Court File No: 26858

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)
BETWEEN:

LITTLE SISTERS BOOK AND ART EMPORIUM

B.C. CIVIL LIBERTIES ASSOCIATION

JAMES EATON DEVA AND GUY ALLEN BRUCE SMYTHE

Appellants

(Plaintiffs)

and

MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA

MINISTER OF NATIONAL REVENUE

ATTORNEY GENERAL OF BRITISH COLUMBIA

Respondents

(Defendants)

APPELLANT'S FACTUM

PART I - STATEMENT OF FACTS

1. The principal business of the Appellant, Little Sisters Book and Art Emporium ("Little Sisters") is the sale of books and magazines most of which are written by and for gay men and lesbians. Most of the books and magazines sold by Little Sisters are published in the United States and imported into Canada by Little Sisters. The Appellant, British Columbia Civil Liberties Association has demonstrated a longstanding, genuine and continuing concern for the rights of disadvantaged groups or individuals in Canada and has likewise opposed censorship of allegedly obscene books and magazines.
Amended Statement of Claim, paras. 6, 7 & 2. Appellants' Record ("AR") Vol. I, pp. 37, 36.

2. From about 1985 and from time to time to the trial, hundreds of books and magazines that Little Sisters has purchased and sought to import into Canada have been detained, prohibited and/or destroyed by customs officials pursuant to the Customs Legislation on the grounds that the books and magazines were "obscene".
   Amended Statement of Claim, para. 8. AR Vol. I, pp. 37-38.
3. This case concerns the constitutionality of Tariff Code 9956(a) of Schedule VII (now Tariff Item 9899.00.00) and s. 114 of the *Customs Tariff*, S.C. 1987, c. 49 and ss. 58 and 71 of the *Customs Act*, S.C. 1986, c. 1 (together the "Customs Legislation"). Section 114 of the *Customs Tariff* prohibits the importation of "any goods enumerated or referred to in Schedule VII" of that statute. Schedule VII lists classes of prohibited goods and assigns each class a code number. Code 9956 deals with obscene, hateful, treasonable, and seditious goods. Code 9956 (a) prohibits the importation of goods described as: "Books, printed paper, drawings, paintings, prints, photographs or representation of any kind that:
   (a) are deemed to be obscene under subsection 163(8) of the Criminal Code."
4. The Customs Legislation in effect at the time of the trial provided for a series of steps for review of the determinations of customs officers. Pursuant to s. 60 of the Act the importer may request to have the classification of prohibited goods re-determined within 90 days of the initial determination. Section 63 provided a right to a further re-determination by the Deputy Minister of National Revenue for Customs and Excise. Section 67 granted a right of appeal from the Deputy Minister's re-determination. These provisions apply equally to books and "any live species of the mongoose family ... oleomargarine ... and second hand mattresses." With respect to prohibited goods classified under tariff code 9956, pursuant to s. 71 an appeal lies to the superior court of the relevant province.
5. In his Reasons for Judgment dated January 19, 1996, Smith J. characterized the administration of the Customs Legislation as gravely systemically flawed. He made, *inter alia*, the following findings:

   a. Grave systemic problems exist in Canada Customs administration.
   Reasons for Judgment, Smith, J., Supreme Court of British Columbia, January 19, 1996 (hereinafter "Reasons for Judgment, BCSC") paras. 100, 250, 259, 263, 181. AR Vol. I, pp. 119-120, 188, 191, 192, 154-155.

   b. Customs administration results in arbitrary consequences; procedures are haphazardly applied; and on occasion, no principled decisions are made.
   Reasons for Judgment, BCSC, paras. 105, 111. AR Vol. I, pp. 122, 124.

   c. Often, decisions are not made within the statutorily-prescribed time limits; a great many of the classifications are qualitatively questionable.
   Reasons for Judgment, BCSC, paras. 112, 113, 115. AR Vol. I, p. 125-126.

   d. Classifying officers have insufficient training and experience to make decisions on obscenity. They are not provided with time to make such decisions. Unjustifiable results are caused in large part by the inability of customs officers to deal with such a large volume of materials in the short time they have available.

Reasons for Judgment, BCSC, paras. 114, 116, 253, 258. AR Vol. I, p. 125, 126, 188-189, 191.

e. There is no formal procedure for placing evidence of artistic or literary merit before the classifying officers.
Reasons for Judgment, BCSC, para. 116, 253. AR Vol. I, p. 126, 188-189.

f.Many publications are prohibited entry into Canada that would likely not be found to be obscene if full evidence were considered by officers properly trained to weigh and evaluate that evidence. Much homosexual erotica that has been prohibited as obscene is not, in fact, obscene. A disturbing amount of homosexual art and literature that is arguably not obscene has been prohibited.
Reasons for Judgment, BCSC, paras. 253, 116, 233, 252. AR Vol. I, p. 188-189, 126, 175, 188.

g. It is not reasonable to expect Customs Inspectors to be able to adequately make a subjective assessment of whether, in the context of the whole work, the exploitation of sex is "undue" and further, whether the exploitation of sex is overcome by an artistic, literary, or other similar purpose in conjunction with their other duties.
Reasons for Judgment, BCSC, para. 254. AR Vol. I, p. 189.

h. It is apparent that wrong decisions under code 9956(a) are inevitable and that non-obscene material is inevitably prohibited.
Reasons for Judgment, BCSC, para. 255. AR Vol. I, p. 189-190.

i. In a system that relies on inspection and detection of illegal importations at the border, it is essential that the importer be afforded an opportunity to place relevant evidence before the classifying officer to facilitate an informed decision. There is presently no formal procedure in place for achieving that.
Reasons for Judgment, BCSC, paras. 253, 259. AR Vol. I, p. 188-189, 191.

j. There is no provision in the customs procedures for creating an adequate record that would give substance to the right of appeal under s. 67.
Reasons for Judgment, BCSC, para. 260. AR Vol. I, p. 191-192.

k. The ubiquitous customs forms are difficult to understand, a fact that was conceded even by representatives of Canada Customs. There is merit to the complaints of the plaintiffs and others that they do not pursue re-determinations because they are not clearly apprised of their rights and the procedures available to them.
Reasons for Judgment, BCSC, para. 261. AR Vol. I, p. 192.

l. Canada Customs has made high rates of error with respect to prohibitions of material destined for Little Sisters. Such high rates of error indicate more than mere differences of opinion and suggest systemic causes.
Reasons for Judgment, BCSC, para. 100. AR Vol. I, p. 119-120.

6. Customs officers rely on an internal memorandum, Memorandum D9-1-1, in classifying goods under Tariff Code 9956. They could not possibly perform that task without the aid of Memorandum D9-1-1. Despite legal authority and legal advice from the Department of Justice in 1992 that material describing or depicting anal penetration was not obscene, *per se*, the Memorandum was not amended to reflect this until September 24, 1994, just days before the trial began.
   Reasons for Judgment, BCSC, paras. 66-67, 156, 264-268. AR Vol. I, pp. 103-104, 144, 193-194.
   Exhibit 225, ASR, Tab 1, p. 1848.
7. The trial Judge recognized that the effects of the unconstitutional enforcement of Tariff Code 9956(a) are felt by others such as distributors of material, other gay and lesbian and non-traditional bookstores, their customers, artists and writers, and all readers and viewers.
   Reasons for Judgment, BCSC, paras. 101, 102, 103, 104, 105, 106, 110, 111, 272 & 273. AR Vol. I, pp. 120, 121, 122, 124, 196.
   Testimony of Prof. T. Waugh, p. 276, l. 20 to p. 278, l. 23; p. 286, l. 41 to p. 287, l. 31. AR Vol. III, Tab 1, pp. 307-311.
   Testimony of J.F. Moldenhauer, pp. 153-154. AR Vol. III, Tab 1, pp. 314-315.
8. The Supreme Court of British Columbia declared pursuant to section 24 of the *Charter of Rights and Freedoms ("Charter")* that the Customs Legislation has been construed and applied from time to time contrary to section 2(b) and section 15(1) of the *Charter*. That part of the judgment was not appealed by the federal government. The Plaintiffs, however appealed to the Court of Appeal the trial Judge's failure to invalidate the Customs Legislation or to read it down (to prevent the prohibition of the importation of books and/or homosexual material) or in the alternative to issue an injunction restraining Customs from applying the Custom Legislation permanently or until such time as the Court orders. The majority of the Court of Appeal dismissed the appeal holding that the impugned Legislation did not infringe section 15 and while it did infringe section 2(b) that infringement was justified pursuant to section 1 of the *Charter*.
   Order, Smith J., January 19, 1996. AR Vol. I, pp. 68-69
   Reasons for Judgment, BCSC, paras. 279 to 283. AR Vol. I, pp. 199-201.
   Order, Court of Appeal of British Columbia, June 24, 1998. AR Vol. II, pp. 202-203.
   Reasons for Judgment, Court of Appeal for British Columbia, June 24, 1998 (hereinafter "Reasons for Judgment, BCCA"), para. 121, 122 per Macfarlane, J.; para. 123-124, per Hall J. AR Vol. II, pp. 248, 249.
9. In the Court of Appeal for British Columbia Mr. Justice Finch dissented and held that the Customs Legislation (at least insofar as it applies to the importation of homosexual books, printed paper, drawings, paintings, prints, photographs or representations) is an unjustifiable infringement of the Plaintiffs' section 2(b) *Charter* rights and that the Crown failed to establish justification under section 1 of the breach. Having so held, Mr. Justice Finch found it was unnecessary for him to consider the arguments arising under section 15 of the *Charter*.

PART II - POINTS IN ISSUE

The Constitutional Questions posed by order of the Chief Justice are as follows:

10. Do ss. 58 and 71 of the *Customs Act,* R.S.C. 1985, c. 1 (2nd Supp.) and s. 114 and Code 9956(a) of Schedule VII of the *Customs Tariff*, S.C. 1985, c. 41 (3rd Supp.) (now s. 136(1) and tariff item 9899.00.00 of the List of Tariff Provisions set out in the schedule to the *Customs Tariff*, S.C. 1997, c. 36), in whole or in part, insofar as they authorize customs officials to detain and prohibit material deemed to be obscene, or in their application to either textual or gay and lesbian material or both, infringe section 2(b) of the *Canadian Charter of Rights and Freedoms*?
11. If the answer to question 1 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to section 1 of the *Canadian Charter of Rights and Freedoms*?
12. Do ss. 58 and 71 of the *Customs Act,* R.S.C. 1985, c. 1 (2nd Supp.) and s. 114 and Code 9956(a) of Schedule VII of the *Customs Tariff*, S.C. 1985, c. 41 (3rd Supp.) (now s. 136(1) and tariff item 9899.00.00 of the List of Tariff Provisions set out in the schedule to the *Customs Tariff*, S.C. 1997, c. 36), in whole or in part, in their application to gay and lesbian material, infringe section 15(1) of the *Canadian Charter of Rights and Freedoms*?
13. If the answer to question 3 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to section 1 of the *Canadian Charter of Rights and Freedoms*?

PART III - ARGUMENT

INTRODUCTION

14. At issue in this case is the constitutional validity of the impugned provisions of the Customs Legislation insofar as they require Customs officers to detain and prohibit the importation of books, magazines, drawings paintings, prints , photographs, film, videos, and representations of any kind when the material is "deemed to be obscene under subsection 163(8) of the Criminal Code," and then place the onus on the importer to pursue a series of "appeals" through the Customs bureaucracy and eventually to the courts.
15. The trial Judge and the majority of the Court of Appeal recognized that the Customs officers in their interpretation and application of the impugned Legislation improperly detained and prohibited non-obscene material but these Judges held that the remedy was a section 24 declaration of unconstitutional administration rather than a section 52 remedy striking or reading down the impugned provisions or an injunction. We begin these submissions in a somewhat unconventional fashion by discussing the question of remedy as that is, to a large extent, what this appeal concerns.

A. THE REMEDY

16. The Appellants' central submission is that at every stage of analysis the trial Judge and the majority of the Court of Appeal erred in law by failing to recognize, or at least give effect to, the nexus between the systemic unconstitutional behaviour of the Customs

bureaucracy and the Customs Legislation. This failure affected their appreciation of the nature and extent of the infringement of both the expression and equality rights, and the entire section 1 analysis. A section 52 remedy of invalidating the Legislation and not simply a section 24 remedy calling for administrative correction, is necessary to ensure the guarantees of a free and democratic society.

17. The Appellants recognize that it is often possible to draw a distinction between the law as written and the law as applied. In most instances that discrepancy is due simply to human error and fallibility and the errors are infrequent and isolated. The remedy is usually immediate and transparent. But where, as in the present case, the mal-administration is chronic, endemic and systemic it is error to fail to attribute that mal-administration to the Legislation, at least as one important contributing cause. It is also error not to provide a remedy that will ensure that the unconstitutional behaviour will be corrected. Whatever level of tolerance a court may have for maladministration of a law that concerns the classification of widgets, there ought to be no such tolerance when the maladministration concerns the expression right of Canadians.
Reasons for Judgment, BCSC, para. 281. AR Vol. I, p. 199.
18. The Court of Appeal's characterization of the evidence and the findings of the trial Judge is not fair or accurate. The Court of Appeal characterized the errors as occasional, (para 85); that there "were some difficulties in its administration" (para 91); "some non-obscene material" was prohibited (para 97); the negative effects on freedom of speech were "minimal" (para 235).
Reasons for Judgment, BCCA, paras. 85, 91, 97 per Macfarlane, JA. AR Vol. II, pp. 237, 239, 241.
Reasons for Judgment, BCSC, paras. 235, 279. AR Vol. I, pp. 182, 1999.
19. The view from the Court of Appeal was not the view of the Appellants or the trial Judge who sat through a two month trial. The trial Judge found as a fact is that "to attribute the errors demonstrated in this trial entirely to human fallibility would be to ignore the grave systemic problems in the Customs administration" (para 250); that "the high rates of error indicate more than mere differences of opinion and suggest systemic causes" (para 100); that "the result of these systemic shortcomings is that admissible materials destined for Little Sisters have been wrongly prohibited" (para 263).
Reasons for Judgment, BCSC, paras. 250, 100, 263, AR Vol. I, pp. 188, 119-120, 192.
20. Even the trial Judge's statement that "a large volume of obscene material is prohibited as a result of the administration of the impugned legislation" (para 238) is not supported by the record. With the exception of four films (Exhibits 187, 190, 190, 192) and two magazines (Exhibits 216 and 247) entered into evidence by the Respondents, Customs did not attempt to prove that even one book or video that it prohibited was obscene.
Reasons for Judgment, BCSC, para. 238, AR Vol. I, p. 183.
21. It is respectfully submitted that this Court must have some regard to the practical difficulties that face litigants in the position of the Appellants. They challenged the constitutional validity of the Custom regime by focussing on a 10 year period between December 1983 to August 1994 and called evidence from bookstore owners and other importers from across Canada and focussed on two main ports of entry, Vancouver and Fort Erie. The record created by this small bookstore and civil liberties association was impressive. In all 30 witnesses testified on behalf of the Plaintiffs, including 13 expert witnesses. 273 exhibits were tendered. The record of detentions and prohibitions before

the trial Judge covered 338 titles which were detained and/or prohibited when destined for Little Sisters, plus the record of detention and prohibition of hundreds of other titles destined for other Canadian importers. While it would be impossible, short of millions of dollars and years at trial to prove that every Customs decision was questionable or wrong surely that is not what is required. The Appellants proved "grave systemic problems in Canada Customs administration."

***infra*, paragraph 5a.**

see also: Bruce Ryder, "Undercover Censorship: Exploring the History of the Regulation of Publications in Canada", forthcoming in Klaus Petersen and Allan Hutchison, eds., *Interpreting Censorship in Canada*(Toronto: University of Toronto Press, 1999) ("Undercover Censorship")

22. The trial Judge was of the view that with the benefit of appropriate and consistent training and with the necessary time and the availability of relevant evidence, there is no reason why the customs officers should not be able to properly apply the Customs Legislation.

    Reasons for Judgment, BCSC, para 257. AR Vol. I, p. 190.

23. There is simply no basis in the record for the trial Judge's confidence in this regard. The passing reference to the witness Testa's comment (at para. 161) that "it is not beyond them to do so" is hardly a proper evidentiary basis, particularly since Testa was not opining and was not qualified to opine, on the customs inspectors ability to properly apply the law. Even if the situation can be **improved,** there is no basis in the evidence to conclude that application of the Legislation would result in the detention and prohibition of only obscene material or that the systemic abuses would cease. The evidence is all to the contrary.

    Reasons for Judgment, BCSC, para. 161. AR Vol. I, p. 145-146.

    Testimony of B. Testa, p. 592, l. 45 to p. 593, l. 5. AR Vol. III, Tab 2, pp. 314-315.

24. In fact the evidence revealed that supposedly highly trained and skilled persons (the most senior of customs officials and police officers) were incapable of making proper and principled decisions with respect to whether something was obscene - **see paragraphs 92 to 100 below.**

25. It is respectfully submitted that Finch J.A. was correct in holding that "if a law is not intelligible without an interpretive aid, such as Memorandum D9-1-1, or without 'appropriate and consistent training' it cannot be said to meet the constitutionally-mandated standard of precision" - particularly when such fundamental rights and freedoms are at stake.

    Reasons for Judgment, BCCA, para. 217. AR Vol. II, p. 289.

26. By granting only the declaration of unconstitutional administration rather than a section 52 remedy (or an injunction) the Court has put the Appellants in an impossible position. As noted above this is unlike a typical case where a Court might find that a board construed a statute in an unconstitutional way and where it would be obvious to everyone if the Board failed to comply with the Court's declarations. Here Customs may or may not change anything but simply lie low while the case proceeds through the courts. Hence, failing to administer the law on a temporary basis is hardly a constitutional remedy if that unconstitutional administration can recommence at any time. Alternatively, even if Customs purported to provide an extra few days of training or wipe its data base clean or issue a new Memorandum with new procedures to be followed it

will take years and many new expensive and lengthy lawsuits before anyone determines whether anything has changed in fact and as a matter of substance.
***Slaight Communications Inc. v. Davidson,* [1989] 1 S.C.R. 1038.**

27. The trial Judge's and majority of the Court of Appeal's sharp distinction between the law as an abstract construct and its administration and application fails to give effect to two important and related principles of constitutional interpretation. The first is that the effect of the impugned Legislation is as important an inquiry as is its purpose. The second is the requirement that Legislation be given a contextual interpretation.
28. The first proposition is borne out by this Court's decision in the analogous case of *R. v. Morgentaler*. This Court emphasized over and over the "practical operation", and the "actual workings" of the Legislation in determining its constitutionality. The Court struck down the statute itself under section 52 because the statutory provisions "produced," "caused," or "often causes," "contributed to," "in large measure created," was the "source of," could be "traced to," "was one part of," "results in," or "is at least indirectly the cause of" the unconstitutional delay experienced by women seeking a therapeutic abortion.
***R. v. Morgentaler,* [1988] 1 S.C.R. 30 at pp. 62, 65, 66, 70-71, 72, 75, 92, 97, 98-99, 100, 103.**
See also: *Re Information Retailers Association of Metropolitan Toronto Inc.* (1985), 52 O.R. 449 (Ont. C.A.) at 471-472.
***R. v. Strachan*, [1988] 2 S.C.R. 980 at 1005-6 re "pitfalls of causation" and "proximity analysis"**
29. The second and related proposition that the *Charter* and the impugned provisions must be given a contextual interpretation has been re-emphasized in this Court's recent decision of *Thomson Newspapers* holding that the analysis must be undertaken " with a close attention to context" amd "a close attention to detail and factual setting."

> In essence, context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a *Charter* right.
> ***Thomson Newspapers Co. v. Canada* (Attorney General), [1998] 1 S.C.R. 877 at 939.**

30. In this case the context is everything: the immutable context of this Legislation is that the Custom officers are as a matter of law required to interpret and apply more than 14,000 Codes and to monitor importations for compliance with 76 other statutes. The huge volumes of importations, whatever their precise number from year to year (in 1993-1994, almost 330 million goods involving 230,000 shipments were imported into Canada), is the virtually immutable context within which the law was intended and does operate. The context is that there are 4,000 customs officers across 240 ports in Canada authorized to detain and prohibit any book, magazine, photo, film or video that they deem to be obscene leaving the importer with the onus of having to challenge that determination through a bureaucratic maze of "appeals" if she disagrees with that determination.
Agreed Statement of Facts, Exhibit 1, para. 15. AR Vol. III, Tab 3, p. 319.
Testimony of J.F. Shearer, p. 981, ll. 27-34. AR Vol. III, Tab 3, p. 323.

Testimony of G.W. Morrison, p. 1745, ll. 12-21. AR Vol. III, Tab 3, p. 324.
Testimony of S.C. Slater, p. 1965, ll. 13-34. AR Vol. III, Tab 3, p. 325.

31. The context is also Legislation that that even Mr. Justice Hall said "does entail a species of prior restraint." Parliament has made customs officials the censors of what material that has been created abroad is or is not to be permitted (to be "published") in Canada, whether for personal use or for wider distribution.
Reasons for Judgment, BCCA, para. 128. AR Vol. II, p. pp. 250-251.

32. The dynamics of such regimes of prior restraint has been described by Professor Thomas Emerson, as follows:

> A system of prior restraint normally brings within the complex of government machinery a far greater amount of communication than a system of subsequent punishment. It subjects to government scrutiny and approval *all* expression in the area controlled--the innocent and borderline as well as the offensive, the routine as well as the unusual. The machinery is geared to universal inspection, not to scrutiny in particular cases which are the subject of complaint or otherwise come to the attention of prosecuting officials. The pall of government control is, thus, likely to hang more pervasively over the area of communication, and more issues are likely to be resolved against free expression.
>
> Professor Emerson also claimed that any system of prior restraint creates propensity for adverse decision making as there is little opportunity for public appraisal and criticism, increasing the chances of discrimination and other abuses.
> **T.I. Emerson, "*The Doctrine of Prior Restraint*" (1955) 20 Law and Contemporary Problems 648 at p. 656-7.**
> **See also:**
> **V. Blasi, "*Toward A Theory of Prior Restraint*" 66 Minn L.R. 1**
> **A. Alan Borovoy, *When Freedoms Collide: The Case for our Civil Liberties* (Toronto: Lester & Orpen Dennys Ltd.,1988), pp. 53-66, at p. 65**

33. Professor Ryder draws a comparison between such sheme of prior restraint and the prohibition of obscenity under the Criminal Code as follows:

> Precisely because criminal prosecution takes place in an open forum, where a defence is mounted, and serious public debate and interest in the targeted materials is generated, its potential excesses will frequently be constrained in a democratic society.
> **Ryder, Undercover Censorship, *supra*, at pp. 130-131**

34. The Appellants proved the truth of Emerson's hypothesis over a two month trial in which there were untold examples of over-censorship, inconsistent decision making, abuse of power and the application of arbitrary, unfair and irrational considerations in the course of determining which material was obscene and which was not.
Reasons for Judgment, BCSC, paras. 278-279 and 100, 105, 108, 111, 223, 250, 252, 261-268. AR Vol. I, pp. 198-199, 119-120, 122, 123, 124, 175, 188, 192-194.

35. Indeed the trial Judge recognized the significance of this immutable context when he said:

> When the scope of their duties is considered along with the volume of importations, it is apparent that **wrong decisions under code 9956(a) are inevitable** and that non-obscene material is **inevitably prohibited**." [emphasis added]
> **Reasons for Judgment, BCSC, para. 255. AR Vol. I, p. 189-190.**

36. The trial Judge however also said this:

> Further, the plaintiffs' submission that any system of prior restraint is inevitably over-inclusive because of a propensity of censors to censor is a generalization that is overcome by the fact that the decision-making discretion of customs officers here is constrained by law. **They may not prohibit material that is not obscene.** [emphasis added]
> **Reasons for Judgment, BCSC, para. 203. AR Vol. I, p.166;**
> **see also: Reasons for Judgment, BCSC, para. 182. AR, Vol. I, p. 155-156.**

37. This of course brings us full circle: once it is accepted that, notwithstanding the legislative direction to prohibit only the obscene, it is inevitable that Customs will ban much more that is not obscene then it is that legislative scheme that is constitutionally deficient.
38. In fact the trial Judge does eventually say that the detention and prohibition of non-obscene material is caused by the impugned Legislation. He says: "The deleterious effects of the legislation **as opposed to the effects of its administration and application**, are that admissible material is sometimes detained to be examined for compliance and that wrong decisions are sometimes made in the classification of materials." [Emphasis added] Presumably from the trial Judge's perspective there are even more wrong decisions made that are to be attributed to administration and application of the Legislation; while we dispute that this dichotomy is properly drawn, the point is that, at the end of the day, the trial Judge recognized that at least some of the unconstitutional effects were *tied to the Legislation.*
    Reasons for Judgment, BCSC, para. 234. AR Vol. I, p. 182.
39. Hence when it is appreciated that what is inevitably prohibited is non-obscene expression - expression that falls within the core of the expression guarantee - it is legal and constitutional error to fail to provide a remedy that will ensure that these unjustified infringements will not be repeated. The only just and appropriate remedy in the circumstances is to strike down or read down the Legislation and send the matter back to Parliament to consider whether a legislative scheme can be created which will ensure that only the obscene is caught. At the very minimum the remedy should have been the issuance of an injunction enjoining the administration of the impugned provisions until Customs can satisfy the Court that the systemic problems have been addressed and permanently resolved.

B. THE INFRINGEMENT OF THE EXPRESSION RIGHT

40. While the Respondent conceded that the impugned provisions infringed the expression right Finch JA. said it is "important not to allow that concession to mask the fundamental importance of freedom of expression." (para166) A full and proper understanding of the nature and extent of that infringement is important for every step of the section 1 analysis and culminates in the third branch of the *Oakes* test in the consideration of the proportionality of the deleterious effects and the salutary effects of the impugned provisions. It is important to begin our submissions with the deleterious effects of the impugned provisions on the expression right and then to tie these submissions back in when we arrive at the third branch of proportionality analysis.
Reasons for Judgment, BCCA, para. 166. AR Vol. II, p. 269.
41. The evidence was overwhelming and virtually uncontradicted that gay and lesbian sexual imagery and text, including that which has been prohibited entry, is vital to gay and lesbian identity, dignity, self worth, community formation, health, and education.

    (a)Professor Waugh testified:

    ... erotic materials in the gay community have not only functioned as erotica in the ordinary sense of the word, but as vehicles of education, of initiation, of community formation, of communication ...
    Testimony of Prof. T. Waugh, p. 279, ll. 2-32; p. 293, l. 28 to p. 294, l. 46. AR Vol. III, Tab 4, pp. 326-328, at p. 326, ll. 6-10.

    (b) Jane Rule said, with respect to Pat Califia's story, "Spelunking"

    It's also, I think, very healthy in the exploration of sex as a creative and exploring and a loving activity between women rather than a rigid exercise proving you're a real this or a real that or a real anything.
    Testimony of J. Rule, p. 687, l. 29 to p. 690, l. 23; p. 696, l. 43 to p. 697, l. 22. AR Vol. III, Tab 4, pp. 329-334 at p. 333, ll. 4-47.

    (c) With respect to why she emphasises sexual explicitness in her work, Pat Califia testified:

    Well, it's partly because I think that if you cannot find any fiction that describes people who are like you, people who have the kind of relationships you would like to have, people that have the kind of sexuality you would like to have, you begin to feel as if you're crazy. You don't exist. You're marginal, you're not important, and it's -- creates a great deal of self-hatred and self-doubt. It also creates, I think, a lot of repression and just human misery.
    Testimony of P. Califia, p. 458, l. 32 to p. 464, l. 1; p. 469, ll. 7-26. AR Vol. III, Tab 4, pp. 335-342 at p. 342, ll. 9-17.

    (d)Professor Kinsman opined:
    ...from the sociological and historical research I have done there is this important relationship between the emergence of gay networks in the community, the availability of this type of erotic material.

Testimony of Prof. G. Kinsman, p. 479, l. 10 to p. 481, l. 17; p. 502, ll. 9-29. AR Vol. III, Tab 4, pp. 343-346 at p. 346, ll. 25-29.

(e) And Professor Ross said:
I would say that lesbian made sexual materials validate lesbian sexuality as healthy, as meaningful and as empowering. They contribute to the positive formation of lesbians' consciousness, community and culture; they combat the historical legacy of invisibility and provide lesbian readers or viewers with an avenue for self-affirmation.
Testimony of Dr. B. Ross, pp. 611-612; p. 617, ll. 1-27. AR Vol. III, Tab 4, pp. 347-349, at p. 349, ll. 1-7.
see also:
Testimony of N. Ricci, p. 348, l. 18 to p. 350, l. 2; p. 355, ll. 1-15. AR Vol. III, Tab 4, pp. 350-353.
Testimony of P. Blackbridge, p. 254, l. 37 to p. 257, l. 18; p. 261, ll. 13-43. AR Vol. III, Tab 4, pp. 354-358.
Testimony of J. Deva, p. 31, l. 33 to p. 33, l. 2; p. 37, ll. 21-38; p. 76.13, l. 40 to p. 76.14, l. 17. AR Vol. III, Tab 4, pp. 359-465.
Testimony of J. Fuller, p. 864, l. 30 to p. 865, l. 15. AR Vol. III, Tab 4, pp. 366-367.
Testimony of S. Schulman, p. 651, l. 23 to p. 660, l. 19; p. 665, ll. 14-25; 666, ll. 1-30. AR Vol. III, Tab 4, pp. 368-379.
Testimony of J.F. Moldenhauer, p. 134, ll. 5-15; p. 135, ll. 4-17; p. 137, l. 39 to p. 138, l. 2. AR Vol. III, Tab 4, pp. 380-383.
Testimony of K. Mistysyn, p. 165, l. 23 to p. 166, l. 37. AR Vol. III, Tab 4, pp. 384-385. Exhibit 175, Tab 1, Expert Report of Chris Bearchell, p. 1, paras. 3 and 4. AR Vol. III, Tab 4, pp. 386-387
Exhibit 232, Expert Report of Bill Coleman, Ph.D., pp. 2-3. AR Vol. III, Tab 4, pp. 388-390.
Reasons for Judgment, BCSC, paras. 128, 229, 230. AR Vol. I, pp. 131, 179-181.

42. And yet the trial Judge found as fact that "much homosexual erotica that has been prohibited as obscene is not, in fact, obscene"; and that "a disturbing amount of homosexual art and literature that is arguably not obscene has been prohibited."
    Reasons for Judgment, BCSC, paras. 223 and 252. AR Vol. I, pp. 175, 188.
43. The effect of the Legislation is not limited to gay and lesbian art and literature. There are over 8500 prohibitions per year, a significant percentage of which involve books.
    Exhibit 1, Agreed Statement of Facts, paragraph 16. AR Vol. III, Tab 5, p. 394.
    Testimony of G. Morrison, p. 1732, ll. 34-39. AR Vol. III, Tab 5, p. 398.
    Testimony of S.C. Slater, p. 1964, ll.2 to 21. AR Vol. III, Tab 5, p. 399.
44. The detentions and prohibitions included children's books, scholarly books, works of artistic or cultural value, social commentary, satire, news and magazines and publications regarding safer sexual practises. A list of some such banned publications is attached as Appendix 'A'.
    See Appendix "A"

see also: Ryder, Undercover Censorship, *supra*, at pp. 131-137 for some high profile seizures by Customs in earlier years, including James Joyce's *Ulysses*.

45. Professor Vance explained that disputes respecting sexual representations are really disputes about sexual practices, behaviours, social order, family relations and gender relations. Serious ramifications thus flow from the prohibition of a single text or image on grounds of alleged obscenity.
Testimony of Prof. C. Vance, p. 770, l. 15 to p. 786, l. 21; p. 788, l. 45 to p. 789, l. 17; p. 792, l. 27 to p. 793, l. 22; p. 797, l. 41 to p. 798, l. 20. AR Vol. III, Tab 6, pp. 400-422.
See also:
Testimony of Prof. G. Kinsman, p. 491, l. 26 to p. 4912, l. 24. AR Vol. III, Tab 6, pp. 422-424.

46. The suggestion that pornography[(1)] or even obscenity is a "base form of expression" must also be reconsidered. As Cossman argues, obscenity cannot be base simply because it is directed at the pleasures of the body; and it is wrong for reasons that the trial Judge even recognized to suggest that obscenity is not related to the search for truth, individual self-fulfilment and political participation, the underlying rationale for the expression right.
***R. v. Butler,* [1992] 1 S.C.R. 452, 489-490.**
Brenda Cossman et al., *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision* (Toronto: University of Toronto Press, 1997) at 122-126. ("*Bad Attitude/s*")
Reasons for Judgment, BCSC, para. 223, AR Vol. I, p. 175.
***Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at 976.**

47. The evidence tendered by the Plaintiffs at trial, which is supported by academic writing, illustrate not only the harm of censorship but the value of pornography. This literature in turn challenges the proposition that there is any real difference between "erotica," "pornography" and "obscenity" or that there is some *a priori,* acontextual way of identifying "good pornography" and "bad pornography" as this Court suggested in *Butler*.
Opinion of JoAnn Loulan, Exhibit 175, Tab 3. AR Vol. III, Tab 7, pp. 425-426.
Opinion of Chris Bearchell, p. 956, l. 26-41; p. 957, ll. 1-45; and Exhibit 175, Tab 1. AR Vol. III, Tab 7, pp. 427-430.
Testimony of Prof. T. Waugh, p. 285, l. 29 to p. 286, l. 22; p. 292, l. 23 to p. 293, l. 4; p. 302, l. 36 to p. 304, l. 19. AR Vol. III, Tab 7, pp. 431-437.
Testimony of P. Califia, p. 467, ll. 10-23; p. 468, l. 30 to p. 469, l. 26. AR Vol. III, Tab 7, pp. 438-440.
Testimony of B. Testa, p. 569, ll. 7-33. AR Vol. III, Tab 7, p. 441.
Testimony of Prof. C. Vance, p. 801, l. 4 to p. 802, l. 32. AR Vol. III, Tab 7, pp. 442-443.
Testimony of L. Murphy, p. 1258, l. 35 to p. 1259, l. 12; p. 1269, l. 37 to p. 1273, l. 33. AR Vol. III, Tab 7, pp. 444-450.

see also:
Cossman et al., *Bad Attitude/s on Trial, supra,* at 7-8 and 122-126.
Nan D. Hunter and Sylvia A. Law, "Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al, in *American Booksellers Association v. Hudnut*, (1987/88), 21 University of Michigan Law Journal of Law Reform 69 at 119 and 220.

Jane Juffer, *At Home With Pornography: Women, Sex and Everyday Life* (New York: New York U. Press, 1998) at 123-130.
Lynda Nead. "From the Female Nude: Art, Obscenity and Sexuality." In *The Visual Culture Reader*, ed. Nicholas Mirzoeff. (London: Routledge, 1998) 485-494.
Camille Paglia, *Sexual Personae: Art and Decadence from Nefertiti to Emily Dickenson* (New Haven, Conn.: Yale University Press, 1994), pp. 1-39, at p. 24.
Wendy McElroy, *XXX: A Woman's Right to Pornography* (New York: St. Martin's Press, 1995) pp. v-xi; 41-53; 125-145, at 52.
Edward de Grazia, *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius* (New York: Random House, 1992) pp. 577-621; 622-688.
Dany Lacombe, *Blue Politics, Pornography and the Law in the Age of Feminism* (Univ. of Toronto Press, 1994) 155-162,
Elizabeth E. Childs, ed., *Suspended License: Censorship and the Visual Arts* (Seattle: University of Washington Press, 1997) 333-365.

48. The view of some radical feminists (led by U.S law professor Catherine Mackinnon and writer Andrea Dworkin and their followers) that pornography is always bad for women ("pornography is no less an act than the rape and torture it represents")[(2)] is a view that is consistently losing support among many, if not most, prominent feminists[(3)].
See e.g.
Testimony of P. Califia, p. 477, l. 43 to p. 478, l. 14. AR, Vol. III, Tab 8, pp. 451-452.
Testimony of Prof. C. Vance, pp. 808-818. AR Vol. III, Tab 8, pp. 453-463.
Testimony of Dr. B. Ross, p. 625, ll. 12-44; p. 630, ll. 1-34. AR Vol. III, Tab 8, pp. 464-465.
Testimony of P. Blackbridge, p. 261 l. 43 to p. 262, l. 15. AR Vol. III, Tab 8, pp. 466-467.
Exhibit 175, Tab 3, Report of J. Loulan, at p. 2. AR Vol. III, Tab 8, pp. 468-469.
In addition to the references at para 47, see:
Nadine Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Right"* (New York: Doubleday, 1995) 11-15 at 15. Professor Strossen identifies the many high profile feminist activists, artists, psychologists, scholars, writers from all walks of life who oppose censorship of pornography and develops a comprehensive and thoughtful exposition for her central thesis that the pro-censorship faction of feminism "poses a serious threat not only to human rights in general but also to women's rights in particular".
Wendy McElroy *XXX, supra* at 128-129. McElroy says: "*Pornography benefits women, both personally and politically."***
Robin West, *"The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory"* (1987) 3 Wisconsin Women's Law Journal, 81.
Thelma McCormack "Must We Censor Pornography? Civil Liberties and Feminist Jurisprudence" in *Freedom of Expression and the Charter*;
Sally Tisdale, *Talk Dirty To Me* (New York: Doubleday, 1994), Chapter 7, pp. 123-166, at pp. 157-159.
Marcia Pally, *Sex and Sensibility* (Hopewell, NJ: Ecco Press, 1994), Chapter 3, pp. 25-61.
Camille Paglia, *Vamps and Tramps* (1994, Vintage Press), pp. 63-67 and pp. 107-112.

J. Toobin, "X-Rated", *New Yorker*, October 3, 1994, pp. 70-78.
Lisa Duggan, Nan Hunter and Carole S. Vance, "False Promises: Feminists Anti-Pornography Legislation in the United States", *Women Against Censorship* (Vancouver: Douglas & McIntyre), edited by V. Burstyn, pp. 130-151. at 145.
Pat Califia, Public Sex: The Culture of Radical Sex (Pittsburgh, Pa.: Cleis Press Inc., 1994), pp. 107-112.
Cossman *et al.*, *Bad Attitude/s on Trial, supra*, at pp. 7-8.
Judith Butler, *Excitable Speech: A Politics of the Performative*. (New York: Routledge, 1997) at 82-86.

49. Professor Alexander Meiklejohn describes obscenity as having a "governing importance" and Professor Tribe, also recognizes its value:

> ...For in the last analysis, suppression of the obscene persists because it tells us something about ourselves that some of us, at least, would prefer not to know. It threatens to explode our uneasy accommodation between sexual impulse and social custom -- to destroy the carefully-spun social web holding sexuality in its place. One need not "sound the alarm of repression" in order to argue that the desire to preserve that web by shutting out the thoughts and impressions that challenge it cannot be squared with a constitutional commitment to openness of mind.
> **L.H. Tribe, *American Constitutional Law*, 2d. (Mineola, N.Y.: The Foundation Press Inc., 1988) pp. 904-1061 at p. 919.**
> **Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (New York: Harper & Brothers) pp. 8-28**
> **Alexander Meiklejohn, "The First Amendment is an Absolute" in Brown, *Alexander Meiklejohn: Teacher of Freedom* at 255.**

50. Professor Laura Kipnis elaborates on the "transgressive" character of pornography as follows:

> Pornography grabs us and doesn't let go. Whether you're revolted or enticed, shocked or titillated, these are flip sides of the same response: an intense, visceral engagement with what pornography has to say. And pornography has quite a lot to say. Pornography should interest us, because it's intensely and relentlessly *about* us. It involves the roots of our culture and the deepest corners of the self. It's not just friction and naked bodies: pornography has eloquence. It has meaning, it has ideas. It even has redeeming ideas. (at p. 161)
> **Laura Kipnis, *Bound and Gagged: Pornography and the Politics of Fantasy in America* (New York: Grove Press, 1996) at pp. 161-206, at 161, and see also 163 and 167.**

51. Even if the Court is not prepared to endorse the view that all pornography has value it should at least divorce itself from the radical feminist perspective that seemingly informed this Court's judgment in *Butler* resulting in rigid and acontextual categories of what is obscene. Most importantly once the Court accepts that it is the Customs Legislation -- and not merely the people who administer it -- that is causative of the

infringement of not only the obscene but the non-obscene, the section 1 analysis that must follow will necessarily be very different from the section 1 analysis conducted by the Court in *Butler*. The error of the trial Judge and majority of the Court of Appeal was in treating *Butler* as dispositive for the section 1 analysis -- and they did so by failing to find a legal nexus between the Legislation and the infringement of non-obscene material.

C. SECTION 1 - REASONABLE LIMIT "PRESCRIBED BY LAW"

52. Mr. Justice Finch considered the question on grounds of substance and principle, not form. If the "law" that the customs officers are to apply is one that they are not capable of interpreting and applying without extra legislative aids and more training then, particularly where there are fundamental rights at stake, the infringement of the expression right is not "prescribed by law".
Reasons for Judgment, BCCA, para. 222. AR Vol. II, p. 291.
53. The majority of the Court of Appeal agreed that the Memorandum was not law but were of the view that the Customs Legislation was not impermissibly vague "because some customs officers have difficulty in classifying material as obscene." However the finding of fact by the trial Judge is that the task of interpreting and applying the law "could not possibly be perform[ed] without the aid of Memorandum D9-1-1." All the evidence led at the trial supported that proposition. None of the customs officers who testified said that they could perform their task without the aid of the Memorandum 9-1-1.
Reasons for Judgment, BCCA, para. 62, per Macfarlane, JA. AR Vol. II, p. 230-231.
Reasons for Judgment, BCSC, para. 156. AR Vol. I, p. 144.
***Osborne v. Canada*, [1991] 2 S.C.R. 69 at 94.**
P.W. Hogg, *Constitutional Law of Canada*, *supra* at 35-11, 35-12.
Testimony of L. Murphy, p. 1225, ll. 5-11; p. 1303, ll. 35-38; p. 1301, l. 47 to p. 1304, l. 5; p. 1339, ll. 4-7. AR Vol. III, Tab 9, pp. 470-476.
Testimony of F. Lorito, p. 1518, ll. 5-9; p. 1524, ll. 24-41, p. 1536, ll. 11-17. AR Vol. III, Tab 9, pp. 477-479.
Testimony of G. Morrison, p. 1748, ll. 23-28. AR Vol. III, Tab 9, p. 480.
Testimony of C. Bird, p. 1611, ll. 1-7. AR Vol. III, Tab 9, p. 481.
Testimony of D.A. Bradt, p. 1687, ll. 35-44. AR Vol. III, Tab 9, p. 482.
see also:
Testimony of B. Testa, pp. 592-609. ASR, Tab 2, p. 1853-1870
Testimony of L. Weir, pp.676-686, 748 -751. ASR, Tab 2, p. 1871-1885.
Allan C. Hutchison, in *In Other Words: Putting Sex and Pornography in Context* (January 1995) Can. J. of Law & Jur., Vol. VIII, No. 1, at p. 137-138
54. The trial Judge's response that the Legislation provides an eventual right of appeal to the courts where the law will be interpreted and applied by the judiciary does not answer the claim that there are no reasonable limits prescribed by law. Canadians have a constitutional right to insist that the **initial** detention and prohibition of any expressive material be prescribed by law, particularly when that initial decision carries with it so many adverse consequences. Furthermore, very few persons have the time, energy, or resources to challenge Customs' frequent initial determinations of obscenity by pursuing a byzantine system of "appeal". Large quantities of non-obscene material are banned from Canada that should not have been. As the trial Judge observed:

The system of redetermination and appeals is resorted to relatively infrequently. The statistics suggest that importers take a very small proportion of classification decisions to the s. 63 level, and of those that are taken, a small number result in reclassification of the initially prohibited material. An even smaller proportion of decisions are appealed to the courts.

The consequences for Little Sisters and its proprietors of this Customs regime have led them to mount this constitutional challenge to the customs legislation."

Reasons for Judgment, BCSC, paras. 86-87. AR, Vol. I, pp. 113-114.
and see:
Testimony of D.R. Benn, p. 344, l. 38 to p. 346, l. 5. AR Vol. IV, Tab 12, pp. 508-510.
Testimony of J. Deva, p. 50, l. 18 to p. 51, l. 24; pp. 66-67; p. 76.2. AR, Vol. IV, Tab 12, pp. 555-515.
Exhibits 8A, 8B, 8C, 8D. AR, Vol. IV, Tab 12, pp. 516-523.
Testimony of M.J. Foster, pp. 198-200. AR Vol. IV, Tab 12, pp. 524-526.
Testimony of J.J. Moldenhauer, pp. 146-151. AR Vol. IV, Tab 12, pp. 527-532.
Testimony of H.L. Hager, p. 271, l. 42 to p. 272, l. 6; p. 275, ll. 11-22. AR Vol. IV, pp. 533-534.
re *Hot Head Paisan*
Exhibits 79, 80, 81, 82A, 82b, 83, 84, 85. AR Vol. IV, Tab 12, pp. 535-547.
Testimony of S. Haar, p. 212, l. 12 to p. 213, l. 5; p. 213, l. 41 to p. 222, l. 6. AR Vol. IV, Tab 12, pp. 548-560.
re *Quim*
Exhibits 86, 88, 89, 90, 91, 92, 63, 94, 95, 96, 97, 98. AR Vol. IV, Tab 12, pp. 561-607.
Testimony of S. Haar, p. 222, ll. 8-24. AR Vol. IV, Tab 12, p. 608.
Testimony of Prof. B. Ryder, p. 230, l. 23 to p. 245, l. 3. AR Vol. IV, Tab 12, pp. 609-624.
re *Bad Attitude*
Exhibits 99, 100, 101, 102. AR Vol. IV, Tab 12, pp. 625-646.
Testimony of Prof. B. Ryder, p. 245, l. 4 to p. 251, l. 21. AR Vol. IV, Tab 12, pp. 647-653.

55. As Professors Ryder and Cosman say in their article "Customs Censorship and the *Charter*: The Little Sisters Case," the "notion that the routine adjudication of the boundary between constitutionally protected expression and obscenity by Custom officials **is supervised by legal norms is a formal mirage rather than a practical reality.**"

> As obscenity law has become more complicated over time the procedural deficiencies of the *Customs Act* have become increasingly anachronistic. Whatever the merits of giving censorship powers to Customs officers in Victorian times when the law was first enacted, it is absurd to ask inadequately trained and qualified officers, without the benefit of even a rudimentary hearing, to determine whether publications fall within the current understandings of the obscene. In the old days, in fact until the 1950s, smut was smut; all sexual representations were considered obscene. Whatever else can be said of it, at least this definition had the merit of simplicity. ...

> The law is much more complicated now. ... The tasks of determining artistic merit and substantial risk of harm to society, as well as the meaning of the notoriously vague concepts of degrading and dehumanizing, befuddle even our most intelligent judges who have had the benefit of days of expert testimony. Legislation that asks Customs officers to make the same determinations on a routine basis with no assistance places everyone, including those officers, in an absurd situation.
> **Brenda Cossman and Bruce Ryder, *Customs Censorship and the Charter: The Little Sisters Case* (1996) 7:4 Constitutional Forum 103 at 109-110. ("*Customs Censorship and the Charter*")**
> **and see:**
> **Ryder, Undercover Censorship, *supra*, at pp. 137-138.**
> **David A. Crerar, *"The Darker Corners": The Incoherence of 1(b) Obscenity Jurisprudence After Butler* [1996-97] 28:2 Ottawa L. Rev. 377. ("*The Darker Corners*")**

(1) The Objective

56. This Court in *Thomson Newspapers* said that even though the question whether the objective is pressing and substantial "necessarily occurs in the abstract before the specific nature of the legislation and its impact on the *Charter* right has been analysed", nevertheless "ascertaining that objective requires a consideration of what the provision **actually does** ..."
***Thomson Newspapers*, *supra*, at 125 (emphasis added)**
57. Hence, we ask this Court to reconsider *Butler* and if necessary overrule it, and at the very least re-examine the objective of s. 163(8) of the *Criminal Code* as it has been incorporated into the Customs Legislation in the context of the evidence advanced at trial. It may be that the objective of section 163(8) of the *Criminal Code* was sufficiently pressing and substantial when the measure chosen to achieve that objective was the prosecution of the obscene after a criminal trial; but when the objective is analysed as part of a scheme that inevitably captures so much constitutionally protected expression then there is no longer a basis for concluding that the objective is pressing and substantial. Furthermore we submit that this Court in *Butler* considered only the objective of section 163(8) of the *Criminal Code* in the context of heterosexual, non-textual obscenity and this case provides the Court with the opportunity of re-examining that objective when homosexual and textual material is involved.
***RJR-MacDonald Inc. v. Canada (A.G.),* [1985] 3 S.C.R. at p. 335**

(i) Obscenity in General

58. The Government's own expert provided new and damning evidence that undermines the claim that any obscenity may be harmful. Dr. Marshall studied the effect on Customs officers who, it is safe to say, may view more pornography on a daily basis that the average Canadian. The trial Judge said:

> Indeed, a study commissioned by Canada Customs and conducted by Dr. William L. Marshall, an eminent clinical psychologist, concluded that exposure of customs officers to pornography in the classification process produced no demonstrable negative changes in their emotions, attitudes and behaviours.
> **Reasons for Judgment, BCSC, para. 195. AR Vol. 1, pp. 162-163.**
> **Testimony of Dr. W.L. Marshall, p.1424, l. 12; p. 1428, l. 18 to p. 1430, l. 46.**
> **AR Vol. IV, Tab 13, pp. 654-657.**

59. As noted above, since *Butler* there has been considerable criticism levelled at the judgment, particularly by leading feminists. The record in this case reveals that the "feminist perspective" that was urged on this Court by LEAF does not enjoy or is losing support among many feminists in Canada and elsewhere.
See references *infra* at paras. 47-49 and particularly *Bad Attitude/s on Trial: Pornography, Feminism and the Butler Decision* pp. 3-47, at pp. 7-8 and Strossen, *Defending Pornography,* at pp. 229-244.
Crerar, *The Darker Corners, supra.*
Richard Moon, *R. v. Butler: The Limits of the Supreme Court's Feminist Re-Interpretion of Section 163* (1993) 25:2 Ottawa L. Rev. 361.
Jamie Cameron, *Abstract Principle v. Contextual Conceptions of Harm: A Comment on R. v. Butler* (1992) 37 McGill L.J. 1135.
60. Further, the Court may take judicial notice of the availability of alleged "obscenity" and "hate propaganda" available on the Internet. The fact that Parliament has refrained from enacting legislation to regulate the Internet, in our submission, is persuasive evidence that Parliament does not consider the suppression of potentially "adult obscenity" crossing the border by electronic means to be a pressing and substantial legislative objective. This is further borne out by the decision of the CRTC not to regulate new media activities on the Internet under the *Broadcasting Act*. In its Public Notice of 17 May 1999, the Commission stated, at para. 124:

> Lastly, the Commission notes that, as with most other media, awareness and knowledge of the benefits that can be obtained from the rich diversity of content available on the Internet, as well as of the existence of offensive content, can be a powerful tool in the hands of users.
> **Telecom Public Notice CRTC 99-14, Ottawa, 17 May 1999, at paras. 117-124.**

(ii) *Gay and Lesbian Material*

61. This Court in *Butler* did not substantively or seriously consider gay and lesbian material. Yet the learned trial Judge and majority of the Court of Appeal said that *Butler* could not be distinguished on the ground that it only applied to heterosexual obscenity relying upon a passage from the trial judgment in *Butler* which indicated that the material included: "lesbianism [&] homosexuality." Such a passing reference is hardly sufficient to draw this conclusion. As was demonstrated at the trial, so called "lezi spreads" in mainstream pornographic publications are not "lesbian pornography."
Testimony of Dr. B. Ross, p. 618, ll. 28-38; p. 622, l. 13 to p. 625, l. 5; p. 626, ll. 17-34.
AR Vol. IV, Tab 14, pp. 659-664 at p. 659, ll. 28-38.

Exhibits 132[(4)], 133**, 134**, 135**, 136. ASR, Tab 3, p. 1901-1905.**
***R. v. Butler* (1989), 50 C.C.C. (3d) 97 (Man. Q.B.) at 100-101.**
Reasons for Judgment, BCSC, para. 186. AR Vol. I, pp. 157-158.
Exhibits 132, 133, 134, 135. AR Vol. IV, Tab 14, p. 658**
Exhibit 46, Tab 42. AR Vol. IV, Tab 14, pp. 665-684.
Barbara Smith, "Sappho Was a Right-Off Woman." In Gail Chester and Julienne Dickey, eds., *Feminism and Censorship: The Current Debate* (London: Prism, 1988) 178-184 at 179 & 184.
Lisa Henderson. "Lesbian Pornography: Cultural Transgression and Sexual Demystification." In *New Lesbian Criticism*, ed. Sally Munt, 173-192, (New York: Columbia University Press, 1992), at 175.

62. Gay and lesbian pornography can be distinguished from mainstream pornography in many ways. The entire framework of production, exhibition and consumption is different.
Testimony of Prof. T. Waugh, p. 287, l. 45 to p. 288, l. 18 re Production; p. 288, l. 21 to p. 289, l. 9 re Exhibition; p. 289, ll. 14-26 re Consumption. AR Vol. IV, Tab 15, pp. 685-688.
see also:
Testimony of Dr. B. Ross, p. 618, l. 10 to p. 619, l. 9. AR Vol. IV, Tab 15, pp. 689-690.
Testimony of R. Hand, p. 845, l. 10 to p. 847, l. 24. AR Vol IV, Tab 15, pp. 691-693.
63. There is solid academic criticism of the equation of homosexual pornography with mainstream heterosexual pornography. Erotica produced for a homosexual audience does not and cannot cause the kind of anti-social behaviour generally or through stereotyping and objectification of women and children that Parliament apprehended might be caused in heterosexual obscenity. While heterosexual obscenity is often misogynist that cannot be said of homosexual material.
Carl F. Stychin, *Law's Desire: Sexuality and the Limits of Justice* (New York: Routledge, 1995), at pp. 55-56.
Testimony of Prof. G. Kinsman, p. 510, l. 17 to p. 512, l. 31, at pp. 511-512. AR Vol. IV, Tab 16, pp. 694-696.
Barbara Smith. "Sappho Was a Right-Off Woman." *supra*.
Lisa Henderson. "Lesbian Pornography", *supra*.
Thomas Waugh*, Hard to Imagine: Gay Male Eroticism in Photography and Film From their Beginnings to Stonewall* (New York: Columbia University Press, 1996) at 48-49. Prof. Waugh says, at p. 48:

"To be sure, gender is the ultimate determining factor of power relations within and around heterosexual eroticism, rigidly prescribing roles for men as producer, consumer, and inserter, and for women as model, commodity and insertee. But the absence of gender as a determining factor distinguishes gay eroticism form straight eroticism, and this is crucial, politically and morally as well as aesthetically."

Kathleen Martindale, *Un/Popular Culture: Lesbian Writing After the Sex Wars*. (New York: State University of New York Press, 1997) pp. 1-32 at 7, 18 & 24; pp. 103-136 at 135.

Karla Jay, "On Slippery Ground: An Introduction" in Karla Jay, ed. *Lesbian Erotics* (New York: New York University Press, 1995) pp. 1-11.

64. The trial Judge recognized:

> On balance, the evidence led relating to a causal link between homosexual pornography and harm to the consumers of that pornography and to society as a whole was far from conclusive.
> **Reasons for Judgment, BCSC, para. 195. AR Vol. I, p. 162-163.**

65. Mr. Justice Finch was correct in finding that the trial Judge however erred when he said that "there is a body of social-science evidence that would support Parliament's reasonable apprehension that obscene pornography produced for homosexual audiences causes harm to society". The only such "evidence" adduced by the Crown was a statement by Professor Neil Malamuth.
Reasons for Judgment, BCCA, para. 231. AR, Vol. II, p. 294.
66. The Appellants respectfully adopt the reasoning of Mr. Justice Finch who after considering all of Professor Malamuth's evidence said:

> The federal Crown relies upon this evidence as sufficient to establish a reasonable apprehension by Parliament of harm from exposure to homosexual pornography. The federal Crown could not direct us to any other evidence tending to show a risk of harm from homosexual pornography.
>
> The provincial Crown said that there was other evidence to the same effect as Professor Malamuth's, but at the end of the day was reduced to saying that the plaintiffs' experts could not say that there was no risk of harm from homosexual pornography, any more than the Crown could say that there was a risk of harm; and further, that the social science evidence of harm from homosexual pornography was inconclusive because this is a new area of inquiry.
>
> I think, with respect, that the position taken by the provincial Crown overlooks the fact that, as noted above, under s. 1 of the Charter it is the Crown who bears the onus of proving that a limitation on a protected right is justified, and that within that obligation lies the burden of proving that there is a pressing and substantial legislative objective, in this case said to be the protection of society from a reasoned apprehension of harm.
>
> I have already expressed the view that Butler did not address the risk of harm from homosexual pornography (see para. 191 above) so I think the question in this case comes down to whether Dr. Malamuth's opinion is sufficient to discharge the Crown's burden.
>
> The learned trial judge found that his evidence did discharge the onus (see paras. 195 and 196), and in this, in my respectful view, he erred. I am unable to find in Professor Malamuth's tentative and qualified opinion the sort of evidence that would show a reasonable basis for a finding by Parliament of a "pressing and substantial" objective. To say that "it would be desirable to have more information", that "consideration of these

complex issues is beyond the scope of the present analysis" and that "I am not aware of any published systematic content analysis of gay pornography" is to acknowledge that available social science evidence does not disclose a pressing and substantial objective. Professor Malamuth's concluding sentence in answer to question "a", which I have underlined, is nothing more than an assumption, and an equivocal one at that.

In my respectful view, the learned trial judge erred in two respects on the issue of pressing and substantial objective. First, he wrongly inferred that Butler had already decided the question. Secondly, he misapprehended the nature and effect of Professor Malamuth's written opinion. If there is evidence to support the Crown's position on this issue, it was not before the court in this case.
Reasons for Judgment, BCCA, paras. 231-238. AR Vol. II, pp.294-298.
See also:
Testimony of Dr. B. Ross, p. 643, l. 14 to p. 645, l. 1. AR Vol. V, Tab 18, pp. 750-752.
Expert Report of Dr. W.A. Fisher, Exhibit 175, Tab 2. AR Vol. V, pp. 836-861.
Testimony of Dr. W.L. Marshall, p. 1447, l. 43 to p. 1457, l. 13; p. 1462, ll. 12-31.
ASR, Tab 4, pp. 1906-1917.

67. Even Justice Macfarlane did not rely upon the Malamuth evidence. He said:

In my opinion, the trial judge was correct to say he need not determine on an evidentiary basis whether there was a causal link between pornography produced for homosexual audiences and harm to society. His comments on the research of Professor Malamuth were not necessary for his decision. In the end it is open to Parliament, even in the face of inconclusive evidence, to entertain a reasoned apprehension of harm from the proliferation of obscenity, whether heterosexual or homosexual, and to prescribe a standard for determining the question whether particular material is obscene.
Reasons for Judgment, BCCA, para. 80. AR Vol. II, p. 111.

68. Justice Macfarlane's errors on the issue of the objective of the impugned provisions are numerous and significant. Firstly, he suggested that because the Appellants had conceded that homosexual pornography can be obscene within the meaning ascribed to that word in *Butler* that this was somehow the end of the analysis. The Applicants conceded in argument that homosexual pornography can be obscene, albeit rarely, within the meaning ascribed to that word by this Court in *Butler*, but they never conceded that it could be justifiably proscribed under the *Charter*. The Appellants have argued throughout the trial and appeal that whatever is the case under the *Criminal Code*, homosexual pornography or obscenity cannot be constitutionally dealt with by customs officials under the Customs Legislation.
69. As there was no evidence that homosexual obscenity does cause a reasoned apprehension of harm Parliament cannot be assumed or even permitted to simply "entertain" this conclusion. In *Thomson Newspapers* this Court said that the "reasonable apprehension of harm test has been applied where it is has been suggested, though not proven, that the very nature of the expression in question undermines the position of groups or individuals as equal participants in society." This Court in *Thomson Newspapers* recognized that in

Butler the groups or individuals undermined were women and children.
***Thomson Newspapers*, *supra* at 958-961.**

70. In this case the evidence was all to the effect that the gay and lesbian community is comprised of an historically vulnerable and disadvantaged group and that is certainly consistent with this Court's view as expressed in such cases as *Egan v. Canada, Vriend v. Alberta* and *M. v H.* It would be a serious error to allow an extremely relaxed standard of justification with respect to expression that the evidence in this case demonstrates is designed to and has the effect of enhancing the gay and lesbian identity, dignity, self worth, community formation health and education. This evidence was led not only with respect to homosexual "erotica" but with respect to much of what Customs has deemed to be obscene and which in fact may be obscene within the meaning of *Butler*.
***Egan v. Canada*, [1995] 2 S.C.R. 513**
***Vriend v. Alberta*, [1998] 1 S.C.R. 493**
***M. v. H.*, [1999] S.C.J. No. 23**
71. Indeed the trial Judge heard much evidence respecting the phenomenon of homosexual sadomasochism ("S/M") and material depicting or describing it -- material that this Court in *Butler* may have regarded as obscene at least in the context of heterosexual material. However this Court in *Butler* heard no such evidence and it is fair to say that such material may have informed the Court's judgment on what was "degrading and dehumanizing" material even when there is the appearance of consent. The trial Judge, evidencing an understanding and sensitivity to this material that no court in Canada previously has, held it cannot be automatically branded as obscene even if "common sense" might suggest the contrary. He quoted with apparent approval or understanding the evidence and writings of various witnesses called by the appellants at trial.
Reasons for Judgment, BCSC, paras. 224, 227, 228, 229, 230 and 231. AR p.
Exhibit 32, *I Once Had a Master* by John Preston. AR Vol. V, Tab 20, p. 758.**
Testimony of N.P. Ricci, Transcript. p. 359, l. 42 to p. 367, l. 14. AR Vol. V, Tab 20, pp. 759-767.
and see:
Testimony of N.P. Ricci, Transcript p. 350, l. 17 to p. 353. l. 35 re assessing literary and artistic merit of a book. AR Vol. V, Tab 20, pp. 768-771.
Testimony of S. Schulman, p. 661, l. 23 to p. 663, l. 31; p. 665, l. 42 to p. 666, l. 31. AR Vol. V, Tab 20, pp. 772-776.
Exhibit 42, *Lesbian S/M Safety Manual*, by Pat Califia. AR Vol. V, Tab 20, p. 777.**
Testimony of P. Califia, p. 464, l. 45 to p. 465, l. 31. AR, Vol. V, Tab 20, pp. 778-779.
Exhibit 35, *Urban Aboriginals*, by Geoff Mains. AR Vol. V, Tab 20, p. 780.**
Testimony of Prof. L. Weir, p. 673, l. 15 to p. 675, l. 27; p. 702, l. 7 to p. 722, l. 7; p. 723, l. 13 to p. 730, l. 47. AR Vol. V, Tab 20, pp. 781-813.
Testimony of Prof. G. Kinsman, p. 493, l. 20 to p. 496, l. 19; p. 496, l. 31 to p. 500, l. 21; p. 501, l. 4 to p. 512, l. 31. AR Vol. V, Tab 20, pp. 814-822.
Testimony of Dr. B. Ross, p. 617, l. 1 to p. 619, l. 19. AR Vol. V, Tab 20, pp. 823-835.
72. Pat Califia, in *Public Sex,* provides a useful explanation of what sadomasochism is:

> Because sadomasochism is usually portrayed as a violent, dangerous activity, most people do not think there is a great deal of difference between a rapist and a bondage enthusiast. But sadomasochism is not a form of sexual assault. It is a consensual activity

that involves polarized roles and intense sensations. An S/M scene is always preceded by a negotiation in which the top and bottom decide whether or not they will play, what activities are likely to occur, what activities will not occur, and about how long the scene will last. The bottom is usually given a *safe word* or *code action* she can use to stop the scene. This safe word allows the bottom to fantasize that the scene is not consensual and to protest verbally or resist physically without halting stimulation.

The key to understanding S/M is *fantasy*. The roles, dialogue, fetish costumes, and sexual activities are part of a drama or ritual. The participants are enhancing their sexual pleasure, not damaging or imprisoning one another. A sadomasochist is well aware that a role adopted during a scene is not appropriate during other interactions and that a fantasy role is not the sum total of her being.
Pat Califia, Public Sex: The Culture of Radical Sex (Pittsburgh, Pa.: Cleis Press Inc., 1994), pp. 167-168.
and see:
Terry Hoople, *Conflicting Visions: SM, Feminism, and the Law. A Problem of Representation* (Spring, 1996) CJLS/RCDS Vol. 11 #1, 177.
MacKendrick, *counterpleasures,* (New York: State University of New York Press, 1999) 25-33.

73. Given the evidence discussed above that gay and lesbian material is not harmful and is indeed valuable, the importance of the government's objective is further eroded. Whatever constitutional competence Parliament may have to criminalize homosexual obscenity - a proposition that we deny - there is simply not a sufficiently pressing and compelling objective to justify giving Customs inspectors the power to ban homosexual material by a system of prior restraint. If there is harm it is so tenuous, speculative and rare that it can await a determination by a criminal court.

(iii) Textual Material

74. We urge the Court to invalidate the impugned provisions whatever media the alleged obscenity relies on and in fact some academics such as Professor Thomas Waugh claim that "photography and film, have had a privileged relationship with gay male culture ..." Nevertheless the apprehension of harm supposedly avoided by the impugned provisions is further attenuated when textual material[(5)] is involved. The trial Judge said *Butler* could not be distinguished on this basis since the material under consideration there included magazines. However, **there were no books at issue in *Butler***, and most of the evidence in this case concerned books, a medium that strictly involves the imagination of both the writer and reader. No one is exploited or in any way harmed in the writing of a book. Even if text can give rise to a reasonable apprehension of harm such texts will be sufficiently rare that the matter can be left to the normal criminal law process.
Exhibit 175, Expert Report of W. Fisher, p. 5. AR Vol. V, Tab 21, pp. 836-861.
Waugh, *Hard To Imagine, supra* at p. 12.
75. Customs officers acknowledged that it is more difficult or complex to classify books than it is to classify pictorial representations; and certainly it is more time consuming to decide whether a book was obscene.

Testimony of J.F. Shearer, p. 1045, ll. 11-26, ll. 33-40. AR Vol. V, Tab 22, p. 862.
Testimony of F. Lorito, p. 1512, l. 32 to p. 1513, l. 8. AR Vol. V, Tab 22, p. 863-864.
Testimony of D.A. Bradt, p. 1706, ll. 29-42. AR Vol. V, Tab 22, p. 865.
Testimony of G. Morrison, p. 1748, l. 11 to p. 1750, l. 22. AR Vol. V, Tab 22, pp. 866-868.
Testimony of Dr. W.L. Marshall, p. 1460, l. 20 to p. 1462, l. 11. ASR, Tab 5, p. 1918-1920.
Exhibits 231, 232, 233. ASR, Tab 5, pp. 1921-1931.

76. In fact between 1962 and 1967 Customs did cease banning books on the order of the Minister of Revenue who called it a "difficult and nasty task" stating that Customs officials "are much better qualified to deal with increasing the seasonal tariff on cabbages and cucumbers than to pass moral judgment on literature coming into the country."
Ryder, Undercover Censorship*, supra*, at p. 135.

77. There are few prosecutions for the written word in other democratic countries. The prosecution policy of the Provincial Attorney General acknowledges the particular difficulty of proving a book is obscene.
Testimony of Prof. T. Waugh, p. 295, ll. 19-39. AR Vol. V, Tab 23, p. 869.
Testimony of Prof. C. Vance, p. 799, l. 30 to p. 800, l. 7. AR Vol. V, Tab 23, p. 870-871.
***Report of The Committee on Obscenity and Film Censorship* (London: Her Majesty's Stationery Office, 1979) ("Williams Report")**
Exhibit 179. AR Vol. V, Tab 23, pp. 872-885.

78. Judges, Commissions and academics have also drawn a distinction between words and images:

> A book requires some understanding and the exercise of imagination; a photograph at once tells its story to all, even to the illiterate. A book demands an expenditure of time and effort; a picture conveys its message swiftly and easily. A description in a book of an erotic scene, no matter how luridly written, still remains only a description; the same scene presented in the form of a vivid photograph instantly rivets the attention, whether its effect is to shock, stimulate or amuse. The familiar saying that one picture is worth a thousand words applies with special force in the field of obscenity.
> ***R. v. Prairie Schooner News Ltd.* (1970), 75 W.W.R. 585 (Man. C.A.) at 589**
> **See also:**
> ***Report of the Committee of Obscenity and Film Censorship, supra* para 7.22, and see also: para 7.7**
> **Robin West, The Difference in Women's Hedonic Lives, *supra* at p. 138.**
> ***R. v. Butler*, *supra* per Gonthier J., at p. 518.**
> **Postman, Neil. *Amusing Ourselves to Death*, at pp. 50, 63, 44-79.**
> **Richard A. Posner*, Law and Literature: A Misunderstood Relation*, (Cambridge: Harvard U. Press, 1988), pp. 329-338.** Judge Posner says, at p. 329: "Although suppression of obscene literature is an issue of great theoretical and historical interest, it may appear to have little practical significance in America today because so little nonpictorial obscenity is being prosecuted."
> **Testimony of Prof. T. Waugh, p. 297, ll. 26-47; p. 298, ll. 1-12. AR Vol. V,**

Tab 24, pp. 886-887.
Testimony of P. Berton, p. 550, l. 31 to p. 553, l. 13; p. 554, l. 36 to p. 556, l. 9. AR Vol. V, Tab 24, pp. 888-894. Mr. Berton said of the constituency of people who write and read books: "We believe that books are the essence of our culture, that without a literature, a county has not only no soul, it has no reason for being."

79. In the course of the trial the Respondents did not attempt to prove that the books that Little Sisters had imported and that Customs had determined were "obscene" were actually so. Nor did the Respondents make any attempt to challenge the opinions of the Appellants' experts that these books were not obscene. Given that Customs held that books such as *American Psycho* and *120 Days of Sodom* are not obscene it is difficult to imagine any book falling into that category.
Exhibit 183, *American Psycho*, AR Vol. VI, Tab 25, p. 895**
Exhibit 223. AR Vol. VI, Tab 25, p. 896-910.
Testimony of J.F. Shearer, p. 1024, l. 39 to p. 1032, l. 45. AR Vol. VI, Tab 25, p. AR Vol. VI, Tab 25, pp. 911-919.
Testimony of L.K. Murphy, p. 1289, l. 10 to p. 1318, l. 33. AR Vol. VI, Tab 25, pp. 920-949.
Exhibit 172: *The 120 Days of Sodom and Other Writings*. AR Vol. VI, Tab 25, p. 950**
Testimony of L.K. Murphy, p. 1262, l. 30 to p. 1265, l. 31. AR Vol. VI, Tab 25, pp. 951-954. Reasons for Judgment, BCSC, para. 227. AR Vol. I, pp. 177-179.
Exhibit 44: *Doc and Fluff*. AR Vol. VI, Tab 25, p. 955.**
Testimony of J. Rule, p. 699, ll. 21-41. AR Vol. VI, Tab 25, p. 956.
Testimony of P. Califia, p. 473, ll. 10-29; p. 477, ll. 33-43. AR Vol. VI, Tab 25, pp. 957-958.
Expert Report of J. Scott -- Exhibit 175, Tab 4, parts 1 and 2. AR Vol. VI, Tab 25, pp. 959-962.
Transcript Proceedings re J. Scott, pp. 960-964. AR Vol. VI, Tab 25, pp. 963-967.

80. Even Justice Hall recognized the difference between textual material and pictorial. He said:

> I do recognize however that the difficulty of categorization can vary with the subject matter. ... I see little if any difficulty in having properly trained personnel screen pictorial material but I can see that border officials may have greater difficulty classifying textual material. ... [(6)]
>
> **Reasons for Judgment, BCCA, paras. 134-135. AR Vol. II, pp. 254-256.**

81. Judge Richard Posner meets head on the continued suggestion that even nonpictorial pornography might be justifiably proscribed because it fosters sexual stereotypes. He responds as follows:

> One person's stereotypes, however is another's truth; and if the real objection to pornography is that it induces false or pernicious beliefs (which can of course have consequences in action), then the sexually graphic angle is a red herring and we are in the

presence of massive and deeply problematic challenge to the liberal tradition of freedom of speech and of the press. Since that challenge is the logical terminus of the speech-is-action school of thought, examined briefly at the end of the preceding chapter, it casts a retrospective doubt over the program of that school."
Posner, *Law and Literature, supra*, at p. 336.

82. The fact that the "child pornography" provisions of the Criminal Code do not apply to books unless it "advocates or counsels sexual activity" with a child is further evidence of that even Parliament now has doubts about the constitutionality of banning textual material.

***Criminal Code*, S.C. 1993, c. 46, s. 163.1**

(iv) Textual Gay and Lesbian Material

83. The combined fact of textual gay and lesbian material, which is what this case was so concerned with, renders even more attenuated any claim that there is a sufficiently pressing and compelling objective to warrant or justify the impugned provisions. The evidence is that the books referred to in **Exhibit 15** are representative of the kinds of gay and lesbian material detained by Customs.
Exhibit 15. AR Vol. VI, Tab 26, pp. 968-969.
Exhibits 17 to 44. AR Vol. VI, Tab 26, p. 970**
Testimony of J. Deva, p.76.11, 11. 2-6. AR Vol. VI, Tab 26, p. 1001.
Testimony of J. Fuller, p. 943, 11. 16-26. AR Vol. VI, Tab 26, p. 1002.
Testimony of K. Mistysyn, p. 180, 1-43 to p. 181, 1.9. AR Vol. VI, Tab 26, pp. 1003-1004.
Testimony of G. Moldenhauer, p. 154, ll. 3-35. AR Vol. VI, Tab 26, p. 1005.
Testimony of L. Murphy, pp. 1133-1136; p. 1169, ll. 23-31. AR Vol. VI, Tab 26, pp. 1006-1010.
Exhibit 24, *My Biggest O*. AR Vol. VI, Tab 26, p. 1018** [*My Biggest O* was prohibited in December 1993 [AR p. 1019], which prohibition was upheld in July, 1994 [AR p. 1040], was again prohibited on August 17, 1994 [AR, p. 1027] and by letter dated October 11, 1994 Little Sister's were advised that *My Biggest O* remained prohibited after the guidelines were changed [AR p. 1033]. Despite this, *My Biggest O* was reclassified as admissible on the last day of the trial.
Transcript Proceedings, D. Kiselbach, p. 2028. AR Vol. VI, Tab 26, p. 1011
My Biggest O is virtually indistinguishable from the books entered as Exhibits 201 to 215, yet those titles were not re-classified and remain prohibited.
Exhibit 3B, Tab 81 and Tab 98. AR Vol. VI, Tab 26, pp. 1019-1032.
Exhibit 147, Tab 11. AR Vol. VI, Tab 26, p. 1033.
Exhibit 258. AR Vol. VI, Tab 26, pp. 1034-1038.
Exhibit 259. AR Vol. VI, Tab 26, pp. 1039-1044.
Testimony of J. Fuller, p. 902, l. 31 to p. 903, l. 13. AR Vol. VI, Tab 26, pp. 1045-1046.
Testimony of L. Weir, p. 738, l. 21 to p. 742, l. 21. AR Vol. VI, Tab 26, pp. 1047-1051.

Testimony of W.R. Daigle, p. 1994, ll. 27-35, p. 2008, l. 7 to p. 2009, l. 5. AR Vol. VI, Tab 26, pp. 1052-1054.
Exhibits 201, *Wads*; 202 *Sex*; 203, *When I was 18*; 204, *Trash*; 205, *Smut*; 206, *Orgasms*; 207, *Lust*; 208, *Hot Studs*; 209, *10 1/2 Inches*; 210, *Cream*; 211, *Cut/Uncut*; 212, *Humongous*; 213, *Juice*; 214 *Hot Acts*; and 215, *Cum*. AR Vol. VI, Tab 26, p. 1055**
Testimony of L. Murphy, p. 1133, l. 6 to p. 1135, l. 26. AR Vol. VI, Tab 26, pp. 1056-1058.
Testimony of Prof. T. Waugh, p. 285, l. 29 to p. 286, l. 21; p. 302, l. 38 to p. 304, l. 12. AR Vol. VI, Tab 26, pp. 1059-1063. (Prof. Waugh expressed the opinion that the books which are exhibits 201 to 215 are "absolutely" important insofar as gay erotica is concerned. He said:

> Not only in terms of gay erotica, but in terms of gay social experience. These memoirs in these volumes go back, in some cases to the '30s, the '40s, and they're the only accounts we often have of people's sexual lives going back that far. I think that [the author] deliberately uses these aggressive and provocative titles to emphasize how important sexuality is in our society, in our culture, in these peoples' lives, and to remind us how much sexuality is covered over in everyday culture and how it's made to seem shameful and hidden and invisible, so he uses these title to assault you with a kind of vivid senses of -- of sexuality at its most gritty and physical. **[AR, p. 1060, ll. 8-22]**

Testimony of L. Murphy, p. 1269, l. 29 to p. 1274, l. 43. AR Vol. VI, Tab 26, pp. 1064-1068.

(2) The Proportionality of the Means

84. This Court recognized this in *Thomson Newspapers* when, with respect to the minimal impairment test it said: "that the minimal impairment stage of the proportionality test necessarily takes into account the extent to which a *Charter* value is infringed..." It is submitted that the same approach should apply to the rational means stage. As well, we submit that when examining the three stages of the proportionality analysis it may be even more important, than at the objective test, to apply a robust contextual analysis and have regard to the real or actual effects of the measures and not just what is written in the statute book.

(a) Rational Means

85. A law that infringes *Charter* rights must be "carefully designed to achieve the objective in question" and may not be "arbitrary, unfair, or based on irrational considerations." ***R. v. Oakes*** **[1986] 1 S.C.R. 103 at 139**
86. The learned trial Judge erred in saying that "*Butler* had settled the point" insofar as this branch of the proportionality test was concerned. Justice Macfarlane agreed with the trial Judge but Justice Hall properly recognized that the Appellants "correctly argue that this legislative regime concerning customs enforcement was not under consideration in *R. v Butler*."
Reasons for Judgment, BCSC, para. 206. AR Vol. I, pp. 166-167.

Reasons for Judgment, BCCA, para. 75, per Macfarlane, JA. AR Vol. II, p. 234; para 127, per Hall, JA. AR Vol. II, p. 250.

87. *Butler* concerned Parliament's constitutional competence to proscribe the distribution of obscene material. *Butler* had nothing to do with the **process** by which material is judged to be obscene except to the extent that it is judged to be obscene after a criminal trial process. *Butler* certainly has nothing to say when the legislation captures in its net the non-obscene.
Reasons for Judgment, BCSC, para. 206; AR Vol. I, pp. 166-167.
see also paras. 181 and 182. AR Vol. I, pp. 154-156.
88. The trial Judge and Justice Macfarlane held that "it is self-evident that the objective of preventing the proliferation of obscenity is logically furthered by prohibiting its importation into Canada."
Reasons for Judgment, BCCA, para. 83. AR Vol. II, pp. 236-237.
Reasons for Judgment, BCSC, para. 206. AR Vol. I, pp. 166-167.
89. The Appellants cannot argue with the logic of this proposition but we take issue with both the premise and the conclusion. For reasons we have set out above, if the objective of the impugned provisions is to be determined by the practical operation and effect of the impugned provisions then the objective of the impugned provisions is to prevent not just the proliferation of the obscene but also much more that is not obscene. Of course if that is the objective it will not meet the pressing and substantial test.
90. Alternatively, if the objective is to prevent the proliferation of only the obscene then the means, we submit, must be examined not just by the statute as written but as it actually operates and its real effects. If the practical operation and effect of the impugned provisions are to prohibit the entry into Canada of non-obscene work and yet fail to prevent the proliferation of not only much obscene material but the worst kind of obscenity then the provisions are so "under" and "over" inclusive as not to be rational. Likewise, if the practical operation and effect of the impugned provisions are to lead to irrational, unfair and inconsistent decision making, then the impugned provisions are not rational as that term has been used in the *Oakes* analysis.
91. There are too many instances to be able to detail in a factum and we of course rely on the findings of fact of the trial Judge [*infra*, para. 5]; yet it is important that this Court have a sense of just how, in practice, censorship by a scheme of prior restraint works: it demonstrates not only that the "function of the censor is to censor". It also demonstrates how that power of censorship is used most effectively against the expression of marginal, dissenting and minority voices rather than the powerful, wealthy and mainstream where similar messages are considered non obscene.
Emerson, *The Doctrine of Prior Restraint, supra*, at 659.
Hutchison, *In Other Words, supra*, at 130 and 132.
92. The testimony of Linda Murphy, the Director of Prohibited Importations, respecting why the book *Sex* by Madonna was not obscene and yet similar less glossy material imported by Little Sisters was obscene was striking in its contrast. For example, Ms. Murphy adamantly refused to agree that a segment of Madonna's book, *Sex*, where she describes having sex with "a teenage boy", "a virgin", "he was just a baby", "he hardly had any pubic hair" was a description of sex with a juvenile. According to Ms. Murphy if the text stated the boy was 16 it would be contrary to the memorandum, but the references used by Madonna, in her opinion, did not describe sex with a juvenile because to draw such a

conclusion one would have to "read into it" or "draw inferences", something which Ms. Murphy says is not done. But this is contrary to the memorandum itself which states that "children and juveniles are persons actually or **apparently** under the age of 18" [emphasis added]. And, unlike Ms. Murphy, other Customs officials such as Ms. Bird and Mr. Lorito do draw inferences based on the material.

Testimony of L. Murphy, p. 1088, l. 6 to p. 1089, l. 6. AR Vol. VII, Tab 27, pp. 1070-1071.

Exhibit 45: *Sex* by Madonna. AR Vol. VII, Tab 27, p. 1072. excerpts at Tab 26., pp. 971-1000.**

Testimony of L. Murphy, p. 1318, l. 36 to p. 1351, l. 18, at p. 1334, l. 4 to p. 1335, l. 29. AR Vol. VII, Tab 27, pp. 1073-1106.

Exhibit 224: Documents relating to *Sex*. AR Vol. VII, Tab 27, pp. 1109-1135.

Appellant's Brief of Legislation and Memoranda D9-1-1.

Exhibit 185. AR Vol. VII, Tab 27, pp. 1136-1161.

Exhibits 22 and 39** (*Drawing the Line* and *Libido* containing photo from *Drawing the Line;* and see excerpts *Sex* by Madonna, AR Vol. VI, Tab 26, esp. pp. 972-975*).***

Testimony of C. Bird, p. 1607, ll. 32-35. AR Vol. VII, Tab 27, p. 1162.

Testimony of F. Lorito, p. 1551, ll. 1-6. AR Vol. VII, Tab 27, p. 1163.

Testimony of J. Shearer, p. 1077, ll. 1-22 and 37-47. AR Vol. VII, Tab 27, p. 1164.

And see:

Testimony of L.K. Murphy:

Re: "excessive ejaculation: p. 1248, l. 31 to p. 1250, l. 8; AR Vol. VII, Tab 27, p. 1171-1173.

Re *Satanic Verses*. pp. 1291-1296. AR Vol. VII, Tab 27, pp. 1183-1188.

Re videos and anal penetration. pp. 1360-1361. AR Vol. VII, Tab 27, pp. 1189-1190.

Testimony of C. Bird

Re *RFD* - Exhibit 237. AR Vol. VII, Tab 27, p. 1191.**

p. 1611, l. 32 to p. 1623, l. 19. AR Vol. VII, Tab 27, pp. 1192-1204.

re *The Man Sitting in the Corridor* - Exhibit 238. AR Vol. VII, Tab 27, p. 1205.**

p. 1627, l. 34 to p. 1632, l. 25. AR Vol. VII, Tab 27, pp. 1206-1211.

re short stories and anthologies. p. 1666, l. 41 to p. 1667, l. 40. AR Vol. VII, Tab 27, pp. 1212-1213.

re *Contract With the World*- Exhibit 141. AR Vol. VII, Tab 27, p. 1214.**

p. 1656, l. 6 to p. 1958, l. 45. Vol. VII, Tab 27, pp. 1215-1217.

Testimony of D.A. Bradt

Re *Herotica* - Exhibit 107. ** original book

p. 1703, l. 41 to p. 1705, l. 38.AR Vol. VII, Tab 27, pp. 1225-1226.

Re *Melting Point* - Exhibit 17. AR Vol. VII, Tab 27, p. 1227.**

Re *Tales of the Dark Lord* - Exhibit 37. AR Vol. VII, Tab 27, p. 1227.**

p. 1710, l. 10 to p. 1713, l. 25. AR Vol. VII, Tab 27, p. 1228.

Testimony of R. Hand, p. 847, l. 23 to p. 848, l. 47.

Exhibits 145 and 146: *Lezzie Smut*, Vol. 1, Issues 1 and 2. AR Vol. VIII, p. 1419.**

93. The testimony of Linda Murphy with respect to the magazine "Oriental Woman" demonstrates the absurdity of censoring certain words when it is readily apparent that the reader would know exactly what was censored. While Ms. Murphy would "guess" that

some of the words "blanked out" referred to anal penetration or anal intercourse her evidence was that "I don't know" if the blanks accomplished anything and further that "the magazine may have been prohibited entry if it hadn't been done." [AR p. 1167, ll. 12-34]

Testimony of L.K. Murphy, p. 1177, l. 13 to p. 1181, l. 35. AR Vol. VII, Tab 27, pp. 1165-1169.

Exhibit 218 - Magazine, "Oriental Women". AR Vol. VII, Tab 27, p. 1170.**

94. Linda Murphy testified that "no magazine would be prohibited solely on the basis of its "advertisements". But, there was no plausible explanation as to why personal and commercial advertisements, no matter how graphic or extreme the depictions or descriptions were, would not be obscene, but any first hand account of what might have occurred when the ads were answered would be. Even more strange is the fact that Morrison did not know of this policy.

Re personal ads: p. 1281, l. 38 to p. 1289, l. 9. AR Vol. VII, Tab 27, pp. 1174-1182.

Testimony of G. Morrison, p. 1768, l. 46 to p. 1769, l. 23. ASR, Tab 7, p. 1942-3.

95. While the evidence at trial was that notwithstanding the complexity of a decision to prohibit a book and the acknowledgement that if customs officers are to do their job properly that they should read books from cover to cover, it was clear that they seldom, if ever, read books from cover to cover.

Testimony of J.F. Shearer, p. 1013, ll. 13-42. AR Vol. IX, Tab 28, p. 1422.

Testimony of F. Lorito, p. 1516, l. 43 to p. 1517, l. 9; p. 1519, ll. 6-8, p.1520, ll. 26-45; p. 1555, l. 25 to p. 1556, l. 20; p. 1556, ll. 21-44.; p. 1557, l. 43 to p. 1558, l. 8. AR Vol. IX, Tab 28, pp. 1423-1431.

Exhibit 106, Tab 87. AR Vol. IX, Tab 28, pp. 1432-1433.

Testimony of G. Morrison, p. 1742, ll. 22-37; p. 1745, ll. 13-19; p. 1765, ll. 9-15, p. 1771, ll. 36-41. AR Vol. IX, Tab 28, pp. 1434-1437.

Testimony of C. Bird, p. 1607, l.36 to p. 1608, I. 5. AR Vol. IX, Tab 28, pp. 1438-1439.

Testimony of D. Bradt, p, 1705, ll. 24-29; p. 1711, l. 34 to p. 1712, l. 4. AR Vol. IX, Tab 28, pp. 1440-1442.

Testimony of S. Slater, p. 1965, ll. 12-34. AR Vol. IX, Tab 28, p. 1443.

96. Magazines, comics and short stories are judged on a segment-by-segment basis and if even one paragraph offends Memorandum D9-1-1 that is sufficient to prohibit the work.

Testimony of J.F. Shearer, p. 1042, ll. 15-45. AR Vol. IX, Tab 29, p. 1444.

Testimony of F. Lorito, p. 1549, l. 47 to p. 1550, l. 18. AR Vol. IX, Tab 29, pp. 1445-1446.

Testimony of C. Bird, p. 1638, ll. 13-46 , p. 1666, l. 47 to p. 1667, l. 18.. AR Vol. IX, Tab 29, pp. 1447-1449

97. Videos are run on fast forward until a sexually explicit scene is reached. It is only then that videos are stopped and any dialogue is listened to.

Testimony of F. Lorito, p. 1550, ll. 19-33. AR Vol. IX, Tab 30, p. 1450.

Testimony of C. Bird, p. 1608, l. 6 to p. 1611, l. 26. AR Vol. IX, Tab 30, pp. 1451-1454.

Testimony of S. Slater, p. 1964, ll. 35-47; p. 1986, ll. 3-37. AR Vol. IX, Tab 30, pp. 1455-1456.

Testimony of G. Morrison, p. 1771, l. 42 to p. 1772, l. 6. AR Vol. IX, Tab 30, pp.

1457-1458.
Exhibits 119 and 152. Videotapes, *Tom of Finland* . AR Vol. IX, Tab 30, p. 1459.**
Exhibit 3-B, Tab 89. AR Vol. IX, Tab 30, pp. 1460-1470.

98. The testimony of John Shearer, the Director General of Tariff Programs (the person ultimately responsible for administering the obscenity provisions of the *Customs Tariff Act*), in which he attempts to justify Customs decision as to why *American Psycho* by Brent Ellis and *120 Days of Sodom* by the Marquis de Sade was considered not to be obscene needs to be contrasted with the testimony of Corinne Bird as to why the book *The Man Sitting in the Corridor* by Marguerite Duras was considered to be obscene and with the testimony of Frank Lorito and Linda Murphy with respect to the prohibition and reconsideration of the book *Empire of the Senseless* by Kathy Acker. Consider the following evidence:

(a)With respect to *American Psycho*, an advance copy of which Canada Customs sought out and which attracted the attention of the A.D.M. of the day, Mr. Shearer agreed that many passages in the book violated several of the paragraphs in Memorandum D9-1-1 [AR p. 1482, ll. 16-19; p. 1483, ll. 27-30]. It was determined not to be obscene, despite a "Secret" Communications Strategy document which describes opinion in the United States with respect to *American Psycho* as "horrific in its gory detail of killings and mutilations (in particular, those descriptions that relate to women)" and acknowledges "the universal, extremely poor literary reviews" [AR p. 1472]. Mr. Shearer testified that "it was determined that this was a good that would, in fact, fall outside the provisions of tariff code 9956, as simple as that."

(b) Likewise, Ms. Murphy agreed that although paragraphs in *The 120 Days of Sodom* depicting the use of fecal matter as part of sexual arousal were every bit as offensive as material entered into evidence by the federal Crown (Exhibit 216, *Mr. SM*; and Exhibit 189, *Shit For Dinner*) it was her opinion that *120 Days of Sodom* was permitted entry into Canada "probably ... on the basis of recognition of the Marquis de Sade." Ms. Bird, the Customs official who initially detained *The 120 Days of Sodom*, while agreeing that there are many, many passages in the book which involve sex with violence, sex with children, sex with fecal matter, sex with urination, sex with coercion, sex with humiliation, nevertheless concluded "the purpose of this book is not the undue exploitation of sex" [AR, p. 1519, ll. 14-29]. Ms. Bird further testified, "I'm not concerned with what someone is going to get out of a book. What I have to do is establish if this material is the undue exploitation of sex or if there is gratuitous sex reproduced in it for sexual gratification, and that was not the case in this book. Apart from that I make no other judgments about the material" [AR, p. 1519, l. 45 to p. 1520, l. 5].

(c) The government was aware that "*American Psycho* has the potential to resurrect and refocus [the censorship] debate." [AR, p. 1472] (As was the case with Madonna's *Sex* [see AR, Vol. VII, pp. 1109-1135, esp. 1122]); we submit that such "political" considerations all to often inform Custom's decisions.

(d) Ms. Bird was not as objective when she reviewed Marguerite Duras' *The Man Sitting in the Corridor* (destined for Trent University Bookstore and prohibited entry), which she

described as "a very short description of a man who sees a woman, keeps her under surveillance, makes her acquaintance and has sex with her and murders her ... The book was written from the point of you are in the man's mind and you know what his intentions are all the way along and you are privy to what's going on in his head" [AR p. 1623, l. 41 to p. 1524, l. 1]. Ms. Bird "was uncomfortable with it" and prohibited *The Man Sitting in the Corridor* on the basis of a passage at the end of the book which she classified as "sex with violence" [AR, p. 1523, ll. 39-40, p. 1524, ll. 1-3; p. 1630, l. 8 to p. 1631, l. 12].

(e) Kathy Acker's *Empire of the Senseless*, described by Prof. Martin of Concordia University as "a major literary accomplishment of considerable social and literary significance" was prohibited in November, 1988. Mr. Lorito, the TVA at Fort Erie, overturned this prohibition based on the *last line of the book*, which reads "And then I thought that, one day, maybe, there'd be a human society in a world which is beautiful, a society which wasn't just disgust". Without this final line, which is what "did it" for Mr. Lorito, he would have upheld the prohibition on the grounds that the book involved the undue exploitation of sex. [p. 1552, l. 40 to p. 1553, l. 28]
Re *American Psycho*: Exhibit 183. AR Vol. IX, Tab 31, p. 1474.**
Exhibit 182. AR Vol. IX, Tab 31, pp. 1471-1473.
Testimony of J.F. Shearer, p. 1024, l. 17 to p. 1032, l. 45. AR Vol. IX, Tab 31, pp. 1475-1483. Re *The 120 Days of Sodom and Other Writings*: Exhibit 172. AR Vol. IX, Tab 31, p. 1484.**
Exhibit 186, Tab 5. AR Vol. IX, Tab 31, pp. 1485-1510.
Testimony of L. Murphy, p. 1262, l. 16 to p. 1265, l. 31. AR Vol. IX, Tab 31, pp. 1511-1514.
Testimony of C. Bird, p. 1638, l. 47 to p. 1643, l. 13. AR Vol. IX, Tab 31, pp. 1515-1520.
Re *The Man Sitting in the Corridor*: Exhibit 238. AR Vol. IX, Tab 31, pp. 1521.**
Testimony of C. Bird, p. 1597, l. 31 to p. 1599, l. 13; p. 1627, l. 34 to p. 1632, l. 26. AR Vol. IX, Tab 31, pp. 1522-1530.
Re *Empire of the Senseless:* Exhibit 235. AR Vol. IX, Tab 31, p. 1531.**
Testimony of L. Murphy, p. 1143, l. 33 to p. 1158, l. 24. AR Vol. IX, Tab 31, pp.1532-1547.
Testimony of F. Lorito, p. 1518, l. 32 to p. 1539, ll. 21. AR Vol. IX, Tab 31, pp. 1548-1569.
Testimony of F. Lorito, p. 1488, l. 21 to p. 1491, l. 3. ASR, Tab 8, pp. 1944-1947.
Exhibit 166, Tab 1. ASR, Tab 8, pp. 1948-1968.

99. Likewise the testimony of Detective Noreen Wolff, while not a customs officer, is instructive in understanding the mind and attitude of the censor and the dynamics of censorship -- testimony which is particularly disturbing given her apparent training and expertise in the "obscene". She was completely incapable of recognizing a magazine as being a work of social commentary and satire (admittedly using disturbing text and drawings to drive home the point) and instead characterized it as "one of the most disturbing publications that I have read or had to view since being in the pornography unit."
Exhibit 247. AR Vol. IX, Tab 32, p. 1570 see Tab 27, pp. 1229-1356.

Exhibit 248. AR Vol. IX, Tab 31, pp. 1571-1572.
Exhibit 268. *Mother Jones*. AR Vol. IX, Tab 31, p. 1573.**
Testimony of N. Wolff, p. 1821, l. 38 to p. 1822, l. 5; p. 1866, l. 31 to p. 1912, l. 25.
AR Vol. IX, Tab 32, pp. 1574-1622.
Testimony of N. Wolff
re *Boiled Angel* - Exhibits 247. AR Vol. VIII, Tab 27, pp. 1229-1356.
and 248. AR Vol. VIII, Tab 27, pp. 1357-1358.
p. 1866, l. 31 to p. 1912, l. 25. AR Vol. VIII, Tab 27, pp. 1357-1404.
re *Hustler*, Exhibit 249. AR Vol. VIII, Tab 27, p. 1405.**
p. 1917, l. 8 to p. 1925, l. 9. AR Vol. VIII, Tab 27, pp. 1406-1414.
re *101 Uses for a Severed Penis,* Exhibit 250. AR Vol. VIII, Tab 27, p. 1415.**
p. 1925, l. 10 to p. 1927, l. 34. AR Vol. VIII, Tab 27, pp. 1416-1418.

100. Detective Wolff's defence of *Hustler* Magazine, a large and mainstream publication too widely available or "popular" to be the subject of her censorship, was (in comparison to her attack on less glossy publications) simply ludicrous**.**
Re *Hustler.* Exhibit 249. AR Vol. IX, Tab 33, p. 1623.**
Testimony of N. Wolff, p. 1917, l. 8 to p. 1925, l. 9. AR Vol. IX, Tab 33, pp. 1624-1632.

101. Justice Macfarlane's conclusion that the impugned provisions were rationally connected to the objective was entirely predicated on his view that the "legislation properly administered should not give rise to irrational results." But at the same time he recognized that this scheme "is not a perfect one"; that "in practical terms it must be and is designed to inspect a small percentage of total material entering the country"; that "it is inevitable that some obscene material will be admitted" and "it is clear that errors will occur in the classification of material which turn out to be non-obscene." Given these findings -- which we submit Justice Macfarlane understated -- it is difficult to understand how the impugned provisions can be said to be rationally connected to the objective even if the objective is to prevent the proliferation of only the obscene. The over and under inclusiveness of the Legislation is as a result of how the Legislation is and inevitably will be administered. In other words, the "proper administration" of the impugned provisions, such that it will only result in the detention and prohibition of the obscene, is a fiction and this must be taken into account in the rational connection part of the analysis if it is to be anything other than a tautology.

102. These problems of under and overbreadth have been used under the rational connection branch of the section 1 analysis (see *Oakes* at p. 142) more frequently they are dealt with under the minimal impairment and proportionality stages of the *Oakes* test. Wherever the locus of the concept, the problem of overbreadth as Rowles J.A. recently stated in *R. v. Sharpe,* "is of particular importance where a statutory provision is found to violate freedom of expression because of the chilling effect that such a law could have on constitutionally protected expression which falls outside the intended ambit of the law." While she went on, referencing this Court's decisions in *R. v. Heywood*, [1994] 3 S.C.R. 761, *R. v. Smith*, [1987] 1 S.C.R. 1045 and *R. v. Goltz*, [1991] 3 S.C.R. 485, to consider "reasonable hypothetical examples" to "illustrate the unintended reach and potential effects of such a provision" no such hypotheticals are required in the case at Bar as it was all proven at trial. Furthermore if legislation can be struck down because the words are **hypothetically** capable of an interpretation that does not advance the law's objective,

then it ought to follow, *a fortiori,* that a law which in its actual operation and effect systemically captures more than is intended by the legislature, is unconstitutional as well.
***R. v. Sharpe,* [1999] B.C.J. No. 1555 (C.A.) (Q.C.) at paras. 165-166.**
***R. v. Heywood*, [1994] 3 S.C.R. 761.**
***R. v. Smith*, [1987] 1 S.C.R. 1045.**
***R. v. Goltz*, [1991] 3 S.C.R. 485.**
***Thomson Newspapers, supra.,* at p. 955, para. 111.**

(b) Minimal Impairment

103. The majority of the Court of Appeal, like the trial Judge, held that the impugned provisions minimally impaired freedom of expression as little as possible because the "legislation is appropriately restrained in that it is designed to catch only obscenity." Again these Justices answered the claim that the Legislation is both over inclusive and under inclusive as "administrative shortcomings" that are properly addressed by a section 24(1) declaration. The Appellants again repeat their submission that if these under and over inclusive shortcomings can be attributed, even in part to the impugned provisions, then this is enough to grant a section 52 remedy as the impugned provisions, and not simply people that administer them, do not minimally impair the expression right.

104. The government must have a high onus under the "minimal impairment" requirement where core expression is at issue. Even if, *arguendo,* the government need not prove that it has achieved the absolutely least intrusive measure conceivable, it must advance evidence to show that Parliament has at least considered whether the pressing and substantial objective could be achieved in other less intrusive ways. The Respondents have completely failed to advance any such evidence in this case.
***RJR-MacDonald v. Canada (A.G.), supra* at p. 305, 344-345**

105. The trial Judge concedes that the means chosen here by Parliament were "not the least drastic means available of achieving the objective", but then placed too much emphasis on administrative convenience and the "practicalities of the circumstances" and not enough emphasis on the importance of the expression right that was infringed.
Reasons for Judgment, BCSC, paras. 213 and 214. AR Vol. I, pp. 169-170.
***Singh v. Canada*, [1985] 1 S.C.R. 177 at 218-219.**
Re Information Retailers Association of Metropolitan Toronto Inc., supra

106. The trial Judge dismissed the suggestion that Parliament should have provided for procedural due process and public scrutiny through a trial or tribunal as is required in the United States on the ground that the antipathy to prior restraint "finds no support in Canadian law."
Reasons for Judgment, BCSC, paras. 215 to 217. AR Vol. I, pp. 170-173.
See also:
***American Booksellers Association v. Hudnut* 771 F. 2d 323 (1985)**
L.H. Tribe, American Constitutional Law, *supra* at pp. 1058-1061.
F. Shauer, "Fear, Risk and the First Amendment: Unravelling the *Chilling Effect* (1978) 58 Boston U.L. Rev. 685

107. In fact the antipathy to prior restraint emanates with Blackstone, has been recognized and confirmed by the Ontario courts and was undoubtedly what informed the reasons of this Court in *Dagenais v. C.B.C.*

Blackstone, *Commentaries*, Of Public Wrongs, Ch. 11, pp. 1549-1553.
***Re: Ontario Film and Video Appreciation Society and Ontario Board Of Censors* (1984), 5 D.L.R. (4th) 766 (Ont. C.A.)**
***Re: Ontario Film and Video Appreciation Society and Ontario Board Of Censors* (1983), 147 D.L.R. (3d) 58 (Ont. Div. Ct.)**
***Re: Information Retailers Association of Metropolitan Toronto Inc. supra* at 471-472**
***Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835 at 873-891.**

108. In saying that a different scheme "would be difficult to imagine" the trial Judge effectively reversed the onus under section 1 onto the Appellants. It is for the Government to show that it has considered the issue and decided it cannot proceed otherwise; it is not for the trial Judge to make assumptions.
Reasons for Judgment, BCSC, para. 220. AR Vol. I, p. 174.
See***RJR-MacDonald v. Canada (A.G.)*, *supra,* at pp. 346-349, per McLachlin J.**

109. The legislative history of the Customs Legislation makes it extremely unlikely the government could ever show it had considered other options. This is the first time that the legislated Customs censorship process has been subject to a judicial challenge. The impugned Legislation has been in existence in similar form since 1833. An amendment in 1985 as a result of the ***Luscher*** decision of March 14, 1985 had nothing to do with the "process" by which books, art and other works are banned from Canada. Parliament has experienced no "historic difficulties" in trying to redress the problem; it has never tried.
***Re Luscher and Deputy Minister, Revenue Canada, Customs and Excise* (1985), 15 C.R.R. 167 (F.C.A.).**
***Hansard*, April 2, 1985 p. 3603-4**
***An Act to amend the Customs Tariff*, S.C. 1985; S.C. 1986; S.C.1987**

For an excellent history of censorship by Canada Customs, see Ryder, Undercover Censorship, *supra*.
Exhibit 16. AR Vol. IX, Tab 34, p. 1633.
Testimony of J. Deva, p. 76.13, ll. 3-32. AR Vol. IX, Tab 34, pp. 1634
Testimony of G. Morrison, p. 1759, l. 30 to p. 1760, l. 7. AR Vol. IX, Tab 34, pp. 1635-1336.

110. The expression right would be minimally impaired only if there is a legislated process which allows for a full, open and public exploration of the complex and sensitive issues that claims of obscenity raise and an adjudication by skilled adjudicators. There are a vast array of possibilities between a full blown obscenity trial and the completely inadequate legislative measures that are presently in place. Given that individual works cannot be determined to be obscene in the absence of proof of actual, and not simply presumed harm, such a process is all the more mandatory as a matter of constitutional imperative.
***R. v. Hawkins* (1993), 86 C.C.C. (3d) 246 at pp. 263-264 (Ont. C.A.)**

111. Customs inspectors have no specialization when it comes to making the legal, and indeed constitutional, determination that a book, art or other work is obscene. The trial Judge's statement (at para. 242) that "the impugned legislation delegates the decision making power to **trained** customs officers" is simply wrong. No specific expertise in art or literature is required of Customs officers and all that is required to become a

commodity specialist -- whether the commodity is "books" or "widgets"-- is completion of secondary school or equivalency. For the minimal impairment test to be met, it is submitted that Parliament should stipulate that only those with proper qualifications should be entitled to make a determination whether a book or film is obscene. This is done in other contexts where fundamental rights are at stake.

Reasons for Judgment, BCSC, para. 242. AR Vol. I, p. 185.
Testimony of J. Rule, p. 692, l. 42 to p. 693, l. 40. AR Vol. III, pp. 496-497.
Testimony of J.F. Shearer, p. 975, ll. 30-40; p. 989, ll. 22-47; p. 1006, l. 23 to p. 1007, l. 4. AR
Vol. III, pp. 498-501.
Testimony of F. Lorito, p. 1476, ll. 5-11. AR Vol. III, p. 502.
Testimony of C. Bird, p. 1574, ll. 25-38. AR Vol. III, p. 503.
Testimony of D.A. Bradt, p. 1681, ll. 35-47. AR Vol. III, p. 504.
Testimony of G. Morrison, p. 1748, l. 29 to p. 749, l. 27. AR Vol. III, pp. 505-506.
Testimony of S.C. Slater, p. 1952, ll. 3-14. AR Vol. III, p. 507
***Criminal Code of Canada,* R.S.C. 1985, c. C-46, Part XX.1.**

112. The trial Judge explained the task imposed upon the customs officer even with the aid of Memorandum D9-1-1 as follows:

> While much of the material presented at our borders may be capable of relatively quick decision in relation to code 9956(a), a substantial amount of material is more difficult to evaluate. The classifying officer must do more than merely identify, on an objective basis, whether the material presented falls within the categories of obscenity enumerated in Butler. The officer must also make a subjective assessment of whether, in the context of the whole work, the exploitation of sex is "undue" and further, whether the exploitation of sex is overcome by an artistic, literary, or other similar purpose. It is not reasonable to expect Customs Inspectors to be able to adequately perform this task in conjunction with their other duties.
>
> **Reasons for Judgment, BCSC, para 254. AR Vol. I, p. 189.**
> **Testimony of Prof. C. Vance, pp. 801-808. AR Vol. X, Tab 35, pp. 1637-1644.**
> **Testimony of F. Lorito, p. 1540, ll. 13-23; p. 1552, ll. 11-26. AR Vol. X, Tab 35, pp. 1645-1646.**
> **Testimony of G. Morrison, p. 1740; p. 1749, ll. 33-47; p. 1750, ll. 1-7. AR Vol. X, Tab 35, pp. 1647-1649.**
> **Testimony of J. Shearer, p. 1006, l. 23 to p. 1007, l. 4. AR Vol. X, Tab 35, pp. 1650-1651.**

113. The trial Judge acknowledged that the internal necessities test for artistic merit "is easily stated but complex and difficult to apply" and explained:

> For example, Nino Ricci, a distinguished Canadian author and professor of creative writing, looks for such things as structure and plot development; internal consistency and credibility; new and complex use of language; complexity in the psychology of the characters, in the development of situations, and in the examination of themes; intent of the author, being careful to distinguish between

artistic purpose and quality; and social and historical context of the work.
Reasons for Judgment, BCSC, para. 226. AR Vol. I, p. 177.
Testimony of N. Ricci, pp. 350-353. AR Vol. X, Tab 36, pp. 1652-1655.
Testimony of L. Weir, pp. 702-808; pp. 718-720. AR Vol. X, Tab 36, pp. 1656-1662.
Testimony of J. Shearer p. 1043, ll. 13-17. AR Vol. X, Tab 36, pp. 1663-1665.
Testimony of F. Lorito, pp. 1522-1524. AR Vol. X, Tab 36, pp. 1667-1669.

114. While the test of obscenity enunciated in *R. v. Butler* demands that the "internal necessities" or "artistic merit" test be applied to any work alleged to be obscene, Customs officers are not qualified to apply this test and, in fact, do not apply it.
Testimony of J.F. Shearer, p. 1014, ll. 32-39. AR Vol. X, Tab 37, p. 1670.
Testimony of F. Lorito, p. 1477, ll. 20-21; p. 1518, ll. 16-31. AR Vol. X, Tab 37, pp. 1671-1672.
Testimony of C. Bird, p. 1657, ll. 4-41. AR Vol. X, Tab 37, p. 1673.
Testimony of D.A. Bradt, p. 1715, ll. 36-47; p. 1716, ll. 26-47; p. 1717, ll. 7-10. AR Vol. 10, Tab 37, pp. 1674-1676.

115. Indeed the trial Judge agreed (with one qualification noted in the next paragraph) that "although customs officers are diligent and hardworking people, they are not capable of making these difficult decisions".
Reasons for Judgment, BCSC, para. 253. AR Vol. I, pp. 188-189.

116. There are times when the stakes are such that the competence of persons to analyse and apply the law cannot be any less than that of a court of law or a highly specialized tribunal. It is submitted that the legal determination of obscenity, charged as it is with constitutional considerations and implications for the free dissemination of ideas, raise high stakes in our constitutional democracy, and should not be entrusted to Customs Inspectors even if they had "the benefit of appropriate and consistent training and with the necessary time and the availability of relevant evidence."
Reasons for Judgment, BCSC, para. 252. AR Vol. I, p. 188.
***Cooper v. Canada (Human Rights Commission)* (1996), 3 S.C.R. 854**
Testimony of J.F. Shearer, pp. 1054-1066. AR Vol. X, Tab 38, pp. 1677-1689.

117. The trial Judge compared the customs inspector to the jury in a criminal prosecution. There can be no fair comparison between the customs inspector and a jury either in expertise or process. The jury performs its functions under the close scrutiny of a judge, prosecutor and defence counsel and in a trial process that bears no similarity to the environment in which the customs inspectors perform their task as **police, prosecutor and judge** -- often in a warehouse as the books pass by on a conveyor belt. The Customs Inspector is no tribunal at all, let alone not one that is specialized, as the learned trial Judge said.
Reasons for Judgment, BCSC, paras. 161, 218a. AR Vol. I, pp. 145-146, 173.
Testimony of S.C. Slater, p. 1954, ll. 2-25; pp. 1956-1957. AR Vol. X, Tab 39, pp. 1690-1691.
Testimony of C.M. Bird, pp. 1585-1587. AR Vol. X, Tab 39, pp. 1693-1695.

118. Justice Finch was surely correct when he said:

> A jury is told to accept the judge's instructions on the law, and not to apply their own understanding of what the law is, or ought to be. Moreover, the judge has the benefit of legal argument on contentious points from both sides to the dispute. It is not the sort of ex parte advice given by the Department of Justice to Customs, or by a lawyer to a prospective importer. Moreover, the judge's instructions on the law can be specifically directed and tailored to the facts of the case, which may be open to the jury to find on the evidence adduced and subjected to cross-examination. The judge's instruction on the law is not open to question by the jury, and the instruction is treated as infallible so there will be certainty in the record, and a proper means of addressing an appeal alleging legal error in the charge, if that should occur.
> **Reasons for Judgment, BCCA, para. 212. AR Vol. II, pp. 287-288.**

119. A democratic safeguard, present in the court system, but missing from the Customs Legislation is the requirement that the legal determinations take place in the glare of public scrutiny -- the so called "open court doctrine." Justice must also be seen to be done. Without subjecting the determination of the Customs Inspectors to public scrutiny Canadians can never be satisfied that the law is being properly and justly applied.
***Edmonton Journal v. Alta. A.G.*, *supra* at p. 1361**
Testimony of K. Mistysyn, pp. 169-170. AR Vol. X, Tab 40, pp. 1696-1697.
Testimony of J. Fuller, p. 939, l. 25 to p. 940, l. 4. AR Vol. X, Tab 40, pp. 1698-1699/
Testimony of F. Lorito, p. 1529, l. 14 to p. 1530, l. 2. AR Vol. X, Tab 40, pp. 1700-1701.
Reasons for Judgment, BCSC, paras. 98 and 117. AR Vol. I, pp. 119 and 126.
Ryder, *Undercover Censorship*, *supra* at 134. Prof Ryder says: ...Where political pressure is exerted towards suppression, concerns about censorship, and a lack of consensus about its appropriate mechanisms and forms, have led the state away from criminalization, and, ironically, towards less visible, less accountable forms of regulation. The result is that too many Canadians have been either uninformed or complacent: so long as the exercise of power over publications has been invisible, there has been nothing to worry about.

120. Finally, the trial Judge's recognition that there must be improvements to the process, training and expertise of the decision makers, clearly demonstrates that there are less restrictive and practical alternatives available to the present scheme. Where the trial Judge erred was in leaving those improvements to the Customs bureaucracy to work out rather than sending the Legislation back to Parliament for overhaul. Just as the Courts are not supposed to rewrite Legislation neither should it be left to the executive or administrative branch of government. The job is Parliament's to do.
***Hunter v. Southam,* [1984] 2 S.C.R. 145, at 169.**
***Schacter v. Canada* (1992), 2 S.C.R. 679**, at 695-715
Criminal Code of Canada, R.S.C. 1985, c. C-46, Part XX.1

121. The Appellants submit that Justice Finch correctly held that:

> Here the legislation does not create an administrative scheme or structure for the identification of obscenity. It is left up to the Customs officials to apply as best

they can the standards set out by s. 163(8) of the Criminal Code. Here, Parliament has opted for the use of self-guided officials to determine moral content, in the absence of due process and intelligible statutory guidelines. As the reasons of the learned trial judge amply demonstrate, the best efforts of Customs officials result in the prohibition of much material that is not obscene.
Reasons for Judgment, BCCA, para. 251. AR Vol. II, p. 303.

122. Even Justice Hall impliedly recognized that the impugned provisions did not minimally impair the expression right, at least with respect to textual material, when he said:

> It may even be the case that Parliament, at some point, will consider it desireable to assign customs authorities primary responsibility for screening non-textual material and leave it to the provincial law officers to deal with textual material that is allegedly obscene under the rubric of the criminal law. That I view as a matter that should be left at this time for consideration by the legislative branch of government.
> **Reasons for Judgment, BCCA, para. 135. AR Vol. II, pp. 255-256.**

123. Where Justice Hall erred is in leaving the matter "at this time for consideration by the legislative branch of government". This is somewhat reminiscent of Sopinka J.'s "incrementalism" approach in *Egan*, an approach that has been discredited by this Court in *Vriend* and *M. v. H* and by the Ontario Court of Appeal in *Rosenberg*.
Reasons for Judgment, BCCA, para. 135. AR Vol. II, pp. 255-256.
***Vriend v. Alberta*, *supra*.**
M. v. H.*, *supra.
***Rosenberg v. Canada (Attorney General)* (1998), 158 D.L.R. (4th) (Ont. C.A.) 664 at para. 37-40**

(c) Proportionality Between the Deleterious Effects and the Benefits of the Ban

124. The third and arguably most important stage of the proportionality analysis "provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*".
***Thomson Newspapers, supra,* at p. 968, para. 125**.

125. The trial Judge did recognize that the deleterious effects of the Legislation, as opposed to the effects of its administration, are that "admissible material is sometimes detained to be examined for compliance and that wrong decisions are sometimes made in the classification of materials".
Reasons for Judgment, BCSC, para. 234. AR Vol. I, p. 182.

126. Where the trial Judge erred however was in not attaching anywhere nearly enough importance to the expression that was infringed by the impugned provisions. The trial Judge, having found that the Legislation results in the prohibition of the non-obscene, then proceeded to conclude that there was proportionality between the deleterious effects

and the objective since "obscenity, whether produced for heterosexual or homosexual audiences, is a base form of expression." The infringement, the Court said, was therefore "minimal". This of course is clear error: the infringement of non-obscene expression, which the evidence in this case revealed included artistic, literary, social, political and cultural expression, is at the core of the expression right. While the Appellants challenge the proposition that even if obscenity is a base form of expression, there should be no doubt that pornography, so long as it is not obscene is an important form of expression.
Reasons for Judgment, BCSC, para. 235. AR Vol. I, p. 182.
***infra*, para. 44**
Appendix "A"

127. With respect to the detentions (as contrasted with the prohibition) of non-obscene material caused by the Legislation both the trial Judge and majority of the Court of Appeal failed to attach sufficient importance to the deleterious effects of such infringements of the expression right. The trial Judge said it is a minimal intrusion and yet the evidence was overwhelming that even the detention of material was very serious.
Exhibit 178, Excerpts from Discovery of Linda Murphy, Tab 1, Question 63. AR Vol. X, Tab 41, pp. 1702-1703.
Exhibit 55 - letter to Glad Day from Golden Lee. AR Vol X, Tab 41, p. 1704.
Testimony of S. Haar, p. 223, l. 26 to p. 224, l. 6. AR Vol. X, Tab 41, pp. 1705-1706.
Testimony of D. Mahoney, p. 111, ll. 1-8. AR p. AR Vol. X, Tab 41, p.1707.
Exhibit 46, Tab 42. AR Vol. X, Tab 41, pp.1708-1716.
Exhibit 180, Affidavit of Lucinda Johnston, paragraph 11. AR Vol. X, Tab 41, p. 1721.
Testimony of J. Fuller, p. 942, ll. 1-42. AR Vol. X, Tab 41, p. 1725.

128. Author Jane Rule eloquently explained how the detention of her award winning book on the ground of alleged obscenity caused lasting harm:

> Some cynics have said, "Isn't it nice to get all that attention". But in fact it's the kind of attention that would, if it attracted readers, find readers who would be very disappointed in the books, since they aren't pornographic, and it is a kind of attention that would very possibly cut me off from the general audience for whom I write. It is the kind of statement or implication that does not simply last for that week or that month, but labels me for the rest of my professional life as someone who is probably a pornographer because, you know, if they held the books, there must be something in them that they don't like.
> **Testimony of J. Rule, p. 700, l. 45 to p. 701, l. 44. AR Vol. X, Tab 42, pp. 1726-1727.**
> **Exhibit 140 - *The Young in One Another's Arms.* AR Vol. X, Tab 42, p. 1728**.**
> **Exhibit 141 - *Contract with the World*. AR Vol. X, Tab 42, p. 1728**.**
> **Testimony of C.M. Bird, p. 1656, l. 6 to p. 1659, l. 8. AR Vol. X, Tab 42, pp. 1729-1732.**
> **Testimony of J. Deva, p. 45, ll. 7-35. AR Vol. X, Tab 42, p. 1733.**

129. These detentions not only stigmatize and marginalize the specific author involved but the entire gay and lesbian and other minority communities.

130. The trial Judge and the Court of Appeal concluded that the minimal effect of detentions was outweighed by the fact that detentions are "essential to the functioning of the system", or in the words of Justice Macfarlane "no screening system can operate without some delay".

Reasons for Judgment, BCSC, para. 234. AR Vol. I, p. 182.
Case of Appeal, para. 96. AR Vol. II, p. 241.

131. This, with respect, does not meet the requirements of the third stage. There may well be delay in any screening system or scheme of prior restraint but this just means that the impugned provisions, insofar as they allow for detentions, are "rationally connected" to the objective of the impugned provisions. What the lower Courts fail to do is to determine why the detention of large quantities of very important expression outweighs the minimal beneficial effect of the limitation given that the detentions do not ensure that much obscene material and the worst kinds are kept out of the country. They also failed to weigh whether the detentions and delay of non-obscene material can be justified in relation to the salutary effects, particularly when there could be less detentions and delays by a different scheme of screening: for example, one in which Parliament ensured that there were specified time limits established by legislation, that detentions were made by persons with proper expertise, ensured that the importer was entitled to due process, and placed the onus on the government, not the importer, to prove that the material is obscene.

132. Other deleterious effects that the trial Judge and majority of the Court of Appeal seemingly ignored was the "chilling effect" of the provisions on publishers, distributors and bookstores such as unwarranted self-censorship and either outright refusal to trade or trade at extra costs as a result of Customs powers. For example, Ms. Fuller explained the implications of detentions to Little Sisters:

> I think there's many different ramifications for the store. One is an accountability to the customers who come into the store having to explain over and over and over again why specific titles might not be available. We do a tremendous amount of special orders for people, having to indicate to them when we make those special orders that we can't in good conscience assure them that this book is going to arrive undetained by Canada Customs.
>
> I don't know of many book stores that have to go through that tedious and expensive process. I think there's also a sense of self-censorship that occurs around ordering books in that you start to try and read into what you think a customs agent would be assessing a book at and you order accordingly.
>
> **Testimony of J. Fuller, p. 942, ll. 1-42. AR Vol. X, Tab 43, p. 1758.**
> **Exhibit 178, Examination for Discovery of Linda Murphy, Tab 1, Question 63. AR Vol. X, Tab 43, pp. 1734-1735.**
> **Exhibit 55 - letter to Glad Day from Golden Lee. AR Vol. X, Tab 43, p. 1736.**
> **Testimony of S. Haar, p. 223, l. 26 to p. 224, l. 6. AR Vol. X, Tab 43, pp. 1737-1738.**
> **Testimony of D. Mahoney, p. 111, ll. 1-8; p. 112, ll. 16-47. AR Vol. X, Tab 43, pp. 1739-1740.**
> **Exhibit 46, Tab 42. AR Vol. X, Tab 43, pp. 1741-1749.**

Exhibit 180, Affidavit of Lucinda Johnston, paragraph 11. AR Vol. X, Tab 43, pp. 1750-1757
Testimony of K. Mistysyn, p. 167, ll. 1-34. AR Vol. X, Tab 43, p. 1759: "I don't think there are very many book buyers who would include in their job dscription having to play censor to a certain degree as well as having to fight censorship issues to the degree that I have to in my daily work schedule."
Testimony of P. Blackbridge, pp. 264-265. AR Vol. X, Tab 43, pp. 1760-1761.
See also:
Exhibit 1, Agreed Statement of Facts, para. 3. AR Vol. X, Tab 43, pp. 1762-1768.

133. As against all of the deleterious effects on the expression right as outlined herein, the trial Judge erred in finding there were any or at least sufficient salutory effects proven by the government. His finding that "a large volume of obscene material is prohibited as a result of the administration of the impugned legislation" is not supported by the record. Even so, he had no answer for the undisputed fact that:

> ...a great deal of **prohibited** material is readily available in news-stands, general-interest bookstores, libraries, and even in the Little Sisters store. As well, the most extreme obscenity, including child pornography, is often smuggled into the country. [emphasis added]

Reasons for Judgment, BCSC, para . 237. AR Vol. I, p. 183.
Testimony of P. Berton, p. 557, ll. 12-19. AR Vol. X, Tab 44, p. 1769.
Testimony of J. Shearer, p. 1052, ll. 24-47. AR Vol. X, Tab 44, p. 1770.
Testimony of L.K. Murphy, p. 1269, ll. 1-18. AR Vol. X, Tab 44, p. 1771.
Testimony of Prof. T. Waugh, p. 328, ll. 13-38. AR Vol. X, Tab 44, p. 1772.
Exhibit 222 - *Bob Flanagan, Supermasochist.* AR Vol. X, Tab 44, p. 1733**

134. The trial Judge's suggestion that the Legislation assists the police in "identifying subjects of investigation," even if true (which is doubtful), can be effected without giving customs officers the power to prohibit the importation of books or other expressive material.
Reasons for Judgment, BCSC, para. 238. AR Vol. I, p. 183.
Testimony of R.E. Matthews, pp. 1939 and 1943-1944. AR Vol. X, Tab 45, pp. 1774-1776.
Testimony of N. Wolff, pp. 1862, 1832, 1834, 1838, 1843, 1845, 1847, 1855-1857, 1860, 1862, 1865, 1916, 1932, 1835-1836, 1931-1933, 1856, 1861. AR Vol. X, Tab 45, pp. 1777-1791 and 1793-1799.
Testimony of J.H. Maitland, p. 1811. AR Vol. X, Tab 45, p. 1792.
see also: *Fort Wayne Books, Inc. v. Indiana,* (1989) 103 L. Ed. 2d 34 (U.S.S.C.)

135. In *R. v. Sharpe* Southin J.A. addressed a similar argument advanced to justify the private possession of child pornography. She said:

> To borrow the words of Brennan J., dissenting, in *Osborne v. Ohio*, 495 US 103, 109 L Ed 2d 98, 110 S Ct 1691 (1990), this is an argument that possession laws are an essential element of a successful enforcement strategy against production

and distribution. The argument did not find favour with him and it finds little favour with me, nor is it at all clear that Parliament enacted subsection (4) for that purpose.

***R. v. Sharpe, supra*, at para. 36**

136. The trial Judge was wrong to dismiss the effect of technological advances in allowing the importation of obscenity and which is beyond the control of the Customs Inspectors.

Reasons for Judgment, BCSC, para. 239. AR Vol. I, p. 184.
***Dagenais v. C.B.C., supra*, at p. 886**
***R. v. Sharpe, supra*, at para. 33.**
see also CRTC 99-14, *infra*, at para. 60.

137. The fact that the impugned provisions apply to importation for purely private purposes further exacerbates the infringement and is not offset by any salutary effect. The invasion of freedom of expression and personal privacy is profound extending to all persons who make no harmful use of pornography including mere collectors.

Testimony of D.R. Benn, pp. 342, l. 28 to p. 346. ASR, Tab 9, pp. 1969-1973.
Exhibit 117. ASR, Tab 9, pp. 1974-1975.
***Stanley v. Georgia*, 22 L. Ed. 2d 542 at 549-550 (U.S.S.C.)**
***U.S. v. 37 Photographs*, 28 L. Ed. 2d 822 (1971, U.S.S.C.) at 836 (per Black J. in dissent).**
Hunter v. Southam Inc.*, *supra
***R. v. Morgentaler*, supra, at pp. 30-34, 161-185.**
Blackstone, *Commentaries*, Of Public Wrongs, *supra*, at 1553.
R. Dworkin, *A Matter of Principle*, "Do We Have A Right to Pornography", Ch. 17, pp. 335-372 at 353-354.
T.M. Scanlon Jr., "Freedom of Expression and Categories of Expression", U. of Pittsburgh L.R., Vol. 40, No. 4 (Summer, 1979) 139 at 158-161.
***Report of the Committee of Obscenity and Film Censorship* (London: Her Majesty's Stationery Office, 1979) ("Williams Report") at para. 10.11**
***R. v. Sharpe*, supra, at para. 49.**

138. The trial Judge was also in error in placing any emphasis on the experience of other countries, most of which have customs legislation that is plainly rooted in concerns of morality, some of which is overtly repressive of homosexuals and even women, and none of which has been subjected to the kind of searching judicial scrutiny that has occurred in this case. Even so, some countries do not permit Customs to ban books and others have specialized tribunals to deal with the issue. This evidence is simply too inconclusive and not even properly proven to advance the inquiry before the Court.

Reasons for Judgment, BCSC, paras. 245 and 246. AR Vol. I, p. 186.

139. This is one of those cases where, in the end, the law must be struck down because the deleterious effects on rights at stake outweigh the salutory effects (if any) of achieving the rather tenuous objective. The impugned Legislation does far more harm than the legislation that was at issue in *Butler*. The magnitude of the infringement from a quantifiable perspective allows of no comparison. In British Columbia only 14 charges under s. 163 of the *Criminal Code* were laid in 4 years and in the same period (1989 - 1992) Customs prohibited 34,748 shipments under Tariff Code 9956. The damage from a

qualitative perspective is not even measurable.
Exhibit 179. AR Vol. X, Tab 46, pp. 1800-1813.
Exhibit 1, Agreed Statement of Facts. AR Vol. X, Tab 46, pp. 1814-1820.

140. Justice Finch's succinct and pithy comment on the third stage of the proportionality analysis is apt:

> It will be apparent that the third stage of the proportionality test established in Oakes, namely weighing the effect of the measures adopted and the objective identified as sufficiently important, does not arise on my view of this case. Nevertheless, having already expressed my views on the importance of the freedom of expression and the deleterious nature of prior restraint, it should be readily apparent that in my view the Customs legislation would not be a proportionate means, even assuming that there were a legitimate end. Free expression is a fundamental right in any democratic society. **A statutory scheme that imperils the free distribution of morally unimpeachable material cannot be justified by the lame explanation that obscenity was the real target.** [emphasis added]
> **Reasons for Judgment, BCCA, para. 255. AR Vol. II, pp. 304-305**

D. SECTION 15: **The Trial Judge and Court of Appeal Erred In Not Finding An Infringement Of Section 15(1) Of The *Charter***

141. As Professors Ryder and Cossman have put it, "the connection and interaction between equality rights and freedom of expression is a distinct and important feature of the Little Sisters litigation." They go on to say:

> In the context of censorship of sexually explicit materials the rights violations that are experienced by the gay and lesbian community cannot be adequately described by separating the violation of their equality rights and the violation of their freedom of expression.
> **Cossman and Ryder, "Customs Censorship and the Charter", supra, at 108**

142. The decisions of the trial Judge and the majority of the Court of Appeal preceded this Court's decision in *Vriend v. Alberta*, *Law v. Canada* and *M. v. H.* and cannot be reconciled with those decisions. The trial Judge applied the "relevance" test as part of the section 15 analysis (the approach of the dissent in *Miron v. Trudel* and *Egan*) and Macfarlane J.A. failed to apply a proper substantive approach finding that the Customs Legislation does not violate section 15 merely because it "does not draw a distinction between homosexuals and others."
Reasons for Judgment, BCSC, paras. 121-136. AR Vol. 1, pp. 128-135
Reasons for Judgment, BCCA, paras. 116, 118, 119. AR Vol. II, pp. 246, 247.
***Vriend v. Alberta*, supra.**
***Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12 (Q.L.)**
***M. v. H.*, *supra*.**

***Miron v. Trudel*, [1995] 2 S.C.R. 418**
***Egan v. Canada*, *supra*.**

143. The unanimous decision of this Court in *Law v. Canada* directs that the appropriate section 15 inquiry and analysis, following upon the analysis in *Andrews v. Law Society of British Columbia*, and the two-step framework set out in *Egan*, *supra*, and *Miron*, *supra* is to make the following three broad inquiries:

> First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).
> ***Law v. Canada*, *supra*, at para. 39.**

144. The Customs Legislation does not draw a formal a distinction based upon sexual orientation (as Macfarlane J.A. noted) but it does fail to take into account the differences between material for heterosexual and homosexual readers or viewers and thus runs afoul of the first of the two broad inquiries in the section 15 analysis. The trial Judge's assessment in this respect is apt:

> ... As attested by several of the plaintiffs' witnesses, erotica produced for heterosexual audiences performs largely an entertainment function, but homosexual erotica is far more important to homosexuals. These witnesses established that sexual text and imagery produced for homosexuals serves as an affirmation of their sexuality and as a socializing force; that it normalizes the sexual practices that the larger society has historically considered to be deviant; and that it organizes homosexuals as a group and enhances their political power. Because sexual practices are so integral to homosexual culture, any law proscribing representations of sexual practices will necessarily affect homosexuals to a greater extent than it will other groups in society, to whom representations of sexual practices are much less significant and for whom such representations play a relatively marginal role in art and literature.
> **Reasons for Judgment, BCSC, para. 128. AR Vol. I, p. 131.**

145. Therefore, it is in the application of the third inquiry that this appeal is most concerned. The trial Judge said:

> However, the inequality of treatment does not arise from "the stereotypical application of presumed group or personal characteristics": per McLachlin J. in

Miron v. Trudel, supra, at para 128. Rather, the group characteristic is a real one and one that is relevant to the goal of the impugned legislation. Sexuality is relevant because obscenity is defined in terms of sexual practices. Since homosexuals are defined by their homosexuality and their art and literature is permeated with representations of their sexual practices, it is inevitable that they will be disproportionately affected by a law proscribing the proliferation of obscene sexual representations. ...

Reasons for Judgment, BCSC, para. 135. AR Vol. 1, p. 134.

146. Assuming that the goal of obscenity prohibition is prevention of harm to society from descriptions or depictions of **obscene** sexual practices then the lower Courts' suggestion that homosexuality is "relevant" to that goal implies that depictions of homosexual sex are harmful to society *because* they involve homosexuality. This is precisely the kind of reasoning from stereotype that section 15(1) is meant to prevent.

***Law v. Canada, supra*, at paras. 34, 47, 64, 80.**

Cossman & Ryder, *Customs Censorship and the Charter*, *supra*, at pp. 105-106.

147. Furthermore there is nothing legally redeeming about a law because the disproportionate impact is "inevitable". In fact that should be the first indicia that something is seriously amiss. That disproportionate impact is not only inevitable but it arises in part as a result of a stereotypical view of gay and lesbians, namely that their sexuality and sexual practices are deviant or perverse. This was proven at the trial in a number of ways, such as the targeting of gay and lesbian bookstores; the fact that Memorandum D-9-1-1, until literally a few days before trial, prohibited, as *per se* obscene, any depiction or description of anal penetration, a sexual practice central to gay men, even though Customs was given legal advice, at least as early as 1992, that it could not legally proscribe such depictions or descriptions; and further findings of fact by the trial Judge that "much homosexual erotica that has been prohibited as obscene is not in fact obscene" and "a disturbing amount of homosexual art and literature that is arguably not obscene has been prohibited."

Reasons for Judgment, BCSC, paras. 135, 252, 264-270. AR Vol. I, p. 134, 188 and 193-195.

Testimony of N. Ricci, pp. 370-379. AR Vol. X, Tab 47, pp. 1821-1830. Who recognized the stereotypical view of gay and lesbians and other minorities. He said: "...I think that all three of these works [banned by Customs] are ground breaking works in the sense in that they are establishing the right of a community to speak, to speak about it's reality, to speak about a reality that is often not documented in mainstream sources, that is often reviled or stigmatized. And, therefore, in a sense, these works perform the work that literature and art often performs, which is to in some way challenge the status quo, to challenge our received perceptions, to challenge our received realities and to expand our notion of what is to be human, to explore aspects of humanity which we might not like, we might not agree with but which exist and which we can't simply ignore or deny." **[p. 1828, l. 43 to p. 1829, l. 9]**

Testimony of Prof. G. Kinsman, pp. 482-483, p. 492, ll. 25-47; p. 493, p. 494, ll. 18-39; p. 495, ll. 27-47; p. 496, ll. 1-7; pp. 510-412. AR Vol. X, Tab 47, pp. 1831-1840. Prof. Kinsman provided an historical context. Pointing out that homosexual activity was proscribed under the *Criminal Code* up until 1969: "...gay sexuality is treated differently

and is criminalized, is a psychiatric problem and is also seen in general as a type of immoral activity." **[p. 1832, ll. 37-40]**
Testimony of Dr. B. Ross, p. 645, ll. 15-34. AR Vol. X, Tab 47, p. 1841.
Testimony of J. Fuller, p. 869. AR Vol. X, Tab 47, p. 1842.
Testimony of J.F. Shearer, p. 988, ll. 12-23; p. 994, ll. 27-36; p. 1007, l. 9 to p. 1009, l. 10; p. 1056, ll. 17-46; p. 1062, l. 27 to p. 1066, l. 41; ASR, Tab 10, pp. 1976-1986.
Testimony of S.C. Slater, p. 1977, ll. 9-12; p. 1978, l. 36 to p. 1979, l. 15. ASR, Tab 10, pp. 1987-1989.
Exhibit 181, Tab 4. ASR, Tab 10, pp. 1990-2000.
Testimony of L. Murphy, p. 1351, l. 23 to p. 1359, l. 21. ASR, Tab 10, pp. 2001-2009.
Exhibits 225, 226, 227. ASR, Tab 10, pp. 2010-2030.
Testimony of R.L. Skelly, p. 330, l. 25 to p. 336, l. 23. ASR, Tab 10, pp. 2031-2037.
Exhibit 116. ASR, Tab 10, pp. 2038-2040.
Testimony of C. Duthie, p. 336, l. 46 to p. 340, l. 46. ASR, Tab 10, pp. 2041-2045. (At the request of BCCLA, Duthie Books imported titles for the purpose of the trial which were prohibited when ordered by Little Sisters. Despite the fact that the shipment was examined (see evidence of R.L. Skelly) they were realeased as admissible to Duthie Books)
Testimony of H.L. Hager, p. 268, l. 23 to p. 275, l. 22. ASR, Tab 10, pp. 2046-2053.
Exhibits 107, 108**, 109**. ASR, pp. 2054-2056.**
Exhibit 3A, Tabs 11, 26, 27, 61; Exhibit 3B, Tab 69, 70, 72; Exhibit 46, Tab 20; Exhibit 106, Tabs 61, 105, 106. ASR, pp. 2057-2187.
Testimony of J. Capes, p. 852, ll. 14-21; p. 854, l. 7 to p. 855, l. 37. ASR, pp. 2188-2190.
Exhibit 3A, Tabs 9, 11, 13, 18, 35; 94; Exhibit 3B, Tab 98. ASR, pp. 2191-2265.
Exhibit 181, Tab 4. ASR, pp. 2295-2305.
Testimony of Dr. W.L. Marshall, p. 1447, l. 43 to p. 1448, l. 24; p. 1457, l. 23 to p. 1460, l. 18. ASR, pp. 2306-2314.
Exhibits 231, 232, 233. ASR , pp. 2315-2325.
Appellant's Brief of Legislation and Memoranda D9-1-1
See also: *R. v. M.(C.)* (1995), 23 O.R. (3d) 629 (C.A.) *per* Abella J.A. at 640.

148. The conclusion of the trial Judge and the Court of Appeal that "homosexual obscenity is proscribed because it is obscene, not because it is homosexual" fails to appreciate that the reason the Court found that "much homosexual erotica that has been prohibited as obscene is not in fact obscene," is that material is often judged to be obscene simply because it involves homosexuality.
Reasons for Judgment, BCSC, paras. 136, 223, AR Vol. I, pp. 135-136, 175.

149. This discriminatory effect arises in large part because of indeterminate and subjective nature of the *Butler* test, such as the proscription of what is said to be "degrading and dehumanizing" and as well the from "the community standard test" used to measure obscenity. As Cossman and Ryder observed:

> ...In the context of gay and lesbian materials, social prejudices can and do continue to inform these community standards, so that the community can be said to believe these images do cause harm. And the fact that no expert evidence is required to prove the community standard of tolerance only further heightens the

vulnerability of gay and lesbian sexual imagery to being suppressed as obscene.
Cossman and Ryder, *Customs Censorship and the Charter*, *supra*, at p.106.
Moon, *R. v. Butler, supra*, at p. 371-372:
As Justice Sopinka recognizes when he links "harm" and "moral corruption", the language of harm can be used to describe the injury that sexually explicit materials may cause to these conservative "family values". More specifically the language of dehumanization or degradation can be used to describe the devaluation of sexual intimacy, the destabilization of monogamous relationships or the undermining of traditional gender roles. Certainly Justice Sopinka's description of harm as the predisposition to "act in an anti-social manner" offers plenty of space for a conservative reading of the provision. Justice Sopinka's example of anti-social conduct is "the physical or mental mistreatment of women by men" but his definition of the phrase is much broader: "Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning."
For other examples of such discrimination see:
***Re Priape Enr. et al. and The Deputy Minister of National Revenue, supra* at 49.**
***Glad Day Bookshop Inc. v. Deputy Minister of National Revenue (Customs & Excise)* (1992), 6 Admin. L.R. (2d) 256 (Ont. Ct., Gen. Div.)**
***R. v. Scythes*, [1993] O.J. No. 537 (Ont. Ct. Prov. Div.)**

150. In upholding the community standard test, because in the words of the trial Judge "that test does **not permit** of the proposition that material that would otherwise be obscene is not obscene if it is produced for a homosexual audience" is exactly what is wrong with that standard.
Reasons for Judgment, BCSC, para. 190. AR p.
Cossman et al., *Bad Attitude/s on Trial, supra* at p. 141.

151. The disproportionate impact created by the obscenity provisions are of course exacerbated when those provisions are incorporated by reference into the Customs Legislation which necessarily allows Customs officers to use their own personal morality and preconceived biases and predilections to ban books that simply offend them Customs officers are no less prone to the same homophobic tendencies as the rest of society.
***R. v. Butler*, supra, at 479.**
Testimony of G. Morrison, p. 1759, l. 34 to p. 1760, p. 7. AR Vol. X, Tab 48, pp. 1843-1844.
Testimony of Dr. W.L. Marshall, p. 1414, ll. 21-39; p. 1417, l. 42 to p.1418, l. 1. AR Vol. X, Tab 48, pp. 1846-1847.
Crerar, *The Darker Corners*, supra, at 393-396:

> Without a firm link between community standards and harm, the distinction between tolerance and taste becomes blurred. Is tolerance merely taste multiplied by the masses -- a tyranny of majority morality? [at 394].

152. The discriminatory effect is particularly severe by reason of the fact that the gay and lesbian material is readily available in only a very few small and struggling

bookstores in Canada (at the time of the trial there were only four such stores in Canada) where most of the books must be imported and all of which are of such value to the gay and lesbian community. Hence any error, whether caused by bias or not, in classifying the books as obscene, let alone the high rate of error as found by the trial Judge, has serious repercussions for the gay and lesbian community. The so-called appeal process is even more illusory for the gay and lesbian bookstore owners who can hardly afford the phalanx of lawyers that would be required to launch and pursue literally hundreds of appeals of individual detentions or prohibitions and, even if successful, still find themselves with material that is outdated or even destroyed.

Testimony of J. Deva, p. 35, l. 6 to p. 36, l. 6; p. 36, l. 38 to p. 38, l. 15; p. 39, l. 23 to p. 40, l. 21; p. 44, l. 33 to p. p. 45, l. 34; p. 46, l. 21 to p. 47, l. 27; p. 50 ll. 19 p. 51, l. 14, p. 51, l. 36 to p. 76, l. 28; p. 76.1, l. 18 to p. 76.4, l. 25; p. 76.33, l. 42 to p. 76.34, l. 8.; p. 76.36, l. 41 to p. 76.37, l. 11. ASR, pp. 2326-2370

Exhibit 3A, Tab 7. ASR, pp. 2371-2384.

Testimony of D. Mahoney, p. 112, ll. 16-46. ASR, p. 2385

Testimony of J.F. Moldenhauer, p. 133, l. 17 to p. 134, l. 2; p. 234, l. 35 to p. 135, l. 33; p. 137, l. 4-17; p. 146, l. 30 to p. 154, l. 35. ASR, pp. 2386-2398.

Testimony of K. Mistysyn, p. 165, l. 23 to p. 166, l. 37; p. 167, l. 1 to p. 168, l. 42. ASR, pp. 2399-2402.

Testimony of M.J. Foster, p. 186, l. 47 to p. to p. 200, l. 11. ASR, pp. 2403-2417.

Exhibits 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78. ASR, pp. 2418-2458.

Testimony of S. Haar, p. 221, l. 44-47; p. 223, l. 26 to p. 224, l. 9. ASR, pp. 2459-2461.

Testimony of J. Fuller, p. 868, ll. 4-27; p. 942, ll. 1-28; p. 943. ASR, p. 2462

153. The lower Court's failure to attribute these discriminatory effects to the Customs Legislation and instead solely to the persons who have administered the Legislation is error for all of the reasons set out above in the discussion of the expression right. If this case has shown anything, it is that the gay and lesbian community has not been accorded by Customs officials, the concern, respect and dignity they are constitutionally entitled to. That discrimination will inevitably be perpetuated if the Customs Legislation is allowed to stand unaltered.

E. SECTION 1

154. The section 1 analysis set out above with respect to section 2(b) infringement applies *mutatis mutandi.* Indeed the failure of the government to demonstrate that gay and lesbian material is harmful is fatal to the government's attempt to justify the section 15 infringement.

155. Given that there is both a section 2(b) and section 15 violation the balance shifts that much further in favour of striking down the impugned provisions. The vitality of one of Canada's vulnerable and historically disadvantaged minority communities is at stake. In performing the balancing exercise called for by s. 1 the combination of these two infringed rights must be taken to outweigh the tenuous governmental interest that is said to underlie the Customs Legislation.

CONCLUSION: THE REMEDY

156. Our primary submission is that the Court should simply strike down the impugned provisions of the Customs Legislation. Certainly this is required by section 52 of the *Constitution Act, 1982* if this Court accepts our submission that there is a sufficient nexus between the Customs Legislation and the detention and prohibition of non-obscene expression. Such infringements have no possible justification under section 1 of the *Charter*. "Reading down" is not necessary in this case, although the Customs Legislation is, *a fortiori*, unconstitutional insofar as gay and lesbian and textual material is concerned given the extreme imbalance between the deleterious effect of the Customs Legislation on such material and the Customs Legislation's negligible, if any, salutary effect.

157. The alternative remedy of "reading down", however, will need to be considered if the Court concludes that the infringement of non-obscene expression is not, in any way, caused by the Customs Legislation. However in that case, the objective of the Legislation would still not be pressing and compelling especially where gay and lesbian material and/or textual material is at issue. The Customs Legislation, having failed the first branch of the *Oakes* test (and indeed other branches as well) must therefore be read down so as not to apply to gay and lesbian and/or textual material. Likewise the Customs Legislation should, at a minimum, be read down if it is ruled to violate section 15 of the *Charter*.
Kent Roach, *Constitutional Remedies in Canada*, (Aurora, Ont.: Canada Law Book, 1995) paras. 14.170, to 14.550.

158. As the very minimum the Court ought to enjoin Customs from administering and applying the Customs Legislation permanently or until such time as there is no risk that the unconstitutional administration will continue.
Kent Roach, *Constitutional Remedies in Canada, supra*, paras. 12.560, 13.530 to 13.850

PART IV - REMEDY REQUESTED

The Appellants seek:

(a) A declaration pursuant to s. 52 of the *Constitution Act 1982* that the *Customs Tariff*, S.C. 1987, c. 41 (3rd Supplement) s. 114, Schedule VII, Code 9956 (a) and the *Customs Act*, S.C. 1986 c.1 (2nd Supplement), s. 58 and s. 71 as amended are of no force or effect;

(b) In the alternative, a declaration pursuant to s. 52 of the *Constitution Act, 1982*, that the *Customs Tariff*, S.C. 1987, c. 41 (3rd Supplement) s. 114, Schedule VII, Code 9956 (a) and the *Customs Act*, S.C. 1986 (2nd Supp), s. 58 and s. 71, as amended, are of no force or effect to the extent that they are construed or applied to detain, seize or prohibit the importation of gay and lesbian books, printed paper, drawings, paintings, prints, photographs or representations of any kind that are alleged to be obscene;

(c) In addition or in the alternative, a declaration pursuant to s. 52 of the *Constitution Act 1982* that the *Customs Tariff*, S.C. 1987, c. 41 (3rd Supplement) s. 114, Schedule VII, Code 9956 (a) and the *Customs Act*, S.C. 1986 (2nd Supp), s. 58 and s. 71, as amended, are of no force and effect to the extent that they are construed and applied to detain, seize

or prohibit the importation of books, printed paper, drawings and paintings into Canada on the ground that the written text is obscene within the meaning of s. 163(8) of the *Criminal Code*;

(d) In addition, or in the alternative, a declaration pursuant to s. 52 of the *Constitution Act, 1982*, that the are of no force or effect to the extent that they are construed or applied to detain, seize or prohibit the importation of gay and lesbian books, printed paper, drawings and paintings into Canada on the ground that the same is obscene within the meaning of s. 163(8) of the *Criminal Code;*

(e) in the final alternative an injunction restraining Customs from applying and administering the *Customs Tariff*, S.C. 1987, c. 41 (3rd Supplement) s. 114, Schedule VII, Code 9956 (a) and the *Customs Act*, S.C. 1986 (2nd Supp), s. 58 and s. 71, as amended, permanently or until such time as there is no risk that the unconstitutional administration will continue;

(f)costs in this Court and in the Court of Appeal on a solicitor-client basis;

(g)such other order as counsel may advise and this Court considers just and appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Joseph J. Arvay, Q.C.

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Irene C. Faulkner

DATED: July 30, 1999

NOTICE TO THE RESPONDENT:Pursuant to subsection 44(1) of the *Rules of the Supreme Court of Canada*, this appeal will be inscribed by the Registrar for hearing after the respondents' factum has been filed or on the expiration of the time period set out in paragraph 38(3)(b) of the said Rules, as the case may be.

1. We endeavour to use the term in a value neutral way to encompass the so called erotic to the so called obscene without suggesting that the definition has legal significance.

2. Catharine A. MacKinnon, *Only Words* (Cambridge: Harvard University Press, 1993) at 29

3. Even a relatively sympathetic admirer of MacKinnon, Prof. Allan C. Hutchison, in *In Other Words: Putting Sex and Pornography in Context* (January 1995) Can. J.

of Law & Jur., Vol. VIII, No. 1, at 107-138, agrees that she "commits a flat and sweeping indictment of men, women and sex throughout history" [and] "seeks to correct it by an equally flat and sweeping solution" (at p. 136) that he views as "too acontextual and essentialist to be intellectually persuasive and politically convincing" (at p. 138). He also concedes that "censorship is an admission of weakness that entrenches the powerlessness of women as it strengthens the hand of the patriarchal state. It does not empower women in their own right nor does it allow the creation of a space within which to resist and realign the misogynist discourse of contemporary society." (at p. 134)

4. ** exhibit not reproducible, to be brought to Court at time of hearing.

5. "Textual material" obviously includes books, but if the distinguishing feature is that the material is a work of the imagination (and not merely the difficulty of classification) then "textual" should also include "printed paper, drawings and paintings".

6. Where Justice Hall erred is in leaving the matter "at this time for consideration by the legislative branch of government" and this will be dealt with below under the "minimal impairment" test.