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Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: LITTLE SISTERS BOOK AND ART EMPORIUM and THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and JAMES EATON DEVA AND GUY ALLEN BRUCE SMYTHE PLAINTIFFS AND: THE MINISTER OF JUSTICE and ATTORNEY GENERAL OF CANADA, and MINISTER OF NATIONAL REVENUE, and ATTORNEY GENERAL OF BRITISH COLUMBIA DEFENDANTS	REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE SMITH

Counsel for the plaintiffs:	J.J. Arvay, Q.C.
Counsel for the defendants The Minister of Justice, Attorney General of Canada, and Minister of National Revenue:	J.A. Van Iperen, Q.C. N. Sharma D.L. Kiselbach
Counsel for the defendant Attorney General of British Columbia:	F.A.V. Falzon A.R. Westmacott
Place and dates of trial:	Vancouver, B.C. October 11 - 14, 17 - 21, 24 - 28, November 9, 10, 14 - 18, 21 - 25, December 7 - 9, 12 - 16, 19, 20, 1994

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I. INTRODUCTION

1 Over the two months taken up by this trial this Court heard from artists, writers, sociologists, anthropologists, psychologists, teachers, book distributors, magazine publishers, booksellers, librarians, customs officers, police officers, and ordinary citizens, many of whom testified most eloquently. The subject of their discourse is a matter at the core of our fundamental democratic values the right to speak and read and write freely. Their testimony illuminated and explored the historic tension between that right and state censorship. The Court's function, though, is not to attempt to resolve that tension as a philosopher or political scientist might, not to decide whether censorship by the state is a good thing or bad. Rather, the Court must determine the legal and factual issues presented by the parties to this action, which questions the constitutional validity of the customs legislation by which Parliament prohibits the importation of obscene material into Canada.

2 The plaintiffs challenge code 9956(a) of Schedule VII and s. 114 of the ***Customs Tariff***, S.C. 1987, c. 41 (3rd Supplement), and ss. 58 and 71 of the ***Customs Act***, S.C. 1986 c. 1 (2nd Supplement). They say these provisions infringe rights and freedoms guaranteed by ss. 2(b) and 15(1) of the ***Canadian Charter***

of Rights and Freedoms, which provide:

> **2.** Everyone has the following fundamental freedoms:
>
> . . .
>
> (b) freedom of thought, belief, opinion and expression . . . .
>
> . . .
>
> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

3 The defendants concede that the challenged legislation infringes s. 2(b), deny that it infringes s. 15(1), and contend that, in any event, it is a reasonable limit on expression and equality and is saved by s. 1, which provides:

> **1.** The ***Canadian Charter of Rights and Freedoms*** guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

II. THE PARTIES AND THEIR POSITIONS

A. The plaintiffs

4 The plaintiff Little Sisters Book and Art Emporium (hereafter referred to as "Little Sisters") is described in the

statement of claim as a provincial corporation whose principal business is the sale of books and magazines, most of which are written by and for homosexual men and women. It is also alleged that Little Sisters operates a mail order business for customers across Canada; that it imports most of the books and magazines it sells from publishers in the United States; that since about 1985 "hundreds" of books and magazines purchased by Little Sisters for importation into Canada have been "seized, detained, prohibited and/or destroyed" by customs officials purporting to act pursuant to the impugned legislation; and that most of those books and some of the magazines are comprised solely of written text.

5 No attempt was made to prove the legal existence of Little Sisters and, although all parties proceeded as if that were an undisputed fact, it is a material fact for want of proof of which the claim of Little Sisters must fail. Accordingly, pursuant to Rule 40(7) of the ***Rules of Court***, I direct that Little Sisters may file the appropriate certification by the Registrar of Companies of its incorporation and good standing in accordance with the provisions of the ***Company Act***, R.S.B.C. 1979, c. 59.

6 The plaintiffs James Eaton Deva and Guy Allen Bruce Smythe are described in the statement of claim as homosexuals and as the directors and controlling shareholders of Little Sisters.

7 The plaintiff British Columbia Civil Liberties Association is said to be a provincially incorporated society whose objects include "the promotion, defence, sustainment and extension of civil liberties and human rights." It is said that the 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." No evidence was led to establish these allegations but, although they are denied in the statement of defence, they were not mentioned, let alone disputed, during argument. As before, I will direct that the Association may file the relevant certification by the Registrar of Companies pursuant to the provisions of the ***Society Act***, R.S.B.C. 1979, c. 390. I will take judicial notice of the allegations concerning the Association's "objects and concerns".

8 The plaintiffs plead that the impugned legislation creates a "system of prior restraint" that has the purpose and the effect of "preventing, deterring, and/or unduly delaying the importation of, and/or of causing the destruction of, material which is not 'obscene'" and thereby infringes the freedom of thought, belief, opinion and expression guaranteed by s. 2(b) of the ***Charter***. As well, they claim that the legislative provisions have been applied to Little Sisters' books and magazines in a manner that discriminates against the authors and readers of the material,

including the plaintiffs Deva and Smythe, on the basis of their homosexuality. This discrimination is said to contravene s. 15 of the ***Charter***.

9 The plaintiffs have named the Minister of Justice and the Attorney General of Canada as defendants, purportedly in reliance on the provisions of the ***Department of Justice Act***, R.S.C. 1985, c. J-2 that impose upon the Minister of Justice the duty to see that the administration of public affairs is in accordance with the law, and upon the Attorney General of Canada the duty to regulate and conduct all litigation for or against the Crown in respect of subjects within the federal jurisdiction. Counsel appeared for these parties and raised no objection to their joinder so I will consider them properly joined. In any event, it appears that the Attorney General of Canada is a proper party by reason of s. 8(7) of the ***Constitutional Question Act***, R.S.B.C. 1979, c. 63.

10 The other defendant named, the Minister of National Revenue, is alleged to be responsible for the administration of the customs legislation. The statement of defence denies this allegation but no mention was made of this issue by any party at the trial. Section 2 of the ***Customs Act*** defines "Minister" as the Minister of National Revenue, so it is clear that Customs is within the jurisdiction of that office.

11 I will refer to the three named defendants collectively as "the federal Crown" in these reasons.

B. **The federal Crown**

12 The federal Crown's statement of defence traverses the statement of claim, as it states that it denies everything not specifically admitted but admits nothing. In the alternative, it pleads three defences:

1. That the plaintiffs are precluded from challenging the application of the customs legislation to Little Sisters' importations because Little Sisters did not exhaust its remedies under the legislation;

2. That the impugned legislation infringes neither s. 2(b) nor s. 15 of the ***Charter***; and

3. That if the impugned legislation infringes either s. 2(b) or s. 15 of the ***Charter***, it is saved by s. 1.

As already noted, the federal Crown admitted at trial that the impugned legislation contravenes s. 2(b) of the ***Charter***.

C. **The provincial Crown**

13 The Attorney General of British Columbia (referred to hereafter as "the provincial Crown") received notice of the constitutional challenge as required by the ***Constitutional Question Act***, R.S.B.C. 1979, c. 63 and is a party to the action by virtue of his appearance and the operation of that statute. The provincial Crown delivered no pleadings and did not lead any oral testimony, although it did tender written evidence of legislative facts. The provincial Crown supported the federal Crown on the basis that the plaintiffs' submissions have constitutional implications for the control, under provincial legislation, of extreme pornography in film and video, *viz.*, the ***Motion Picture Act***, S.B.C. 1986, c. 17.

III. THE REMEDIES CLAIMED

14 The plaintiffs invoke s. 52(1) of the ***Constitution Act, 1982***, which provides:

> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

and s. 24 of the ***Charter***, which provides:

> **24.** (1) Anyone whose rights or freedoms, as guaranteed by this ***Charter***, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The ***Charter*** is part of the Constitution by virtue of s. 52(2)(b) of the ***Constitution Act, 1982***.

15 Specifically, the plaintiffs seek declarations pursuant to s. 52(1) of the ***Constitution Act, 1982,*** that code 9956(a) of Schedule VII and s. 114 of the ***Customs Tariff***, S.C. 1987, c. 41 (3rd Supplement), and ss. 58 and 71 of the ***Customs Act***, S.C. 1986, c. 1 (2nd Supplement):

1. are of no force or effect at all; or, alternatively

2. are of no force or effect to the extent that they are construed and applied to detain, seize, or prohibit the importation of books and printed paper into Canada on the ground that the written text is obscene within the meaning of s. 163(8) of the ***Criminal Code***; and, in addition or alternatively,

3. are of no force or effect to the extent that they are construed or applied to detain, seize, or prohibit the importation of books, printed paper, drawings,

paintings, prints, photographs or representations of any kind produced for homosexual audiences that are alleged to be obscene.

16 In addition, or alternatively, the plaintiffs seek a declaration pursuant to s. 24(1) of the ***Charter***, that the impugned provisions "have at all material times been construed and applied in a manner that is contrary to s. 2(b) and/or s. 15 of the ***Charter*** and that is not justified pursuant to s. 1".

IV. **THE LEGISLATIVE SCHEME**

17 The legislative scheme governing the movement of goods into Canada from outside its borders is found in the ***Customs Act*** *and the* ***Customs Tariff***. The relevant provisions of the scheme can be summarized as follows.

18 Section 12 of the ***Customs Act*** imposes an obligation to report imported goods to the nearest customs office. The mode of importation determines who is charged with the obligation. First, every person entering Canada has a duty to report goods in his or her actual possession. Second, goods imported by courier or by mail must be reported by the person who exported them to Canada. Third, any other goods arriving in Canada on a conveyance must be reported by the person in charge of the

conveyance. Finally, goods arriving in any other manner must be reported by the person on whose behalf they are imported.

19 The person reporting the goods is obligated to accurately complete prescribed forms setting out the place and date of purchase, the name of the vendor, and a detailed description of the quantity and value of each kind of good imported. This is known as "accounting for" the goods. Goods accounted for are then "classified", by reference to the ***Customs Tariff***, to determine their admissibility into Canada and the customs duty payable. Goods subject to customs duty are charged with that duty until it is paid, and the importer and the owner are jointly liable for payment.

20 While the legislative scheme is essentially a regulatory one, by s. 160, the wilful evasion of compliance or payment of duties and the possession of and dealing with goods imported in contravention of the ***Customs Act*** are made criminal offences, subjecting the offender to imprisonment for up to five years and a maximum fine of $25,000.

21 The burden of proof of compliance in respect of any proceedings under the ***Customs Act***, except for criminal proceedings, is placed on the importer by s. 152(3).

22 This self-reporting system is policed by customs officers, who are defined by s. 2 of the Act as including "any person employed in the administration or enforcement" of the ***Customs Act*** and any member of the Royal Canadian Mounted Police.

23 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. There are more than 14,000 such codes. Code 9956 deals with obscene, hateful, treasonable, and seditious goods. For present purposes, we are concerned only with goods referred to in code 9956(a) of the Schedule. It prohibits the importation of goods described as:

> Books, printed paper, drawings, paintings, prints, photographs or representations of any kind that
>
> (a) are deemed to be obscene under subsection 163(8) of the Criminal Code.

Subsection 163(8) of the ***Criminal Code***, R.S.C. 1985, c. C-46 provides:

> **163.(8)** For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

24 Section 99 of the ***Customs Act*** authorizes customs officers to examine imported goods and mail and to open packages that they

reasonably suspect may contain goods referred to in the ***Customs Tariff***. This provision is supplemented by s. 42 of the ***Canada Post Corporation Act***, S.C. 1993, c. C-10, which requires that any mail arriving from outside Canada "that contains or is suspected to contain" anything prohibited under the ***Customs Act*** be submitted to a customs officer. There is an exception in s. 99(2) of the ***Customs Act*** for mail weighing thirty grams or less; such mail may not be opened without the consent of the person to whom it is addressed.

25 Section 58 of the ***Customs Act***, which authorizes customs officers to determine the tariff classification of imported goods, is subject to constitutional challenge in this case. It is pursuant to this section that customs officers determine whether goods are prohibited by s. 114 and code 9956(a) of the ***Customs Tariff***. So far as it is relevant, section 58 reads as follows:

> **58.**(1) An officer may determine the tariff classification . . . of imported goods at any time before or within thirty days after they are accounted for . . .
>
> . . .
>
> (5) Where an officer does not make a determination ... under subsection (1) in respect of goods, a determination of the tariff classification . . . of the goods shall, for the purposes of sections 60, 61 and 63, be deemed to have been made thirty days after the time the goods were accounted for . . . in accordance with any representations made at that time in respect

> of the tariff classification . . . by the person accounting for the goods.
>
> (6) A determination of tariff classification . . . is not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by sections 60 to 65.

26 Section 101 of the ***Customs Act*** permits customs officers to detain goods until they are satisfied that the goods have been dealt with in accordance with the customs legislation and other legislation administered by Canada Customs.

27 Section 59 permits any officer designated by the Minister, or any officer within a class of officers so designated, to re-determine tariff classifications under, *inter alia*, s. 60. This delegation has been made to a class of officers known as Tariff and Values Administrators.

28 Section 60 affords the importer the right to have the classification of prohibited goods re-determined as follows:

> **60.**(1) The importer . . . may . . .
>
> (a) within ninety days, or
>
> (b) where the Minister deems it advisable, within two years
>
> after the time the determination . . . was made in respect of the goods under section 58, request a re-determination of the tariff classification . . . .

> (2) A request under this section shall be made to a designated officer in the prescribed manner and in the prescribed form containing the prescribed information
>
> (3) On receipt of a request under this section, a designated officer shall, with all due dispatch, re-determine the tariff classification . . . and give notice of his decision to the person who made the request.

29 Section 63 grants a right to a further re-determination by the Deputy Minister of National Revenue for Customs and Excise:

> **63.**(1) Any person may,
>
> (a) within ninety days after the time he was given notice of a decision under section 60 . . . , or
>
> (b) where the Minister deems it advisable, within two years after the time a determination . . . was made under section 58,
>
> request a further re-determination of the tariff classification . . . re-determined . . . under section 60 . . . .
>
> (2) A request under this section shall be made to the Deputy Minister in the prescribed manner and in the prescribed form containing the prescribed information.
>
> (3) On receipt of a request under this section, the Deputy Minister shall, with all due dispatch, re-determine the tariff classification . . . and give notice of his decision to the person who made the request.

30 The Deputy Minister is authorized by s. 64 to re-determine the tariff classification of goods on his own initiative in certain circumstances:

> **64.** The Deputy Minister may re-determine the tariff classification . . . of imported goods
>
> (a) within two years after the time a determination . . . was made under section 58, where the Minister deems it advisable,
>
> . . .
>
> (c) at any time, where the person who accounted for the goods . . . has failed to comply with any of the provisions of this Act or the regulations or has committed an offence under this Act in respect of the goods,
>
> (d) at any time, where the re-determination . . . would give effect to a decision of the Canadian International Trade Tribunal the Federal Court or the Supreme Court of Canada made in respect of the goods, and
>
> (e) at any time, where the re-determination . . . would give effect in respect of the goods in this paragraph referred to as the "subsequent goods", to a decision of the Canadian International Trade Tribunal, the Federal Court or the Supreme Court of Canada . . . , made in respect of
>
> (i) other like goods of the same importer or owner imported on or prior to the date of importation of the subsequent goods, where the decision relates to the tariff classification of those other goods,
>
> . . .
>
> and, where the Deputy Minister makes a re-determination . . . under this section, the Deputy Minister shall forthwith give notice of that decision to the person who accounted for the goods . . . , the importer of the goods or the person who was the owner of the goods at the time of release.

Section 2(3) authorizes the Deputy Minister to delegate his powers, duties and functions under the Act to any person. Those

relating to re-determinations under s. 63 of tariff classifications have been delegated to the Director-General of Tariffs, Programs Branch, an official in the Ministry of National Revenue.

31 Section 67 grants a right of appeal from the Deputy Minister's re-determination to the Canadian International Trade Tribunal, which must hold a hearing and may then make "such order, finding or declaration as the nature of the matter may require". Section 71, which also faces constitutional challenge in this case, substitutes the superior court of the relevant province or territory for the Canadian International Trade Tribunal where the goods in question have been prohibited pursuant to, *inter alia*, code 9956. The section reads as follows:

> **71.**(1) Where the release of goods has been refused on the ground that the goods have been determined to be prohibited goods as described in code 9956 . . . of Schedule VII to the *Customs Tariff*, re-determination may be requested under sections 60 and 63 or made under section 64 and appeals may be taken under sections 67 and 68 in respect of the determination, subject to the following modifications . . . .

It then goes on to prescribe the necessary amendments to ss. 64(d), 64(e), 67, and 68 to effect the substitution of the appropriate court for the Canadian International Trade Tribunal.

32 Section 67, as amended, grants a right of appeal in these terms:

> **67.**(1) A person who deems himself aggrieved by a decision of the Deputy Minister made pursuant to section 63 or 64 may appeal from the decision to the [superior court of the province or territory] by filing a notice of appeal in writing with the Deputy Minister and the [clerk of the court] within ninety days after the time notice of the decision was given.
>
> (2) Before making a decision under this section, the [court] shall provide for a hearing and shall publish a notice thereof in the *Canada Gazette* at least twenty-one days prior to the day of the hearing, and any person who, on or before the day of the hearing, enters an appearance with the [clerk of the court] may be heard on the appeal.
>
> (3) On an appeal under subsection (1), the [court] may make such order, finding or declaration as the nature of the matter may require, and an order, finding or declaration made under this section is not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by section 68.

Finally, a right of appeal from the superior court of the province or territory to the Federal Court is granted by s. 68:

> **68.**(1) Any of the parties to an appeal under section 67, namely,
>
> (a) the person who appealed,
>
> (b) the Deputy Minister, or
>
> (c) any person who entered an appearance in accordance with subsection 67(2),
>
> may, with leave of a judge of the Federal Court, within ninety days after the date a decision is made under

> section 67, appeal therefrom to that Court on any question of law.
>
> (2) The Federal Court may dispose of an appeal by making such order or finding as the nature of the matter may require or by referring the matter back to the [court] for re-hearing.

33 The rights of re-determination and appeal provided in the legislation are the sole remedies available to importers. Any recourse to the courts other than as provided is precluded by ss. 58(6), 62(3), and 65(3). As well, by virtue of s. 67(3) a decision of the court made after an appeal pursuant to s. 67 may not be assailed except by resort to s. 68.

34 An importer whose goods are prohibited entry may arrange to export the goods or to abandon them to the Crown. In the latter case, s. 142 permits the Minister to export, dispose of, or sell the goods and s. 36 makes the importer liable for reasonable expenses incurred by the Crown, except if the goods are sold.

V. THE CUSTOMS BUREAUCRACY

35 Sections 58, 60, 63, and 64 of the ***Customs Act*** provide bare delegations of discretionary decision-making powers. To determine by whom and how those powers are exercised, it is

necessary to examine the customs bureaucracy and its administrative procedures.

36 Canada Customs headquarters is located in Ottawa. The country is divided into customs regions in which are located regional customs offices and the various "ports of entry", that is, seaports, airports, customs warehouses, post offices, and border-crossing stations. The bureaucratic structure is like a pyramid, with the Deputy Minister of National Revenue for Customs and Excise at the apex. Below that officer are various levels or classes of officers.

37 There are approximately 10,000 employees in the customs system, of which about 4,000 are uniformed Customs Inspectors stationed at the ports of entry. It is their duty to detect unreported, misdescribed, and prohibited goods. As well, they monitor compliance with seventy-eight federal statutes administered by Canada Customs, including the ***Customs Act*** and the ***Customs Tariff***, dealing with subjects as diverse as atomic energy, agricultural products, pests, narcotics, and food and drugs, to name a few.

38 Applicants for the position of Customs Inspector must have post-secondary training or a technical school diploma in courses leading to police, security, or customs work. Until recently,

high school graduation was the educational prerequisite for the position and many of the Customs Inspectors presently employed have no further formal education. All new inspectors undergo a sixteen-week training session at the Customs and Excise College in Rigaud, Quebec, during which they spend only a few hours on the interpretation and application of code 9956. They must successfully complete an examination at the end of this training and are then assigned to ports of entry where they receive informal, "on-the-job" training from more-experienced officers.

39 Employees one level above inspectors are known as Commodity Specialists. These officers, who are more specialized than Customs Inspectors and deal with particular goods or classes of goods, work in the regional offices and are chosen from applicants from the ranks of Customs Inspectors. All Commodity Specialists receive a three-week period of general, classroom training at the Customs and Excise College, and those assigned to deal with code 9956 also attend at Headquarters in Ottawa for approximately three days to two weeks of further instruction by members of what is known as the Prohibited Importations Directorate. I will describe that group momentarily.

40 The classification powers conferred by s. 58 of the ***Customs Act*** are exercised by Customs Inspectors and Commodity Specialists.

41 The third level of officials, who also work in the regional offices, are known as Tariff and Values Administrators. Their functions include the exercise of the powers delegated to them to deal with re-determinations of tariff classifications pursuant to s. 60. Tariff and Values Administrators are chosen by competition. Most applicants are Commodity Specialists. Those chosen receive further training at the College and, if assigned to code 9956 duties, attend at the Prohibited Importations Directorate for up to two weeks for additional guidance and instruction in regard to its interpretation and application.

42 The responsibilities of Commodity Specialists and Tariff and Values Administrators include providing assistance and advice on classification decisions to those officers ranking below them.

43 In areas of very high volumes of importations, like the Toronto Region, individual Tariff and Values Administrators and Commodity Specialists are sometimes assigned full-time to code 9956 responsibilities. In Fort Erie, for example, the volume of goods potentially subject to classification under code 9956 is so high that a procedure has been implemented for handling them that includes the Customs Inspectors detaining goods suspected of violating code 9956 and forwarding them to particular Commodity Specialists for examination and classification. In less busy areas, these duties are carried out by officers as part of their routine.

44 It is the responsibility of Regional Managers to assign Commodity Specialists and Tariff and Values Administrators to deal with code 9956 duties. As Customs employees generally consider this work to be undesirable, not all officers participate in it and those assigned to it are regularly moved from these duties into other areas, generally after three to six months.

45 The Prohibited Importations Directorate is located at headquarters in Ottawa. It has responsibility for reviewing materials and making recommendations on requests for re-determination under s. 63, reviewing requests by importers and publishers for advance opinions with respect to contemplated importations, and providing guidance and advice to the officers in the regional offices and ports of entry with respect to the interpretation and application of code 9956. It also advises the Deputy Minister when requested on legal and policy matters.

46 The Directorate presently consists of twelve persons, of whom seven are directly involved in the re-determination process. These officers are known as Tariff Administrators. On commencing their duties, they receive informal training for several days from more- senior officers in the Directorate.

47 The Tariff Administrators are supervised by a Manager who, in turn, reports to the Director of the Directorate. The

Directorate is one of ten directorates responsible to the Director-General of Tariffs, Programs Branch, to whom the re-determination responsibilities of the Deputy Minister have been delegated. The Director-General reports to the Assistant Deputy Minister of National Revenue, Programs Branch, who reports to the Deputy Minister of National Revenue for Customs and Excise.

VI. THE CUSTOMS PROCEDURES

48 The examination of all goods and mail presented at ports of entry would be a practical impossibility. There are approximately 240 ports of entry in Canada, and in the fiscal year 1993-1994, for example, almost 230,000 shipments, made up of about 330,000,000 goods, were imported through them. Customs officials estimate that there are approximately 10.5 million entry transactions each year and that between 20,000 and 40,000 items of mail enter the Customs Mail Center daily in Vancouver alone.

49 Customs tries to examine approximately 8% of the goods imported. As Customs is predominantly concerned with ensuring compliance with the law and with detecting contraband, goods that are unlikely to contravene applicable legislation are examined less frequently. An example of such goods is books, which are not subject to customs duty and which ordinarily do not fall within Schedule VII of the ***Customs Tariff***.

50 The procedures to be followed by customs officers in classifying goods pursuant to their statutorily delegated powers are set out in a departmental memorandum entitled "Procedures For the Administration of Tariff Code 9956", known as Memorandum R9-

1-1. This is an internal directive for Customs employees and is not made publicly available.

51 There is no systematic pattern of examination. Customs officers obtain guidance for identifying possibly-prohibited goods from s. 1 of Memorandum R9-1-1, which says:

> 1. Upon presentation of appropriate documentation, Customs Officers must determine whether or not the goods may be classified under tariff code 9956. As a guide, the following information will be considered:
>
> (a) invoice description of the goods and any documentation available which describes the importation;
>
> (b) information obtained from the importer, especially concerning any previous determination which the goods may have had;
>
> (c) importers and exporters known to deal in pornographic goods;
>
> (d) geographic origin and production company of the goods (i.e., known sources of pornography);
>
> (e) intelligence information and
>
> (f) other information known about the goods, for example, information obtained through the news media or any other source.

52 Thus, officers often detain goods on suspicions aroused by the title of the material. Occasionally, as suggested in s. 1(c), particular importers or foreign exporters will be formally identified, either locally or nationally, for heightened inspection. Little Sisters has been so identified at the Vancouver Mail Center, where virtually all imported mail

addressed to Little Sisters is examined. Similarly, all shipments by Inland Distributors Ltd., an American book-distributor, are routinely examined at the Fort Erie port of entry.

53 An officer who suspects goods may be within code 9956 and who detains them for further inspection must complete Part A, entitled "Notice of Detention", of a customs form known as Form K27 and send or deliver it to the importer. The Form K27 has spaces for the date, identification of the Point of Entry, and two "Control" numbers, described respectively as "Regional Control No." and "Point of Entry Control No.". It then says:

> The following goods have been detained for a determination of tariff classification. Once a determination has been made, you will be notified in writing.

There follows a space in which the officer writes a description of the goods detained, identifying them by their titles.

54 When the officer has classified the material, he or she must complete and send to the importer Part B of Form K27, entitled "Notice of Determination". The first part of the form lists the goods prohibited pursuant to s. 114 and code 9956 of Schedule VII of the ***Customs Tariff***, advises that the examination was done pursuant to s. 58 of the ***Customs Act***, and refers the importer to

the back of the form for "Your rights respecting this determination". Below that reference are two areas entitled "Section 1" and "Section 2". Section 1 is a series of boxes to be checked by the officer to indicate the type of material involved, for example, "book", "magazine", "photograph", etc. Section 2 is another series of boxes to be checked by the officer to specify the ground for prohibition. There are eight boxes, entitled "Sex With Violence", "Child Sex", "Incest", "Bestiality", "Necrophilia", "Hate Propaganda", "Anal Penetration", and "Other". The box marked "Anal Penetration" is no longer applicable, for reasons I will come to. The box "Other" is followed by a short line on which the officer may write one or two words to describe the ground for prohibition.

55 The back of the form K27 advises the recipient of the right to dispute the determination pursuant to s. 60 of the ***Customs Act*** by filing a Form B2 (Request for Review, Redetermination or Re-appraisal) at a Customs office within ninety days of the date of the determination. It goes on to set out available options if the importer does not wish to dispute the determination, and describes the incidents of exporting the goods and abandoning them to the Crown.

56 Section 3 of Memorandum R9-1-1 instructs officers how to complete and what to do with Part A of the Form K27. It states

that the regional office is to "assign a separate running control number for each K27 form" in the box provided for that purpose, and that the port of entry is to assign its own "separate running control number" in the box provided. That is significant, because the Form B2 requires the dissatisfied importer to complete a box identified as "Classification No." but has no provision corresponding to the "Control" numbers on the Form K27. That would pose no problems for an experienced customs broker, but it caused much confusion with respect to Little Sisters' attempts at re-determinations. Indeed, even senior Customs officers called to testify were unable to explain how the Form B2 was to be completed. In fact, instructions for filling up Form B2 are contained in another internal directive, Memorandum D11-6-1, but this memorandum is provided to importers only if they ask for it.

57 Sometimes, the classifying officer will wish to consult with other customs officers. Section 9 of Memorandum R9-1-1 advises that customs officers may consult with Commodity Specialists and Tariff and Values Administrators who may, in difficult cases, seek assistance from the Prohibited Importations Directorate. However, the classification decision must be made by an officer designated to exercise the powers granted by s. 58.

58 This consultation procedure gives rise to the possibility that an officer consulted by an officer of lower rank on a

classification decision may be assigned to handle the re-determination of that very decision. While Customs has an unwritten policy that this should not occur, instances were identified where it did occur.

59 The officer responsible for classification must refer certain goods to Headquarters for review. The procedure in this regard is laid down in s. 11:

> 11. The following goods must be referred to Headquarters:
>
> (a) any goods which are being imported ostensibly for an educational, scientific, medical or artistic purpose but which may contain material classifiable under tariff code 9956;
>
> . . .
>
> (d) any goods to which the application of the departmental guidelines in Memorandum D9-1-1 is not clear.

60 The reason for s. 11(a) is that Customs does not consider officers ranking below the Prohibited Importations Directorate to be expert in evaluating such purposes, an evaluation that must be undertaken in determining whether any work is obscene. Curiously, no guidance is offered to lower ranking officers as to how to recognize the material referred to in s. 11(a) so that they may cull it and refer it.

61 Section 12 directs what must be done when a re-determination is requested pursuant to s. 63. It provides for the secure delivery of the goods in question to the Prohibited Importations Directorate in sufficient time to enable a re-determination to be completed within four weeks of the initial importation. While there is no reference to it in Memorandum D9-1-1, when a request is made pursuant to s. 63, Tariff and Values Administrators are asked to record their reasons for prohibition under s. 60 and to forward their reasons and a recommendation to the Prohibited Importations Directorate. The quality of these reports varies. Section 13 advises that the Prohibited Importations Directorate will endeavour to complete the re-determination within two weeks of receiving the goods.

62 The review for re-determination purposes under s. 63 is actually done by Tariff Administrators in the Prohibited Importations Directorate. They prepare a written recommendation for the Manager, who reviews it and in turn sends it and his own recommendation to the Director. The Director reviews this material and sends it to the Director-General for his signature and formal decision. The Manager, Director, and Director-General do not often participate in or add anything to the process.

63 If the importer chooses to submit extrinsic material on the re-determination, such as expert opinion, the Tariff

Administrators will consider it. However, such evidence is not routinely invited and oral evidence is never permitted.

64 There are special procedures set out in ss. 17 to 22 with respect to mail. If suspected mail weighs less than thirty grams a letter must be sent to the addressee requesting consent to open and examine it. Mail examined and found admissible is returned to Canada Post Corporation for delivery. If mail is classified as prohibited, a Form K27 with Parts A and B completed must be mailed to the consignee. Section 21 contains the following advice:

> It is to be noted that an appreciable volume of prohibited matter is being sent by mail by foreign publishers and distributors of obscene material who regularly send illustrated advertising matter of their products by this means, and in many cases, unsolicited.

65 Sections 24 to 28 prescribe procedures with respect to destruction of goods, s. 29 with respect to "media inquiries", and s. 30 with respect to importers' access to prohibited goods. With respect to the latter, s. 30 says:

> 30. Requests by importers and/or their lawyers to review prohibited goods which are the subject of an appeal, should be considered on a case-by-case basis. Such requests are to be considered during both levels of the departmental appeal process, but only where operational equipment and resources make it feasible. Customs Officers are instructed not to enter into discussions or debates on the merits of the case during the viewing. To minimize the requests for access to prohibited goods, importers should be provided with a reference to the specific section of the guidelines which has resulted in the goods being prohibited under

> this tariff item at the time of the notice of determination or redetermination.

Thus, importers have no guarantee that they may see, and in fact are discouraged from seeing, the prohibited material for purposes of preparing a submission on a request for re-determination.

66 In reaching classification decisions, customs officers are guided by Customs Memorandum D9-1-1, entitled "Interpretative Policy and Procedures for the Administration of Tariff Code 9956". This document was first published in 1985 and was prepared with the assistance of legal advice from the Department of Justice as to the meaning and application of the obscenity test. It is revised periodically to reflect changes in legislation and jurisprudence. Unlike Memorandum R9-1-1, a copy of Memorandum D9-1-1 will be given to any member of the public, but only on request.

67 The present edition was published on September 29, 1994, a few days before this trial commenced, and differs from its predecessor. Prior to the revision, customs officers were directed by Memorandum D9-1-1 to prohibit, as obscene, material that depicted or described anal penetration. The preamble to the revised Memorandum states that material depicting or describing anal penetration is no longer to be considered obscene solely for that reason because "departmental policy" had been revised "as a result of evolving jurisprudence".

68 Memorandum D9-1-1 begins by stating:

> This memorandum outlines and explains the interpretation of tariff code 9956 of Schedule VII to the *Customs Tariff* and provides procedures to be followed in this regard.

The Memorandum goes on to reproduce code 9956 and then, under the title "Guidelines and General Information", sets out detailed procedures to be followed in the classification process.

69 The Memorandum offers this guidance to customs officers with respect to code 9956(a):

> 5. Goods which are deemed to be obscene under the *Criminal Code* are those of [sic], a dominant characteristic of which, is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence.
>
> 6. The following goods, in so far as they are deemed to be obscene . . . within the meanings of the terms set forth above, are to be classified under tariff code 9956 and their importation into Canada prohibited:
>
> > (a) goods which depict or describe sexual acts that appear to degrade or dehumanize any of the participants, including:
> >
> > > (1) depictions or descriptions of sex with violence, submission, coercion, ridicule, degradation, exploitation or humiliation of any human being, whether sexually explicit or not, and which appear to condone or otherwise endorse such behaviour for the purposes of sexual stimulation or pleasure;
> > >
> > > (2) depictions or descriptions of sexual assault (previously, rape). Any goods that depict or describe a sexual activity between male/female, male/male or female/female which appears to be without his/her consent and

> which appears to be achieved chiefly by force or deception;
>
> (3) depictions or descriptions of bondage, involuntary servitude and the state of human beings subjected to external control, in a sexual context;
>
> (4) depictions or descriptions which appear to be associating sexual pleasure of [sic] gratification with pain and suffering, and with the mutilation of or letting of blood from any part of the human body, involving violence, coercion and lack of basic dignity and respect for a human being;
>
> (5) depictions or descriptions of sexual gratification gained through causing physical pain or humiliation, or the getting of sexual pleasure from dominating, mistreating or hurting a human being. This includes depictions and descriptions of physical force which appear to be used so as to injure, damage or destroy; of extreme roughness of action; of unjust or callous use of force or power; of spanking, beating or violent shoving in a sexual context;
>
> (6) depictions or descriptions of mutilation or removal of any part of the human body or of the taking of human life, real or implied, for the purpose of sexual arousal; and
>
> (7) depictions or descriptions of menstrual blood, fecal matter, urine or the inducement of feces through enemas as part of sexual arousal.

. . .

8. It should be emphasized that a book, film, video cassette, etc., is to be assessed in its entirety. It is to be considered as a whole and its overall nature and dominant characteristic must be assessed. A section containing subjects outlined in this Memorandum must be assessed as an integral part of the entire work and in the context of its theme. However, goods which in their essence are made up of many individual elements are not to be treated as a whole and may be prohibited on the basis of any one of their elements which fall within the prohibitory provisions of tariff

> code 9956. Similarly, a magazine or newspaper is to be considered on a segment-by-segment basis.
>
> 9. Goods not classified under tariff code 9956 include the following:
>
> . . .
>
> (b) goods which communicate in a rational and unsensational manner information about a sexual activity that is not unlawful are not to be prohibited;
>
> (c) sex aids and toys are not to be deemed obscene and, therefore, are not to be classified under tariff code 9956; goods are not to be prohibited solely on the basis of advertisements which simply promote the sale of various sex toys or sex aids. However, explicit textual descriptions or visual depictions in the advertisements deemed to be obscene will be prohibited;
>
> (d) in assessing goods under tariff code 9956, full recognition should be given to freedom of expression . . . .

These sections incorporate a generally accurate and comprehensive summary of the present state of the law relating to obscenity as gleaned from the legislation and the jurisprudence interpreting it.

70 The Memorandum goes on in s. 10 to outline procedures whereby importers may submit material in advance of commercial importation for an opinion on admissibility by the Prohibited Importations Directorate. It also advises that the Directorate will provide advice with respect to the administration of code 9956, and states that these services are offered to encourage voluntary compliance with the legislation.

71 Section 11 provides that goods made in Canada and exported are to be considered to be importations for purposes of code 9956 on their return to Canada.

72 Section 12 requires officers to deliver Form K27 to importers when their goods are detained and classified as prohibited. Sections 13 to 16 summarize the rights of re-determination and appeal set out in the ***Customs Act***. They advise that requests for re-determination must be made on a Form B2 and set out the prescribed time limits.

73 Finally, ss. 17 to 21 set out procedures for dealing with goods classified as prohibited and abandoned to the Crown.

74 Customs officers have sources of classification assistance in addition to Memorandum D9-1-1. For example, the Prohibited Importations Directorate has a manual of examples of materials that are considered to be within and without code 9956(a). The manual is used for training purposes and is often consulted for comparative reference by members of the Prohibited Importations Directorate.

75 As well, Customs maintains a computerized database of prohibitions under code 9956, known as TRS. However, although this database is presently accessible by all regional offices, it

is not yet accessible by all ports of entry. Further, it is not entirely reliable. Since prohibited goods are listed by title, it has happened that admissible items have been prohibited entry because a previously prohibited item had the same title. Moreover, the TRS lists only prohibited titles and does not record items that have been examined and ruled admissible nor items that have been prohibited but re-determined as admissible. Such items may be unwittingly detained and prohibited again pursuant to s. 58. A striking example of this is the collection of short stories entitled "Macho Sluts" (Boston: Alyson Publications, Inc., 1988), written by Pat Califia, a noted lesbian author. It has been prohibited pursuant to s. 58 on four separate occasions since October 23, 1989, when it was re-determined under s. 63 to be admissible.

76 Videotapes and motion pictures imported for public showing are not examined by customs officers, but are forwarded to provincial film classification boards for classification pursuant to provincial legislation.

77 The parties agreed upon some statistics that provide insight into the results of the administration of code 9956(a). For example, the number of prohibitions made pursuant to s. 58 in the period from 1988 to June, 1994, is set out in the following table:

Year	Number of Prohibitions
1988	9859
1989	9708
1990	9919
1991	7996
1992	7325
1993	6558
To June 1994	2185

78 The total number of items examined at the Prohibited Importations Directorate during the same period of time, that is, for examinations for purposes of s. 63 re-determinations, for advice to lower-ranking officers, and for advance opinions, is set out below:

Year	Items Examined
1988-89	3116
1989-90	2912
1990-91	3708
1991-92	5464
1992-93	5801
1993-94	7844

79 Most of the items dealt with under code 9956(a) are pictorial in nature, but a substantial number are textual. The following table identifies the number of textual and pictorial items examined at the Prohibited Importations Directorate for the purpose of re-determinations requested under s. 63 during the period 1992 to June, 1994:

	1992-1993	1993-1994

Printed Matter	30	155
Non-Printed Matter	84	310

The table suggests that in the order of 35% to 50% of materials dealt with at the Prohibited Importations Directorate are textual. The testimony of senior officials in the Prohibited Importations Directorate was consistent with those estimates. They opined that between 5 and 10% of these materials are books, 40 to 45% are magazines, and another 40 to 45% are videotapes. They also estimated that the re-determination process generally takes one to two days for each book, one or more days for each magazine, and as much as one-half day for each one-half-hour videotape.

80 While arithmetical calculations may be misleading when based on such general estimates, they do provide some outline of the dimensions of the problem giving rise to the plaintiffs' complaints about the administration of the customs scheme. If the year 1993-1994 is used as an example, of the 7,844 items examined, between 390 and 780 were books, between 3,100 and 3,500 were magazines, and between 3,100 and 3,500 were videotapes. Applying the estimated re-determination times for each kind of material, we see that between 390 and 1,560 days are required to deal with books, between 3,100 and 3,500 with magazines, and between 1,550 and 1,750 with videotapes, a total of 5,040 to 6,810 days. As already noted, this work is done by only seven Tariff Administrators.

81 Clearly, the estimates of actual time spent per item must be excessive. However, they are not unreasonable estimates, considering the necessity to consider each item as a whole and the complexity inherent in the obscenity decision. The inference to be drawn is that Tariff Administrators in the Prohibited Importations Directorate do not have sufficient time available to consistently do a proper job. The problem is even more significant at the regional levels where customs officers encounter much higher volumes of goods and have far more expansive duties.

82 Few decisions to prohibit are challenged, and few challenges succeed. For example, much of the material affected by code 9956(a) enters the country through the post office. Of the approximately 20,000 to 40,000 items of mail that enter the Customs Mail Center in the Vancouver post office each day, a maximum of approximately 10% are actually examined by customs officers for possible prohibition pursuant to code 9956(a). During the period between February 1, 1994, and June 3, 1994, 352 "prohibited" classification decisions were made at the Customs Mail Center. However, during the slightly longer period from November, 1993, to June 2, 1994, only 75 requests for re-determinations pursuant to s. 60 were made in British Columbia arising out of all ports of entry, and only about 1% of those resulted in reclassification of the goods.

83 The Port of Fort Erie is one of the busiest in the country. Most commercial shipments of books and magazines enter through that port, so about 75% of what is inspected and examined is printed materials. Between September, 1992, and May, 1993, 442 titles were detained at Fort Erie for possible classification under code 9956(a), 264 were prohibited as obscene, and 10 of those were ultimately reclassified by Tariff and Values Administrators acting pursuant to s. 60.

84 Of the 5,801 items examined at the Prohibited Importations Directorate in the period 1992-1993, 114 were examined for the purpose of re-determinations requested pursuant to s. 63. Eight of those items were reclassified as not obscene. Of the 7,844 items examined in the period 1993-1994, 465 related to re-determinations under s. 63. Fifty-five of the 465 items examined were reclassified as not obscene.

85 Only three appeals from decisions of the Deputy Minister under s. 63 have been heard in the courts since 1985. Glad Day Bookshop Inc. v. The Deputy Minister of the Department of National Revenue (Customs and Excise), an unreported decision of the District Court of Ontario pronounced March 20, 1987, involved a book entitled "The Joy of Gay Sex". The Court concluded the book was not obscene and allowed the appeal. In Little Sisters Book and Art Emporium v. Deputy Minister, Revenue Canada, Customs and Excise, the federal Crown consented to judgment in the County

Court of Vancouver on April 28, 1988, allowing an appeal with respect to "The Advocate", an American periodical published for homosexuals. In Glad Day Bookshop Inc. v. Deputy M.N.R., Customs and Excise (1992), 90 D.L.R. (4th) 527 (O.C.J.), the Court dismissed the importer's appeal and held that the materials, which consisted of male homosexual magazines and collections of short stories, were obscene.

86 Thus, the system of re-determinations 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.

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

VII. THE FACTUAL BACKGROUND

88 As a young man, the plaintiff James Deva was very confused by his homosexual feelings. After leaving university, he travelled to Vancouver to investigate "the gay lifestyle". Although he is

qualified as a teacher, he was unable to obtain work in that field. He subsisted on welfare and on his earnings as a sales clerk for about four years. Then he read "The Joy of Gay Sex" and, he said, the book vitalized him.

89 He and his partner, the plaintiff Bruce Smythe, who did not testify, decided to open a bookstore specializing in homosexual literature. Mr. Deva felt it to be an important undertaking. He believed the confusion and loneliness felt by homosexuals could be ameliorated by enabling individual homosexuals to obtain literature dealing with homosexuality. In this way, he believed, they would gain insight into their own lives and would come to realize, as he had, that there are other homosexuals experiencing similar difficulties coping with life in our society.

90 Mr. Deva and Mr. Smythe opened the Little Sisters bookstore in 1983 in an area of Vancouver populated by many homosexuals. One of only four stores in Canada specializing in materials for homosexuals, the store has become what Mr. Deva describes as a nerve center for the homosexual community. It serves not only as a retail source of homosexual literature but as a focus for social and political activities. Bulletin boards in the store carry advertisements of goods wanted and for sale, of available accommodation, and of events of interest to the store's patrons. The store acts as a ticket distribution centre for many events attended by homosexuals. It is the site of book readings and of

what are known as "book launches", events attended by authors to announce and promote their new publications.

91 The Little Sisters store carries a wide variety of materials, mostly catering to homosexual tastes. It has a large selection of gay and lesbian fiction and a section on gay studies. It sells many periodical publications. Books and magazines are chosen to appeal to homosexual men and women on an approximately equal basis. The store has what Mr. Deva described as a "recovery section" containing health-related materials on such topics as alcoholism, human immunodeficiency virus (HIV), and acquired immune deficiency syndrome (AIDS). The selection of materials related to HIV and AIDS is perhaps the largest in the country. The store also has a large assortment of greeting cards, mostly of a homosexual nature, and a small section containing videotapes, both mainstream and pornographic, for sale and rental. It also sells various sexual devices. As a matter of policy, the store does not sell materials exhibiting what the proprietors consider to be pedophilia, violence towards women, or misogyny.

92 Mr. Deva and Mr. Smythe rely heavily on their manager, Janine Fuller, a lesbian, who has been with Little Sisters since February, 1990. Like Mr. Deva, Ms. Fuller told of her difficulties as a young homosexual in a society she perceived to be hostile to homosexuals. Also like Mr. Deva, she attributes the "validation" of her homosexuality to reading a book, "Saphistry", which she

obtained from the Toronto Women's Book Store. She said the book encouraged her to understand the sexual feelings with which she was struggling and to realize, as well, that she was not alone in those feelings. She overcame her fear of being known as a lesbian and "came out" at age 21. She attributes her adjustment in large part to the understanding and support of her parents. She too is dedicated to the notion that a source of material dealing with homosexuality is important for individual homosexuals.

93 In addition to Mr. Deva, Mr. Smythe, and Ms. Fuller, the store has two full-time and six part-time employees. Mr. Deva and Ms. Fuller are responsible for the management of the store.

94 Little Sisters imports a large proportion of its stock, mostly from the United States. There are very few publishers of exclusively homosexual material in Canada. Historically, the bulk of such material has been published in the United States by what are descriptively referred to as "small presses". Recently, large, well-known publishers, like Penguin, McLellan Stewart and Harper Collins have entered the field and Little Sisters now obtains a considerable quantity of material from them.

95 Little Sisters has experienced difficulties with Canada Customs since its inception. Anticipating such difficulties, Mr. Deva and Mr. Smythe approached Canada Customs to seek a way to smooth the passage of their importations into Canada. They were

told that they should submit, for advance review, one copy of each item they intended to import, a suggestion they understandably found to be unacceptable. The delays inherent in that procedure would have been costly to their business. As well, they found the suggestion offensive as they believed that books dealing with heterosexual topics were not handled in that way when imported by traditional bookstores.

96 As expected, Little Sisters began to experience delayed deliveries of imported material and prohibitions of some items. In the early years, Mr. Deva and Mr. Smythe accepted these difficulties passively. However, they believed that Customs was prohibiting important work that was not obscene, and when Customs prohibited two issues of "The Advocate", they decided to resort to the re-determination procedures provided by the legislation. They felt they were being singled out by Customs since the magazine was available in Vancouver by subscription and on various news-stands.

97 Lawyers employed by Little Sisters unsuccessfully invoked ss. 60 and 63. Mr. Deva and Mr. Smythe considered the issue sufficiently important to justify the expense of an appeal under s. 67. On the day of the hearing of the appeal, counsel for Canada Customs consented to a judgment allowing the appeal. The federal Crown justified this result at this trial by stating that the Deputy Minister had changed his mind after the s. 63 re-

determination was made but that there was no statutory procedure for him to formalize that decision except by a judgment granted pursuant to an appeal under s. 67. It seems the impending appeal caused those responsible to look more carefully at the publication. In any event, Little Sisters' position was eventually vindicated some sixteen months after the initial prohibition. In the meantime, Little Sisters lost the ability to sell the two shipments prohibited and the intervening thirty issues of the periodical. To add insult to injury, the magazines seized at the time of the prohibition were never returned to Little Sisters, although some monetary compensation was ultimately paid.

98 Little Sisters has sought re-determinations on several occasions since then, but they have often been frustrated by the obscurity of Customs' forms and procedures and by the cost of legal services. Janine Fuller was given responsibility for dealing with prohibited shipments after she became store manager. On occasion, she has resorted to advising the local press of detentions and has found that delayed shipments have been delivered following the ensuing publicity.

99 The delays and disruptions caused by detained and prohibited shipments have affected Little Sisters financially and in other ways. Often, material is dated by the time it is received and has lost its sales value. Publications denied entry to Little Sisters are often successfully imported and sold by other stores. Planned

events, like book launches, are sometimes jeopardized when Customs interrupts shipment of the publications involved. The proprietors often refer customers to local general-interest stores to obtain publications that Little Sisters is unable to import. More subtly, Mr. Deva and Ms. Fuller must be very circumspect in their ordering. They are uncomfortable with this self-censorship.

100 The plaintiffs identified 261 titles detained from imported shipments destined for Little Sisters since 1984, seventy-seven of them on more than one occasion. Of those, sixty-two were released for delivery after examination pursuant to s. 58. Little Sisters sought re-determinations pursuant to s. 60 on 210 prohibitions and were successful on twenty-eight. Of 150 re-determinations sought pursuant to s. 63, they were successful on forty-six. As mentioned, they were successful on their one appeal pursuant to s. 67. Thus, roughly 20% of prohibitions at the s. 58 level were considered to be incorrect by Tariff and Values Administrators acting pursuant to s. 60, and roughly 30% of the decisions of lower-ranking officers were considered to be incorrect by Tariff Administrators reviewing the materials pursuant to s. 63. Such high rates of error indicate more than mere differences of opinion and suggest systemic causes.

101 Little Sisters is not alone in feeling the effects of the enforcement of code 9956(a). The store acquires most of its American material from Inland Distributors Limited, a wholesale

distributor of the works of small American publishers. Inland is a large business. It deals with approximately 6,000 separate publishers and distributes their publications to more than 5,000 retail stores, about 350 of which are located in Canada. It exports American publications to more than 40 countries. Inland carries a wide variety of material, and about 15% of its stock is comprised of publications produced by and for homosexuals.

102 Inland ships to its Canadian customers by truck through the Fort Erie port of entry. Because of difficulties encountered at Customs with shipments destined for Little Sisters and other Canadian bookstores dealing in similar material, Inland had to make significant changes to its procedures. Ultimately, Inland published and distributed to its Canadian customers a list of prohibited publications with a warning that customers should order them at their own risk.

103 The Glad Day bookstore in Toronto also specializes in homosexual material. It has experienced problems similar to those of Little Sisters, although it has been more aggressive in its approach to Customs, pursuing more of its prohibitions, some as far as appeal under s. 67. Coincidentally, it successfully appealed the prohibition of "The Joy of Gay Sex" under s. 67, the book that so profoundly affected Mr. Deva. One small American publisher of lesbian materials has refused to ship to the Glad Day store because

of the trouble and expense it experienced in dealing with Canada Customs.

104 The Toronto Women's Book Store has been affected as well. That store, with the assistance of two professors from Osgoode Hall Law School, challenged some prohibitions based on anal penetration. Despite their comprehensive and reasoned submissions that anal penetration is not *per se* obscene, their requests for re-determination were unsuccessful. Moreover, they found that the reasons given for prohibition changed as they proceeded through the bureaucracy. That understandably frustrated them, as their submissions were focused on the reasons for prohibition given at the previous level. Expense deterred the store from appealing pursuant to s. 67.

105 Customs' administration of code 9956(a) results in arbitrary consequences. Traditional bookstores do not have similar encounters with Canada Customs. Helen Hager, who operated a general-interest bookstore in Vancouver for many years, did not know that Customs inspected books for obscenity until she left that business and opened a store catering to women, in which she stocked some material for lesbians. She had two shipments from Inland interrupted at the border and has never received two of the books in the shipment, nor any documents from Customs in relation to them.

106 Duthies, one of Vancouver's oldest and best-known bookstores, has had a section catering to homosexual tastes for many years. Duthies carries many titles that were prohibited when Little Sisters attempted to import them. The effect on Little Sisters of the special scrutiny of shipments destined for them was strikingly illustrated in the testimony of Celia Duthie, the proprietor of Duthies. She was asked shortly before the trial by the British Columbia Civil Liberties Association to import several titles that were prohibited when Little Sisters had attempted to import them. The shipment was examined by Customs but was delivered to her store.

107 Publications denied to Little Sisters can often be found in other stores. As well, many prohibited titles are housed in the Vancouver Public Library.

108 Little Sisters' choice of carrier affects their ability to import material. Because of the scrutiny their shipments receive at the Vancouver Mail Center, Little Sisters uses United Parcel Services as much as possible for cross-border deliveries. They have not had a book carried by that carrier prohibited in the last two years, while virtually every shipment to them through the mail is inspected and many items are prohibited. On one occasion, a package of domestic mail from Ontario was opened and inspected by Customs. This understandably contributed immensely to the perception of the principals of Little Sisters that they are being

persecuted by Customs. Although I am satisfied that this incident was the result of inadvertent human error by customs officers, it was caused by the systemic targeting of Little Sisters' importations in the Customs Mail Center.

109 There are many examples of inconsistencies in Customs' treatment of publications. I have already mentioned "Macho Sluts", a book by the lesbian author Pat Califia that was prohibited after it had been re-determined under s. 63 to be admissible. The plaintiffs identified another thirty-five publications that were prohibited after they had been ruled admissible by Customs.

110 The Customs regime affects artists and writers as well as commercial businesses. For example, Persimmon Blackridge, a local artist with impressive credentials and an international reputation, was embarrassed and upset by Customs' decision to prohibit re-entry into Canada of photographs produced by her and two colleagues as part of an internationally-recognized work dealing with lesbian sexuality. Jane Rule, a renowned author who received the prestigious award for best Canadian novel in 1978, spoke eloquently of her feelings as a lesbian and of the hurt and shame she felt when she learned that her award-winning novel had been suspected of contravening code 9956(a) and was detained for inspection by Customs.

111 That detention illustrates how haphazardly Customs' procedures are sometimes applied. Ms. Rule's novel, "Contract With the World", was initially detained by a Commodity Specialist because the title aroused her suspicion that the book might contain hate propaganda. Later, she read the book jacket and, noticing that it referred to sexual matters, she decided to detain it until she could find time to investigate that aspect of the book. Her supervisor happened to see the book and recognized Jane Rule as a well-known author. He so advised the Commodity Specialist, who immediately released the book without any further investigation. Thus, the book was detained for examination but it was not examined and no principled decision was made.

112 Often, decisions are not made within the statutorily-prescribed time limits. The plaintiffs identified many instances where the thirty-day time limit between detention and determination under s. 58 was exceeded. As well, they identified many instances where the date of detention was incorrectly recorded on the Form K27, making it impossible to determine whether the thirty-day time limit was observed.

113 Re-determinations requested by Little Sisters under s. 60 were completed in times ranging from ten days to three and one-half months. It was conceded by Customs' witnesses at trial that the reviewing officer could not have read the books in question in some instances within the time it took to give the decision. Some

requests for re-determination under s. 63 have taken more than a year for decision.

114 These 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.

115 Moreover, a great many of the classifications are qualitatively questionable. That is understandable at the s. 58 level, as decisions are made by such expedients as thumbing through books, choosing pages at random to read, and fast-forwarding videotapes to count the number of offending scenes. Again, officers faced with an overwhelming workload have little practical choice but to take shortcuts. More care is taken at the s. 60 and s. 63 levels, but even there it is doubtful that all books, for example, are read completely.

116 Many publications, particularly books, are ruled obscene without adequate evidence. This highlights perhaps the most serious defect in the present administration of code 9956(a), that is, that classifying officers are neither adequately trained to make decisions on obscenity nor are they routinely provided with the time and the evidence necessary to make such decisions. There is no formal procedure for placing evidence of artistic or literary merit before the classifying officers. Consequently, 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.

117 On the other hand, it appears that highly-publicized materials are sometimes given the benefit of the doubt. For example, a book of photographs entitled "Sex", produced by the popular entertainer known as "Madonna", was approved for admission on an advance review of the Prohibited Importations Directorate, despite the fact that it contains many depictions that, considered discretely, violate code 9956(a). As well, a book entitled "American Psycho" was similarly approved, although it contains passages of the grossest obscenity. It was, however, sponsored by a large publishing house and was widely publicized at the time of its importation.

118 It should also be mentioned that police forces concerned with enforcing s. 163(8) within our borders rely to a great extent on customs officers. Police officers from Ontario and British Columbia testified that the resources available to them do not permit them to seek out offenders. Their role is confined to reacting to complaints and information received from others. Many of their investigations are initiated by information received from customs officers concerning the attempted importation of obscenity.

119 Against that background I will turn to consider whether the impugned legislation is constitutionally sound.

VIII. ANALYSIS

A. Whether the legislation infringes a charter right or freedom

1. Whether s. 2(b) is infringed

120 The defendants have conceded that the legislation infringes the freedom of expression guaranteed by s. 2(b) of the ***Charter***. That is a proper concession as it is beyond doubt from the jurisprudence, of which R. v. Butler, [1992] 1 S.C.R. 452, particularly at pp. 486-90, is but one example, that obscenity is expression. Thus, a law prohibiting the importation of obscenity is an infringement of the right of freedom of expression.

2. Whether s.15(1) is infringed

a. Standing

121 The first question raised here concerns the standing of the corporate plaintiffs to seek a declaration with respect to s. 15 (1) of the ***Charter***. The federal Crown challenges the standing of the corporate plaintiffs on the ground that s.15(1) applies only to individual persons. It seems clear that only individuals may invoke this section: Milk Board v. Clearview Dairy Farm Inc.

(1987), 12 B.C.L.R. (2d) 116 (C.A.) at p. 125; Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326 at p. 1382.

122 However, where a corporation has standing under one section of the ***Charter***, it is not precluded from raising a challenge in the same proceeding to another section of the ***Charter*** under which it would not have standing if it made the second claim alone. That point is made by Lysyk J. in Canadian Bar Assn. v. British Columbia (Attorney General) (1993), 101 D.L.R. (4th) 410 (B.C.S.C.) at pp. 419-20, where he observed that once standing is established with respect to one ground of constitutional challenge, corporate status is irrelevant for purposes of other grounds of challenge. It is not disputed that the corporate plaintiffs have standing to challenge the impugned legislation on the ground that it infringes s. 2(b). It follows that they have standing to raise a challenge on the equality ground as well.

123 In any case, the plaintiffs Deva and Smythe are individuals directly affected by the impugned legislation and have standing to seek the declaration requested.

124 The analysis under s. 15(1) consists of three steps, described by Gonthier J. in Miron v. Trudel, [1995] 2 S.C.R. 418 at p. 435, paras. 13-14 as follows:

> The first step looks to whether the law has drawn a distinction between the claimant and others. The second step then questions whether the distinction results in disadvantage, and examines whether the impugned law imposes a burden, obligation or disadvantage on a group of persons to which the claimant belongs which is not imposed on others, or does not provide them with a benefit which it grants others (*Andrews, supra*). It is at this second step that the direct or indirect effect of the legislation is examined.
>
> The third step assesses whether the distinction is based on an irrelevant personal characteristic which is either enumerated in s. 15(1) or one analogous thereto. As Mcintyre J. emphasized in *Andrews*, *supra*, at p. 165, s. 15(1) seeks to eliminate differences based on irrelevant personal characteristics:
>
> > In other words, the admittedly unattainable ideal [of equality] should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.

This approach was approved in Egan v. Canada, [1995] 2 S.C.R. 513 per La Forest J., in the principal majority judgment, at pp. 530-31, para.9.

b. **Whether the law has drawn a distinction**

125 The impugned legislation prohibits the importation of material that is deemed to be obscene. It is neutral on its face and applies to all obscenity, whether tailored for heterosexual or homosexual audiences. It does not draw a distinction between others and the plaintiffs Deva and Smythe.

c. **Whether the effect of the legislation imposes a burden or disadvantage**

126 Even though a law does not create a distinction on its face, it may still be discriminatory in its effect if it imposes burdens or disadvantages based on the enumerated or analogous grounds. Thus, in Egan, *supra*, Cory J. said, at pp. 586-87, para. 138:

> Direct discrimination involves a law, rule or practice which on its face discriminates on a prohibited ground. Adverse effect discrimination occurs when a law, rule or practice is facially neutral but has a disproportionate impact on a group because of a particular characteristic of that group.

127 The plaintiffs Deva and Smythe must show that they have suffered disadvantage because of their homosexuality, and that the disadvantage is one suffered by them and other homosexuals as a group as opposed to other individuals and groups in society: Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 per McIntyre J. at p. 174.

128 The defining characteristic of homosexuals the element that distinguishes them from everyone else in society is their sexuality. Naturally, their art and literature are extensively concerned with this central characteristic of their humanity. 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.

129 This unequal effect is compounded by the facts that such a large proportion of such materials is produced in the United States and that there are only four bookstores in Canada dealing extensively in homosexual erotica.

130 The combination of these circumstances has adversely affected the ability of the plaintiffs Deva and Smythe, and other homosexuals, to obtain material that has value to them. They have been correspondingly disadvantaged and the disadvantage is directly related to their homosexuality.

131 However, the distinctive treatment arises from the application of s. 163(8) of the ***Criminal Code***, a provision that is incorporated only by reference in the impugned legislation and that is not challenged by the plaintiffs in this litigation. Accordingly, the disproportionate impact is not the responsibility of the impugned legislation and it cannot be said that this legislation imposes a burden on the plaintiffs that would amount to an infringement of their rights under s. 15(1): see Thibaudeau v. Canada, [1995] 2 S.C.R. 627, per Cory and Iacobucci JJ., at pp. 701-04, paras. 157-164.

d. Whether the distinction is discriminatory

132 If the disproportionate effect on homosexuals results from the customs legislation, not s. 163(8) of the ***Criminal Code***, it is incumbent on the plaintiffs to demonstrate that the distinction is discriminatory. The first issue in this aspect of the analysis is whether the homosexuality of the plaintiffs Deva and Smythe is a ground analogous to the grounds enumerated in s. 15(1) of the ***Charter***. The federal Crown has conceded that sexual orientation is an analogous ground. Similar concessions have been accepted in other ***Charter*** cases, for example, in this court in Knodel v. Medical Services Commission (1991), 58 B.C.L.R. (2d) 356 and in the Supreme Court of Canada in Egan, *supra*. I therefore take it as established that the plaintiffs' homosexuality is capable of affording a ground of discrimination within s. 15(1) of the ***Charter***.

133 A distinction based on an analogous ground will be discriminatory only if the distinction is irrelevant to "the functional values of the legislation": Miron, *supra*, per Gonthier J. at p. 436, para. 15, pp. 453-54, para. 54; Egan, *supra*, per La Forest J. at pp. 532-33, paras. 13-14. For example, sexual orientation would be irrelevant to a law respecting qualifications for employment.

134 The unequal treatment here is said to arise from the fact that the prohibition of obscenity produced for homosexuals affects them disproportionately to the effect on heterosexuals of the prohibition of heterosexual obscenity. That is so.

135 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. Here, the comment of La Forest J. in Egan, *supra*, at p. 529 is apposite. He said:

> [N]ot all distinctions resulting in disadvantage to a particular group will constitute discrimination. It would bring the legitimate work of our legislative bodies to a standstill if the courts were to question every distinction that had a disadvantageous effect on an enumerated or analogous group. This would open up a s. 1 inquiry in every case involving a protected group.

136 The point is that homosexual obscenity is proscribed because it is obscene, not because it is homosexual. The disadvantageous effect on homosexuals is unavoidable and is within the ambit of the

comment of La Forest J. quoted above. It follows that the unequal impact of the law on homosexuals has not been shown to be discriminatory within s. 15(1) of the ***Charter***.

3. Whether the legislation is saved by s. 1

137 The prohibition of the importation of obscenity is an infringement of the freedom of expression guaranteed by s. 2(b) of the ***Charter***; that is conceded by the defendants and follows from the decision in R. v. Butler, *supra*, where it was confirmed that the criminalization of obscenity by s. 163 of the ***Criminal Code*** is an infringement of freedom of expression. Thus, the delegation to customs officers of the power to prohibit the importation of obscene material is the delegation of a power to infringe a protected freedom, and the delegating legislation must therefore be subjected to analysis under s. 1 of the ***Charter***: Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038 at pp. 1079-80.

a. Admissibility of evidence

138 Before turning to the s. 1 analysis of the constitutionality of the impugned laws it is necessary to rule on the admissibility of certain evidence offered as relevant to that analysis.

139 Some of the evidence in question tends to establish what are described as "legislative facts". Such facts are unique to constitutional and ***Charter*** litigation. They are described in the following passage from the reasons for judgment of the Court in R. v. Danson, [1990] 2 S.C.R. 1086 at p. 1099:

> Adjudicative facts are those that concern the immediate parties: . . . "who did what, where, when, how, and with what motive or intent . . . ." Such facts are specific, and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements . . . ." [citations omitted]

140 The distinction is a rational one. In a dispute between parties over private rights, such as the courts are usually concerned with, the court attempts to find the facts with respect to completed past events for the purpose of adjudicating the consequences between the parties. In the realm of legislative facts, however, the court is not concerned with assessing the legal consequences of past actions as between the immediate parties before the court, but with ascertaining economic and social facts that transcend the interests of the parties.

141 The sources of evidence to establish such facts are many and varied. To require proof of such facts in accordance with the traditional rules of evidence would put an intolerable burden on trial courts. Moreover, such exactitude of proof is not necessary.

As stated by the Divisional Court of the Ontario Court (General Division) in Canada Post Corp. v. Smith (1994), 118 D.L.R. (4th) 454 at p. 466:

> Trial-type procedures are best employed to resolve controversies involving disputes over adjudicative facts, facts pertaining to the parties. In contrast, such truth seeking procedures are not usually required for the ascertainment of legislative facts. The exception is where specific or concrete legislative facts are critical to a judicial determination. Legislative facts relating more to policy than concrete fact are often not amenable to ascertainment by trial procedures. Cross-examining a social scientist on a particular theory is unlikely to produce "truth" as understood in the context of adjudicative facts.

142 The plaintiffs objected to the admission of several published articles offered by the federal Crown as social-science evidence. The plaintiffs' position is that, since the plaintiffs called *viva voce* social-science testimony and subjected their witnesses to cross-examination, it would be improper to permit the defendants to simply file such evidence and deprive the plaintiffs of the opportunity to cross-examine. For the reasons in the passage I have just quoted from Canada Post Corp., *supra*, this objection cannot prevail.

143 The plaintiffs do not object on the ground of relevancy. The federal Crown contends, correctly in my view, that the material is relevant to show that there is a body of scientific opinion that would provide a reasonable and rational basis for Parliament to conclude that homosexual obscenity causes harm to society. As the

issue is not which social-science school of opinion should prevail, but only whether there is a rational basis for Parliament to act, the fact that the evidence was not offered *viva voce* and was not tested by cross-examination is not fatal to its admission. These articles have been published and have therefore added to the known body of social-science evidence relating to the links between pornography and harm. They have passed the low threshold of admissibility for such evidence and, like the books and journal articles referred to in Butler, *supra*, may be considered by the Court.

144 Two of the published papers to which the plaintiffs took objection were written by Professor Neil M. Malamuth, a psychologist from the University of California, Los Angeles, whose written opinion prepared for this litigation was earlier marked in evidence by consent of the parties. Professor Malamuth deals, in his opinion and in the published articles, with the relationship between obscenity and changes in attitudes and behaviours of those exposed to it. The plaintiff's contend that it is improper to permit the federal Crown to augment Professor Malamuth's opinion with these articles. That would be so if Professor Malamuth's opinion and the published articles were tendered to establish that there is such a causal link between obscenity and harm. However, they are not tendered for that purpose, but for the purpose of demonstrating that there is a known body of social-science opinion

that would support Parliament's reasonable apprehension that the link exists. They are admissible for that limited purpose.

145 The plaintiffs objected as well to an article, offered by both defendants, written by Christopher N. Kendall entitled " *Real Dominant, Real Fun!* : Gay Male Pornography and the Pursuit of Masculinity", published in Volume 57 of the Saskatchewan Law Review at p. 22 (1993). Their position is that the article's theme is legal analysis and that it can be referred to, if at all, only as persuasive authority during argument. The defendants' position is that the article is in the nature of social-science evidence and is relevant to the issue of whether there is a reasonable basis for Parliament's conclusion that homosexual obscenity causes harm to society. The article contains elements of both legal and social-science analysis and argument. The author, a homosexual, states his purpose at pp. 27-8 in these words:

> At a minimum, it is my purpose in writing this paper to provide a necessary re-evaluation of arguments alleging that gay male pornography is so central to the expression and promotion of gay male identity that it must, of necessity, be defended and promoted. Contrary to those who view gay male pornography as qualitatively different from heterosexual pornography, hence non-harmful, I will argue that the effects of its production and distribution are no less damaging than the harms resulting from other pornography.

The paper is an attempt to accomplish that purpose. It does not publish any social-science evidence but reviews existing evidence and the opinions of others to construct an argument supporting the

author's thesis. It is argument, not evidence, and is inadmissible.

146 The plaintiffs also objected to two types of evidence tendered by the provincial Crown. First, the plaintiffs objected that certain materials relating to the Motion Picture Act, 1986 are not relevant. I agree with counsel for the provincial Crown that the material is relevant to show the basis for and the nature of the provincial regulatory scheme for film and video pornography and to illustrate the implications in other contexts of the remedies the court has been asked to grant.

147 The second group of materials objected to by the plaintiffs was comprised of social-science publications concerning domestic violence and abuse, particularly among homosexuals. The plaintiffs' position is that the publications may not be admitted to impeach their witnesses, nor as proof of the truth of the contents of the publications. Counsel for the provincial Crown has not sought to use the materials for either of those purposes, but only for the purpose of demonstrating that legislators have a basis for a rational concern about the effects of homosexual obscenity on society. The materials are relevant and admissible for that limited purpose.

148 The plaintiffs were given notice of the proposed evidence and an opportunity to meet it. Indeed, much of the plaintiffs'

evidence was concerned with the same subject. Moreover, the nature of the evidence is such that proof by conventional means would likely be costly and would probably have extended the trial unnecessarily. Further, the validity of the opinions expressed in the materials is not to be decided in this case. Accordingly, the materials mentioned, except for the Kendall article, are admitted into evidence.

149 The defendants objected to some of the testimony of Carole Vance, an anthropologist called by the plaintiffs to offer social-science evidence. The objection is sustained with respect to her testimony about what she heard at the proceedings of the Attorney General's Commission on Pornography (the "Meese Commission"). That evidence was offered for the truth of what Ms. Vance heard and is hearsay for that purpose. Although it is in the nature of social-science evidence and is relevant to the rational-basis issue, it consists of mere anecdotal observations of what witnesses and members of the Meese Commission said. It is the kind of specific-legislative-fact evidence that should be subject to the ordinary rules of evidence. It fails the tests of reliability and necessity and is inadmissible: R. v. Khan, [1990] 2 S.C.R. 531.

150 Ms. Vance's testimony apart from her evidence concerning the proceedings of the Meese Commission is admitted and accepted. I found her to be an experienced and knowledgeable scholar in her field.

151 The federal Crown tendered copies of legislation from foreign jurisdictions relating to pornography and obscenity, as well as memoranda, directives, and guidelines from some of those jurisdictions. The plaintiffs did not object to the admissibility of the foreign legislation, but did object to the admissibility of the other materials on the ground they have not been properly proven according to the rules of evidence.

152 These materials are relevant to the minimal-impairment aspect of the s. 1 analysis as illustrating the way in which other countries deal with the proliferation of obscenity. The federal Crown filed an affidavit of a legal secretary in the Department of Justice who identified the source of each of these items of evidence. She exhibited to her affidavit copies of transmittal documents indicating in each case that the material was received from an official in a position of some responsibility with the respective government department dealing with importation of obscenity. Her affidavit establishes that the materials are sufficiently reliable and trustworthy to justify their admission.

b. **Whether the limitation is "prescribed by law"**

153 The first requirement of s. 1 is that the limitation on the ***Charter*** right or freedom be "prescribed by law". The meaning of this phrase and the proper analytical approach have been settled by

the decision in R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606. What is required is that the law in question be sufficiently intelligible to provide fair notice to citizens, that is, "an understanding that certain conduct is the subject of legal restrictions" (p. 635). In addition, the law must be precise enough that it sufficiently describes the boundaries of unlawful conduct and delineates "an area of risk to allow for substantive notice to citizens" (p. 639).

154 The converse of a measure prescribed by law is a measure that is vague. The Court described such laws, at pp. 639-40, in these words:

> A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible . . . and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary.

155 The plaintiffs submit that the infringement of the expression right is not prescribed by law for two reasons: first, because, although code 9956(a) is admittedly law, it is unconstitutionally vague since it is applied by civil servants and not the judiciary; and secondly, because the "operative document" used to detain and prohibit representations is Memorandum D9-1-1, and it is not law. I will deal with these submissions in turn.

156 The plaintiffs argue that s. 163(8) of the ***Criminal Code*** survived a vagueness challenge in Butler, *supra*, only because the law was to be interpreted and applied by the judiciary. Here, they say, the law relating to obscenity is interpreted and applied by civil servants who could not possibly perform that task without the aid of Memorandum D9-1-1. The evidence supports the latter proposition, as several customs officers testified to the difficulty of classifying material as obscene and to their reliance on Memorandum D9-1-1.

157 I do not agree that a law may be constitutional or unconstitutional for vagueness depending on the nature of the tribunal charged with the duty of interpreting and applying it. The key is whether the tribunal, whatever its composition, is guided by intelligible standards.

158 The decision in R. v. Nova Scotia Pharmaceutical Society, *supra*, is instructive on this point. There, Gonthier J., writing for the Court, explained the proper roles of the concept of vagueness in ***Charter*** analysis, at pp. 626-632. We are concerned in this case with only two of them: whether the law is so vague as not to constitute a limit prescribed by law, and whether the law is overbroad. The latter is a consideration in the proportionality analysis under s. 1, particularly in the minimal-impairment aspect

of that analysis. The former is engaged in this part of the plaintiffs' submissions.

159 As Gonthier J. made clear in Nova Scotia Pharmaceutical Society, at p. 642, the standard to be met by the impugned law at this stage of the analysis is a minimal one. If the law provides notice to citizens that certain conduct is the subject of legal restrictions and provides limitations on enforcement discretion, it will pass this threshold test. As to discretion, he said, at p. 642:

> What becomes more problematic is not so much general terms conferring broad discretion, but terms failing to give direction as to how to exercise this discretion, so that this exercise may be controlled. Once more, an unpermissibly vague law will not provide a sufficient basis for legal debate; it will not give a sufficient indication as to how decisions must be reached, such as factors to be considered or determinative elements. In giving unfettered discretion, it will deprive the judiciary of means of controlling the exercise of this discretion.

160 Thus, the focus is not on the nature of the tribunal enforcing the law, but on whether the tribunal's discretion is controlled by intelligible standards.

161 Further, s. 169 of the ***Criminal Code*** provides that offences under s. 163 may be tried on indictment or summarily. Where the Crown proceeds by indictment s. 536(2) permits the accused to elect to be tried by a court composed of a judge and jury. In such cases

the jury, with the assistance of instruction on the law by the presiding judge, interprets and applies the law to the facts of the case at hand. If a jury comprised of ordinary citizens is capable of applying the law of obscenity in a criminal case, surely trained customs officers are capable of applying it in a civil regulatory setting with the assistance of relevant evidence, including expert opinion, and competent instruction on the relevant legal principles. The capability of customs officers was attested to by Bart Testa, an expert in semiotics or signs, who said, when explaining the difficulties inherent in assessing literary and artistic merit of sado-masochistic representations without an understanding of the codes and conventions employed in that genre:

> The people involved in Customs have not, in my view, developed an understanding or knowledge of the codes necessary to understand the mixed messages and mixed codes in, for example, the work of John Preston. . . . And it is not beyond them to do so. I just don't believe that they have done so . . . .

162 Finally, while the interpretation and application of code 9956(a) is initially in the hands of bureaucrats, the legislation provides a right of appeal to the courts, where the law will be interpreted and applied by the judiciary.

163 Accordingly, the plaintiffs' submission that the law is unconstitutionally vague because it is applied by civil servants and not by the judiciary must be rejected.

164 I turn now to the plaintiffs' second point, *viz.*, that Memorandum D9-1-1 is the operative document and that it is not law. Code 9956(a) of the ***Customs Tariff*** incorporates s. 163(8) of the ***Criminal Code*** by reference. The latter qualifies as a limit prescribed by law: Butler, *supra*. Sopinka J., writing for the Court on this point, said at p. 491:

> Standards which escape precise technical definition, such as "undue", are an inevitable part of the law. The ***Criminal Code*** contains other such standards. Without commenting on their constitutional validity, I note that the terms "indecent", "immoral" or "scurrilous", found in ss. 167, 168, 173 and 175, are nowhere defined in the ***Code***. It is within the role of the judiciary to attempt to interpret these terms. If such interpretation yields an intelligible standard, the threshold test for the application of s. 1 is met. In my opinion, the interpretation of s. 163(8) in prior judgments which I have reviewed, as supplemented by these reasons, provides an intelligible standard.

165 The standards identified by Sopinka J. for the interpretation and application of s. 163(8) of the ***Criminal Code*** have been set out by Canada Customs for the guidance of its officers in sections 5 through 9 of Memorandum D9-1-1. These guidelines are prepared in consultation with the Department of Justice and are revised from time to time to take account of changing jurisprudence. They are legal advice, like advice given by a lawyer to a prospective importer, and like instructions given by the presiding judge to a jury on the trial of an indictment preferred under s. 163 of the ***Criminal Code***. In using the guidelines in Memorandum D9-1-1, customs officers are therefore engaged in the application of a

measure that has been found in Butler to be one "prescribed by law" as that phrase is used in s. 1 of the ***Charter***.

166 In the result, the plaintiffs' submission that the legislation fails on the ground of vagueness cannot succeed.

c. Whether the limitation is reasonable and demonstrably justified

167 Section 1 of the ***Charter*** next requires that the infringement be shown to be "reasonable" and "demonstrably justified in a free and democratic society". As McLachlin J. stated in RJR - MacDonald Inc. v. Canada (Attorney General) (1995), 127 D.L.R. (4th) 1 (S.C.C.) at pp. 88-9, paras. 127-8, the state bears the burden of demonstrating that the infringement is justifiable by the processes of reason and rationality, that is, by rational inference from evidence or established truths. She summarized the burden as follows, at p. 89, para. 129:

> The bottom line is this. While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning. The task is not easily discharged, and may require the courts to confront the tide of popular public opinion. But that has always been the price of maintaining constitutional

> rights. No matter how important Parliament's goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail.

168 The factors relevant to the demonstration required by s. 1 are set out in R. v. Oakes, [1986] 1 S.C.R. 103. They are summarized by McLachlin J. in RJR - MacDonald at pp. 89-90, para. 130 as follows:

> The first requirement is that the objective of the law limiting the Charter right or freedom must be of sufficient importance to warrant overriding it. The second is that the means chosen to achieve the objective must be proportional to the objective and the effect of the law -- proportionate, in short, to the good which it may produce. Three matters are considered in determining proportionality: the measures chosen must be rationally connected to the objective; they must impair the guaranteed right or freedom as little as reasonably possible (minimal impairment); and there must be overall proportionality between the deleterious effects of the measures and the salutary effects of the law.

(1) **The importance of the objective**

169 The first step in this part of the analysis is to identify the objective of the legislation. The plaintiffs conceded, I think correctly, that the objective is the same as that of s. 163 of the ***Criminal Code***. By incorporating the ***Code*** definition of obscenity into the impugned customs legislation, Parliament made clear its intention that the provisions are part of a legislative scheme to

deal with the same subject matter. Thus, s. 163 of the ***Criminal Code*** and s. 114 and code 9956(a) of Schedule VII of the ***Customs Tariff*** comprise a dualistic attack on obscenity, the former by criminalizing its dissemination within the country and the latter by prohibiting its entry.

170 In Butler, the Supreme Court of Canada identified the objective of the legislation as the avoidance of harm caused to society by the detrimental impact on its members of exposure to obscene material, and found that objective to be sufficiently pressing and substantial to justify an interference with the expression right.

171 However, the plaintiffs submitted that Butler is not determinative of the "pressing and substantial" issue here. They pointed out that the ***Criminal Code*** does not criminalize possession for mere personal use. On that fact, they rested the proposition that there is no pressing and substantial concern about individual citizens possessing obscene material for personal use. As the customs legislation does not exempt obscene materials imported for personal use, it follows, they said, that to that extent the legislation does not have a constitutionally legitimate purpose. They emphasized what has been described as the "right of moral independence", an adjunct of which is the right of individuals to consume pornography in private, and urged that it must be respected

even if the condition in which human beings flourish is compromised.

172 I cannot agree. First, the plaintiffs rest their submission on American authorities, notably Stanley v. State of Georgia, 22 L. Ed. 2d 542 (1969, U.S. S. Ct.), particularly at pp. 549-50, and the dissenting judgment of Black J. joined by Douglas J. at pp. 836-38 in United States v. Thirty-seven (37) Photographs, 28 L. Ed. 2d 822 (1971, U.S. S. Ct.). These passages emanate from a very different constitutional heritage in which free speech and privacy are relatively unfettered constitutional rights. The United States constitution has no provision similar to s. 1 of the ***Charter***, which permits the state to override those individual rights in justifiable circumstances, and these authorities are therefore of limited assistance.

173 Moreover, there is nothing in Butler that suggests that the dissemination of obscenity is not criminal conduct if the end result is personal use of that material. The ultimate purpose of most, if not all, obscenity is use by individuals. Indeed, it is that very result that the criminalization of the dissemination of obscenity is intended to prevent. It is the use of obscenity by individuals that produces harm to society and it is irrelevant whether the use is in public or in private: see R. v. Red Hot Video Ltd. (1985), 18 C.C.C. (3d) 1 (B.C.C.A.), per Anderson J.A., at pp.

22-3. The criminalization of the propagation of obscenity has as its aim the limiting or preventing of such use.

174 As well, the importation of obscenity across our borders is no less a dissemination of it than the distribution of it within our borders. Butler has made it clear that it is the proliferation of obscenity in Canada that is the evil. The act of importing contributes to that proliferation, both in the quantity and in the geographic dispersal of obscene material.

175 Finally, the invasion of privacy and individual autonomy that would be involved in criminalizing possession within Canada for personal use is not a factor in the customs scheme. The privacy right protects a reasonable expectation of privacy from an unreasonable search and seizure, but it is not an absolute right and it must give way in appropriate circumstances to the government's interest in intruding on individual privacy to enforce the law: Hunter v. Southam Inc., [1984] 2 S.C.R. 145 at pp. 159-60. That proposition is further exemplified in R. v. Oldfield, [1987] 3 W.W.R. 671 (B.C.C.A.), where Wallace J.A. observed that there is no constitutional right of privacy distinct from the right to be free from unreasonable search and seizure enshrined in s. 8 of the ***Charter***. He said, at p. 672:

> I do not accept the proposition that s. 8 guarantees a broad and general right to be secure from unreasonable

> invasion of privacy, apart entirely from search or seizure.

176 Persons entering Canada have an even lower expectation of privacy than in most other situations. Writing for the majority in R. v. Simmons, [1988] 2 S.C.R. 495, a case concerning the legitimacy of a strip-search of a person seeking to enter Canada, Dickson C.J.C., as he then was, said at p. 528:

> People do not expect to be able to cross international borders free from scrutiny. It is commonly accepted that sovereign states have the right to control both who and what enters their boundaries. For the general welfare of the nation the state is expected to perform this role. Without the ability to establish that all persons who seek to cross its borders and their goods are legally entitled to enter the country, the state would be precluded from performing this crucially important function.

177 Accordingly, the fact that the impugned legislation has the effect of prohibiting obscene materials intended for private possession and use does not diminish the importance of the objective of impeding the proliferation of obscenity.

178 There were other factors that persuaded Sopinka J. in Butler of the importance of the objective of s. 163(8) of the ***Criminal Code***. At pp. 497-8, he referred to the fact that such legislation may be found in most free and democratic societies; that democratic societies have for centuries set limits on freedom of expression by suppressing obscenity to protect the moral fibre and well-being of

the state; that the criminalization of obscenity has been held to be compatible with the ***Canadian Bill of Rights*** in R. v. Prairie Schooner News Ltd. (1970), 75 W.W.R. 585 (Man. C.A.) at p. 604; and that the enactment of s. 163(8) is consistent with Canada's international obligations, referring to the ***Agreement for the Suppression of the Circulation of Obscene Publications*** and the ***Convention for the Suppression of the Circulation of and Traffic in Obscene Publications***. He referred as well to "the burgeoning pornography industry". Those factors are equally cogent here.

179 In the result, the question whether the objective of the challenged legislation is of sufficient importance to justify interfering with the protected freedom must be answered in the affirmative.

(2) Whether the means chosen are proportional to the objective and effect

(a) Whether the means are rationally connected to the objective

180 The first step in the proportionality analysis is to determine whether the measures chosen by Parliament are rationally connected to the objective of the legislation.

181 The plaintiffs argue that the federal Crown has not proven that the legislation results in the detention and prohibition of

only obscene material. They say the evidence establishes that the legislation is grossly over-inclusive, in that it detains and prohibits much non-obscene material. This is an inherent defect of any system of prior restraint, they say, because such systems have a propensity toward censorship, as it is much easier to prohibit material than to prosecute it later; because there is little opportunity for public appraisal and criticism of the process; and because, as the plaintiffs put it, the job of a censor is to censor. As well, the plaintiffs contend that the impugned legislation is under-inclusive, in that much obscene material finds its way into the country. Further, they say, many classifications defy rationality and fairness. The result, in their submission, is that the defendants have not established a rational connection between the legislation and the objective.

182 The difficulty with that argument is that the ***Customs Tariff***, s. 114 and code 9956(a) of Schedule VII, prohibits the importation only of material that is deemed to be obscene under s. 163(8) of the ***Criminal Code***. Butler holds that s. 163(8) of the ***Code*** is rationally connected to the objective shared by that legislation and the impugned customs legislation. It follows that the prohibition of imported obscenity is rationally connected to the objective of the customs legislation, and that to the extent that non-obscene material is prohibited and obscene material is admitted, it is a result of inadequate examination and incorrect

interpretation and application of the law. The results identified by the plaintiffs are not caused by the law, but by the administration of the law by those to whom the discretion to enforce the law has been delegated.

183 The plaintiffs attempted to distinguish Butler on the basis of the media and the content of the materials in question in that case. They sought to confine Butler first, to graphic obscenity and, secondly, to heterosexual obscenity. From those premises, they argued that the federal Crown has failed to prove a causal connection between the consumption of textual pornography and harm to society, and between the consumption of pornography produced for homosexual audiences and harm to society.

184 However, Butler cannot be distinguished in the ways suggested. The materials under consideration in Butler consisted of videotapes, magazines, and sexual devices: see pp. 463, 464-65. It is not clear whether the questionable parts of the magazines were textual or pictorial or both. Nevertheless, in his review of the history of the law of obscenity, Sopinka J. referred at p. 474 to Brodie v. The Queen, [1962] S.C.R. 681, a decision in which the novel "Lady Chatterley's Lover" was held to be obscene. In doing so, he said nothing to suggest that text should now be excluded from the obscenity test. Indeed, Gonthier J., in a concurring judgment delivered for himself and L'Heureux Dubé J., expressly departed from the reasoning of Sopinka J. when, at pp. 517-19, he

distinguished between the content of pornography and its representation, and suggested that the medium of representation could be determinative of whether pornographic material is obscene. That was not the view of the majority in Butler. Accordingly, books and other written materials are not excluded from the application of the obscenity law.

185 In seeking to distance pornography produced for homosexual audiences from the reach of Butler, the plaintiffs submitted that Butler is confined to heterosexual pornography that demeans women and thus causes harm to society. They referred to L.E.A.F., an intervenor in that case, as representing the views of a pro-censorship faction of the feminist movement. They suggested the submissions made by L.E.A.F. were influential in the decision in Butler, and that the rights of homosexuals were overlooked. They emphasized that the essence of the decision was the finding that heterosexual obscenity causes harm to society by desensitizing attitudes toward women as a class, and led evidence to attempt to show that it has not been demonstrated that homosexual pornography causes harm.

186 This suggested distinction cannot be maintained. The material in question in Butler was seized from Mr. Butler's retail video store and consisted of magazines and videotapes described as "hard core pornography" and various sexual devices. The trial judge described it in these words:

> The material includes the presentation of sexual intercourse, anal intercourse, acts of *cunnilingus* and *fellatio*, men and women masturbating, men ejaculating in the face and other parts of the body of women and other men, lesbianism, homosexuality, incestuous sexual relations, group sex, very colourful and highly magnified, prolonged and vivid views of male and female genitalia, and use of various kinds and descriptions of sexual devices. [Emphasis added]
>
> R. v. Butler (1989), 50 C.C.C. (3d) 97 (Man. Q.B.) at p. 100

Thus, the material contained depictions of homosexual practices. The Manitoba Court of Appeal entered convictions on all counts. The Supreme Court of Canada set aside those convictions and ordered a new trial on all counts. It is implicit in that decision that such material is considered by the Supreme Court of Canada to be capable of constituting obscenity. Indeed, it should be noted that the plaintiffs conceded in argument that homosexual pornography can be obscene within the meaning ascribed to that word by Butler.

187 Further, the judgment speaks of harm caused generally by obscenity. Sopinka J., speaking for the majority, said at p. 485:

> Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse. Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning. [Emphasis added]

In describing the nature of that harm at p. 493, he adopted the following words of the *Report on Pornography* by the Standing

Committee on Justice and Legal Affairs (MacGuigan Report)(1978), at p. 18:4:

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

188 During his review of the jurisprudential history of the obscenity law, Sopinka J., at p. 480, quoted Wilson J. in Towne Cinema Theatres Ltd. v. The Queen, [1985] 1 S.C.R. 494 at p. 524, where she described the nature of the harm caused by obscenity in this way:

> The most that can be said, I think, is that the public has concluded that exposure to material which degrades the human dimensions of life to a subhuman or merely physical dimension and thereby contributes to a process of moral desensitization must be harmful in some way.

Further, in reaching his conclusion on the "pressing and substantial" issue, Sopinka J. said at p. 498 of Butler:

> I would therefore conclude that the objective of avoiding the harm associated with the dissemination of pornography in this case is sufficiently pressing and substantial to warrant some restriction on full exercise of the right to freedom of expression. [Emphasis added]

I have already noted that the pornography in Butler included depictions of homosexual practices.

189 The passages I have quoted do not support the suggestion that Butler has no application to pornography produced for homosexual audiences.

190 Moreover, to accede to that suggestion would be to derogate from the community-standard test. In a passage approved by Sopinka J. at p. 478 in Butler, Wilson J. enunciated that test in Towne Cinema, *supra*, at p. 521 in these words:

> It is not, in my opinion, open to the courts under s. 159(8) [now s. 163(8)] of the *Criminal Code* to characterize a movie as obscene if shown to one constituency but not if shown to another . . . . In my view, a movie is either obscene under the *Code* based on a national community standard of tolerance or it is not. If it is not, it may still be the subject of provincial regulatory control.

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.

191 Accordingly, the plaintiffs' submission that pornography produced for homosexual audiences is not within the ambit of the Butler decision cannot be accepted.

192 In view of that conclusion, it is not necessary to address the plaintiffs' contention that the rational connection between the legislation and the objective must be demonstrated by evidentiary proof that there is a causal relationship between pornography produced for homosexual audiences and harm to society, and that the defendants have not met that evidentiary burden.

193 I would hold against the plaintiffs on this submission in any event. As to the standard of proof of causation, Sopinka J. said, at p. 501 in Butler, that the rational link between s. 163 and the objective must relate to the actual causal relationship between obscenity and the risk of harm to society. He concluded that, although no direct causal link could be proven, it was appropriate in that case to assume a cause-and-effect relationship between obscenity and harm. At p. 502 he wrote:

> While a direct link between obscenity and harm to society may be difficult, if not impossible to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs.

and at p. 504:

> I am in agreement with Twaddle J.A. who expressed the view that Parliament was entitled to have a "reasoned apprehension of harm" resulting from the desensitization of individuals exposed to materials which depict violence, cruelty, and dehumanization in sexual relations.
>
> Accordingly, I am of the view that there is a sufficiently rational link between the criminal sanction, which demonstrates our community's disapproval of the dissemination of materials which potentially victimize

> women and which restricts the negative influence which such materials have on changes in attitudes and behaviour, and the objective.

194 Iacobucci J. concisely summarized this approach to the establishment of a rational connection in RJR - MacDonald, *supra*, at p. 105, para. 184, in these words:

> Rational connection is to be established, upon a civil standard, through reason, logic or simply common sense. The existence of scientific proof is simply of probative value in demonstrating this reason, logic or common sense. It is by no means dispositive or determinative.

McLachlin J. took a similar approach at pp. 97-8, paras. 155 - 158 of RJR - MacDonald.

195 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. 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. Nevertheless, there is social-science evidence linking such pornography to undesirable behavioural changes in some persons exposed to it. For example, the federal Crown referred to the opinions of Professor Neil M. Malamuth of the University of California, Los Angeles, a

psychologist who has extensive experience in the study of the psychological aspects of pornography, sexual aggression, and media effects. Professor Malamuth's research findings and opinions have been published in books and professional journals. He is known to espouse the view that pornography produced for homosexual audiences may cause the kinds of changes in attitudes, emotions, and behaviours identified in Butler as harmful to society. While the expert witnesses called by the plaintiffs were more or less critical of Professor Malamuth's methods and conclusions, they generally acknowledged that he is a leading researcher in the field.

196 Thus, there is a body of social-science evidence that would support Parliament's reasoned apprehension that obscene pornography produced for homosexual audiences causes harm to society. The weight of that evidence is a matter for Parliament to assess.

197 Before leaving this aspect of the matter I should mention the plaintiffs' submission that the federal Crown has failed to demonstrate the necessary rational connection because it led no evidence that customs officers even consider the question of harm in making classification decisions. The plaintiffs relied on R. v. Hawkins (1993), 86 C.C.C. (3d) 246 (Ont. C.A.), and particularly the following passage of the reasons for judgment of the Court at p. 263:

> Under the *Butler* test, not all material depicting adults engaged in sexually explicit acts which are degrading or dehumanizing will be found to be obscene. The material must also create a substantial risk of harm to society. That risk is now an element of obscenity-based crimes. Like any element of a criminal allegation, it must be proved beyond a reasonable doubt and that proof must be found in the evidence adduced at the trial.

198 Whether proof of that element is necessary in classification decisions made under the customs scheme is not before me. Moreover, the gist of the plaintiffs' submission is that the federal Crown must fail on the rational-connection test if it fails to prove that customs officers apply the law correctly. As I have already stated, the faulty application of the law by statutory delegates has no s. 52(1) constitutional implications.

199 The plaintiff's submission based on over- and under-inclusiveness did not arise in Butler. While the question of the breadth of the impugned legislation is appropriately considered in the proportionality analysis, the thrust of the plaintiffs' submission here is that a system of prior restraint cannot be considered to be rationally connected to an objective that infringes freedom of expression. Accordingly, they say, the statutory delegation of the power to prohibit obscenity cannot withstand the rational-connection test.

200 The doctrine of prior restraint is an American one that espouses that no restraint of free speech should be countenanced

except in the most urgent circumstances: see Emerson, Thomas L., "The Doctrine of Prior Restraint", (1955), 20 Law and Contemporary Problems 648, at p. 655. Such a doctrinal approach to the issues here would ignore the requirement that an examination of legislation under s. 1 of the ***Charter*** must be a purposive one, as described by Dickson J., as he then was, in R. v. Big M Drug Mart, [1985] 1 S.C.R. 295 at p. 344 as follows:

> This Court has already, in some measure, set out the basic approach to be taken in interpreting the *Charter*. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

201 This approach mandates a consideration of the right or freedom in question in its context in the particular case. As Wilson J. said, in Edmonton Journal v. Alberta (A.G.), [1989] 2 S.C.R. 1326 at pp. 1355-56:

> The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as relevant aspects of any values in competition with it.

202 Thus, in Canada, freedom of expression is not accorded transcendent importance in every situation; competing rights and values may prevail.

203 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.

204 Moreover, it is not the timing of the restraint, whether "prior" or "subsequent", that is critical. What is important is whether the discretion is limited by proper standards. The point is made by Professor Frederick Schauer in "Fear, Risk and the First Amendment: Unraveling the *Chilling Effect*", [1978] Boston University Law Review 685 at pp. 727-28, in this way:

> Unchecked discretion, vague standards and incompetent administration, while frequently associated with the system of prior restraint, can just as easily exist in a system of subsequent punishment. If the flaws inherent in any prior restraint scheme do lead to frequent instances of mistaken suppression of protected material, the fault lies in the applicable rules and procedures timing is a largely irrelevant factor.

205 The issue, therefore, is not whether any system of prior restraint of expression is capable of being rationally connected to the objective, but whether this system of prior restraint is so connected.

206 In summary, Butler has settled the point that there is a rational connection between s. 163(8) of the ***Criminal Code*** and the

objective of preventing obscenity, both heterosexual and homosexual. As that provision is incorporated by reference in the impugned legislation to further the same objective, a similar connection exists here. In Lavigne v. O.P.S.E.U., [1991] 2 S.C.R. 211, Wilson J. stated at p. 291:

> The Oakes inquiry into "rational connection" between objectives and means to attain them requires nothing more than a showing that the legitimate and important goals of the legislature are logically furthered by the means the government has chosen to adopt them.

It is self-evident that the objective of preventing the proliferation of obscenity is logically furthered by prohibiting its importation into Canada.

(b) Whether there is minimal impairment of the right

207 It is necessary to consider the nature of the expression right to put this discussion in context. There is no hierarchy of ***Charter*** rights: Dagenais v. Canadian Broadcasting Corporation, [1994] 3 S.C.R. 835 at p. 877. Nevertheless, freedom of expression enjoys a high standing. In Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, Cory J. said at p. 1336:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression.

208 The values underlying the right to freedom of expression were summarized in Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927 by Dickson C.J.C., as he then was, at p. 976 in this way:

> We have already discussed the nature of the principles and values underlying the vigilant protection of free expression in a society such as ours. They . . . can be summarized as follows: (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.

209 The means chosen to further the objective of preventing the harm that results from obscenity must be balanced against their effects on those principles.

210 It is not necessary for the Crown to establish that it has chosen the least drastic means available to achieve the objective. As stated by Lamer C.J.C. in R. v. Chaulk, [1990] 3 S.C.R. 1303 at p. 1341:

> Recent judgments of this Court (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; and *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123) indicate that Parliament is not required to search out and to adopt the absolutely least intrusive means of attaining its objective. Furthermore, when assessing the alternative means which were available to Parliament, it is important to consider whether a less intrusive means would achieve the "same"

> objective or would achieve the same objective as effectively.

211 Sopinka J. took a similar approach in Butler, *supra,* at pp. 504-05:

> In determining whether less intrusive legislation may be imagined, this Court stressed in the *Prostitution Reference*, *supra,* that it is not necessary that the legislative scheme be the "perfect" scheme, but that it be appropriately tailored in the context of the infringed right (at p. 1138).

212 The reasoning underlying this approach is explained by Wilson J. in Lavigne v. Ontario Public service Employees Union, *supra*, at p. 295 as follows:

> It seems to me that this Court has agreed that a form of "reasonableness" test may be preferable to a strict application of the minimal impairment branch of *Oakes* in those circumstances where the Legislature must mediate between the claims of competing groups, and especially where, in doing so, it opts to protect the interests of the disadvantaged and disempowered. In those cases, the Court will defer to the choice of the Legislature so long as alternative measures for meeting or promoting the government's goals are not clearly superior.

213 The legislation prohibiting the dissemination of obscenity is concerned with protecting individuals and groups who may suffer harm as a result of its production and utilization. The protection is extended not only to those who might suffer attitudinal and behaviourial changes from exposure to obscenity, but to those persons and groups who might be harmed because of those changes and to vulnerable individuals and groups involved in its production.

Their claims to protection must be balanced against the claims of importers and consumers of obscenity to free expression. The means chosen here by Parliament are not the least drastic means available of achieving the objective, but they must not be struck down simply for that reason and without consideration of their reasonableness and effectiveness.

214 The federal Crown rested on a defence of the impugned legislation and made no attempt to suggest available alternatives. As counsel for the federal Crown put it:

> Parliament has tailored a system of customs regulations which gives an importer the right to seek judicial review of administrative decisions if aggrieved while preventing the legitimate and important business of customs administration from being brought to a standstill. Given the volume of importations in Canada at the various points of entry each year no other practical alternative can be envisioned.

That is a cogent submission. While the government has the burden of demonstrating minimal impairment, the Court must have due regard to the practicalities of the circumstances facing Parliament.

215 The suggestion that there should be a trial, in which the liberty of the importer and the availability of the material would be at stake, for each item Customs considers to be within code 9956(a) is unreasonable. That would be impractical. United States v. Cotroni [1989] 1 S.C.R. 1469, where the issue was whether the extradition laws unconstitutionally infringed the right of a

Canadian citizen to remain in Canada, deals with this point. In rejecting the submission that extradition is not a reasonable limit in circumstances where the accused is a Canadian citizen, the conduct of the accused with respect to the alleged crime took place entirely in Canada, and the accused could be charged with the offence under Canadian as well as United States law, La Forest J., in the majority judgment, observed at p. 1494 that:

> ... to require judicial examination of each individual case to see which could more effectively and fairly be tried in one country or the other would pose an impossible task and seriously interfere with the workings of the system.

He went on at p. 1495 to say:

> A comment I made in *R. v. Edwards Books and Art Ltd., supra,* (now approved by a majority of this Court: see *R. v. Schwartz,* [1988] 2 S.C.R. 443, at p. 488) seems appropriate here. I stated at pp. 794-95:
>
> > Given that the objective is of pressing and substantial concern, the Legislature must be allowed adequate scope to achieve that objective. It must be remembered that the business of government is a practical one. The Constitution must be applied on a realistic basis having regard to the nature of the particular area sought to be regulated and not on an abstract theoretical plane. In interpreting the Constitution, courts must be sensitive to what Frankfurter J. in *McGowan, supra,* at p. 524 calls "the practical living facts" to which a legislature must respond.

That comment is equally appropriate here.

216 Further, a system such as that in the United States, which was offered by the plaintiffs as an illustration of a less intrusive and allegedly superior system, is not imperative in Canada. Because free speech is presumptively protected by the First Amendment to the United States Constitution, the guidelines for detentions and seizures of pornographic materials issued by the Department of Treasury, United States Customs Service, require customs officers to refer to the U.S. Attorney all materials they consider to be obscene. Such materials then enjoy the protection of rigorous procedural safeguards of free speech, including the necessity for a judicial determination in each case.

217 The premise of such a system is an antipathy to prior restraint of expression in almost all circumstances, a premise that finds no support in Canadian law: see, for example, Canada (Human Rights Commission) v. Taylor [1990] 3 S.C.R. 892, where human rights legislation prohibiting hate propaganda and authorizing a human rights tribunal to enjoin it by an order to be filed and enforced as a court order was held to be constitutional; Canadian Newspapers Company v. Canada (Attorney General), [1988] 2 S.C.R. 122, where mandatory publication bans under the ***Criminal Code*** were held to be constitutional; Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, where common law publication bans with respect to criminal trials were held to be consistent with constitutional principles when such bans are granted in appropriate circumstances;

and R. v. Keegstra, [1990] 3 S.C.R. 697, where the ***Criminal Code*** provisions prohibiting hate propaganda were held to be constitutional.

218 Moreover, there is a vast difference between the United States and Canada in the dimension of the problem. The United States is a net exporter of pornography, unlike Canada, which imports most of its pornography from that country. As the problem is different, the solution may have to be different too.

The premise of the plaintiffs' suggestion that specialized tribunals be created to deal with imported obscene material is that the impugned legislation precludes their creation. It does not. In fact, the federal Crown's position is that its customs officers are specialized tribunals for purposes of the impugned legislation. I agree, although I will have more to say about their training and the time and resources made available to them to perform their functions properly.

219 It was suggested as well that much of what Customs does could be turned over to the provinces to be dealt with by provincially-appointed administrative agencies. For the court to suggest that would be an unwarranted intrusion into matters that are properly within the jurisdiction of elected governments.

220 The burden on the government to demonstrate minimal impairment does not necessarily require the government to suggest a less intrusive means of achieving the legislative objective and to show that the impugned provisions are superior. In RJR-MacDonald, *supra*, at p. 99, para. 160, McLachlin J. said:

> On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail. [Emphasis added]

In that case, there was evidence that the government had considered and rejected less intrusive means of achieving the objective relating to tobacco consumption but the government did not demonstrate why those means were not as effective as the means chosen. Here, it is difficult to imagine an effective means of prohibiting entry of obscenity into the country that would not involve delegation to administrative officers of inspection- and decision-making powers to be exercised at the ports of entry. Thus, the failure of the federal Crown to suggest and rebut a less intrusive scheme is not determinative of the minimal-impairment issue in this case.

221 Other factors relevant to the conclusion that the legislation minimally impairs freedom of expression were dealt with in Butler at pp. 505-09. Some of them are relevant here.

222 First, the legislation, like s. 163(8) of the ***Criminal Code***, was designed to catch only obscenity. Thus, it is carefully tailored to meet the objective.

223 Secondly, meritorious works are not prohibited. This proposition requires elaboration. The plaintiffs established that erotica produced for homosexuals plays an important role in their lives, a role far more important than heterosexual erotica plays in the lives of heterosexual citizens. Erotica produced for homosexuals furthers, for them, the three underlying values of free expression enunciated in Irwin Toy Ltd., *supra*, at p. 976, that is seeking and attaining truth, participating in social and political decision-making, and cultivating the diversity of forms of individual self-fulfilment and human flourishing in a tolerant or welcoming environment. As the plaintiffs' witnesses demonstrated, much homosexual erotica that has been prohibited as obscene is not, in fact, obscene. However, that result is not caused by the law but by the incorrect application of the law.

224 Considerable evidence and argument was directed to the topic of homosexual sado-masochism. The plaintiffs established that sado-masochism is a theatrical, ritualistic practice in which the consent of the participants is inherent, although they conceded consent is not necessarily always present. Customs officers routinely prohibit depictions and descriptions of sado-masochistic

practices on the ground that they involve either explicit sex with violence or sex without violence that subjects persons to degrading or dehumanizing treatment. However, it must not be forgotten that Sopinka J. said at p. 485 of Butler:

> [T]he portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. [Emphasis added]

Thus, descriptions and depictions of sado-masochistic practices are not necessarily obscene. Each case must be considered discretely, and such materials will not be obscene if they meet the "internal necessities" test.

225 The internal necessities test was outlined in *Brodie, supra*, at p. 704-5:

> What I think is aimed at is excessive emphasis on the theme for a base purpose. But I do not think that there is undue exploitation if there is no more emphasis on the theme than is required in the serious treatment of the theme of a novel with honesty and uprightness. That [Lady Chatterly's Lover] is a serious work of fiction is to me beyond question... The [obscenity] section recognizes that the serious-minded author must have freedom in the production of a work of genuine artistic and literary merit and the quality of the work... must have real relevance in determining not only a dominant characteristic but also whether there is undue exploitation.

That test was affirmed by Sopinka J. in Butler, *supra*, at pp. 481-82, who went on to say at pp. 482-83:

> Accordingly, the "internal necessities" test, or what has been referred to as the "artistic defence", has been interpreted to assess whether the exploitation of sex has a justifiable role in advancing the plot or theme, and in considering the work as a whole, does not merely represent "dirt for dirt's sake" but has a legitimate role when measured by the internal necessities of the work itself.

226 The internal necessities test is easily stated but complex and difficult to apply. 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.

227 Mr. Ricci defended three works prohibited by Customs: "Afterglow", (Boston: Lace Publications, 1993), a collection of stories about lesbian love edited by Karen Barber; "I Once Had a Master", (Boston: Alyson Publications, Inc., 1984), a collection of short stories by John Preston dealing primarily with gay male sado-masochism; and "Melting Point", (Boston: Alyson Publications, Inc., 1993), a collection written by Pat Califia containing short stories dealing with lesbian and gay homosexuality, often with elements of sado-masochism, and an essay on lesbianism and "safe sex". In his opinion, all three have artistic and literary merit. Of "Afterglow" he said:

> [T]aking it as a whole, when the book is examined at its structural and thematic level, it seems to me that certainly one of the important functions and intentions of this work is that attempt to normalize or validate or legitimize or destigmatize lesbian sexuality. And I think that would be consistent with artistic intention and would be evidence of artistic intention, particularly as those motifs are handled in a sophisticated and literary manner.

Commenting on "I Once Had a Master", Mr. Ricci said:

> [I]n essence this book does cover the spectrum . . . in terms of the possibilities of writing, dealing with sex. So we have . . . the initial stories, which are reasonably complex initiation stories about the accession or the realization of one's sexual identity. We have the three stories in the center which function more as simple depictions of sexuality although, again, there is an emotional context and, as in some of the stories in "Afterglow", they function as a statement that this sexuality exists and, in that sense, as a validation of the reality of that sexuality. To the final two stories where he begins to develop more fully the emotional repercussions of that sexuality and the need for sort of a fuller emotional relationship. So again, taken as a whole, I think the book functions to try and cover that whole spectrum of possible functions and possibilities for sex and sexual activity and possible ways of dealing with one's own sexual definitions and sexual identity.

Mr. Ricci went on to say, regarding "Melting Point", that ". . . of the three books this one is certainly the most explicit and extreme in its depictions of sex, but I think one would also argue it is also the most sophisticated." He reviewed the contents of the work and summed up his view of it as follows:

> There would be no question in my mind that this work amply meets the criteria for artistic merit and artistic purpose. And, as I say, it ends with an essay on lesbianism and safe sex which is handled with the same

> degree of complexity and profundity as the fiction material is. In other words, it is a fairly thorough exploration of the contradictions often involved in sexual behaviour and is, I think, very promoting of safe sex yet also understanding of the ways in which people often take risks that are quite dangerous for them. It also analyzes the way in which women and AIDS in the female community has been understudied and has been largely ignored.

228 These passages indicate the need for a careful and thoughtful application of the internal necessities test, but they also demonstrate that the proper application of that test, even to sado-masochistic representations, may redeem works that might seem obscene on first impression.

229 "Macho Sluts", (Boston: Alyson Publications Inc., 1988) by Pat Califia, illustrates this point. The book is concerned with lesbian, sado-masochistic practices. It was prohibited on several occasions but when considered carefully with the proper test in mind it was re-determined pursuant to s. 63 of the ***Customs Act*** to be admissible. That decision is in keeping with the author's stated purpose and the proper application of the internal necessities test. The author's introduction to the work is informative:

> "Liberty is the right not to lie." - Albert Camus
>
> The things that seem beautiful, inspiring, and life-affirming to me seem ugly, hateful, and ludicrous to most other people. This may be the most painful part of being a sadomasochist: this experience of radical difference,

> separation at the root of perception. Our culture insists on sexual uniformity and does not acknowledge any neutral differences - only crimes, sins, diseases, and mistakes. This smug erotic totalitarianism does hidden violence to dissidents and perverts. It distorts our self-images, ambitions, and dreams. We think we are alone, or crazy, or ridiculous. Our desire learns to curb itself, and we come to depend on the strength of self-repression for our safety. We live in fear of being known, and such fear stifles the nascent erotic wish before the image of what is wished for can be fully formed. We know we are ugly before we have even seen ourselves, and the injustice of this, the falsehood, chokes me.
>
> What, then, are my choices, as a writer and a sadomasochist? I could keep my sexuality private, write about other issues, other sorts of people, and tell myself that these are more important themes, more universal characters, more valid as literature. That involves telling a lie by omission - becoming invisible as a pervert, assuming an undeserved mantle of normalcy and legitimacy.

Califia here expresses the importance of homosexual sado-masochist literature in furthering the principles and values that underlie freedom of expression as outlined in Irwin Toy, *supra*. She further expresses a dominant theme prevalent in homosexual art and literature, and one that was attested to by many of the plaintiffs' witnesses, that is, the need for self-affirmation and empowerment through expression.

230 Professor Becki Ross, a sociologist specializing in women's studies, put it this way:

> 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. I think a specialness or uniqueness of lesbians is our sexuality, and access to producing and consuming our own sexual images is crucial to interrupting both the stubborn invisibility of lesbians in the culture at large and also the negative problematic stereotyping of lesbians as either, on the one hand, asexual, pinched spinsters, or as sex-crazed, man-hating monsters. Lesbian S & M materials are especially significant, I would say, to lesbian S & M sub-cultures. Lesbian S & M images constitute a sub-genre of lesbian pornography which is read by lesbian consumers from a place of familiarity with the codes and conventions specific to lesbian S & M fantasy, materials, and practices.

231 In the face of this evidence, a society committed to the values underlying freedom of expression, as our society is, cannot defend the automatic prohibition of descriptions and depictions of homosexual sado-masochism. Such materials must be subjected to the internal necessities test, and if they meet that test they will avoid the effect of code 9956(a) of the ***Customs Tariff***.

232 The third factor mentioned by Sopinka J. at p. 506 in the minimal-impairment analysis, the historic difficulties experienced by Parliament in defining obscenity, was settled by that decision and is no longer of concern.

233 The fourth factor should be mentioned. While Sopinka J., a pp. 506-7, attached importance to the fact that s. 163(8) of the ***Criminal Code*** does not extend to the private use or viewing of obscene materials, that consideration is of little weight here.

The customs legislation does not make the importer a criminal; it merely prohibits entry of obscene goods into the country.

(c) **Proportionality between deleterious effects and the objective**

234 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. The first is a minimal intrusion on the right of free expression and is essential to the functioning of the system and the attaining of its objective. The second is the inescapable result of the fact that decisions are made by human beings; they cannot always be correct.

235 Obscenity, whether produced for heterosexual or homosexual audiences, is a base form of expression, far from the core values underlying free expression. The objective of the legislation, on the other hand, "seeks to enhance respect for all members of society, and non-violence and equality in their relations with each other": per Sopinka J. in Butler at p. 509. The infringement of s. 2(b) by the impugned legislation is therefore minimal in relation to the objective to be achieved.

(d) Whether there is proportionality between the deleterious and salutary effects

236 There is also proportionality between the deleterious effects and the salutary effects of the legislation.

237 The plaintiffs argued that the law is ineffective as it catches only a small proportion of the obscenity crossing our borders. They pointed to the evidence 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.

238 Nevertheless, a large volume of obscene material is prohibited as a result of the administration of the impugned legislation. As well, the existence of the system of inspection at our borders undoubtedly serves as a deterrent to those who would wish to bring obscene materials into the country. Further, the legislation assists the police in performing the functions necessary to carry out Parliament's dual approach to the objective. This is achieved, in part, by customs officers assisting the police to identify subjects of investigation within our borders for possible criminal offences relating to obscenity.

239 The plaintiffs referred as well to technological advances that permit the electronic importation of obscenity, and to the inability of the impugned legislation to deal with that problem. However, the fact that the legislation is not perfectly effective in achieving the objective is not determinative. As noted by the Court in McKinney v. University of Guelph, [1990] 3 S.C.R. 229 at p. 317:

> [I]t is important to remember that a legislature should not be obliged to deal with all aspects of a problem at once. It must surely be permitted to take incremental measures. It must be given reasonable leeway to deal with problems one step at a time, to balance possible inequalities under the law against other inequalities resulting from the adoption of a course of action, and to take account of the difficulties, whether social, economic or budgetary, that would arise if it attempted to deal with social or economic problems in their entirety, assuming such problems can ever be perceived in their entirety.

240 The plaintiffs submitted further that the government's interest in prohibiting the importation of obscene material is not predicated on any constitutionally entrenched right or freedom but is justified on the basis of administrative considerations. I cannot agree. The objective is to restrain the proliferation of obscenity and that objective is founded on the notion that obscenity diminishes fundamental values of society.

241 The plaintiffs' objection that materials of political, social, and health value are being denied to homosexuals can be met by the

proper application of code 9956(a). So far as homosexual obscenity is concerned, no case can be made for a differential treatment.

242 In summary, the impugned legislation delegates the decision making power to trained customs officers. The legislation is carefully drafted to prohibit only obscene materials. The scheme provides a complete statutory code of review and appeal for aggrieved importers. The time periods within which the customs officers must exercise their powers are reasonable and are specified in the legislation. The legislation does not grant a right to an oral hearing but that is not fatal to a regulatory scheme where the liberty and security of the person are not affected. While the burden of proof is on the importer in the review and appeal process, that too is not unreasonable in such a regulatory scheme. It should be noted that while the legislation does not specify how the customs officers are to exercise their discretion, neither does it place any limitations on the evidence and submissions they may receive.

243 Modern society has come to rely on administrative decision-making as essential to proper government and to recognize that specialized tribunals and administrative decision-makers are particularly well-suited to deal with routine decisions requiring specialized knowledge. Customs officers can fill that role.

244 Comfort for the conclusion that the infringement created on freedom of expression by the impugned legislation may be found in the fact that many other free and democratic societies employ similar schemes of customs control over obscenity.

245 The Canadian scheme does not criminalize the importation of obscenity and does not subject the importer to the possibility of conviction for importing obscenity, as is the case in several other countries. The impugned legislation is a mere civil prohibition of obscenity that is essentially regulatory. The focus is on controlling and preventing the importation of obscenity rather than on punishing the importer. In that respect, we differ from Australia, Bermuda, Germany, New Zealand, Singapore, Hong Kong and France where the importation of obscene articles is a criminal offence.

246 Those countries have similar systems for inspection and detention of obscenity at their borders. As already mentioned, the United States customs regime also proscribes the importation of obscenity and detects it by an inspection system at its borders. Great Britain also prohibits the importation of obscene materials under the provisions of the ***Customs Laws Consolidation Act*** (1876), 39-40 Vict. c 36, as do Japan, Trinidad, and Tobago under similar legislation.

247 It is settled that the courts should be slow to interfere with Parliament's reasonable assessment of where the line between competing values should most properly be drawn: Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927 at pp. 993-94. I am satisfied that the legislation questioned here has been shown to be reasonable and demonstrably justified pursuant to s. 1 of the ***Charter***. Accordingly, the claim based on s. 52(1) of the ***Charter*** must be dismissed.

248 I turn now to consider whether the plaintiffs are entitled to a remedy under s. 24(1) of the ***Charter***.

B. Whether the application of the legislation infringers a *Charter* right or freedom

1. Whether s. 2(b) is infringed

249 As already stated, customs officers are not authorized by the impugned sections of the ***Customs Act*** to prohibit the importation of material that is not obscene. To the extent they may do so they exceed their powers and their errors are susceptible to correction by the procedures set out in the ***Customs Act*** for re-determinations and appeals. No system can entirely eliminate errors inherent in the decision-making process; human beings are not infallible.

250 However, to attribute the errors demonstrated in this trial entirely to human fallibility would be to ignore the grave systemic problems in the Customs administration.

251 Most homosexual pornography is imported from outside Canada. Homosexuals form a small minority group in society, probably less than 10% according to the evidence here, and there are only four bookstores in Canada dealing extensively in their literature. Imported shipments destined for those bookstores are methodically identified and scrutinized by customs officers. Moreover, estimates by customs officers of the proportion of all materials they detained and examined in relation to code 9956(a) that were produced for homosexual audiences ranged from 20% to 75%, a proportion far in excess of the relative size of the group.

252 Further, a disturbing amount of homosexual art and literature that is arguably not obscene has been prohibited. The plaintiffs' expert witnesses identified several prohibited books and works of art that, although concerned with homosexual practices, had overriding cultural, political, or educational value.

253 During submissions, counsel for the plaintiff argued that, although customs officers are diligent and hardworking people, they are not capable of making these difficult decisions. I agree, with one qualification. I found those officers who testified to be intelligent, conscientious public servants endeavouring to perform

a complex and difficult task in adverse circumstances. I am sure they are representative of their colleagues in the Customs service. The reason many, though not all, customs officers are not capable of making obscenity decisions is not because of any innate inability, but because they are not given the training, the time, nor the necessary evidence in many cases, to properly carry out their duties with respect to code 9956(a).

254 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.

255 It must not be forgotten that Customs Inspectors must interpret and apply more than 14,000 codes in the ***Customs Tariff*** and must, as well, monitor importations for compliance with seventy-six other federal statutes. 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.

256 Moreover, the understanding as to their responsibilities among customs officers dealing with code 9956(a) is not uniform. For example, while memorandum D9-1-1 requires classifying officers to read books from cover to cover, some officers simply thumb through them or read pages at random. Many officers review videotapes with the assistance of a fast-forward device, stopping only to examine scenes of explicit sex; they do not listen to the soundtrack. Some who testified acknowledged that they are not capable of determining artistic merit and that they do not attempt to do so. Others claim to consider each item carefully and completely and to determine whether the work has a valid purpose. Some have the view that they must rely only on express or direct representations and are forbidden to draw inferences of obscenity. Others have no difficulty with the proposition that an inference of obscenity is sufficient to prohibit a work.

257 The plaintiffs assert that it is unrealistic to assume that customs officials could ever be properly trained to properly apply code 9956(a). However, with the benefit of appropriate and consistent training and with the necessary time and the availability of relevant evidence, there is no reason why they should not be able to properly apply that provision.

258 It is essential that those officers designated to classify goods pursuant to code 9956(a) have sufficient training and experience to be able to make reasonable assessments of artistic and literary merit. It is evident from the care shown in some of the classification decisions placed in evidence that many customs officers perform their task properly on many occasions. However, the evidence establishes that too often the officers responsible for classification decisions do not have sufficient time or training to perform their duty.

259 There are other systemic deficiencies that require correction. For example, the question of evidence is an important one. 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.

260 Further, s. 67 of the ***Customs Act*** provides for an appeal to the superior trial court of the relevant province, and it has been held in Glad Day Bookshop Inc. v. Deputy M.N.R., Customs and Excise (1992), 90 D.L.R. (4th) 527 (Ont. Ct. Gen. Div.) that in Ontario, the appropriate procedure is in the nature of a trial. That may not be the case in British Columbia: see Dupras v. Mason (1994), 99 B.C.L.R. (2d) 266 (C.A.) and McKenzie v. Mason (1992), 72

B.C.L.R. (2d) 53 (C.A.), where it was held that an "appeal" is ordinarily a review of the record below for error, not a new trial. 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.

261 As well, 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.

262 Moreover, there seems to be no valid reason why Customs could not improve the TRS system to provide all necessary information to all officers charged with the responsibility of making decisions pursuant to code 9956(a).

263 The result of these systemic shortcomings is that admissible materials destined for Little Sisters have been wrongly prohibited. Thus, the s. 2(b) rights of the authors and artists of those materials, of those Canadian citizens who would have read and seen them, and of Little Sisters and its proprietors have been arbitrarily infringed.

264 Those s. 2(b) rights have been infringed as well by Customs' treatment of materials describing or depicting anal penetration. That depictions and descriptions of anal sex do not offend the community standard of tolerance was recognized as early as 1983 in R. v. Doug Rankine Co. Ltd. (1983), 36 C.R. (3d) 154 (Ont.Co. Ct.), where Borins Co. Ct. J., as he then was, said at p. 173:

> In my opinion, contemporary community standards would tolerate the distribution of films which consist substantially of scenes of people engaged in sexual intercourse. Contemporary community standards would also tolerate the distribution of films which consist of scenes of group sex, lesbianism, fellatio, cunnilingus, and anal sex. However, films which consist substantially or partially of scenes which portray violence and cruelty in conjunction with sex, particularly where the performance of indignities degrades and dehumanizes the people upon whom they are performed, exceed the level of community tolerance.

265 That passage was quoted with approval by Wilson J. in Towne Cinema, *supra*, a 1985 decision of the Supreme Court of Canada, at p. 523. She continued at p. 523:

> In drawing this distinction I do not think that Borins Co. Ct. J. was suggesting that the average Canadian finds the former type of film to his or her taste or that such films are inoffensive to most Canadians. Rather, I think that Borins Co. Ct. J. recognized that whether or not Canadians found the former type of films distasteful, they were prepared to tolerate their being shown.

266 Thus there has been eminent authority on the point since 1983. Nevertheless, Customs continued to prohibit, as obscene,

representations of anal intercourse until September 29, 1994, the eve of this trial, when Memorandum D9-1-1 was amended.

268 It is difficult to understand why it took Customs until September 29, 1994, to officially end its practice of prohibiting material depicting or describing anal sex. On March 18, 1992, counsel in the Department of Justice wrote to senior counsel for Revenue Canada - Customs and Excise setting out an analysis of the decision in Butler which concluded:

> However, as we have advised in previous opinions, there is no jurisprudence supporting the proposition that all depictions or descriptions of anal penetration are obscene in and of themselves on the basis that anal penetration is inherently degrading or dehumanizing.
>
> Therefore, if the client were to decide that depictions of anal penetration are obscene, without first making a determination that they are degrading or dehumanizing to the participants, such a finding would be contrary to the reasoning in Butler.

That memorandum was prepared and delivered in the context of a review of Memorandum D9-1-1 undertaken by Customs specifically to determine whether any amendments to the guidelines were required as a result of the decision in Butler. The decision not to amend was one deliberately taken, and no satisfactory explanation was offered by the federal Crown for the fact that Customs continued to prohibit depictions of anal penetration in the face of the jurisprudence I have referred to and the opinions received from the Department of Justice.

269 Twenty-nine separate publications destined for Little Sisters were proven during the trial to have been prohibited since May, 1990, solely on the ground that they described or depicted anal penetration, several on more than one occasion.

270 As descriptions and depictions of anal sex are not obscene by contemporary Canadian standards and have not been since at least 1983, Customs' routine prohibition of such materials has contravened s. 2(b) of the ***Charter***.

271 The plaintiffs complained as well about the fact that shipments destined for Little Sisters are targeted in the Vancouver Mail Center. Customs justified this procedure on the basis that a history of presenting obscene material justifies the heightened scrutiny. That is a valid proposition in the abstract, but the federal Crown led no evidence of any principled basis upon which such procedures are instituted. They appear to be solely at the discretion of local officials. While there was no direct evidence led that this broad and unfettered discretion has been abused, it is certainly open to abuse in the absence of any controlling standards. As it has been applied arbitrarily, I consider it to be an infringement of the s. 2(b) freedom in this case.

2. **Whether s. 15(1) is infringed**

272 Anal intercourse is an important part of male homosexual relationships. Professor Thomas Waugh, a teacher of Fine Arts specializing in Film Studies, put it this way:

> Anal intercourse is a standard sexual practice within the gay male community. Exalted by classical Greek and Arabic poets, as well as by modern artists from Rimbaud and Ginsberg to Pasolini, anal intercourse evokes all of the romantic and erotic connotations within gay male culture that "missionary position" coitus does within mainstream culture.

The prohibition of representations of that practice discriminated against male homosexuals, and in particular the plaintiffs Deva and Smythe, until the amendment of Memorandum D9-1-1. It deprived them of representations of practices central to the values and culture of the minority group to which they belong. As well, as Professor Waugh pointed out, it constituted an embargo of "safe sex" guidelines within Canadian homosexual communities at a time, in the context of the AIDS epidemic, when such guidelines have been particularly important.

273 This discrimination was arbitrary and infringed the s. 15(1) ***Charter*** right to equality of Mr. Deva and Mr. Smyth, as well as other homosexual Canadian males.

274 It is not necessary, as the plaintiffs have suggested, for the federal Crown to show that the infringements of ss. 2(b) and 15(1) are justified under s. 1 of the ***Charter***. It is only limitations on ***Charter*** rights that are "prescribed by law" that are capable of redemption under s. 1. The infringements described above result from administrative procedures and guidelines, not from law: see Re Ont. Film and Video Appreciation Society (1984), 45 O.R. (2d) 80 (C.A.); Committee for the Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139, per Lamer C.J., at p. 164. In any event, the federal Crown made no attempt to justify the administration of the legislation, as opposed to the legislation itself, under s. 1.

IX. **THE APPROPRIATE REMEDY**

275 Where the legislation does not itself infringe the *Charter* but the administration of the legislation does, the appropriate remedy is not pursuant to s. 52(1) of the ***Charter***, but pursuant to s. 24(1). In Schachter v. Canada, [1992] 2 S.C.R. 679, Lamer C.J.C. said, at pp. 719-20:

> Where s. 52 of the *Constitution Act, 1982* is not engaged, a remedy under s. 24(1) of the Charter may nonetheless be available. This will be the case where the statute or provision in question is not in and of itself unconstitutional, but some action taken under it infringes a person's Charter rights. Section 24(1) would there provide for an individual remedy for the person whose rights have been so infringed.

276 The Chief Justice expanded on the ability of the courts to grant an individual s. 24(1) remedy in certain cases at p. 720:

> This course of action . . . is . . . founded upon a presumption of constitutionality. It comes into play when the text of the provision in question supports a constitutional interpretation and the violative action taken under it thereby falls outside the jurisdiction conferred by the provision. I held that this was the case in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, when I determined that a provision which provided a labour adjudicator with discretion to make a range of orders could not have been intended to provide him with the discretion to make constitutional orders. The legislation itself was not unconstitutional and s. 52 was not engaged, but the aggrieved party was clearly entitled to an individual remedy under s. 24(1).

277 On this point, La Forest J. observed, in R v. Beare, [1988] 2 S.C.R. 387, at p. 411:

> [I]f it was established that a discretion was exercised for improper or arbitrary motives, a remedy under section 24 of the *Charter* would lie.

278 While the plaintiffs have failed to establish that the impugned provisions of the ***Customs Act*** and ***Customs Tariff*** mandate the infringement of s. 2(b) and s. 15(1) rights in a manner that cannot be justified under s. 1, they have succeeded in showing that the administration and application of the material sections of the legislation have frequently contravened those sections of the ***Charter***.

279 They have shown as well that some customs officers have from time to time exercised their discretion in an arbitrary and improper manner. Books have been prohibited without any proper consideration of whether the exploitation of sex was undue in the overall context and of whether there existed artistic, literary, or other similar merit. Materials have been routinely prohibited on the ground that depictions and descriptions of anal penetration are obscene. Inconsistent decisions have been made with respect to the same works. While some of these examples were no doubt the result of mere human error, in large part they are the arbitrary and improper consequence of an inadequate and flawed administration of the legislation. Accordingly, a remedy may be granted pursuant to s. 24(1).

280 The federal Crown submitted that no remedy may be granted pursuant to s. 24(1) of the ***Charter*** because Little Sisters did not exhaust all rights of re-determination and review under the ***Customs Act***. The federal Crown relies on ss. 58(6), 62(3), and 65(3), which provide that no remedy lies with respect to a classification determination except in accordance with the provisions of the ***Customs Act***.

281 I do not agree that those provisions preclude a constitutional remedy in a situation, such as this, where arbitrary and improper classification decisions are the result not only of ordinary human

error but also of systemic defects that virtually guarantee that such errors will be made.

282 Section 24(1) allows this court to grant any remedy that it deems appropriate in the circumstances. The plaintiffs seek only a declaration that the impugned provisions of the ***Customs Act*** and the ***Customs Tariff*** have at all material times been construed in a manner that is contrary to s. 2(b) and/or s. 15(1) of the ***Charter***. They are entitled to a declaration, but I am concerned about the breadth of the declaration they seek. They have demonstrated that from time to time during the period covered by the evidence at trial some customs officers have acted arbitrarily and have thereby infringed s. 2(b) and s. 15(1), and there will be a declaration to that effect.

X. **JUDGMENT**

283 The applications for declarations pursuant to s. 52(1) of the ***Constitution Act, 1982*** that code 9956(a) of Schedule VII and s. 114 of the ***Customs Tariff***, S.C. 1987, c. 41 (3rd Supplement) and ss. 58 and 71 of the ***Customs Act***, S.C. 1986, c. 1 (2nd Supplement) are of no force or effect are dismissed. The application for a declaration pursuant to s. 24(1) of the ***Canadian Charter of Rights and Freedoms*** that those legislative provisions have been construed

and applied in a manner contrary to s. 2(b) and s. 15(1) of the ***Charter*** is granted with the qualifications I have expressed.

"K.J. Smith, J."

Vancouver, B.C.
January 19, 1996.