

IN THE SUPREME COURT OF CANADA  
(On Appeal from the Court of Appeal of British Columbia)

B E T W E E N:

LITTLE SISTERS BOOK AND ART EMPORIUM,  
B.C. CIVIL LIBERTIES ASSOCIATION  
JAMES EATON DEVA and GUY ALLEN BRUCE SMYTHE

Appellants

- and -

MINISTER OF JUSTICE, ATTORNEY GENERAL OF CANADA,  
and MINISTER OF NATIONAL REVENUE, and  
ATTORNEY GENERAL OF BRITISH COLUMBIA

Respondents

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

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**Little Sisters Book and Art Emporium et al v. Minister of Justice et al**

**Factum of the Women's Legal Education and Action Fund (LEAF)**

**Part I: Introduction and Statement of Facts**

1. LEAF is an organization committed to advancing women's equality through public interest interventions and legal education. LEAF's intervention in this case is based on its work on obscenity law and on the equality rights of lesbians, including Canada-wide community consultations on the issues that arise in this case.

11 2. Lesbian materials, including sexually explicit materials, are important to all women and are essential to the emotional, social, sexual and political lives of lesbians. LEAF submits that the *Customs Tariff* (herein the "Customs regime") denies the constitutional equality and expression rights of lesbians and other disadvantaged groups. This regime is unconstitutional because it fails to provide mechanisms to guard against misuses of the censoring power and it is wholly unsuited to making the factual and legal determinations, including the constitutional equality analysis, which should be required before any materials are found to be "obscene" and, as such, prohibited.

21 *Customs Tariff*, S.C. 1997, c.36 s.136(1) and Tariff Item 9899 00.00 of the List of Tariff Provisions in the Schedule (which refers to *Criminal Code* R.S.C. 1985, c. C-46 s. 163(8) (obscene publications)) (formerly *Customs Act* R.S.C. 1985 c.1 (2<sup>nd</sup> Supp.) ss 58, 71 and *Customs Tariff*, S.C. 1985 c.41 (3<sup>rd</sup> Supp.) s. 114, Code 9956(a) of Schedule VII).

3. About 90 per cent of the stock destined for one of the appellants, Vancouver-based Little Sisters Book and Art Emporium (herein "Little Sisters"), is imported from the United States. Canada Customs routinely inspect virtually all shipments to Little Sisters pursuant to the authority to detain and prohibit obscene publications set out in the Customs regime. Shipments to other lesbian and gay bookstores in Toronto and Montreal and from distributors of lesbian and gay publishers are also methodically identified and scrutinized by Customs officers. These detentions have resulted in damage to the materials and caused delays in delivery. Canada Customs also has destroyed, lost, forgot about, and prohibited entry of materials destined for lesbian and gay .

1 bookstores and distributors of gay and lesbian materials. "Large quantities of non-obscene materials have been banned from Canada that should not have been." No other bookstores have not been subjected to this heightened scrutiny and the same materials cleared Canada Customs, even if inspected, when destined for other bookstores.

**Appellants' Record** (herein "A.R.") Reasons for Decision (Smith, J.) vol.I pp97, 117-127, 188, 362; Reasons for Decision (Hall, J.A.) vol.II pp291-292; vol.III pp313; vol IV pp513-515, 526, 532; vol.VI pp1003-05; vol.X pp1699,1704, 1733,1736, 1739-40, 1755.

4. Canada Customs agents, at all levels of the internal re-determination process for establishing if materials should be prohibited as obscene, operate under severe time constraints. They rely on a mechanical analysis of activities described or depicted, and only rarely do they have evidence on  
11 and attempt to assess harm or merit.

Q. Would you read a book cover-to-cover if that was necessary? A. That was rarely necessary...If you started reading it and the general nature was sort of sensationalistic in a sexual manner and you might flip through to make sure the entirety is like that....You find-try to find at least two or three instances of something prohibited and then once you hit three in the-it was deemed that the rest of the book was of the same nature you would prohibit it there without reading the rest of it. G.L. Slater, Commodity Specialist, A.R. vol.IX p.1443.

Reasons for Judgment ( Smith, J.), A.R. vol.I pp125-126 paras 115-116.

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5. The trial judge found that there are "grave systemic problems in the Customs administration" and that the re-determination process is unclear, inconsistent, and difficult for importers to understand. Importers seeking to appeal a prohibition are only given a vague reason for decision (a check off box on a form) and they are not given access to the materials before challenging the correctness of the decision. Even when Little Sisters successfully appealed the prohibition of a particular publication, the same publication is often prohibited again.

Reasons for Judgment ( Smith, J.), A.R. vol.I pp188, 119-125 para 250.

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6. A sampling of the vast range of materials destined for lesbian and gay bookstores or distributors of lesbian and gay materials which have been seized and/or prohibited by Canada Customs since 1984 includes the following:

- 1 a. work and commentary on the work of visual artists including Kiss and Tell, Tom of Finland and Della Grace.
- b. sex education manuals including Wendy Caster, *The Lesbian Sex Book*; Charles Silverstein, *The Joy of Gay Sex*; Pat Califia (ed.), *The Lesbian S/M Safety Manual*; Jack Hart, *A Manual for Men Who Love Men*.
- 11 c. novels and other works by internationally acclaimed authors including Marguerite Duras, *The Man Sitting in the Corridor*, Jean Genet, *Querelle*, Jane Rule, *Contract With the World* and *The Young in One Another's Arms*; Sarah Schulman, *Girls, Visions, and Everything*; Pauline Réage, *The Story of O*; Dorothy Allison, *Trash*; Joe Orton, *Prick Up Your Ears*; Kathy Acker, *Empire of the Senseless*.
- d. anthologies and edited collections of essays including Sarah Holmes and Karen Barber, *Testimonies: Lesbian Coming Out Stories*; Carol Beder, *Unbroken Ties: Lesbian Ex-Lovers*; bell hooks, *Black Looks, Race and Representation*; Joseph Beam, *In the Life: A Black Gay Anthology*; Richard Mohr, *Gay Ideas; Outing and Other Controversies*; Henry Abelove et al, *The Lesbian and Gay Studies Reader*; and Hannah Alderfer, *Caught Looking: Feminists, Pornography and Censorship*.
- 21 e. anthologies and edited collections of short stories including David Leavitt, *A Place I've Never Been*; Susie Bright (ed.), *Herotica*; Karen Barber (ed.) *Bushfire: Stories of Lesbian Desire* and *Afterglow: More Stories of Lesbian Desire*; and Pat Califia (ed.) *Melting Point*.
- f. periodicals including *The Advocate*; *Deneuve*; *The New York Native*; *Quim: For Dykes of All Persuasions*; *Bad Attitude*; and *Hothead Paisan*.

Appendix I: A.R. References for Sampling of Materials Detained and/or Prohibited.

## Part II: Summary of Issues

- 31 7. LEAF submits that the Customs regime, insofar as it authorizes customs officials to detain and prohibit materials deemed to be obscene, infringes both sections 2(b) and 15(1) of the *Canadian Charter of Rights and Freedoms* (herein the "*Charter*"). LEAF also submits that the infringement is not demonstrably justified in a free and democratic society pursuant to section 1 of the *Charter*.

## Part III: Argument

### 1. Applicable Constitutional Principles

8. LEAF submits that the Customs regime for seizing and prohibiting entry into Canada of

1 materials that it deems obscene violates both the section 2(b) and 15(1) guarantees of the *Charter* by inappropriately limiting the free expression of sexual minorities in a discriminatory way. The rationales for protecting the expression of lesbians, gay men, bisexuals and transgendered (herein "LGBT" or "queer") people are intimately bound up with and cannot be separated from the historical, social, political and legal context of the Appellants' claim. Thus an integrated analysis of the constitutional rights to equality and to free expression is required.

9. Section 15 of the *Charter* serves to foster human dignity and freedom and to promote a society in which all persons enjoy recognition at law as human beings equally deserving of concern, respect and consideration. All *Charter* rights strengthen and support each other and  
11 section 15 plays a particularly important role in that process. The interpretive lens of the equality guarantee should therefore influence the interpretation of other constitutional rights.

*Law v. Canada*, [1999] 1 S.C.R. 497 at 500 para 4; *M. v. H.*, S.C.C. No 25838, May 20, 1999 at para 47; *R v. Corbiere*, S.C.C. No 25708, May 20, 1999 at para 5; *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624 at 667 para 54; *New Brunswick v. G.(L)* S.C.C. No 26005 (September 10, 1999) para. 112.

10. This Court has held that the relevant perspective for the objective analysis of an equality claim is that of a reasonable person in circumstances similar to the claimant. All of the claimant's and the group's traits, history and circumstances, including society's past and present treatment of  
21 them, must be considered in evaluating whether an impugned law is discriminatory. This approach recognizes and validates the particular knowledge, needs and experiences of those affected by discrimination, those whose voices are frequently silenced in dominant culture.

*Egan v. Canada*, [1995] 2 S.C.R. 513 at 546 para 41; *Law v. Canada*, [1999] 1 S.C.R. 497 at paras. 59-61; *M. v. H.*, S.C.C. No 25838, May 20, 1999 at para 67; *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624 at para 65-66.

11. The purposes of the free expression guarantee in section 2(b) are to facilitate and encourage the search for truth, participation in social and political decision making, and diversity in forms of individual self-fulfillment. As classically understood, free expression rights were founded on an



1 assumption of formal equality, in particular, an assumption of pre-existing social, political and economic equality. LEAF submits that an integrated analysis of free expression rights with *substantive* equality rights would strengthen and support each of these constitutional rights in this case. Substantive equality requires that lesbians and other constitutionally protected minority communities have the freedom to explore personal and community identities through writings, photography, drawing and other media.

*Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 1007, Thomas Emerson, "Toward a General Theory of the First Amendment" (1968) 72 Yale L. J. 877.

11 12. When free expression and equality are linked, the search for truth can then be understood as the constant questioning of established "truths" to allow marginal and disadvantaged voices to be heard. The pre-existing political and social inequalities which limit the ability of disadvantaged persons and groups to express and publish their ideas, and the systemic suppression of the voices of the disadvantaged, which is inimical to participation in political and social decision making, come into focus. An integrated analysis also recognizes that cultivating self-fulfilment and individual autonomy takes place within a context where relationships amongst individuals, their communities and the larger society may be relationships where equality has not been achieved.

21 Bettina Quistgaard, "Pornography, Harm and Censorship: A Feminist (Re)Vision of the Right to Freedom of Expression" (1993) 52 U. T. Fac. L. Rev. 132; David Lepovsky, "Towards a Purposive Approach to Freedom of Expression and its Limitations" in Frank McArdle (ed.) *The Cambridge Lectures 1989* (Montreal: Blais, 1990); Jennifer Nedelsky, "Reconceiving Autonomy" (1989) 1 Yale J. of L. and Fem. 7.

## 2. The Social Context of Lesbian Expression

13. The Customs regime discriminates against lesbians by silencing already marginalized voices, aggravating disparities in the ability of lesbians and other women to access means of communication, and ignoring how materials by, for and about lesbians connect individuals and communities and free women to shape their own lives independent of dominant norms.

1 *2(a) Lesbian Identities*

14. Materials about lesbians facilitate the emergence and development of lesbian identity. Few young lesbians have lesbian role models. Public and school libraries are under considerable pressure not to make available materials with lesbian and gay themes or even lesbian and gay characters. Restrictions on access to lesbian materials make the affirmation of lesbian identity even more difficult.

*Assinaboine South Teachers' Assn. of the Manitoba Teachers' Society v. Assinaboine South School Division No. 3*, [1998] M.J. No. 364 (Q.B.); *Chamberlain et al. v. Board of Trustees of School District #36 (Surrey)* (1998), 168 D.L.R. (4<sup>th</sup>) 221 (B.C.S.C.).

11 When I was first coming out as a lesbian, I found myself in the Toronto Women's Bookstore having attempted to seek out information about lesbian identity and specifically sexual identity. I had found it very problematic within mainstream bookstores so I found myself at the Toronto Women's Bookstore. I was both tremendously nervous and tremendously elated... Janine Fuller, Little Sisters manager, A.R. vol.III p.366.

21 I realize that a big part of what is holding me back was the feeling that if I became a lesbian, I would have to live in a white world. Black women are welcome, but it was still a white world. ... I can't go back to the home that I grew up in, the world of my family and church--I don't belong there anymore. I have to find a new home. When I read *Zami* [by Audre Lorde] I know that home for me as a Black lesbian exists, and I know it is only a matter of time until I find it. Lisa C. Moore, "1985: Memories of My Coming Out Year" in Lisa C. Moore (ed.), *Does Your Mama Know? An Anthology of Black Lesbian Coming Out Stories* (Decatur: RedBone Press, 1997) 5 at 14-15.

15. Dominant culture often ignores, denies, and vilifies queer culture, intimate social relationships and sexuality. Suppression of lesbian materials fosters the oppression of lesbians through invisibility and denigration. Especially for those who are just "coming out", self esteem is harmed by a culture of repression, alienation and widespread social hatred. Suicide attempts appear to be two to 14 times higher among lesbian, gay and bisexual youth than among heterosexual youth. A recent study found that 44 per cent of Canadian homosexual youth had considered suicide in the previous year and 34 per cent had made a suicide attempt.

Didi Herman, *The Anti-Gay Agenda* (Chicago: University of Chicago Press, 1997) at 92-110, 60-91; Amy Rein, *Sexual Orientation and Suicide Behaviour Among Adolescents* (Simon Fraser University: Unpublished PhD Thesis, 1998) at 8, 65.

1 **2(b) Lesbian Sexualities**

16. The creation and distribution of materials about lesbian sexuality affirms this sexuality by presenting it as healthy, meaningful and empowering. Such materials are about self exploration and creating cultural communities. Lesbian materials also attempt to counter dominant heterosexual misrepresentations of lesbian sexuality as perverse and deviant.

11 Audre Lorde, "The Uses of the Erotic: The Erotic as Power" in Henry Abelove et al, (eds.) *The Lesbian and Gay Studies Reader*\*\*<sup>1</sup> (New York: Routledge, 1993) at 339; Mariana Valverde, "Beyond Gender Debates and Private Pleasures: Theory and Ethics in Sex Debates" (1989), 15 *Feminist Studies* 237; Tee Corinne, "Notes on Writing Sex" in Judith Barrington (ed.) *An Intimate Wilderness: Lesbians Write on Sexuality* (Portland: The Eighth Mountain Press, 1991) at 212.

It's fun. It's also, I think, very healthy in the exploration of sex as a creative and exploring and a loving activity between women rather than a rigid exercise proving you're really this or a real that or a real anything. I would really, really be glad to have this book around, particularly for quite young lesbians who know very little in their own experience....There are Black people in this book...working class people, handicapped people...overweight people.... Jane Rule, author of *Contract With the World*\*\* and *The Young in One Another's Arms*\*\*, testifying about Karen Barber, *Bushfire: Stories of Lesbian Desire*\*\* A.R. vol.III pp333-334.

21 ...Lesbian made sexual materials...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 of self affirmation. Dr. Becki Ross, expert witness, A.R. vol.V p.833.

31 17. Because discriminatory thinking about the sexuality of people with disabilities is pervasive, sexual materials of any sort for people with disabilities are rare. For LGBT people with disabilities, they are rarer still. This paucity of materials is compounded where persons with disabilities require materials in alternative formats when those formats are only available through individuals or organizations that may exercise censorship.

18. Materials about safer sex practices, sexual health and HIV must present information in a format appropriate for the intended audience. The format must be sensitive, amongst others

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<sup>1</sup> Materials marked with a double asterisk (\*\*) were detained and/or prohibited by Canada Customs.

1 things, to the literacy level, sexual orientation, occupation, language, abilities, and age of that audience. Prohibiting access to this information endangers health.

Q. Did you see some need to produce that book [*The Lesbian S/M Safety Manual\*\**]...?

A. There was nothing in print when I began to put that collection together that would reach women who might be isolated... who would need to try to glean useful information from sources like mainstream pornography which are not very useful....One of my specific concerns with the safety manual was that ...mainstream mass market pornography is not very accurate from a sex education standpoint. A lot of it describes people doing things, that in fact, could be damaging or could be dangerous to their health.... Pat Califia, author, **A.R.** vol.V p.779

11

Another alarming seizure [was]...*The New York Native\*\**...[which] is known in our community for carrying extremely important progressive thinking about HIV and AIDS... Many, many people read *The New York Native* for the most recent information about HIV and the research going on around HIV. James Deva, Little Sisters owner, **A.R.** vol.III, p.365.

*Piercing Fans International Quarterly\*\** ...is the definitive magazine on the art of body piercing. It provides interviews, historical and documentary information and promotes safety, health and originality. Lucinda Johnston, Pages Books buyer, **A.R.** vol.X p.1752.

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Cindy Patton, "Visualizing Safe Sex: When Pedagogy and Pornography Collide" in Diana Fuss(ed.) *Inside/Out: Lesbian Theories, Gay Theories* (New York: Routledge, 1991) at 373.

### 2(c) *Lesbian Communities*

19. LGBT materials perform a critical role in developing and nurturing LGBT communities and cultures. Few lesbians are born into families where lesbian cultures are acknowledged or valued. To overcome social isolation, lesbians need to set out to learn about a new culture and to find lesbian communities.

31

...for gay people literature is a very important bond, a kind of glue within our, our community.... the way that we connect with our community is often through our literature, through our newspapers and through our books. Jearld Moldenhauer, former owner of Glad Day Books, **A.R.** vol.III.3 p.380.

...validation literature...[is] a literature which serves to say we are here, this is what we are....all three of these works [Karen Barber, *Afterglow\*\**, John Preston, *I Once Had a Master\*\**, and Pat Califia, *Melting Point\*\**] are ground breaking works in that sense in that they are establishing the right of a community to speak... about a reality that is often not documented in mainstream sources, that is often reviled or stigmatized. And therefore...these works perform the work that literature and art often performs... Nino Ricci, author, **A.R.** vol.X, pp1828-29.

- 1 20. Lesbians of colour and Aboriginal lesbians find that they are often marginalized from mainstream and LGBT cultures and from communities of colour and Aboriginal communities. Discriminatory censorship of their expression impedes the struggle of lesbians of colour and Aboriginal lesbians for full participation in social and political life.

11 South Asian lesbian and gay newsletters have served as forums for articulating identities, establishing communities, and have demonstrated the necessity of identity politics as an important stage in the liberation process.... For South Asian gay men, lesbians and other silenced groups, self representation alone cannot liberate us, but breaking silence is the first step in resisting conventional expectations and challenging domination. Nayan Shah, "Sexuality, Identity and the Uses of History", in Rakesh Ratti (ed.), *A Lotus of Another Color: An Unfolding of South Asian Gay and Lesbian Experience* (Boston: Allyson, 1993) at 127-28.

21 The day I saw a poster declaring the existence of an organization of Gay American Indians, I put my face into my hands and sobbed with relief. A huge burden of isolation and of being defined only by one's enemies left me on that enlightening day....After learning about the social positions and special offices fulfilled by Indians whose tribes picked them...precisely because they displayed the characteristics we call gay, I knew that Gayness goes far beyond simple sexual/emotional activity...The problem is not how to find [gay people] so much as it is to *see* them, the trees in all those forests, for suppression has caused them to hide from our view and cultural bias has caused our view to be blind to what is before us. Judy Grahn, *Another Mother Tongue: Gay Words, Gay Worlds* (Boston: Beacon Press, 1984) at 105.

Makeda Silvera, "Introduction", in Makeda Silvera (ed.), *Piece of my Heart: A Lesbian of Colour Anthology* (Toronto: Sister Vision Press, 1991); Rakesh Ratti "Introduction" in Rakesh Ratti (ed.), *A Lotus of Another Color: An Unfolding of the South Asian Gay and Lesbian Experience* (Boston: Allyson, 1993).

#### 2(d) Dissemination of Lesbian Materials

- 31 21. Lesbian cultural and political life requires that lesbians have the freedom to experiment with different aesthetic forms, including satire (such as *Hothead Paisan\*\**) and camp (*Love Bites\*\**), without fear that it will be so misunderstood in dominant culture that it would be prohibited. Customs censorship threatens the existence of lesbian cultural works. For example, *Drawing the Line*, a collection of photographs by Kiss and Tell, an art collective, is intended to provide a context for serious, informed discussions about lesbian sexual imagery. This work, which has been exhibited in galleries all over the world, was denied entry or re-entry to Canada at least three times.

1 Canada Customs prohibited reentry of *Drawing the Line*\*\* , a book on the collection which was published in Canada and distributed by an American company; prohibited entry of the magazine *Deneuve*\*\* because it carried an article with photographs of the work from the collection; and destroyed photographs when the collective attempted to bring them back into Canada.

Persimmon Blackbridge, artist, writer and member of the Kiss and Tell Collective, A.R. vol.X,pp1760-61,vol.III pp354-357,467; [Original materials: *Hothead Paisan*, Ex. 80; *Love Bites*, Ex.24; *Drawing The Line*, Ex. 22; *Deneuve*, Ex.104].

22. Dissemination of materials about lesbians is one way in which lesbians can claim visibility in the wider community and thereby become fully accepted as members of society. Lesbians are all  
11 but invisible in Canadian public life. Many LGBT people "pass" as heterosexual to avoid a hostile world but the "passing" person must accept the twin albatross of silence and invisibility. Visibility within the larger society is essential to counter the misrepresentations which lead to lesbophobia, homophobia and heterosexism, to encourage lesbian participation in social and political life, and to cultivate diversity in all forms of human flourishing.

21 ...the development of gay and lesbian literature is a very fragile development because it's about people's truly lived experience and the willingness and bravery of the writers to express those experiences in that hostile environment. Now obviously anyone, especially in the 1970's but this is also true today, who chooses to be openly gay or lesbian in their work will face professional liability....we know that pretending that people do not live the way they do does not make them go away, it only isolates and separates them from society. Sarah Schulman, author of *Girls, Visions, and Everything*\*\* , A.R. vol.III p.379.

Average Good Looks, "Taking Voice: Average Good Looks' Strategies for Facilitating Discourse" in D.Augaitis (ed.), *Questions of Community: Artists, Audiences, Coalitions* (Banff: Banff Centre Press, 1995); Cheryl Clarke, "Saying the Least Said, Telling the Least Told: The Voices of Black Lesbian Writers" in Makeda Silvera (ed.), *Piece of My Heart: A Lesbian of Colour Anthology* (Toronto: Sister Vision Press, 1991) 171 at 172.

31 23. The existence of feminist and queer publishers is essential because, as authors, lesbians are not widely published in the mainstream press. These publishers (and their distributors) are subject to heightened scrutiny by Canada Customs and do not have the political power to circumvent customs censorship. In contrast, the record establishes that potentially controversial books from

1 major publishers like Warner Books (the publisher of Madonna, *Sex*) and Random House (the publisher of Brett Easton Ellis, *American Psycho*) have been carefully handled at the highest levels to ensure the treatment of these works at the Canadian border does not "resurrect and refocus the continuing debate of whether the government should be in the 'censorship business'."

The feminist writing and publishing community, characterized by lesbian leadership, has enabled me not to be silent or invisible. Visibility and vigilance are integral to my everyday, nonwriting lesbian life. Cheryl Clarke, "Saying the Least Said, Telling the Least Told: The Voices of Black Lesbian Writers" in Makeda Silvera (ed.) *Piece of My Heart: A Lesbian of Colour Anthology* (Toronto: Sister Vision Press, 1991) 171 at 175.

11 ...Golden-Lee will no longer ship books to you...every shipment we send to you, whether containing questionable materials or not, is detained for months at a time. When shipments are returned to us they are always missing books. Further, the books returned to us are so damaged that we have to write them off as unsalable. Letter from Golden-Lee Distributors to Glad Day Books, A.R. vol.X p.1736 [Ex. 55].

A.R. vol.VII p.1123 [Ex. 224]; A.R. vol.IX p.1472; A.R. vol.IV p.665-666 [Ex. 46].

### 2(e) *Benefits to Heterosexual Women*

24. The equality rights of heterosexual women are also affected by the targeting of LGBT materials. These materials benefit heterosexual women because they may challenge sexism, compulsory heterosexuality and the dominant, heterosexist sexual representations which often portray "normal" heterosexuality as men dominating women and women enjoying pain and degradation. Moreover, some materials detained by Canada Customs as "obscene" when destined for lesbian and gay bookstores were feminist works intended for a general audience (such as bell hooks, *Black Looks, Race and Representation\*\**) and others were anthologies of works by mainly heterosexual women (such as Susie Bright (ed.), *Herotica\*\**).

Adrienne Rich, "Compulsory Heterosexuality and Lesbian Existence" and Audre Lorde, "The Uses of the Erotic: The Erotic as Power," in Henry Abelove et al (eds), *The Lesbian and Gay Studies Reader\*\** (New York: Routledge, 1993) at 227, 339.

### 1 3. The Incorporation of Equality Principles into Obscenity Law

#### *3(a) Introduction*

25. LEAF submits that obscenity law is constitutionally valid only if it is anchored in a fully developed equality analysis which acknowledges both the liberatory and the oppressive possibilities of sexual materials for and about adults. Hence the determination of whether work is obscene and therefore prohibited requires decision makers to address complex and contextually sensitive factual and legal (including constitutional) questions. Moreover, obscenity law has long been plagued with a range of problems including vagueness, subjectivity, lesbophobia, homophobia and heterosexism, potential for abuse as a mechanism of censorship, difficulties with proof and effective enforcement, and the lack of clear interpretative guidelines. Therefore the process by which obscenity determinations are made must be capable of addressing complex questions, have safeguards against systemic and structural problems and, at the very least, allow for a full and open hearing.

26. The Customs regime referentially incorporates section 163(8) (obscene publications) of the *Criminal Code* and therefore Customs officers are called upon to apply this law. LEAF submits that the Customs regime is unconstitutional because it is opaque, wholly unsuited to making the necessary factual and legal determinations, and fails to provide mechanisms to guard against misuses of the censoring power. Thus it is impossible for customs officers within the current regime to perform the task of prohibiting materials in a constitutionally satisfactory manner.

21 *R v. Morgenthaler*, [1988] 1 S.C.R. 30; *Singh v. Canada*, [1985] 1 S.C.R. 177.

#### *3(b) Harm and Its Context*

27. The Court held in *R. v. Butler* (herein "*Butler*") that obscenity law had to be focussed on the harms posed by some sexual representations to women and children. This Court expressly rejected the traditional approach to obscenity law based on "a general instinctive sense of what is decent and indecent", stating that "...this particular objective is no longer defensible in view of the *Charter*". The *Butler* decision also made it clear that sexually explicit materials were protected by



1 the *Charter's* free expression guarantee even if the sole purpose of such materials was sexual arousal and gratification. Thus this Court's *Butler* decision signals an important shift from the traditional morality rationale for obscenity law towards a harms-based equality analysis.

*R. v. Butler*, [1992] 1 S.C.R. 452 at 476, 429, 485; *Brodie v. R.*, [1962] S.C.R. 681.

28. LEAF submits that, while the harms-based equality approach to obscenity law articulated by this Court in *Butler* must remain the cornerstone of obscenity law, a more constitutionally sensitive analysis of obscenity law is now required. The more general statements in *Butler* relating to "moral corruption", "moral desensitization" and "anti-social conduct" as rationales for obscenity law hearken to discredited rationales and therefore can only be properly understood  
11 within specific discussions of harm.

*R. v. Butler*, [1992] 1 S.C.R. 452 at 494, 481, 485; Mariana Valverde, "The Harms of Sex and the Risks of Breasts: Obscenity and Indecency in Canadian Law" (1999) 8 Social and Legal Studies 181.

29. LEAF submits that mere assumptions about harm and merit without an evidentiary foundation are not sufficient to justify a violation of expressive freedoms when the impugned materials involve adults. Instead, specific and compelling evidence is required which must prove that the elements of obscenity, including substantial risk of harm and absence of merit, have been made out regarding the impugned materials without resort to discriminatory beliefs. The evidence  
21 on harm must demonstrate, for example, that the materials increase propensity for violence, or they serve to foster and perpetuate the unequal position in society of those groups protected by the *Charter's* equality guarantee.

*R. v. Hawkins* (1994), 86 C.C.C. (3d) 246 (Ont. C.A.).

30. It is neither desirable nor possible to set out an exhaustive list of the factors that must be considered in determining whether or not the impugned materials cause harm and therefore unduly exploit sex. However, the harms-based obscenity analysis must be sensitive to a myriad of factors, some of which include: the sex, race, age, disability and sexual orientation of the

1 participants, characters, and creators; the purposes of the materials; the intended audience; real or  
 apparent violence; consent and dialogue; the nature of the publication, including the relationship  
 of the impugned materials to the entirety of the publication; the framework and manner of  
 production, distribution and consumption; and, the benefits to viewers/readers from the  
 production and dissemination of the materials.

Ann Scales, "Avoiding Constitutional Depression: Bad Attitudes and the Fate of *Butler*"  
 (1994) C.J.W.L./R.F.D. 349; Patricia Hill Collins, "The Sexual Politics of Black  
 Womanhood" in *Black Feminist Thought: Knowledge, Consciousness and the Politics of  
 Empowerment* (New York: Routledge, 1990) 163.

11 31. LEAF submits that materials which appear to eroticize exploitation or subordination or which  
 appear to entrench discriminatory stereotypes based upon, for example, sex, sexual orientation,  
 race, disability or age are much more likely to be harmful. However, it is only upon a critical and  
 thorough examination of the impugned materials in light of the evidence presented on harm that  
 the principles in *Butler* can be applied in a constitutionally sensitive and appropriate manner.

32. LEAF submits that obscenity law must be sufficiently inclusive to prevent harm to  
 disadvantaged groups, yet must be tailored so as not to entrench disadvantage. Without the  
 requirement that harm be articulated, obscenity determinations may be filled with little more than  
 discrimination dressed up as morality further dressed up as undue exploitation. Such  
 21 inappropriate applications promote harm to lesbians and gay men by silencing legitimate sexual  
 expression and by encouraging the view that this expression is less worthy of respect and more  
 deserving of prohibition.

### *3(c) Some Examples of the Treatment of Lesbian and Gay Materials post-Butler*

33. In *Butler*, the Court did not address the application of obscenity law to the expression of  
 lesbians and gay men. Too often, obscenity interpretations by judges and customs agents post-  
*Butler* have failed to apply obscenity principles in a constitutional manner. The broad principles  
 articulated in *Butler*, especially the "degrading and dehumanizing" test, have at times been used to

1 justify thinly disguised attacks upon lesbian and gay materials. Most notoriously, Canada Customs refused, until the eve of the Little Sisters trial, to remove its blanket policy of prohibiting entry of any depictions or descriptions of anal penetration without any consideration of harm or merit because it considered the practice "degrading and dehumanizing".

Anal intercourse is standard everyday activity among gay men, and naturally then it forms the basic material of sexual representation....Ancient Greek poets and many Arabic poets celebrated anal intercourse, and in the modern period you can look at poets like Walt Whitman and Allan Ginsberg...It's a very important cultural tradition, this erotic representation. On the other hand, it's one the traditions that is probably the most misunderstood. Dr. Thomas Waugh, expert witness, A.R. vol.V p.299.

11

*Glad Day Bookshop Inc. v. Canada*, [1992] O.J. No. 1466 (Gen. Div.); *R. v. Scythes*, [1993] O.J. No.537 (Gen.Div.); Reasons for Judgment ( Smith, J.), A.R. vol.I pp193-96.

34. The Little Sisters record is replete with references to lesbian and gay s/m materials because so many of these works were prohibited by Canada Customs. LEAF submits that, as with any sexually explicit materials, conclusions cannot be drawn that such materials are harmful and without merit and therefore obscene and prohibited without proper consideration of the factors discussed above and any other evidence which may be relevant to the question of harm or merit. Simple extrapolations from assumptions about harm deemed relevant in cases involving  
21 heterosexual materials, like those made in *R. v. Scythes*, are insufficient to justify prohibition of lesbian and gay s/m depictions or descriptions. As the trial judge in the case at bar stated:

...the proper application of [the internal necessities] test, even to sado-masochistic representations, may redeem works that might seem obscene on first impression....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*. Reasons for Judgment (Smith, J.), A.R. vol.I,pp179, 181 para 228, 231.

31

*R. v. Scythes*, [1993] O.J. No.537 (Ont. Ct. J.); Dr. Gary Kinsman, vol.X pp1839-40; Terry Hoople, "Conflicting Visions: SM, Feminism, and the Law. A Problem of Representation" (1996) C.J.L.S./R.C.D.S. 177.

35. The obscenity provisions have been applied in a way which is reminiscent of the morality testing engaged in in the past but applied particularly viciously to the lesbian and gay community.

1 In *Glad Day Books v. D.M.N.R. (Customs and Excise)*, an appeal (by way of a new trial) from a Canada Customs prohibition of sexually explicit biographies, stories, drawings, comics and photographs for and about gay men, the Crown called no witnesses and tendered no evidence, other than the impugned materials. The judge failed to consider in any meaningful way whether the impugned materials were likely to result in harm or had merit. Rather, in reviewing various materials he assumed that the materials were harmful and without merit, for example, because:

11 This is a succession of grotesque drawings of three males engaged in various forms of sexual activity... It is a sexual encounter without any real meaningful human relationship. The manner in which the conduct is depicted would not be recognized as compatible with the proper functioning of society. It is degrading. There is a strong inference of harm. The community would not tolerate others being exposed to this gross material. I find it to be obscene.

This is a magazine of explicit pictures of nude males and stories of explicit casual sexual encounters relating to oral and anal sex. The description and activities are degrading and without any human dimension. The dominant characteristic is the undue exploitation of sex. I find it to be obscene.

21 *Glad Day Bookshop Inc. v. Canada (Deputy Minister of National Revenue (Customs & Excise))*, [1992] O.J. No. 1466 (Gen.Div.) per Hayes, J..

36. The trial judge in the instant case stated that “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.” In making this statement, the trial judge relied on two discriminatory beliefs. First, he assumed that sexually explicit LGBT materials are more likely to violate the obscenity standard than heterosexual materials. Yet there is no evidence that lesbian and gay materials are more likely to be obscene than in materials produced for heterosexual men. The second erroneous belief is that lesbian and gay men are primarily defined by their sexual practices. As author Jane Rule stated at trial:

31 ...I bitterly resent the attempt to marginalized, trivialize and even criminalize what I have to say because I happen to be a lesbian; I happen to be a novelist;...the assumption is therefore that there must be something pornographic because of my sexual orientation, and I think that is a shocking way to deal with my community. Of course we have

1 writers who are writing erotica and so they should. I celebrate that. But we are not a community churning out sex tracts. We are a community speaking with our passion, our humanity in a world that is so homophobic that it sees us as nothing but sexual creatures instead of good Canadian citizens, fine artists, and brave people...**A. R.** vol.X p.1727.

Reason for Decision ( Smith, J.) **A.R.** vol.1 p.134; Christopher Nowlin, "The Relevance of Stereotypes to a Section 15 Analysis in *Little Sisters Book and Art Emporium et al v. Min. of Justice et al* (1996) 30 U.B.C.L. Rev 333.

**3(d) Artistic, Literary, Scientific and Educational Merit**

11 37. In *Butler* this Court also stated that materials were not obscene if they satisfied the "internal necessities test", that is, if they have artistic, literary, educational or scientific merit. The Court also held that if there was any doubt whether materials fell into this category, that doubt should be resolved in favour of not prohibiting the materials. LEAF submits that the internal necessities test assumes heightened significance where minority sexual expression is impugned.

*R. v. Butler*, [1992] 1 S.C.R. 452 at 486, 505.

38. The evidence at the Little Sisters trial establishes that Canada Customs agents, at every level of the re-determination process, do not even attempt to assess the merit of the materials they are judging. The first level Customs Inspectors are "... not trained in literary [sic], and they wouldn't do that, they wouldn't judge for its literal [sic] merits." One Commodity Specialist, the second  
21 level of decision making in the internal re-determination process, did not recognize either Jane Rule or Marguerite Duras as internationally known authors. The same specialist also testified that "It is not for me to say, I don't determine purposes of a book, I just establish that it's not the undue exploitation of sex." A Tariff and Value Administrator, the decision maker at the third level, stated that "he was not well versed in literary matters". Even the Director General of the Tariff Programs Division, John Shearer, testified that "we do not hold ourselves out to be literary or artistic experts. We do the best we can...and reach a reasoned opinion on whether the article meets the tests of D-1-1 or not".

**A.R.** vol.IX pp1424, 1523, 1650, 1519, 1558, 1666.

1 *3(e) National Community Standards of Tolerance Test*

39. In *Butler*, the Court re-articulated the community standard of tolerance test as what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. This test is also used to determine whether the impugned materials have merit. This Court affirmed earlier jurisprudence that the standard was a national one and not the standards of small segments of the community.

*R v. Butler*, [1992] 1 S.C.R. 452 at 476 and 484-485.

40. LEAF submits that the national community standard of tolerance test should be rejected. This test obscures the two inquiries required for an obscenity analysis, that is, whether the materials pose a substantial risk of harm and whether they have merit. It also unnecessarily  
11 references, by using the same language, the standard and therefore the jurisprudence for the morality-based obscenity standard. Therefore it can operate as a mechanism to reintroduce the constitutionally discredited values of that standard into the analysis.

41. LEAF also submits that the inherently majoritarian analysis of national community standard of tolerance test is ill-suited to analyze materials which are of fundamental importance to the social, emotional, sexual, and political life of a disadvantaged minority and moreover, it is contrary to the letter and spirit of this Court's post-*Butler* equality jurisprudence. This Court has also recognized the systemic and long-standing discrimination against lesbians and gay men. It  
21 has held that when evaluating claims of discrimination that "the appropriate perspective is not solely that of a 'reasonable person'—a perspective which could through misapplication serve as a vehicle for the imposition of community prejudices."

*Egan v. Canada*, [1995] 2 S.C.R. 513 at 546 para 41; *Law v. Canada*, [1999] 1 S.C.R. 497 at paras 59-61; *M. v. H.*, S.C.C. No 25838, May 20, 1999 at para 67; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at paras 65-66.

42. Reliance on majoritarian community standards may justify importation of anti-lesbian community prejudices (under the guise of "established truths") directly to the heart of obscenity

1 law. For example, a study of the attitudes of Canada Customs officers by Dr. W. Marshall, an expert witness called by the Crown in the case at bar, established that 20 per cent Customs officers might be homophobic. Dr. Carole Vance testified at trial that "those who find homosexual practice and behaviour reprehensible or dangerous or immoral are very concerned to restrict either information or imagery that alludes or represents that behaviour." Given the prevalence of lesbophobia, homophobia and heterosexism in Canadian society, lesbian materials, whether or not they are about sexuality, are more likely to be viewed as obscene.

A.R. vol.X pp1845-47; vol.III p.420.

#### 4. Section 1

11 43. LEAF submits that the objective of preventing violence against women and children, and of preventing harm to the equality interests of women, children and other vulnerable groups resulting from the dissemination of certain sexual materials, is pressing and substantial.

44. However, LEAF submits that the infringement of the equality and expression rights of lesbians and gay men is not justifiable. The Crown led no evidence to show that the rights impairment was "carefully tailored so that rights are impaired no more than necessary". The Customs regime lacks basic procedural protections. It does not provide importers the opportunity to see materials which are alleged to be obscene or to present evidence and argument as to whether they are harmful or have merit. Customs officials lack the time and expertise to assess complex issues.

21 *RJR MacDonald v. Canada*, [1995] 3 S.C.R. 199 at para 160;vol.II p.304.

45. As a result, in a societal context of pervasive lesbophobia, homophobia and heterosexism, the process mandated by the Customs regime will necessarily result in the discriminatory targeting, miscategorization, and ultimate suppression of lesbian and gay materials. The record shows that for years virtually the entire stock of a lesbian and gay bookstore was detained and reviewed by Canada Customs officials. This degree of scrutiny is not, and never could be, minimal impairment of free expression and equality rights.

1 46. Moreover, while there may be salutary effects of Customs' enforcement of obscenity law (this is unclear on the record), the deleterious effects of such enforcement on lesbian and gay bookstores, individuals and LGBT communities are devastating. The suppression of lesbian materials which are protected under the *Charter* exacerbates the systemic suppression of lesbian voices and identities. Lesbians and their communities, and the wider Canadian society, are denied access to the legitimate and constitutionally protected expression of lesbians.

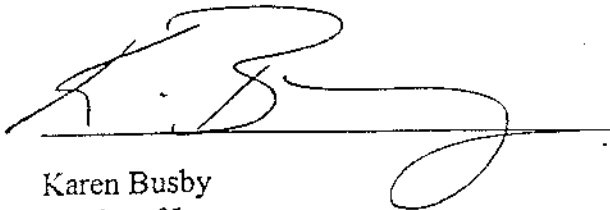
### 5. Remedy

11 47. The discriminatory suppression of lesbian expression, contrary to the free expression and equality rights of the *Charter*, is an inevitable result of the process established by the Customs regime. Sensitivity training for individual Customs officers cannot sufficiently remedy the structural inadequacies of the current regime nor can such training create the necessary evidentiary context within which obscenity determinations must be made. LEAF therefore submits that the appropriate remedy is to strike down the impugned regime pursuant to section 52 of the *Charter*.

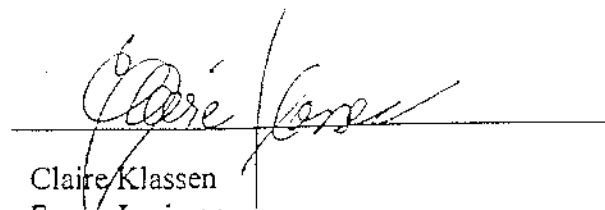
### Part IV: Order Requested

48. The intervener, the Women's Legal Education and Action Fund (LEAF) respectfully requests that this Court grant an order that the Customs regime to be declared of no force and effect under section 52 of the *Charter*.

21 All of which is respectfully submitted by Counsel for the Women's Legal Education and Action Fund (LEAF)



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31 DATED: September 27, 1999



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- Ann Scales, "Avoiding Constitutional Depression: Bad Attitudes and the Fate of *Butler*" (1994) *CJWL/RFD* 349 (LEAF Book of Authorities at Tab 29) 30
- Terry Hoople, "Conflicting Visions: SM, Feminism, and the Law. A Problem of Representation" (1996) *CJLS/RCDS* 177 (LEAF Book of Authorities at Tab 30) 33

**Appendix I : References for the Sampling of Materials  
Detained and/or Prohibited By Canada Customs**

**1. Artistic Works (Reproductions or Commentary)**

- a. Kiss and Tell, Drawing the Line, A.R. vol.V, pp 919-920 [Exhibit 157] [Original Material--Exhibit 22].
- b. Tom of Finland, vol. VI, p.970; vol. IX p.1470; Ex.3b [Original Material (books)--Exhibit 29, 30] [Original Material (video)--Exhibit 152].
- c. Della Grace, *Love Bites*, A.R. vol. X, p. 1747 [Exhibit 46].

**2. Sex Education Manuals**

- a. Wendy Caster, *The Lesbian Sex Book*, vol.VI, p.1025; Ex.3b Tab 78.
- b. Charles Silverstein, *The Joy of Gay Sex*, J. Moldenhauer, A.R. vol.IV, p. 527.
- c. Pat Califia (ed.), *The Lesbian S/M Safety Manual*, A.R. vol.X, p.1747 [Exhibit 46] [Original Material--Exhibit 41].
- d. Jack Hart, *Sex: A Manual for Men Who Love Men*, A.R. vol.X, p.1746 [Exhibit 46].

**3. Novels and Literary Works**

- a. Marguerite Duras, *The Man Sitting in the Corridor*, C. Bird, A.R. vol.IX, p.1523 [Original Material--Exhibit 238].
- b. Jean Genet, *Querelle*, J. Deva, A.R. vol.IV, p.512.
- c. Jane Rule:
  - i. *Contract With the World*, Reasons for Judgment, A.R. vol.I, p. 124 at para 111 [Original Material--Exhibit 141] and
  - ii. *The Young in One Another's Arms*, A.R. vol. X, p.1727 [Original Material--Ex.140].
- d. Sarah Schulman, *Girls, Vision and Everything* vol.IV p.533.
- e. Pauline Réage, *The Story of O*, A.R. vol. IV, p. 683 [Exhibit 46].
- f. Dorothy Allison, *Trash*, vol. X, p.1763.
- g. Joe Orton, *Prick Up Your Ears*, Exhibit 3b.
- h. Kathy Acker, *Empire of the Senseless*, A.R. vol.IX, p. 1143 [Original Material--Ex. 235].

**4. Anthologies and Edited Collections of Essays**

- a. Sarah Holmes and Karen Barber, *Testimonies: Lesbian Coming Out Stories*, A.R. vol.6 p.1025 [Exhibit 3b.].
- b. Carol Beder, *Unbroken Ties: Lesbian Ex-Lovers*, A.R. vol.6 p.1025 [Exhibit 3b.]
- c. bell hooks, *Black Looks, Race and Representation*, vol.6 p.1025 [Exhibit 3b.]
- d. Hannah Alderfer, *Caught Looking: Feminists, Pornography and Censorship*, vol.VI, p.970, 1002-05 [Exhibit.15, 28];
- e. Joseph Beam, *In the Life: A Black Gay Anthology*, vol.VI, p.1061, Exhibit 112.
- f. Richard Mohr, *Gay Ideas: Outing and Other Controversies* A.R. vol.VI, pp 968,1002-05 [Exhibit 15] [Original Material--Exhibit 21].
- g. Henry Abelove et al, *The Lesbian and Gay Studies Reader*, vol.IX p.1440.

**5. Anthologies and edited collections of short stories**

- a. Susie Bright (ed.), *Herotica*, L.Hager, A.R. vol.IV, p.533-34, 682 [Original Material--Ex. 107].
- b. Karen Barber (ed.):
  - i. *Bushfire: Stories of Lesbian Desire*, A.R. vol.VI, p. 969 [Exhibit 15] [Original Material - Exhibit 27] and
  - ii. *Afterglow: More Stories of Lesbian Desire*, A.R. vol.VI, p. 969 [Exhibit 15] [Original Material--Exhibit 34].
- c. David Leavitt, *A Place I've Never Been*, A.R.vol. X, p.1696.
- d. Pat Califia (ed.) *Melting Point*, A.R. vol.VI, p. 969 [Ex.15] [Original Material--Exhibit 17].

**6. Periodicals**

- a. *The Advocate*, J. Deva, A.R. vol.III, p. 365; A.R. vol.IV, p. 683 [Exhibit 46].
- b. *Deneuve*, vol.III, p.467 [Exhibit 104].
- c. *The New York Native*, J. Deva, A.R. vol.III, p. 365.
- d. *Quim: For Dykes of All Persuasions*, A.R. vol.IV, p.561 [Exhibit 86] [Original Material--Exhibit 93].
- e. *Bad Attitude*, J.. Deva, A.R. vol.IV, p. 514; A.R. vol.X, p. 1746 [Exhibit 46] , A.R. vol.IV, p.625 [Exhibit 99] [Original Material - Exhibit 134].
- f. *Hothead Paisan*, A.R. vol.IV, p. 539 [Original Material--Exhibit 80].