The Court's Opinion on this question was (**TAB 1**, para. 48):

> It is not necessary for a statement, publication, notice, sign, symbol, or other representation to be phrased, designed or structured in any particular way in order to constitute an opinion. It is the content of the message in the context of which it is both made and received which is determinative of whether a representation is an opinion. Again, it is a question of fact in each case.

c. **Question 3: Can a breach of section 2(1) of the Act be found in the face of a defence based on section 2(2) of the Act? That is, does section 2(2) of the Act bar the Panel from finding a breach of section 2(1) of the Act when the alleged wrongdoer can establish that he/she is freely expressing his/her opinion?**

Question 4: If section 2(2) of the Act is not a bar to finding a breach of section 2(1) of the Act, can section 2(2) be used after a finding of breach of section 2(1) in order to justify that breach?

26. The Court dealt with Question 3 and Question 4 together. The Court noted (para. 104) that Questions 3 and 4 related to the interplay between s. 2(1) and s. 2(2). In its thorough analysis, the Court's view was that:

- Section 2(2) is neither a defence to or a justification for a breach of s. 2(1) (paras. 66, 97).

- The harm caused by discriminatory and hate/contempt-based expression is well recognized (para. 67).
- "Opinion" is not excluded from the reach of s. 2(1) by virtue of s. 2(2). Excluding opinions from the reach of s. 2(1) would go a long way in defeating the purpose of the legislation (paras. 67 – 70).
- Section 2(2) is an admonition to balance the competing objectives of freedom of expression and the eradication of discrimination (paras. 73, 97).
- Balancing of the competing interests should occur as a second step, after a finding of *prima facie* contravention of s. 2(1) (paras. 77; 97).
- The two-step process does not mean that freedom of expression will be given any greater consideration than any of the other *Charter* rights that come into play (para. 81).
- In almost all cases, where the second-step balancing is undertaken in relation to a complaint under s. 2(1)(b), it will lead to a finding that the two interests have already been balanced as a result of the proper application of the terms "hatred" and "contempt" (paras. 81, 97).
- An application of the *Oakes* test will only be necessary where the constitutionality of the legislation is at issue (para. 84).
- What is required to properly balance the two competing interests is (para. 85):

  > ... an examination of the nature of the statement in a full, contextual manner which recognizes the objectives and goals of the legislation and is Charter sensitive. It will also be necessary for the Panel to apply other principles enunciated by the Supreme Court of Canada in relation to s. 2(b). In particular it is essential that the Panel consider the nature and the context of the expression and the degree of protection which this type of expression is afforded (Keegstra at 766; and Taylor at 922). The Panel should also give full recognition to the other provisions of the Charter which may come into play. These may include s. 15 (equality rights); s. 25 (aboriginal rights); s. 27 (multicultural rights); s. 28 (sexual equality); and s. 2(a) (freedom of religion).
- The true defences and justifications available to a complaint of contravention of s. 2(1) are set out at s. 2(3) and s. 11.1.
- In every case, including those in which members of the media are named as respondents, it will be incumbent upon the Panel to look carefully at all of the

circumstances. In those cases where the media are named as a respondent, the Panel's consideration will include factors such as:

- tone of the article;
- whether both or only one side of an event was reported;
- whether there was any editorial or commentary surrounding the statement, and, if so, whether it was disapproving or supportive.

The Court noted the list was not exhaustive (para. 94).

27. The Court's Opinion was (para. 97):

> Section 2(2) is an admonition to balance freedom of expression and the eradication of discrimination in the consideration of a complaint under s. 2 of the Act. That section is neither a defence nor a justification for a breach of s. 2(1). Justifications and defences to a breach of s. 2(1) are found in s. 2(3) and s. 11.1 of the Act. Balancing the eradication of discrimination and freedom of expression will occur indirectly in the consideration of a complaint under s. 2(1)(b). In relation to both s. 2(1)(a) and s. 2(1)(b) a direct balancing of these interests will occur after a *prima facie* breach of either of those sections is found.

d. Question 5: What standard must the Panel apply to determine whether a representation "is likely to expose a person or a class of person to hatred or contempt"? Are different considerations applied to questions of "contempt" as opposed to questions of "hatred"?

28. The Court noted (at para. 104) that Question 5 involved an analysis of how s. 2(1)(b) ought to be applied.

(i) "Hatred" and "Contempt"

29. The Court began its analysis of Question 5 with a consideration of the terms "hatred" and "contempt" (para. 105). The Court noted that the definitions of the terms in *Nealy v. Johnston* (1989), 10 C.H.R.R. D/6450 at D/6469 (C.H.R.T.) (**TAB 19**) were approved by the Supreme Court of Canada in *Taylor* (page 927 in the S.C.R., page 600 in the D.L.R., **TAB 5**):

> In defining "hatred" the Tribunal [in *Taylor*] applied the definition in the Oxford English Dictionary (1971 ed.) which reads:

> active dislike, detestation, enmity, ill-will, malevolence.
>
> The Tribunal drew on the same source for their definition of contempt [at p. 28]. It was characterized as
>
> > the condition of being condemned or despised; dishonour or disgrace.
>
> As there is no definition of "hatred" or "contempt" within the [Canadian Human Rights Act] it is necessary to rely on what might be described as common understandings of the meaning of these terms. Clearly these are terms which have a potentially emotive content and how they are related to particular factual contexts by different individuals will vary. There is nevertheless an important core of meaning in both, which the dictionary definitions capture. With "hatred" the focus is a set of emotions and feelings which involve extreme ill will towards another person or group of persons. To say that one "hates" another means in effect that one finds no redeeming qualities in the latter. It is a term, however, which does not necessarily involve the mental process of "looking down" on another or others. It is quite possible to "hate" someone who one feels is superior to one in intelligence, wealth or power. None of the synonyms used in the dictionary definition for "hatred" give any clues to the motivation for the ill will. "Contempt" is by contrast a term which suggests a mental process of "looking down" upon or treating as inferior the object of one's feelings. This is captured by the dictionary definition relied on in Taylor. . . in the use of the terms "despised", "dishonour" or "disgrace". Although the person can be "hated" (i.e. actively disliked) and treated with "contempt" (i.e. looked down upon), the terms are not fully coextensive, because "hatred" is in some instances the product of envy of superior qualities, which "contempt" by definition cannot be. (Emphasis in original.)

30. The Court concluded (para. 107) that the definitions of "hatred" and "contempt," as used in human rights legislation, have been settled. The Court also concluded that since the meanings of the terms are different, it will be necessary to apply different considerations to a determination of whether "hatred" or "contempt" has been established for the purposes of s. 2(1).

(ii) **"Likely to expose"**

The focus should be on the impact on the target group.

31. The Court reviewed the prior decisions considering the terms "likely to expose" (**TAB 1**, paras. 108 - 115). The Court noted (para. 108), as had the Tribunal in

Canadian Jewish Congress v. North Shore Free Press Ltd. (1997), 30 C.H.R.R. D/5, at D/26, para. 124 (B.C.H.R.T.) ("*CJC*") (**TAB 20**), that the meaning of "likely to expose" was not discussed explicitly by either the majority or the minority of the Court in *Taylor* (**TAB 5**). The Tribunal in *Nealy* discussed the meaning of "expose" and quoted with approval from the Tribunal decision in *Taylor* (quoted at para. 109 of the Opinion of the Court). The Tribunal in *Nealy* went on to consider the phrase "likely to expose" a person or persons to hatred or contempt and stated, at D/6470 (quoted at para. 110 of the Opinion):

> We note, as the excerpt suggests, that there is no need for the complainants to prove an active effort or intent on the part of the respondents to produce the adverse consequences contemplated by the section. Moreover, the use of the wording "likely to expose a person or persons to hatred or contempt" means that it is not necessary that evidence be adduced that any particular individual or group took the messages seriously and in fact directed hatred or contempt against another or others, still less that anyone has in fact been victimized in this way. It is enough to prove that the matter in the messages is more likely than not to spark a positive reaction amongst some of the listeners to it which will likely in turn manifest itself in "hatred" or "contempt" towards the target of the messages.

32. The Court went on to note (para. 111) that *Nealy* applied a standard of the "gullible or malevolent listener" to the potential impact of the communications, and that the Panel in *CJC* rejected that standard (in light of the broader reach of the British Columbia legislation, as compared to the reference of s. 13 of the *Canadian Human Rights Act* to repeated telephonic communication). The *CJC* Panel also found that a "reasonable person" standard would be too onerous. The Court observed (at para. 113) that the Panel in *CJC* recast the issue, concluding that the issue was not about persuading a recipient to feel hatred or contempt, but about whether the effect of the communication was to increase the likelihood that members of a target group will be exposed to hatred or contempt.

33. The Court agreed (para. 115) with the Tribunal in *CJC* that the test is not whether the communication is likely to persuade a recipient to feel hatred or contempt, but rather the impact of the message on the target group. However, the Court disagreed (para.

115) with the Tribunal in *CJC* that the issue turns on whether the message is "likely to increase the risk of exposure." The Court stated (**TAB 1**, para. 115):

> Accordingly, the inquiry ought to be whether it is more likely than not that the members of the target group will be exposed to hatred or contempt because the message makes it more acceptable for recipients to act on their feelings of hatred and contempt. This assessment would be made on a reasonable person standard. Thus a communication will be "likely to expose" a person or group to hatred or contempt where it can be demonstrated that the reasonable listener would believe that the communication would make it more likely than not that the target group would be so exposed.

Tests should not be applied rigidly.

34. The Court noted (**TAB 1**, para. 116) that in addition to the definitions which have developed, tests have emerged to aid in the determination of whether a message is likely to expose a person or class of persons to hatred or contempt. The Court agreed (at paras. 120, 124) with the Tribunal in *Abrams v. North Shore Free Press Ltd.*, [1999] B.C.H.R.T. No. 5 (QL) (**TAB 21**) that the tests developed in the jurisprudence must not be applied rigidly and that context plays a significant role in the entire consideration of whether there has been a breach of legislation.

35. The Court adapted the test set out in *Abrams* to reflect the requirements of the *HRCMA* and suggested the following as assisting in the determination (at para. 125):

> Does the communication itself express hatred or contempt of a person or group on a basis of one or more of the listed grounds? Would a reasonable person, informed about the context, understand the message as expressing hatred or contempt?
>
> Assessed in its context, is the likely effect of the communication to make it more acceptable to others to manifest hatred or contempt against the person our group concerned? Would a reasonable person consider it more likely than not to expose members of the target group to hatred and contempt?

The full context of each case must be considered.

36. The Court noted (para. 129) that the full context of each case will have to be considered to determine whether s. 2(1)(b) of the *HRCMA* has been contravened. The

Court provided a list of suggested factors for guidance, but noted that the list was not exhaustive. The factors include:

(i) content of the communication;

(ii) tone of the communication;

(iii) the image conveyed, including whether the use of quotations or reference sources gives the message more credibility;

(iv) vulnerability of the target group;

(v) the degree to which the expression reinforces existing stereotypes;

(vi) the circumstances surrounding the message, including whether the messages appeal to well publicized issues;

(vii) the medium used to convey the message;

(viii) circulation of the publication;

(ix) credibility to be accorded to the communication;

(x) the context of the publication, for example, whether it is part of a debate or whether it is presented as news or as a purportedly authoritative analysis.

(iii) Opinion summary on s. 2(1)(b)

37. The Court stated its Opinion in summary on interpretation of s. 2(1)(b) at para. 130:

> The definitions of "contempt" and "hatred", for the purposes of human rights legislation, have been settled by a majority of the Supreme Court of Canada in *Taylor*. Those definitions dictate that different considerations apply to each of those terms. The definition of "likely to expose" should focus on the impact of the communication on the target group, specifically, whether the communication makes it more likely than not that the target group will be exposed to hatred and contempt. Any test applied to determine whether a representation "is likely to expose a person or class of persons to hatred or contempt" must be highly contextual and responsive to the legislation. Further such a test should be viewed as an analytical framework rather than as a template. In applying such a framework the Panel should draw from the various factors and consideration used in other cases, including, but not limited to:

- the message - Content, tone, images conveyed, reinforcement of stereotypes, surround circumstances;

- the medium - Credibility, circulation, context of the publication; and

- the audience - Vulnerability of the target group.

3. Submission flowing from the Opinion of the Court

38. The Court stated in its Opinion (at para. 85):

> ... It will also be necessary for the Panel to apply other principles enunciated by the Supreme Court of Canada in relation to s. 2(b). In particular it is essential that the Panel consider the nature and the context of the expression and the degree of protection which this type of expression is afforded (Keegstra at 766; and Taylor at 922). The Panel should also give full recognition to the other provisions of the Charter which may come into play. These may include s. 15 (equality rights); s. 25 (aboriginal rights); s. 27 (multicultural rights); s. 28 (sexual equality); and s. 2(a) (freedom of religion).

39. LEAF submits the following in furtherance of the Opinion of the Court, as an explanation or amplification of this statement made in the Court Opinion.

40. The reference of the Court to *Keegstra* (at page 766 in the S.C.R., as referred to by Justice Rooke; page 249 in the D.L.R., **TAB 4**) includes the following statements by Dickson, C.J.C.:

> ... As I have said already, I am of the opinion that hate propaganda contributes little to the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged. While I cannot conclude that hate propaganda deserves only marginal protection under the s. 1 analysis, I can take cognizance of the fact that limitations upon hate propaganda are directed at a special category of expression which strays some distance from the spirit of s. 2(b), and hence conclude that "restrictions on expression of this kind might be easier to justify than other infringements of s. 2(b)" (*Royal College*, supra, at p. 247).

41. The Supreme Court's decision in *Taylor* (at page 922 in the S.C.R., as referred to by Justice Rooke; page 596 in the D.L.R., **TAB 5**) adopted the above statement from *Keegstra*.

42. The Supreme Court has articulated the core values which underlie freedom of expression: pursuit of truth, participation in social and political decision-making, and individual self-fulfillment.

- *R. v. Keegstra*, **TAB 4**, at 219, 246 - 247.

- *R. v. Butler* (1992), 89 D.L.R. (4th) 449 at 481, para. "e" (**TAB 22**).

- *R. v. Sharpe* (2001), 194 D.L.R. (4th) 1 at 22, para. 23 (S.C.C.) (**TAB 23**).

43. In *R. v. Keegstra*, **TAB 4** at 244, Dickson C.J.C. noted that not all expression is equally crucial to the principles at the core of s. 2(b) of the *Charter*:

> In my opinion, however, the s. 1 analysis of a limit upon s. 2(b) cannot ignore the nature of the expressive activity which the state seeks to restrict. While we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s. 2(b).

- See also *Taylor*, **TAB 5** at 596; *Butler*, **TAB 22**, at 482, para "b"; *Sharpe*, **TAB 23**, at 24, paras. 27 – 28 on the attenuation of constitutional worth of some expression.

44. Expression which is <u>not</u> linked to the core values of expression is given less weight in the balancing of interests. Further, expression that is related only to the value of self-fulfillment may be given less weight than expression that lies closer to the core of the guarantee (such as political expression).

- *R. v. Sharpe*, **TAB 23**, at para. 23.

- *R. v. Butler*, **TAB 22**, at page 482, para. "b," and page 488, para. "a."

III. CONCLUSION

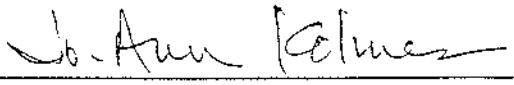
45. LEAF respectfully submits that the Opinion of the Court is binding on the Panel. The Court's answers to the five questions give the Panel authoritative guidance on the interpretation and application of s. 2 of the *HRCMA*. Any contrary submissions should be rejected.

46. In furtherance or amplification of the Court's Opinion, LEAF notes that the Supreme Court of Canada has provided guidance on how to analyze the nature and context of expression, and the degree of protection to be afforded depending on that nature and

context. There are a number of decisions from the Supreme Court that will assist the Panel in properly balancing the competing equality and expression interests in a full, contextual manner that recognizes the goals of the legislation and is *Charter* sensitive.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10TH DAY OF DECEMBER, 2001.

CHIVERS GRECKOL & KANEE



JO-ANN R. KOLMES
Solicitors for the Intervenor
Women's Legal Education and Action Fund ("LEAF")

LIST OF AUTHORITIES

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1	*Re Kane*, [2001] A.J. No. 915 (Q.B.) (QL)
2	*Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7, as am.
3	*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, excerpts
4	*R. v. Keegstra* (1990), 77 Alta. L.R. (2d) 193 (S.C.C.)
5	*Canada (Canadian Human Rights Commission) v. Taylor* (1990), 75 D.L.R. (4th) 577 (S.C.C.)
6	British Columbia Human Rights Commission, "A Call for Action: Combatting Hate in British Columbia," November 16, 1999
7	*Saskatchewan Human Rights Commission v. The Engineering Students' Society* (1984), 5 C.H.R.R. D/2074, appeal allowed on other grounds, (1986), 7 C.H.R.R. D/3443 (Sask. Q.B.), aff'd (1989), 56 D.L.R. (4th) 604 (Sask. C.A.), leave to appeal to S.C.C. refused June 8, 1989, 57 D.L.R. (4th) viii
8	M. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," (1989), 87 Michigan L. Rev. 2320, also published in M. Matsuda, C. Lawrence III, R. Delgado and K. Crenshaw, *Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Boulder: Westview Press, 1993), excerpts
9	*Association of Black Social Workers v. Arts Plus* (1994), 24 C.H.R.R. D/513 (N.S. Bd. of Inq.)
10	*Rasheed v. Bramhill* (1980), 2 C.H.R.R. D/249 (N.S., Bd. of Inq.)

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