Court File No. 22191

SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for Manitoba)

B E T W E E N:

DONALD VICTOR BUTLER

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

FACTUM OF THE INTERVENOR

THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

ARVAY, FINLAY
Barristers
300 - 754 Broughton Street
Victoria, British Columbia
V8W 1E1
(604) 388-6868
Fax (604) 388-4456

Solicitors for the Intervenor
The British Columbia Civil
Liberties Association

JOSEPH J. ARVAY, Q.C.
Counsel

BURKE-ROBERTSON
Barristers and Solicitors
70 Gloucester Street
Ottawa, Ontario
K2P 2M2
(613) 236-9665
Fax (613) 235-4430

Ottawa Agents for Intervenor

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I N D E X

PART I

STATEMENT OF FACTS

1. The Intervenor, the British Columbia Civil Liberties Association ("BCCLA") accepts the statement of facts as set out in the Appellant's factum.

2. The BCCLA was granted leave to appeal by the Honourable Mr. Justice Sopinka on February 4, 1991.

3. The BCCLA together with the Little Sisters Book and Art Emporium has commenced an action which seeks, inter alia, a declaration that the Custom Tariff, S.C. 1987, c. 41 (3rd Supp), s. 114, Schedule VII, Code 9956 (a) is contrary to s. 2(b) of the Canadian Charter of Rights and Freedoms insofar as it prohibits the importation of books and magazines into Canada on the grounds that these books and magazines are "obscene" within the meaning of s. 163 (8) of the Criminal Code. The trial of this action is set to begin on September 3, 1991 in the Supreme Court of British Columbia.

PART II

POINTS IN ISSUE

4. The BCCLA submits that s. 163 of the Criminal Code violates s. 2(b) of the Charter and cannot be demonstrably justified pursuant to s. 1 of the Charter.

5. Alternatively, s. 163 of the Criminal Code is unconstitutional at least insofar as the proscription of "obscene written matter" is concerned.

PART III
ARGUMENT

The Nature of the Expression Right

6. While the Respondent does not "take issue with whether the impugned provision violates s. 2(b) of the Charter it is important to emphasize that it does. While it may be "dangerously misleading to conceive of s.1 as a rigid and technical provision, offering nothing more than a last chance for the state to justify incursions into the realm of fundamental rights": R. v. Keegstra (1991), 1 C.R. (4th) 129 (S.C.C.) per Dickson C.J. at 29, it would be an even greater mistake to treat the infringement of s.2(b) of little moment or its infringement something that can be easily justified. Furthermore, this Court in Keegstra (supra) at 163 made it very clear that a "contextual approach" must be applied: while all expression may be entitled to protection under s.2(b) the justification for the infringement of the expression will be more difficult in some cases than in others depending upon the nature of the expression that a particular law purports to suppress. The nature of the expression proscribed by the impugned provisions must therefore be taken into account at each step in the s.1 analysis.

> "...a particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has a greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute...":
> Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326 at 1328 quoted with approval in Keegstra (supra) at 163.

7. In Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927 at 968 and Keegstra (supra) at 156 this Court stressed "the 'democratic commitment' said to underlie the expression right." The democratic commitment is a commitment to self-government; it is a commitment to government by the sovereign people. It is submitted that to be uncensored is one of the constitutive rights of the sovereign.

See Dixon, "The Bessie Smith Factor" in Liberties (1989,

Russell ed at 13); Dixon, "Freedom of Expression as a Fundamental Right" A Position Paper of the BCCLA.

8. While this commitment to democracy clearly protects all expression "relating to the political process": Keegstra (supra) per McLachlin J. at 214, "the linchpin of the s.2(b) guarantee": Keegstra (supra) at 185 per Dickson C.J., political expression in this sense, embraces all manner of public discussion on all social and political issues - on "issues which bear upon our common life": (Meiklejohn, Political Freedom, 1965 at 75, and see also 60,77,79).

9. The BCCLA agrees substantially with the writings of Alexander Meiklejohn and those who have applied and further extended his central thesis. Meiklejohn has expressed it this way:

> We believe in self government. If men are to be governed, we say, then that governing must be done, not by others, but by themselves (p.9)...[I]n such a society, the governors and the governed are not two distinct groups of persons. There is only one group - the self-governing people. Rulers and the ruled are the same individuals (p.12)...When men govern themselves, it is they - and no one else - who must pass judgement upon unwisdom and unfairness and danger. And that means unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe,... (p.27)... The primary purpose of the First Amendment is, then, that all citizens shall, so far as possible understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counter belief, no relevant information, may be kept from them. Under that compact upon which the Constitution rests, it is agreed that men shall not be governed by others, that they shall govern themselves":(p. 75): Meiklejohn, Political Freedom
>
> See also: Scanlon, "A Theory of Free Expression", 1 Philosophy and Public Affairs 204 (1972); Scanlon "Freedom of Expression and Categories of Expression" in Pornography and Censorship ed. Copp and Wendell at 139; Emerson, "Toward a General Theory of the First Amendment" (1963) 72 Yale Law Journal 877 at 879.

10. There are of course other important values underlying the expression right such as the search for truth, and self-fulfilment: Irwin Toy (supra) at 976. In Keegstra (supra) at 217, Madam Justice McLachlin said that "no one rationale provides the last word on freedom expression. Indeed it seems likely that theories about freedom of expression will continue to develop.":

Pornography As a Significant Category of Expression

11. Pornography, including the material proscribed by s.163 of the Criminal Code is a category of expression that is closely connected with all of the values underlying the expression right. It can be described as a form of political speech and certainly is expression which "bears upon our common life." In the Brief of the Amici Curiae "Feminist Anti-Censorship Task Force" ("FACT") (whose members included many prominent feminists), in American Booksellers Association v. Hudnut, 771 F. 2d 323 (Ind. Fed. Ct., 7th Cir., 1985), it was argued:

> "Further, sexual speech is political. One core insight of modern feminists is that the personal is political...The dynamics of intimate relations are likewise political, both to the individuals involved and by their multiplied effects to the wider society. To argue...that sexually explicit speech is less important than other categories of discourse reinforces the conceptual structures that have identified women's concerns with relationships and intimacy as less significant and valuable precisely because those concerns are falsely regarded as having no bearing on the structure of social and political life: FACT, (1987/88) 21 U of Mich Jo. of Law Reform 69,
>
> Depictions of ways of living and acting that are radically different from our own can enlarge the range of human possibilities open to us and help grasp the potentialities of human behaviour both good and bad. Rich fantasy imagery allows us to experience in imagination ways of being that we may not wish to experience in real life. Such an enlarged vision of possible realities enhances our human potential and is highly relevant to our decision-making as citizens on a wide range of social and ethical issues. "FACT" at 119-20.

12. Meiklejohn says that obscenity has a "governing importance.":

> "In the current discussion as to whether or not 'obscenity' in literature and the arts is protected by the First Amendment, the basic principle is, I think, that literature

and the arts are protected because they have a 'social importance' which I have called a 'governing' importance. For example, the novel is at present a powerful determinative of our views of what human beings are, how they can be influenced, in what directions they should be influenced by many forces, including their own judgements and appreciations. But the novel, like all the other creations of literature and the arts, may be produced wisely or unwisely, sensitively or coarsely, for the building up of a way of life which we treasure or for tearing it down. Shall the government establish a censorship to distinguish between 'good' novels and 'bad' ones? And more specifically, shall it forbid the publication of novels which portray sexual experiences with a frankness that, to the prevailing conventions of our society, seems 'obscene'?

The First Amendment seems to me to answer that question with an unequivocal 'no.' Here, as elsewhere, the authority of citizens to decide what they shall write and, more fundamental, what they shall read and see, has not been delegated to any of the subordinate branches of government. It is 'reserved to the people,' each deciding for himself to whom he will listen, whom he will read, what portrayal of the human scene he finds worthy of his attention."

Meiklejohn, "The First Amendment is an Absolute" in Brown, Alexander Meiklejohn at 255

13. In "False Promises: Feminist Antipornography Legislation in the U.S" by Duggan, Hunter and Vance (in Women Against Censorship ("WAC") ed. v. Burstyn) the authors recognize pornography's "social function":

> "Pornographic speech has many, often anomalous, characteristics. One is certainly that it magnifies the misogyny present in the culture and exaggerates the fantasy of male power. Another, however, is that the existence of pornography has served to flout conventional sexual mores, to ridicule sexual hypocrisy and to underscore the importance of sexual needs. Pornography carries many messages other than woman-hating: it advocates sexual adventure, sex outside marriage, sex for no reason other than pleasure, casual sex, anonymous sex, group sex, voyeuristic sex, illegal sex, public sex. Some of these ideas appeal to women reading or seeing pornography, who may interpret some images as legitimating their own sense of sexual urgency or desire to be sexually aggressive..."
>
> L. Williams, Hard Core: Power, Pleasure, and the 'Frenzy of the Visible' (1989) at 277: "We need to see pornography in all its naked explicitness if we dare to speak frankly about sexual power and pleasure and if we are to demystify sex."

14. Pornography can also contribute to self-development and human

flourishing. Pornography, no matter how vile or tasteless:

> "tells us something about ourselves that some of us, at least, prefer not to know. It threatens to explode our uneasy accommodation between sexual impulse and social custom - to destroy the carefully spun web holding sexuality in place...": Tribe, American Constitutional Law at 669-670
>
> See also, R. West, "The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General' Commission on Pornography Report" (1987) 4 Am. Bar. Found. Res. Jo. 681 at 696:
>
> "Anti-censorship feminists argue that pornography is of value (when it is of value) not simply because it is speech and not simply because it is consensually bought and sold, but because of its content. Good pornography has value because it validates women's will to pleasure. It celebrates female nature. It validates a range of female sexuality that is wider and truer than that legitimated by the non-pornographic culture. Pornography when it is good celebrates both female pleasure and male rationality."
>
> see also "FACT" at 120:
> "For sexual minorities, speech describing conduct can be a means of self-affirmation in a generally hostile world. Constriction of that speech can deny fundamental aspects of self-identity."

15. Furthermore, while the Criminal Code recognizes a defence of artistic merit to a charge of obscenity: R. v. Brodie [1962] S.C.R. 681 at 705, this, to many people, creates a meaningless or unworkable distinction. Camille Paglia, in her recent book, Sexual Personae: Art and Decadence from Nefertiti to Emily Dickinson says that pornography and art cannot be distinguished.

> "Our knowledge of these fantasies [of sexual violence] is expanded by pornography, which is why pornography should be tolerated, though its public display may reasonably be restricted. The imagination cannot and must not be policed. Pornography shows us nature's daemonic heart, those eternal forces at work beneath and beyond social convention. Pornography cannot be separated from art; the two interpenetrate each other more than humanistic criticism has admitted. Geoffrey Hartman rightly says: "Great art is always flanked by its dark sisters, blasphemy and pornography".
>
> ...
>
> That popular culture reclaims what high culture shuts out is clear in the case of pornography. Pornography is pure pagan imagism. Just as a poem is ritually limited verbal

> expression, so is pornography ritually limited visual expression of the daemonism of sex and nature. Every shot, every angle in pornography, no matter how silly, how twisted, or pasty, is yet another attempt to get the whole picture of the enormity of chthonian nature. Is pornography art? Yes. Art is contemplation and conceptualization, the ritual exhibitionism of primal mysteries. Art makes order of nature's cyclonic brutality. Art, I said, is full of crimes. The ugliness and violence in pornography reflects the ugliness and violence in nature": Paglia, Sexual Personae: Art and Decadence from Nefertiti to Emily Dickinson at 24 & 34-35.
>
> See also: Pope v. Illinois 481 U.S. 497 (1987) per Justice Scalia: "Just as there is no use in arguing about taste, there is no use litigating about it. For the law courts to decide 'what is beauty' is a novelty even for today's standards."

16. In the absence of the most compelling justification therefore, the expression encompassed by s. 163 of the Code cannot be constitutionally infringed.

Section 1 of the Charter

A. Not of Pressing and Substantial Concern

17. In Irwin Toy (supra) at 975, this Court, recognizing the importance of the "democratic commitment" said:

> "If the government is to assert that its purpose was to control a harmful consequence of the particular conduct in question, it must not have aimed to avoid, in Thomas Scanlon's words...
>
> (a) harms to certain individuals which consists in their coming to have false beliefs as a result of those acts of expression;
>
> (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing."

18. In determining whether the expression in issue can be infringed in accordance with s. 1 of the Charter it should be illegitimate but for exceptional cases, to recognize the harms referred to in the above paragraph as being of pressing and substantial concern, for to do so would be to entirely negative

the right and deny its existence.

Quebec Protestant School Board (1982) 140 D.L.R. (3d) 33 (SCC).

19. The objective of s. 163 of the Criminal Code is the enforcement of a particular standard of morality, or perhaps that which is regarded as "politically correct": Hard Core at 26; This is borne out by a review of the historical record. A useful summary is provided by Professor John McLaren in "Now You See it, Now you Don't": The Historical Record and The Elusive Task of Defining The Obscene ("McLaren") (to be published in the Alta Law Rev.). The impugned provision can trace its heritage to the early eighteenth century when the courts recognized a common law of obscene libel in R. v. Curl (1727), 93 E.R. 849 (K.B.), [McLaren at 10] which in turn was based on the jurisdiction of the courts "as custodian of the morals of all the king's subjects" a proposition articulated even earlier in R. v. Sedley (1663), 82 E.R. 1036 (K.B.). Prior to R. v. Hicklin (1868), 3 L.R.Q.B. 360 "obscenity" while a crime had no definition; however, in Hicklin (supra) Chief Justice Cockburn "put it beyond doubt that adverse moral impact was the test of the 'obscene' because of its corrupting quality". [McLaren at 29-31] In Canada, in the Criminal Code of 1892 obscenity was proscribed under the heading "Offenses Against Morality". The first statutory definition of obscenity (and that which continues in s. 163(8) in only a slightly altered form) was introduced in 1959 - not to move away from the conservative morality of the Hicklin test but to "toughen it up." : McLaren at 52.

See also: Kendrick, The Secret Museum: Pornography in Modern Culture (1987).

20. The enactment of legislation to preserve or enforce a particular standard of morality might have been legitimate prior to the enactment of the Charter and may continue to be so when the there is a coincidence or very close connection between that immoral conduct and harm to one's person or property. With the enactment of the Charter, legislation which is premised on one group in society, even the majority

"asserting the possession of an insight into the moral universe intrinsically superior to that of their fellows" is not an objective that can be described as "of pressing and substantial concern". Ackerman, Reconstructing American Law (1984 at 99)

21. Professor Ronald Dworkin similarly emphasizes the importance in a democratic society of the right of "moral independence" which he says is violated when

> "the only apparent or plausible justification for a scheme or regulation of pornography includes the hypothesis that the attitudes about sex displayed or nurtured in pornography are demeaning or bestial or otherwise unsuitable to human beings of the best sort, even though the hypothesis may be true. It also violates that right when that justification includes the proposition that most people in a society accept that hypothesis and are therefore pained or disgusted when other members of their own community, for whose lives they understandably feel special responsibility, do read dirty books, or look at dirty pictures. The right is therefore a powerful constraint on the regulation of pornography, or at least it so seems, because it prohibits giving weight to exactly the arguments most people think are the best arguments for even a mild and enlightened policy of restriction of obscenity."
>
> Dworkin, "Do We Have a Right to Pornography?" in A Matter of Principle, 1985.

22. The purpose of s.163 can not be "shifted" or recharacterized based on what is considered to be the harmful effect on women caused by some pornography: R. v. Big M. Drug Mart Ltd., [1985] 1 S.C.R. 295; In R. v. Pereira-Vasquez (1989), 26 B.C.L.R. (2d) 273 (B.C.C.A.) at 277, the Court properly characterized the purpose of the obscenity provision as applying to material even when it is not violent or subjugating to women as long as it consists of "nothing but exploitations of sex by explicit portrays of sexual acts".

23. In Keegstra (supra) the hate propaganda provisions were held to have a constitutionally valid objective because hate propaganda was said to cause "very real harm" of two types:

(i) the harm done to members of the target group and

(ii) because of its influence upon society at large:

Keegstra (supra) 170.

Pornography is fundamentally different from hate propaganda in many respects.

24. Even if "morality" can be an objective within the meaning of s. 1, there is insufficient consensus on the morality of pornography to be accorded any constitutional recognition. By contrast, while there was debate about the constitutionality of laws that proscribed hate propaganda there was clearly a consensus in Canadian society that such expression is "deeply offensive, hurtful, damaging to target group members, misleading to listeners, and antithetical to the furtherance of tolerance and understanding in society": Keegstra (supra) at 183. Professor McLaren notes the very different situation for pornography:

> "The arguments which have swirled round the federal government's two abortive proposals for revision of the obscenity sections of the Criminal Code show in bold relief that, if there ever was a time when one could point to widely shared moral notions of what should attract proscription by the law as obscene or pornographic, we have lost any pretence to consensus.

25. Furthermore, every piece of hate propaganda caught by s. 319(2) of the Code does, by definition, wilfully promote hatred against an identifiable group; it is not unreasonable to say that it causes "emotional damage of grave psychological and social consequence", or that it provokes a "response of humiliation and degradation": Keegstra (supra) at 170-71. That can not be said of every or even most of the material proscribed by s. 163 of the Code. Pornography does not "target groups" for attack; pornography might include material that glorifies violence against women but that same legislation outlaws material that celebrates the sexuality of men and women, and includes material that is legitimately regarded as erotica by heterosexual and homosexual men and women.

> S. Diamond, "Pornography: Image and Reality" in WAC at 54; Ms. Magazine, April 1985 "Is One Women's Sexuality Another Woman's Pornography?"; Mother Jones, February 1990, "Nasty Girls"; Christensen, Pornography: The Other Side, (Unpublished Article, at 10-11); West, "The

Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General' Commission on Pornography Report" (1987) 4 Am. Bar. Found. Res. Jo. 681 at 690 - 696; Hard Core, supra, c. 8.

26. Nor is there any reliable or credible evidence to demonstrate a causal connection between viewing or, a fortiori, reading, pornographic material and violent acts against any particular group.

McCormack "Making Sense of Research on Pornography" WAC, Appendix I; Fisher, "The Emperor Has No Clothes: On the Fraser and Badgley Committees' Rejection of Social Science Research on Pornography" in Regulating Sex, Fisher and Barak "Pornography, Erotica and Behaviour: More Questions than Answers" (1981) 14 International Journal of Law and Psychiatry 65; Hard Core at 187-189; Linz, Penrod and Donnerstein, "The Attorney General's Commission On Pornography: The Gaps between 'Findings and Facts'" (1987) 4 Am. Bar Fo. Res. Jo. 713; D'Amato, "A New Political Truth: Exposure to Sexually Violent Material Causes Sexual Violence" (1990) William and Mary L.R. 575 at 605: "...the key finding of the Meese Commission bears a causal relation not to the truth but the political truth."

27. Furthermore, any connection between pornography and negative attitudinal changes in individuals or society at large is tenuous and complex. In the FACT brief, the Amici state at 106:

> "To equate pornography with conduct having the power to 'subordinate' living human beings, whatever its value as a rhetorical device, requires a 'certain sleight of hand'to be incorporated as a doctrine of law ...Words and images do influence what people think, how they feel, and what they do, both positively and negatively. Thus pornography may have such an influence. But the connection between fantasy or symbolic representation and actions in the real world is not direct or linear. Sexual imagery is not so simple to assess. In the sexual realm, perhaps more so than in any other, messages and their impact on the viewer or reader are often multiple contradictory, layered and highly contextual."
>
> See also: Diamond, "Pornography: Image and Reality" at 47; Richards, Toleration and the Constitution at 207 and McLaren at 64-65.

28. Indeed to many feminists, sexist pornography is a product of the economic and social conditions of our society, not vice

versa: Burstyn, "Political Precedents and Moral Crusades: Women, Sex, and the State" in WAC at 24. To the extent that s. 163 is intended to outlaw images that subordinate women, it is sorely underinclusive in its scope; most mainstream magazines and movies should also be proscribed: Steele, "A Capital Idea: Gendering in the Mass Media." in WAC at 64-72; Tushnet, "Review" (1989) 58 Cin. L.Rev. 183 at 187;

29. Even the material that is alleged to combine sex with "crime horror, cruelty and violence" cannot safely be said to be limited to material that humiliates and degrades men or women or inculcates negative or misogynists attitudes. Most pornography of the "sado-masochistic" genre would probably run afoul of s.163 (That is how it is interpreted by customs officials pursuant to the Custom Tariff S.C. 1987, c. 49, s.114; Tariff Code 9956; Guidelines Memorandum D9 -1 -1); but not all, or perhaps even most of, the S/M pornography has as its purpose or effect the humiliation or degradation of men and women. There is a growing body of studies on the phenomenon of S/M conduct and S/M pornography. Most sado-masochism as practised or as depicted in films or as described in books, is said to be consensual, in the nature of fantasy or play, and pleasurable: "the encounters are usually carefully scripted and controlled, generally with real concern for the wellbeing and pleasure of both partners": Christensen, Pornography: The Other Side (supra) at 18-19; Professor Thelma McCormack reports that

> "we have studies of sadomasochistic fantasy that suggest that bondage fantasies are not uncommon, and that many persons male and female, find fantasies of this sort enhance sexual experience. Freud regarded sadomasochistic fantasy as pathological, but contemporary psychiatrists (Stoller, 1979) and sexologists (Francoeur, 1977) are less critical. On the contrary, Friday(1973) regards willingness of women to engage freely in bondage and other fantasies without guilt as a measure of liberation.": McCormack "Making Sense of Research on Pornography" in WAC at 195;

30. While some might claim that women who would "consent" to this sort of sexual activity particularly with a man, are guilty of

a "false consciousness", this view is challenged in a powerful article by Professor Robin West in "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory." (1987), 3 Wisconsin Women's Law Journal, 81. West, a feminist, is critical of the anti-pornography campaign by some feminists because of its focus on subordination and submissiveness. In her article she argues that sexual submission has erotic appeal and value when it is an expression of trust while it is damaging and injurious when it is an expression of fear: She writes:

> "Here I want to emphasize - I hope not over emphasize - the value of sexual submission when it is an expression of trust, because that, I believe is the source of pleasure women find in voluntary and fantasized erotic submission, in all of its forms. Absolutely pliant obedience - the willingness to transform one's subjectivity into another's object - is sexually arousing (for some) when it enables the submissive subject to transcend her own selfhood, and thereby to abdicate her responsibility for her own action. That this total abdication of responsibility can be erotic, I think, reflects a genuine human truth and a deep human need. It can be pleasurable and exhilarating and sometimes so much so that it is sexually stimulating to forego authorship of one's actions. When we grant power to another to control - to author - our acts, that grant may, and I have argued often does, express a deep-seated and forgotten (or not so forgotten) fear. But it might not. It might also express our total trust in that other. That 'other' might be trustworthy. That placing of trust in one who is stronger is felt by some to be intensely pleasurable, and that the fantasy of doing just that is felt by many more to be so, should teach us something."
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> See also: Hard Core, (supra) at 195 - 206; Hunt, "Report of a Conference on Feminism, Sexuality and Power"; Farr, "The Art of Discipline: Creating Erotic Dramas of Play and Power"; G. Rubin "The Leather Menace: Comments on Politics and S/M in Coming to Power 3rd ed., 1987)

31. Furthermore, and perhaps most importantly, even if pornography does have the ability to change attitudes or behaviour, in a negative way, of some people over the course of time, that is a harm that we must endure given our commitment to a self-governing democratic society: Irwin Toy at 975; Meiklejohn (supra). If this is a cognizable harm, then as noted above

(para 18), it must nevertheless be limited to an exceptionally limited category of expression. This point is eloquently made by the United States Court of Appeals in Hudnut (supra) as follows:

> "Indianapolis justifies the ordinance on the ground that pornography affects thoughts. Men who see women depicted as subordinate are more likely to treat them so... There is much to this perspective. Beliefs are also facts. People often act in accordance with the images and patterns they find around them... Words and images act at the level of the subconscious before they persuade at the level of the conscious. Even the truth has little chance unless a statement fits within the framework of beliefs that may never have been subjected to a rational study. Therefore we accept the premises of this legislation.
>
> Depictions of subordination tend to perpetuate subordination ... yet this simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation. Pornography affects how people see the world, their fellows and their social relations. If pornography is what pornography does, so is other speech...
>
> If the fact that the speech plays a role in a process of conditioning were enough to permit government regulation, that would be the end of freedom of speech."

32. There was an important "something more" present in Keegstra (supra), at 202, that explains this Court's concern with the effect of hate propaganda on the target groups and society at large. In that case, hate propaganda was described as a category of expression only "tenuously connected with the values underlying the guarantee of freedom of speech" (p. 94) but, most importantly, as inconsistent with the constitutional and democratic values of equality and multiculturalism: Keegstra (supra) at 168, 178-81.

33. In the case of pornography, no competing constitutional values are in issue. Indeed, the principles of equality and privacy would be set back, not furthered, by upholding the impugned law. While some of the material proscribed by s. 163 is unquestionably misogynist, s. 163 captures much more in its net. The overbreadth is only exacerbated by the law's vagueness: Paris Adult Theatre v. Slaton 413 US 498 at 103

(1973); Pope v. Illinois, 481 U.S. 497 (1987) per Scalia J.

34. If the community standard test is to be applied, the judiciary could not realistically avoid imposing its views of correct sexuality in a diverse community.

> "The inevitable result would be to disapprove of those images that are least conventional, and privilege those that are closest to majoritarian beliefs about proper sexuality." FACT at 109.

35. An application of a community standard test will almost always systematically discriminate against homosexuals, a group in society that is entitled to the protection of s. 15 of the Charter: King, "Censorship and Law Reform: Will Changing the Laws Mean a Change for the Better?" WAC 79 at 85.

36. The problem with the overbreadth of the obscenity provision does not end with the gay community. In Pereira-Vasquez (supra) at 289, the British Columbia Court of Appeal has said that the obscenity provisions do not exclude all sexually explicit erotica but only sexually explicit erotica that "portrays positive and affectionate human sexual interaction." On this interpretation, the fears of those feminists who oppose censorship will undoubtedly be realized. Rather than promote the principle of equality, the law will undermine it. The obscenity provisions can be applied by courts (mostly men) to stifle the development of feminist sexually explicit images. In the Amicus brief of FACT the authors state at 121:

> "The range of feminist imagination and expression in the realm of sexuality has barely begun to find voice. Women need the freedom and the socially recognized space to appropriate for themselves the robustness of what traditionally has been male language. Laws such as the one under challenge here would constrict that freedom ... Amici fear that as more women's writing and art on sexual themes emerge which are unladylike, unfeminine, aggressive, power-charged, pushy, vulgar, urgent and intense, the traditional foes of women's attempts to step out of their 'proper place' will find an effective tool of repression in the Indianapolis ordinance."
> See also: the references at paras. 25 and 30.

37. In Willis, "Feminism, Moralism, Pornography" Caught Looking

(2nd ed. 1988), the writer states:

> "The basic purpose of obscenity laws is and always has been to reinforce cultural taboos on sexuality and suppress feminism, homosexuality and other forms of sexual dissidence."

(It is not without some irony that Caught Looking an anthology of critical essays relating to pornography (which included photographs), and described by L. Williams in Hard Core, (supra) at 27 - 28 as "particularly helpful as a starting point for the feminist analysis of graphic pornography" was recently detained by Customs Canada and barred entry into Canada, see Appendix "A").

Means not Reasonable and Demonstrably Justified

38. The overbreadth of s. 163 of the Code was dealt with, to some extent, in order to demonstrate that its purpose and effect was inconsistent with other constitutional values. If there are some valid objectives to s. 163, or to obscenity legislation in general, then it is apparent that the means used by s. 163 are simply not proportionate to those objectives. The objectives may for example be to prevent such material from falling into the hands of children, persons whose rational capacities are probably diminished: Irwin Toy (supra) at 986; or to simply protect an unwilling audience from being "assaulted" by material they regard as offensive: Dworkin at 365. If these were Parliament's objectives the law must be repealed and reenacted in precise terms by restrictions on the time, place and manner of the publication. Likewise if Parliament's objective was to protect persons, such as children or women, who are actually harmed in the making of obscene movies, then the impugned provision completely overshoots its mark. See the Report of the Committee on Obscenity and Film Censorship ("Williams Report").

39. In conclusion, the infringement of the expression right by the impugned provision does not serve any sufficiently important objective of pressing and substantial concern, and further that the means chosen are not reasonably and demonstrably justified in a free and democratic society.

Books, A Special Form of Expression

40. The record is devoid of evidence of any harm caused by books. Even if there could be some basis for the restriction of videos (which we deny), there can be no justification for the censorship of "written matter": s. 163(1) of the Code. Books are at the core of the expression right. They are the principle medium for the advocacy of opinion. Books cannot be thrust upon an "unwilling audience." No one is exploited in the writing of a book. Books may be more erotic than pictures but less likely to deceive. In R. v. Prairie Schooner News Ltd (1970), 75 W.W.R. 585, the Manitoba Court of Appeal said at 589:

> "A book requires some understanding and the exercise of imagination; a photograph at once tells its story to all, even to the illiterate. A book demands an expenditure of time and effort; a picture conveys its message swiftly and easily".
>
> See also: R. Barthes, "The Rhetoric of the Image", Responsibilities of Form; N. Postman, Amusing Ourselves To Death: Public Discourse in the Age of Show Business 1986 at 49-51; the Williams Report at paragraph 7.7 and 7.22; and R. West "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory", supra at 138.

41. The censorship of books by custom officials pursuant to the Customs Tariff will be the subject of the Intervenor's action set for trial in Vancouver in September 1991. An extensive evidentiary record is being assembled for that purpose. It is submitted that this Court, if it was to uphold the impugned provisions, should confine its holding to the bulk of the material before the Court, namely videotapes and either sever the proscription of "obscene written matter" or leave the constitutionality of the prohibition of "obscene written matter" to another day.

A.G. Manitoba v. McKay, [1989] 2 S.C.R. 357.

PART IV

NATURE OF ORDER REQUESTED

42. That s. 163 of the Criminal Code is contrary to s. 2(b) of the

Charter and is not justified under s. 1 of the Charter.

43. Alternatively, that s. 163 of the Criminal Code is unconstitutional at least insofar as it purports to apply to "obscene written matter."

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

"Joseph J. Arvay"

JOSEPH J. ARVAY, Q.C.

APPENDIX A

Revenue Canada Customs and Excise | Revenu Canada Douanes et Accise

Canada

NOTICE OF DETENTION/DETERMINATION
AVIS DE RETENUE OU DE CLASSEMENT TARIFAIRE

9956

Importer/Importateur

LITTLE SISTERS
1221 THURLOW ST.
VANCOUVER, B.C.
V6E 1X4

Regional Control No. / N° de contrôle régional	
Point of Entry / Bureau d'entrée	VANCOUVER CMC
Point of Entry Control No. / N° de contrôle au bureau d'entrée	803 K27 4546
Date	2 May 1991

PART A — NOTICE OF DETENTION / **PARTIE A — AVIS DE RETENUE**

The following goods have been detained for a determination of tariff classification. Once a determination has been made, you will be notified in writing. / Les marchandises désignées ci-après ont été retenues aux fins du classement tarifaire. Nous vous aviserons par écrit du classement effectué.

Description of goods/Désignation des marchandises

"THE UNCERTAINTY OF STRANGERS & OTHER STORIES" & "CAUGHT LOOKING"

Exporter/Exportateur

INLAND BOOK CO. LTD BOX 120261 EAST HAVEN CONNECTICUT 06512

DEPARTMENT OF NATIONAL REVENUE - CUSTOMS AND EXCISE

MINISTÈRE DU REVENU NATIONAL - DOUANES ET ACCISE

1 — CONSIGNEE/CONSIGNATAIRE

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