Department of Justice Canada
Ministère de la Justice Canada

LITIGATION SUPPORT RESEARCH REPORT

PREPARING AND TENDERING SECTION 1 *CHARTER* EVIDENCE: *LITTLE SISTERS BOOK AND ART EMPORIUM* V. *THE MINISTER OF JUSTICE*

Dan Kiselbach, Counsel
Vancouver Regional Office

1995

LR1995-3e

Research, Statistics and Evaluation Directorate/
Direction générale de la recherche,
de la statistique et de l'évaluation

Policy Sector/Secteur des politiques

Canada

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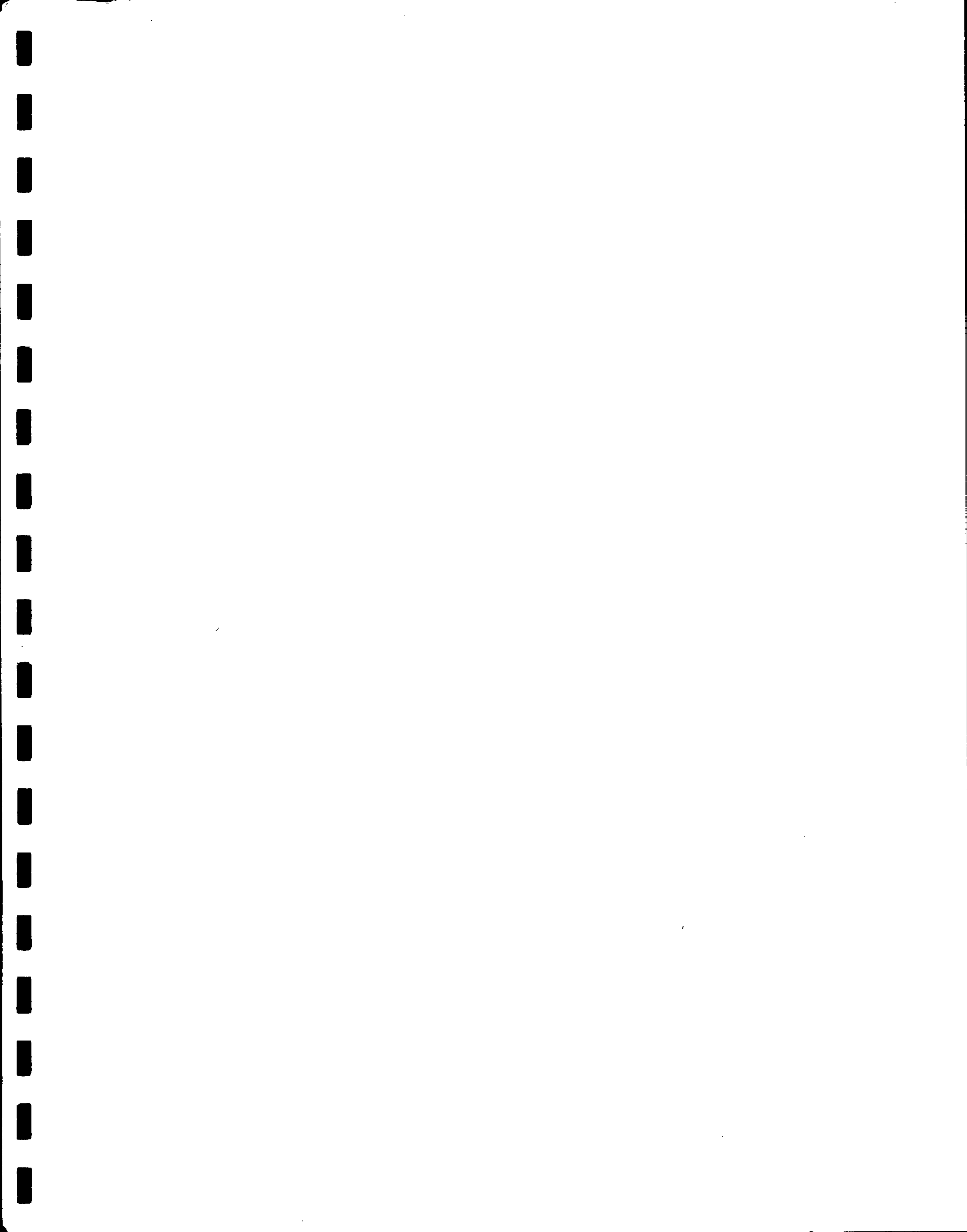

TABLE OF CONTENTS

EXECUTIVE SUMMARY v

1.0 INTRODUCTION 1

2.0 THE NATURE OF THE ACTION IN LITTLE SISTERS 1
- 2.1 The Position of the Plaintiffs 1
- 2.2 The Canadian Government's Position 2
- 2.3 The British Columbia Government's Position 3
- 2.4 Procedural History 3

3.0 THE SECTION 1 TEST 4

4.0 THE PRECEDENTIAL EFFECT OF *R.* v. *BUTLER* 5

5.0 ENTERING SECTION 1 *CHARTER* EVIDENCE IN LITTLE SISTERS 8
- 5.1 Use of Brandeis Briefs in Constitutional Cases 9
- 5.2 Rules of Evidence Regarding Proof of Legislative Facts are Completely Relaxed 10
- 5.3 Legislative Fact Material Must be Received as Evidence as it Cannot be Referred to in the Guise of Authorities 12

6.0 WRITTEN BRANDEIS BRIEF MATERIALS 13
- 6.1 Social Scientific Literature 13
- 6.2 House of Commons Debates and Official Reports Filed in *Butler* Showing that the Objective of the Legislation is Pressing and Substantial 15
- 6.3 Statistical Information Regarding the Attitudes of Canadians 17
- 6.4 Legislative History of the *Customs Act* 18
- 6.5 International Agreements 18
- 6.6 Foreign Legislation, Policy Regarding the Application of Foreign Legislation and Articles Regarding the Operation of Foreign Legislation 20

7.0 WALKING, TALKING BRANDEIS BRIEFS 22
- 7.1 Customs Evidence 23
- 7.2 Police Evidence 24

7.3 Using Section 37 of the *Canada Evidence Act* to Restrict the Cross Examination of Police Witnesses Providing Section 1 Evidence 25
7.4 Expert Evidence 27

8.0 CONCLUSION 28

EXECUTIVE SUMMARY

This paper discusses the nature of the evidence that was gathered, the arguments made regarding the admission of evidence and the rulings that were made by the court in connection with the tendering of evidence of legislative or constitutional facts in *Little Sisters Art Emporium* v. *The Minister of Justice*. The legislative or constitutional fact evidence was particularly relevant to the section 1 *Charter* defence that was advanced in this case.

There is an important distinction in constitutional cases between *adjudicative* facts, which are the facts in dispute before the Court between the parties and *legislative* or *constitutional* facts, which relate to the constitutionality of the impugned legislation. In the case of legislative facts, the rules of evidence are completely relaxed. The presentation of legislative facts was first accomplished by Louis Brandeis through the use of the so-called Brandeis Brief in *Muller* v. *Oregon* in 1908. A Brandeis Brief of legislative fact evidence is received through an expanded doctrine of judicial notice.

At trial, constitutional evidence was tendered in the form of Brandeis Brief material that had been compiled in connection with this case. Both the plaintiffs and the defendants also called witnesses to introduce legislative fact evidence at trial. The Brandeis Brief method of tendering legislative fact evidence seems to be preferred in British Columbia, however, for various reasons including judicial economy. It is suggested that litigators who are engaged in the process of marshalling legislative or constitutional fact evidence may find it useful to try to obtain litigation support from various sources to assist in the investigation and compilation of legislative facts.

SOMMAIRE

Le présent document examine la nature des éléments de preuve recueillis, l'argumentation présentéé concernant l'admissibilité des éléments de preuve et les décisions prises par le tribunal concernant la présentation des éléments de preuve sur les faits législatifs ou constitutionnels dans l'affaire *Little Sisters Art Emporium c. Ministre de la Justice*. Les éléments de preuve sur particulièrement pertinents en ce qui a trait au moyen de défense fondé sur l'article premier de la *Charte* qui a été soulevé dans cette affaire.

Il existe une distinction importante dans les affaires constitutionnelles entre les faits *d'intérêt privé*, c'est-à-dire les faits contestés par les parties devant le tribunal et les faits *législatifs ou constitutionnels* qui concernant la constitutionnalité de la législation contestée. Dans le cas des faits législatifs, les règles de preuve sont totalement assouplies. La présentation des faits législatifs a d'abord été faite en 1908, dans l'affaire *Muller* v. *Oregon*, par Louis Brandeis, qui a utilisé ce qu'on appelle le Mémoire Brandeis dans l'affaire *Muller* v. *Oregon*. Un Mémoire Brandeis des éléments de preuve de faits législatifs est admis en vertu de la règle étendue de la connaissance d'office.

Lors du procès, la preuve constitutionnelle a été présentée sour la forme d'un Mémoire Brandeis comportant de la documentation qui avait été recueillie en rapport avec cette affaire. Les parties demanderesses et les parties défenderesses ont également assigné des témoins en vue de présenter des faits législatifs au procès. Toutefois, la méthode de présentation des faits législatifs au moyen du Mémoire Brandeis semble être préférée en Columbie-Britannique pour plusieurs raisons, y compris les économies. On propose que les parties à un litige qui envisagent de présenter des éléments de preuve sur des faits législatifs ou constitutionnels pourraient tirer profit de tenter d'obtenir de l'aide de diverses sources afin d'enquêter et de receuillir les faits législatifs.

1.0 INTRODUCTION

One of the most controversial issues of our time is whether the government should have the power of censorship.[1] The question of whether or not the government of Canada should be entitled to prohibit certain forms of speech was the focus of the trial in *Little Sisters Art Emporium* v. *The Minister of Justice*. In *Little Sisters*, the customs legislation that served to prohibit the importation of obscenity was itself on trial. *Little Sisters* is unusual since at trial Department of Justice Canada counsel were concerned with introducing evidence in defence of the legislation, pursuant to section 1 of the *Charter*. This paper will discuss the nature of the section 1 evidence that was gathered, the arguments made regarding the admission of section 1 evidence and rulings that were made by the court in connection with the tendering of section 1 evidence in *Little Sisters*.[2]

2.0 THE NATURE OF THE ACTION IN LITTLE SISTERS

2.1 The Position of the Plaintiffs

Little Sisters Book and Art Emporium is a store identified at trial as a focal point for the downtown Vancouver gay community. Among other things, Little Sisters imports pornography that appears to be directed toward a gay audience. It also imports items that its proprietors or managers know have been previously prohibited entry into Canada on the grounds that it is obscene. Little Sisters and

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* This paper was prepared at the request of Dr. Louise Potvin, Coordinator, Litigation Support Coordinating Committee, Department of Justice Canada. It was presented to Department of Justice social scientists, lawyers and other staff in Ottawa on June 14, 1995 during a training session on the tendering of section 1 *Charter* evidence. I am very grateful to Dr. Potvin for her assistance in providing comments on this paper while it was in draft form. I am also grateful for the comments of George Dolhai, counsel, Human Rights Section, Department of Justice, who provided his comments on this paper after it was presented. I also wish to acknowledge the contribution of Nicola Wright, Research Assistant, Department of Justice, for her assistance in editing the final draft. I am, of course, solely responsible for the content of this paper.

[1] In *R.* v. *Butler*, [1992] 1 S.C.R. 452 (S.C.C.) at 460-461 Mr. Justice Sopinka noted that the court was required "to address one of the most difficult and controversial contemporary issues, that of determining whether, and to what extent, Parliament may legitimately criminalize obscenity."

[2] Mr. Justice Smith of the B.C. Supreme Court has not delivered judgment in this case, nor has he ruled on the admissibility of some of the s. 1 evidence tendered at trial. It is quite possible that this case could go to the British Columbia Court of Appeal. Since the matter is *sub judice* I will only provide a very general outline as to how evidence was marshalled to meet the main issues in this case.

other persons strongly object to the exercise by Canada Customs of the power to prohibit the importation of items that are deemed to be obscene. They say that the customs legislation that serves to prohibit the importation of obscenity into Canada is unconstitutional, and seek a declaration that the legislation is of no force and effect.[3]

Among other things the plaintiffs say that this legislation is an unconstitutional limitation of their *Charter* rights including section 2(b) "freedom of expression". The owners of Little Sisters have also suggested that the legislation is an unconstitutional infringement of their section 15 *Charter* rights. Essentially, they say that the law that serves to prohibit the importation of obscenity is applied by customs officers in a manner that targets material directed to a gay audience.

Further they suggest that some types of material that Little Sisters imports, for example, material relating to sadomasochism, takes on special importance to members of the gay community. To the extent that the customs legislation serves to prohibit material having a special importance to members of the gay community, they argue that this is an unconstitutional interference with their section 15 *Charter* rights.

2.2 The Canadian Government's Position

The Canadian government admits that the customs legislation limits Little Sisters' section 2(b) *Charter* rights. However the government alleges that legislation that provides customs officers with the power to prohibit the entry of obscenity should be regarded as an exercise of national sovereignty and national self-protection and is demonstrably justified pursuant to section 1 of the *Charter*.

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[3] Section 114 of the *Customs Tariff* states that:

> The importation into Canada of any goods enumerated or referred to in Schedule VII is prohibited.

Tariff code 9956 of *Schedule VII* to the *Customs Tariff* refers to the following goods:

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

S. 163(8) of the *Criminal Code* indicates that:

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

Further the government denied any infringement of the Plaintiffs' section 15 *Charter* rights. In particular, it denied that any material that fell under the category of obscenity took on special importance to members of the gay community.

2.3 The British Columbia Government's Position

The Attorney General for the province of British Columbia intervened in this case as the province saw that the outcome of this case could have an impact on the province's right to cut, classify and licence films pursuant to the British Columbia *Motion Picture Act.*

2.4 Procedural History

Little Sisters had been scheduled to go to trial in the fall of 1993. Just before trial the Plaintiff's counsel filed 20 affidavits relating to the issues in this case. Department of Justice Canada counsel sought an adjournment in order to properly prepare the case in the face of this new affidavit material. Much of the affidavit material contained opinion evidence specifically tailored in an apparent attempt to show that the customs legislation impugned in this case was not a reasonable limitation pursuant to section 1 of the *Charter*.

It had taken several years to get the case to court. The government was criticized in the media for seeking an adjournment of this matter. In the face of this criticism those handling the case for the government understood that the new trial dates would have to be regarded as being peremptory in nature. The criticism was unfair since it was the plaintiff's decision to file additional affidavits at the last minute prior to trial. This changed the evidentiary terrain of the case and necessarily meant that Department of Justice Canada counsel needed an adjournment to properly prepare the case. The trial was re-scheduled to commence October 3, 1994 and to run until Christmas.

By the spring of 1994 a Department of Justice Canada counsel assigned to this case, Mary Humphries, had been elevated to the British Columbia Supreme Court. The other counsel, Harry Wruck, Q.C. was required full time on a massive piece of environmental litigation. New counsel had to be found to assume conduct of this matter.

Hans Van Iperen, Q.C. assumed the role as lead counsel. Nina Sharma was assigned as a legal agent to work up the file. In the late spring of 1994 I was asked if I could assist by developing the section 1 brief. While I agreed to do so it was not entirely clear to me what a section 1 brief was or how section 1 evidence could be

tendered in court. I started developing the section 1 *Charter* brief in May of 1994. The deadline for providing notice of all section 1 material to plaintiffs' counsel was the end of August, 1994.

3.0 THE SECTION 1 TEST

The Supreme Court of Canada has made several statements as to the nature of the analysis to be conducted pursuant to section 1 of the *Charter*. The analysis to be conducted in determining the reasonableness of a limit has been established by this Court in numerous cases, the seminal one being *R.* v. *Oakes*[4].

To establish that a limit is reasonable and demonstrably justified in a free and democratic society the Court must be satisfied of two criteria.

> First, the legislative objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. The objective must be pressing and substantial before it can be characterized as sufficiently important to justify the restriction on the right or freedom. Second, once a sufficiently important objective is established, the party seeking to invoke section 1 must show that the means chosen are reasonable and demonstrably justified in a free and democratic society. This involves a "proportionality test". In this part of the test, courts balance the interests of society with those of individuals or groups. There are three important components to the proportionality test: (1) the measures adopted must be rationally connected to the achievement of the objective in question; they must not be arbitrary, unfair or based on irrational consideration, (2) the means chosen, even if rationally connected to the objective, must impair as little as possible the right and freedom in question, and (3) there must be a proportionality between the effects of the measures responsible for limiting the charter right or freedom, and the objective which has been identified as being pressing and substantial[5]

The Supreme Court of Canada in *Dagenais* v. *CBC* recently rephrased the third part of the proportionality test outlined in Oakes as follows:

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[4] [1986] 1 S.C.R. 103.

[5] Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123 at 1190.

> ...there must be a proportionality not only between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, but also between the deleterious and salutary effects of the measures.[6]

The categories of the *Oakes* approach are simply to provide an analytical framework. No bright line separates one aspect of the analysis from the other.[7] The test under section 1 of the *Charter* is not to be mechanically applied but invites flexibility.

Evaluation of whether a limit is demonstrably justified under section 1 will differ depending on whether the rights of a person have been infringed by the state as "singular antagonist" (as in the criminal law context) or by the state acting to reconcile the claims of competing individuals or groups or to allocate scarce government resources. In the criminal law context it is possible to determine with a degree of accuracy if the impugned law is the least drastic means for achieving the state interest. Where the state is acting to reconcile the claims of competing individuals the same degree of certainty may not be achievable.[8]

4.0 THE PRECEDENTIAL EFFECT OF *R.* v. *BUTLER*

The task of obtaining and filing s.1 *Charter* evidence was made easier by the Supreme Court of Canada's decision in *R.* v. *Butler*. This is because *Butler* decided the issue of whether or not section 163 of the *Criminal Code* (which defines obscenity and criminalizes the publication, distribution and circulation of obscenity) was a reasonable limit on freedom of speech guaranteed by section 2(b) of the *Charter*.

Mr. Butler, an owner of an "adult video/visual club" was prosecuted on various counts of selling obscene material, possessing obscene material for the purpose of distribution and exposing obscene material to the public view contrary to section 163 of the *Criminal Code*. The trial judge indicated that: (1) obscenity was protected by section 2(b) of the *Charter*; (2) a law limiting a *Charter* freedom must have a purpose other than controlling morals or encouraging decency and must be directed at protecting equality if it is to be saved under section 1 of the *Charter*; and, (3) section 163 of the *Criminal Code* did not, on its face, contravene the *Charter* but might be interpreted in a manner resulting in a contravention. He convicted Butler on charges where he was of the view that the material had been legitimately proscribed according to section 1 of the *Charter*.

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[6] *Dagenais* v. *CBC*, [1994] 3 S.C.R. 835 at 839.

[7] *Canada (Human Rights Commission)* v. *Taylor*, [1990] 3 S.C.R. 892 at 925.

[8] *United States of America* v. *Cotroni* [1989] 1 S.C.R. 1469 and *Stoffman* v. *Vancouver General Hospital* (1990), 3 S.C.R. 483.

The Manitoba Court of Appeal allowed the Crown appeal and entered convictions against Mr. Butler on all counts. The parties agreed that the trial judge misdirected himself in that he focused the section 1 inquiry on the material in question as opposed to section 163 of the *Criminal Code*. Huband J.A., for the majority, indicated all the materials were obscene and constituted "purely physical" activity and not protected speech pursuant to section 1 of the *Charter*. The majority therefore did not enter into any section 1 *Charter* inquiry.

On appeal to the Supreme Court of Canada, Sopinka J. writing for the a majority of the judges hearing the case, indicated that section 163 of the *Criminal Code* is a limit on freedom of speech guaranteed by section 2(b) of the *Charter*. He concluded that section 163 of the *Criminal Code* was saved pursuant to section 1 of the *Charter* and directed a new trial on all charges. The essence of the section 1 analysis was as follows.

The objective of section 163 was characterized as being the avoidance of harm to society rather than moral disapprobation, although, as Sopinka J. explained, the notions are connected.

> First, the notions of moral corruption and harm to society are not distinct, as the appellant suggests, but are inextricably linked. It is the moral corruption of a certain kind which leads to the detrimental effect on society. Second, and more importantly, I am of the view that with the enactment of section 163, Parliament explicitly sought to address the harms which are linked to certain types of obscene materials. The prohibition of such materials was based on a belief that they had a detrimental impact on individuals exposed to them and consequently on society as a whole. Our understanding of the harms caused by these materials has developed considerably since that time; however this does not detract from the fact that the purpose of this legislation remains, as it was in 1959, the protection of society from harms caused by the exposure to obscene materials.[9]

Evidence before the Court indicated that the danger of obscenity lies in the prospect that it "attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable."[10] With this in mind, Sopinka J. held that the objective of avoiding harm associated with the dissemination of obscenity (materials that

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[9] *Butler*, *supra* at 494 - 495.

[10] *Standing Committee on Justice and Legal Affairs* (MacGuigan Report), *Report On Pornography* (Ottawa: Minister of Supply and Services Canada, 1978); see also *R.* v. *Red Hot Video Ltd.* (1985), 45 C.R. (3d) 36 (B.C.C.A.); *Agreement for the Suppression of the Circulation of Obscene Publications*, Convention for the Suppression of the Circulation of and Traffic in Obscene Publications (United Nations, 1950).

seriously offend values fundamental to our society) is sufficiently pressing and substantial to warrant some restriction on full exercise of the right to freedom of expression.

In examining whether section 163 of the *Criminal Code* was a proportionate measure Sopinka, J. noted that obscenity "does not stand on an equal footing with other kinds of expression which directly engage the 'core' of the freedom of expression values, is most often motivated by economic profit and often depicts women, particularly, as being without human character or identity."[11]

On the issue of whether criminalizing obscenity is rationally connected to the objective of preventing harm Sopinka J. referred to several official reports. He noted that, unlike the MacGuigan Report, the *Report of the Special Committee on Pornography and Prostitution* (Fraser Committee Report)[12] could not show a causal relationship between pornography, the commission of violent crimes, child sexual abuse or the disintegration of communities and society. He also referred to the *Final Report of the U.S. Attorney General's Commission on Pornography*[13] (Meese Commission Report), and concluded that:

> While a direct link between obscenity and harm to society may be difficult, if not impossible, to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs.[14]

Sopinka J. characterized the competing social scientific evidence as being "inconclusive".[15] Yet he found a sufficiently rational link between the criminalization of obscenity and the objective because, he noted, Parliament was entitled to have a "reasoned apprehension of harm" resulting from the desensitization of individuals exposed to obscenity.[16]

Regarding minimal impairment, he indicated that: (a) the provision is designed to catch material that creates a risk of harm to society; (b) materials that have scientific, artistic or literary merit are not captured; (c) Parliament has unsuccessfully attempted to more precisely define the notion of obscenity; and, (d) section 163 does not reach private use or viewing of obscene materials.

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[11] *Butler, supra* at 500 where Sopinka J. adopts a passage written by Shannon J. in *R.* v. *Wagener* (1985), 43 C.R. (3d) 318 at 331.

[12] (Ottawa: Supply and Services Canada, 1985).

[13] (Washington, D.C.: U.S. Department of Justice) 1986.

[14] *Butler, supra* at 502.

[15] *Butler, supra* at 502.

[16] *Butler, supra* at 504.

In dealing with the question of balance between the effects of the limiting measure and the objective, Sopinka J. noted that the infringement is confined to a measure designed to prohibit the distribution of sexually explicit materials that are degrading or dehumanizing or accompanied by violence. The objective of the legislation in preventing harm to individuals and groups, such as women and children, is of fundamental importance. The effect of the restriction therefore did not outweigh the importance of the legislative objective.

As the prohibition of the importation of obscenity is anchored in the *Criminal Code*, definition of obscenity Department of Justice Canada counsel in *Little Sisters* were in a position to rely on the findings of *Butler*. In particular, *Butler* decided the issue of whether it was reasonable for Parliament to apprehend that harm to society will occur as a result of the dissemination of pornography. This is relevant to the issue of whether a prohibition on the importation of obscenity meets a "pressing and substantial concern" (the objective element of the *Oakes* test).

It was recognized, however, that counsel for the plaintiffs would attempt to distinguish *Little Sisters* from *Butler*, would introduce evidence to suggest that the law should not be saved pursuant to section 1 of the *Charter* and would not accept that *Butler* had decided the issue of whether it was reasonable for Parliament to conclude that harm will occur as a result of the dissemination of all forms of pornography. In particular, it was expected that the plaintiff's counsel would argue that particular forms of pornography, especially gay male pornography and sadomasochistic pornography should be viewed differently than pornography that is directed at a straight male audience. One argument is that a feature of gay pornography is the absence of the exploitative power relationship that permeates pornography directed at a heterosexual audience. Further the plaintiff's counsel has suggested that it is naive to assume that sadomasochistic pornography is "violent" and nonconsensual. Rather, the plaintiffs suggest that much of this material should be viewed as "sexual theatre" involving models who consent to engage in sadomasochistic activities.

5.0 ENTERING SECTION 1 *CHARTER* EVIDENCE IN LITTLE SISTERS

At trial, I sought to enter the section 1 evidence in the form of Brandeis Brief material that I had compiled in connection with this case. The presentation of legislative facts was first accomplished by Louis Brandeis through the use of the so-called Brandeis Brief in *Muller* v. *Oregon* in 1908.[17] The Brandeis Brief in that case contained extensive

[17] *Muller* v. *Oregon*, 208 US 412 (1908); cited in William H. Charles et al., *Evidence and the Charter of Rights and Freedoms*, (Toronto: Butterworths, 1988) at 113.

social science data of books, articles, reports of committees, testimony before congressional committees, reports of the State of Municipal officers and agencies.[18]

In *Little Sisters*, the plaintiff's counsel objected to the admission of this material on the grounds that it could not possibly be entered as evidence but should be treated akin to "authorities" for the court's guidance.

I did not accept this view and when I indicated that the material should be received as evidence, the Court asked for full argument on this issue. In the course of argument the plaintiff's counsel conceded that much of what I submitted could be received as section 1 "evidence". He maintained his objection to the reception of social science and scholarly articles as well as the policy material pertaining to how foreign legislation was applied in other countries. The material was received by the court subject to a ruling on its admissibility as evidence.[19]

5.1 Use of Brandeis Briefs in Constitutional Cases[20]

Mr. Justice Strayer has indicated that *Charter* decisions should not be made in a vacuum and that the court is performing a legislative function when it deals with the validity of a statute in the sense that its decision affects not only the parties involved, but the public at large and that the decision may involve questions of policy.[21]

Legislative or *constitutional* facts are necessary for the court to properly deal with the issues of whether or not the impugned legislation, which limits the freedom of expression guaranteed by the *Charter*, is reasonable and demonstrably justified as

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[18] William H. Charles, *Evidence and the Charter of Rights and Freedoms*, *supra* at 113.

[19] Since we have not received a ruling from Mr. Justice Smith on the admissibility of certain Brandeis Brief material it would be prudent to heed the cautionary note of George Dolhai, counsel, Human Rights Section that counsel should try to muster section 1 *Charter* evidence in a form that would survive independent of an adverse ruling on the use of a Brandeis Brief. He has noted that Sopinka J. in a question and answer session sponsored by the Department of Justice on April 12, 1995 indicated a need to clarify the distinction between adjudicative and legislative or constitutional facts. This indicates that counsel should be very careful in determining the purpose for which the evidence is being tendered when deciding whether or not it should be tendered as Brandeis Brief material.

[20] I wish to acknowledge the contribution of Harry Wruck, Q.C. General Counsel, Department of Justice, Vancouver Regional Office in the development of the argument regarding the admissibility of Brandeis Brief material.

[21] B. Strayer, *The Canadian Constitution and the Courts*, (3d ed.) (Toronto: Butterworths, 1988) at 274; *Little Sisters Book and Art Emporium* v. *The Minister of Justice*, ruling of the Honourable Mr. Justice Smith, November 8, 1994.

required by section 1 of the *Charter*. In this regard the Court must consider whether the object of the legislation meets a pressing and substantial concern and whether the means adopted are proportionate to the objective in question.

5.2 Rules of Evidence Regarding Proof of Legislative Facts are Completely Relaxed

There is an important distinction in constitutional cases between *adjudicative* facts, which are the facts in dispute between the parties before the Court, and *legislative* or *constitutional* facts, which relate to the constitutionality of the impugned legislation. In the case of legislative facts, the rules of evidence are completely relaxed.[22]

The Ontario Court of Appeal has noted that there are only two limitations with respect to the admissibility of extrinsic evidence in constitutional cases. Such evidence is inadmissible if:

(1) it is inherently unreliable or offends public policy; or

(2) it is tendered for the purpose of assisting in the statutory construction of a provision.[23]

A Brandeis Brief of legislative fact evidence is received through an expanded doctrine of judicial notice.[24] The expansion of the doctrine of judicial notice to facilitate the admission of legislative fact evidence is justified on the grounds of practicality and principle. It is a very practical and perhaps the only realistic way to inform the court of a wide range of material. This is because any attempt to inform the court by ordinary means would be extremely time consuming and expensive. The kind of material that is admissible as legislative fact evidence is similar to the kind of evidence admissible on a reference. The evidence is essential background information to the impugned limit.[25]

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[22] B. Strayer, *The Canadian Constitution and the Court*, *supra* at 274.

[23] *R.* v. *Seo* (1986), 25 C.C.C. (3d) 385. Mr. Justice Smith made a similar ruling to this effect in *Little Sisters* on November 8, 1994.

[24] *R. v. Bonin* (1989), 47 C.C.C. (3d) 230 (B.C.C.A.); *Muller* v. *Oregon* (1908), 208 US 412. The doctrine of judicial notice is a rule of evidence that facilitates the reception of "notorious facts" by allowing the Court to take notice of them.

[25] Michael Pierce, *Argument and Evidence Under Section 1 of the Canadian Charter of Rights and Freedoms*, (Ottawa: Department of Justice Human Rights Law Section, 1994).

Further, it is not necessary to be as definite about legislative facts as would be the case for adjudicative facts. While the Court must reach a definite conclusion on adjudicative facts, which are relevant to the disposition of litigation, the court need not be so definite with respect to legislative or constitutional facts. That is because legislative or constitutional facts are simply tendered to show whether there is a rational basis for the position that is taken by the government on the issue in dispute.[26]

Legislative fact evidence often fails to meet the traditional requirements of judicial notice that the facts be so notorious as not to be the subject of dispute amongst reasonable persons and are capable of immediate and accurate demonstration by resort to readily accessible sources of information. The admission of legislative fact evidence involves, therefore, the application of an expanded doctrine of judicial notice. As one author has noted:

> It has been argued in Canada that the scope of judicial notice should be expanded to allow courts to judicially notice legislative facts in constitutional cases, which "normally transcend the interests of the immediate parties before the court and frequently involve questions of economic and social fact which either cannot be readily proven by conventional techniques of evidence or are sufficiently obvious that they should not have to be proven. They are obvious in the sense that not everyone can be assumed to know them but that they can be ascertained from reliable sources which would nevertheless not likely pass the conventional admissibility tests for direct evidence.[27]

Courts have taken an extremely liberal approach to the admissibility of legislative fact evidence. In fact, in *Edwards Books and Art Ltd.* v. *The Queen* the Supreme Court of Canada expressed the view that the Court may go so far as to take on the role of an inquisitorial fact finder of legislative fact evidence of social and economic facts.

> ... I do not accept that in dealing with broad social and economic facts such as those involved here the court is necessarily bound to rely solely on those presented by counsel. The admonition in *Oakes* and other cases to present evidence in

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[26] P. Hogg, "Proof of Facts in Constitutional Cases" (1976), 26 *U.T.L.J.* 386 cited in William H. Charles et al., *Evidence and the Charter of Rights and Freedoms, supra* at 112 - 113.

[27] William H. Charles et. al. *Evidence and the Charter of Rights and Freedoms, supra* at 112 - 113.

> *Charter* cases does not remove from the courts the power ... to take judicial notice of broad social and economic facts and to take the necessary steps to inform itself about them.[28]

In the same vein, Lamer J. in *R.* v. *Smith* indicated that he did not feel restricted to admitting section 1 *Charter* evidence submitted by counsel, and referred to and relied upon a report of the Canadian Sentencing Commission more than a year after the Court heard the appeal in that case.[29]

The liberal approach taken with respect to the admission of legislative fact evidence was underscored by the British Columbia Court of Appeal in *R.* v. *Bonin.* In *Bonin* the court squarely addressed the issue of the admissibility of extrinsic evidence contained in a Brandeis Brief first tendered at the appeal level. The court was prepared to take judicial notice of relevant materials of social and economic facts regardless of whether they had been available to the trial judge.

5.3 Legislative Fact Material Must be Received as Evidence as it Cannot be Referred to in the Guise of Authorities

While several courts have taken a liberal approach to the admissibility of Brandeis Brief material as evidence, the Federal Court of Appeal has indicated that it is not appropriate for the Attorney General of Canada to refer to Brandeis Brief material not tendered or received as evidence. The Court indicated that the means for receiving evidence do not include "bootlegging evidence in the guise of authorities".[30]

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[28] *Edwards Books and Art Ltd.* v. *The Queen* (1986), 35 D.L.R. (4th) 1 (S.C.C.) at 72.

[29] *R.* v. *Smith,* [1987] 1 S.C.R. 1045.

[30] *Taylor and Western Guard Party* v. *Canadian Human Rights Commission* (1987), 78 N.R. 180 at 188 - 189.

6.0 WRITTEN BRANDEIS BRIEF MATERIALS

Most of the section 1 Brandeis Brief material filed as evidence in this case was collected, collated and served on the plaintiff's counsel one month prior to the commencement of trial.

6.1 Social Scientific Literature

There appeared to be a dearth of social scientific literature dealing directly with the issue of harm and homosexual or sadomasochistic pornography. However, we found some relevant articles that we filed in the form of a Brandeis Brief. These articles were filed for the purpose of showing that it is reasonable for Parliament to apprehend harm from the dissemination of obscenity directed at a homosexual and sadomasochistic audience.

Cases indicating that the Court could receive this material as evidence included the following. In *R.W.D.S.U.* v. *Saskatchewan*[31] the Supreme Court of Canada considered newspaper articles attached as exhibits to affidavits even though the Saskatchewan Court of Appeal refused to do so. In *R.* v. *Videoflicks Ltd.*[32] the only evidence relating to section 1 of the *Charter* was a report by the Law Reform Commission of Canada[33] issued more than 15 years prior to the Supreme Court of Canada decision, which provided the whole factual basis for upholding the *Ontario Retail Business Holidays Act*[34] pursuant to section 1 of the *Charter*. In *Moge* v. *Moge*[35] Madam Justice L'Heureux-Dubé, dissenting, referred to a great body of

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[31] [1987] 3 W.W.R. 673 (S.C.C.).

[32] (1987), 55 C.R. (3d) 193 (S.C.C.).

[33] Law Reform Commission of Canada, *Report on Sunday Observance Legislation*, (Ottawa: The Commission, 1976).

[34] R.S.C. 1980 c. 453.

[35] (1992), 99 D.L.R. (4th) 456 (S.C.C.).

material relating to the objectives of the *Divorce Act* and the difficulties associated with divorce.[36]

Some of the articles filed in this regard were written by Dr. Malamuth, a very prominent expert in the study of the effects of sexual imagery who was called to provide *viva voce* evidence in support of the position taken by the government of Canada.[37] Other articles filed included scientific research papers[38] and articles presenting theories and points of view.[39] One of the most useful of these articles was written by Christopher Kendall[40] published in a legal journal, which contained a well-reasoned rebuttal to the anticipated arguments to the Plaintiffs' counsel. In it he noted that:

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[36] This was not a section 1 case but the material considered included: Morley Gunderson, Leon Muszynski and Jennifer Keck, *Women and Labour Market Poverty* (Ottawa: Canadian Advisory Council on the Status of Women, 1990); Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (New York: Free Press, 1985); Statistics Canada, "Alimony and Child Support", by Dianne Galarneau in *Perspectives on Labour and Income* (Ottawa: Minister of Supply and Services, 1992); Statistics Canada, *Women in Canada: A Statistical Report* (2nd ed.) (Ottawa: Minister of Supply and Services Canada, 1990); *National Council of Welfare, Women and Poverty Revisited* (Ottawa: Minister of Supply and Services Canada, 1990); Statistics Canada, "Work and Relative Poverty", by John M. Evans and Raj K. Chawla in *Perspectives on Labour and Income* (Ottawa: Minister of Supply and Services Canada, 1990); Board of the Social Assistance Review Committee (Ontario), *Transition* (Toronto: Ministry of Community and Social Services, 1988) and *Report of the Florida Supreme Court Gender Bias Study Commission* (Talahassee: Florida Supreme Court, 1990).

[37] Neil M. Malamuth, et. al. "Testing Hypotheses Regarding Rape: Exposure to Sexual Violence: Sex Differences, and the 'Normality' of Rapists", (1980), 14 *J. Research in Personality* 121; Neil M. Malamuth, "Sexually Violent Media: Thought Patterns and Antisocial Behaviour" (1989), 2 *Public Communication and Behaviour*.

[38] Ford Hickson et al. "Gay Men as Victims of Nonconsensual Sex" (1994), 23 *Archives of Sexual Behaviour*; D. Struckman-Johnson, "Men Pressured and Forced into Sexual Experience", (1994), 23 *Archives of Sexual Behaviour*, Vol. 23(1); Caroline K. Waterman et al., "Sexual Coersion in Gay Male and Lesbian Relationships: Predictors and Implications For Support Services", (1989), 26(1) *The Journal of Sex Research* 118; and Claire M. Renzitti, *Violent Betrayal: Partner Abuse in Lesbian Relationships*, (London: Sage Publications. 1992).

[39] Albert Bandura, *Social Foundations of Thought And Action: A Social Cognitive Theory*, (Englewood Cliffs, New Jersey: Prentice-Hall, 1986); *Against Sadomasochism: A Radical Feminist Analysis*, (East Palo Alto, Calif.: Frog In The Well Press, 1982); and John Stoltenberg, "Gays and the Pornography Movement: Having the Hots for Sex Discrimination", *Men Confront Pornography*, (New York: Crown Publishing, 1990).

[40] Christopher N. Kendall, "Real Dominant, Real Fun!: Male Pornography And The Pursuit Of Masculinity", (1993), 57 *Sask. L.R.* 21.

> Harm in gay male pornography is not eliminated simply because there are no women in it. At a basic level this argument assumes that there is something about men hurting and violating men that makes the resulting assault non-harmful, normal and acceptable - an assumption that only reinforces already dominant assumption about acceptable behaviour and male aggression generally. Sexualized violence is violence and the biological capabilities of the person who harms or is harmed are irrelevant. Harm inherent in straight pornography is not simply its presentation of the biological male violating the biological female. Rather the danger stems from the model of behaviour afforded the biological male and sexualized as normal, gendered (male) behaviour. Power is not dependent on biology. The presentation of "male" as aggressive and dominant, when interpreted to legitimate/normalize power for those socialized to exhibit these characteristics, reinforces values and practices that comprise male superiority and ultimately cause considerable harm for those who become their victims[41] [emphasis in original; references omitted]

In the summer of 1995, Dr. Louise Potvin, Director, Litigation Support Coordinating Committee, provided welcome assistance in researching the issue of whether or not any social scientific research had been conducted, nationally or internationally, that dealt directly with the issue of homosexual and sadomasochistic pornography and the link to harm. Within a month we were advised that no such research had been uncovered. This report gave us further assurance that we were not overlooking any evidence of constitutional or legislative facts.

6.2 House of Commons Debates and Official Reports Filed in *Butler* Showing that the Objective of the Legislation is Pressing and Substantial

A brief of some material filed in *Butler* was generated to ensure that the court in this case had a complete record of the relevant legislative or constitutional facts showing that Parliament had a reasonable apprehension of harm as a result of the dissemination (including the importation) of obscenity.

[41] Kendall, *supra* at 43.

Although it was the position of the government of Canada that *Butler* had established that the objective of preventing harm associated with the dissemination of obscenity is pressing and substantial, Department of Justice Canada counsel wanted, out of an abundance of caution, to provide the court in *Little Sisters* with a full and complete record of all of the relevant constitutional facts. This material included the following:

(1) *Report of the House of Commons Standing Committee on Justice and Legal Affairs, Report on Pornography*[42];
(2) Commons Debates[43];
(3) *Report of the Special Committee on Pornography and Prostitution* (Fraser Report)[44].

Cases (other than *Butler*) that indicated that government reports were admissible included *R.* v. *Lyons*[45] where the Supreme Court of Canada referred to U.S. government reports,[46] and *R.* v. *Corbett*[47] where the Supreme Court considered reports on task forces such as the Federal-Provincial Task Force Report[48] and a Federal Law Reform Commission Report. In *R.* v. *Oakes* the court considered reports relating to drug use and drug trafficking.[49] In *R.* v. *Mortgentaler*[50] the court indicated that one of the most useful sources of information was the Badgley

[42] (Ottawa: 1978).

[43] April 1, 1985 - April 3, 1985.

[44] *Supra*, note 12. This contained information including an R.C.M.P. analysis of the primary source countries for pornography in Canada and a description of the types of concerns voiced by Canadians regarding the dissemination of pornography in general.

[45] [1984] 2 S.C.R. 633 at 659.

[46] For example, *Studies for the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance*, and *Report of the Presidential Commission on Law Enforcement and the Administration of Justice* as cited in *Lyons* at 659.

[47] [1988] 1 S.C.R. 670.

[48] *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* [prepared for the Uniform Law Conference of Canada] (Toronto: Carswell, 1982).

[49] *Report of the Special Committee on Traffic in Narcotic Drugs*, Appendix to Debates of the Senate, Canada, Session 1955; and, *Final Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (Ottawa: 1973).

[50] [1988] 1 S.C.R. 30.

Commission Report, which was established to study whether the procedure provided in the *Criminal Code* was operating equitably across Canada.

In *R.* v. *Whyte*[51] the Supreme Court of Canada considered debates of the House of Commons when legislation was introduced and amended. In *R.* v. *Hufsky*[52] the Supreme Court of Canada considered extracts from Hansard.

6.3 Statistical Information Regarding the Attitudes of Canadians

An independent survey conducted in 1995 by a media organization was included in the brief. This was tendered as evidence showing that Canadians strongly support restrictions on the depictions of explicit sex and violence.[53] This was also relevant to the issue of whether or not Canadians viewed restrictions on depictions and descriptions of sex and violence as a pressing and substantial matter.

The following cases suggested that this material was admissible. In Reference Re *Public Service Employee Relations Act*[54] the court considered various national and international reports and surveys[55] In *R.* v. *Thompsen*[56] the court considered Brandeis Brief material accepted in *R.* v. *Hufsky* and *R.* v. *Seo* consisting of statistics, reports and studies with respect to the problem of impaired driving.

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[51] [1988] 2 S.C.R. 3.

[52] [1988] 1 S.C.R. 621.

[53] Times Mirror Centre for the People and the Press, *Mixed Message About Press Freedom on Both Sides Of Atlantic: Eight Nation, People & The Press Survey* (Washington: Times Mirror Center for the People and the Press, 1994).

[54] [1987] 1 S.C.R. 313.

[55] *Report of Canada on Articles 10 -12*, (Ottawa: 1982); Canada, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, Issue No. 43 (January 22, 1981); Canada, Task Force on Labour Relations, *Canadian Industrial Relations: The Report of Task Force on Labour Relations*, (Ottawa: The Privy Council Office, 1968); International Labour Organization, *Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part (4)(b)), International Labour Conference, 69th Session, (Geneva: International Labour Office 1983); International Labour Organization, *I.L.O. Official Bulletin: Special Supplement*, Volume LIV, No. 2, (Geneva: International Labour Office, 1971).

[56] (1988), 40 C.C.C. (3d) 411 (S.C.C.) at 421.

6.4 Legislative History of the *Customs Act*

A brief of the legislative history of the relevant tariff code that served to prohibit obscenity was collected.[57] This indicated, amongst other things that in Canada as early as 1842 the United Provinces forbade importations of books that were prohibited entry into the United Kingdom. This was of assistance in showing that a Customs Tariff Code prohibition on the entry of obscenity into Canada had long historical roots. Further, the legislative history showed that when the Federal Court of Canada declared that the former wording of the Tariff code was unconstitutional, Parliament had acted quickly in bringing into force the current version of the Tariff code.

6.5 International Agreements

Laurie Wright, Department of Justice Canada counsel, Constitutional and International Law Section provided excellent assistance in uncovering several treaties, cases and materials that gave an outline of international human rights law and Canada's commitments in the area. In *Re Public Service Employee Relations Act*[58] the court in referring to international instruments specifically indicated that:

> The various sources of international human rights law - declarations, covenants, conventions, judicial and quasi-judicial decision of international tribunals, customary norms - must, in my opinion, be relevant and persuasive sources for the interpretation of the *Charter's* provisions.[59]

The nature of Canada's international obligations together with a review of the international obligations of other free and democratic societies indicated that obscenity is on the fringe of expression protected by section 2(b) of the *Charter* and that Canada is entitled to restrict the circulation of obscenity through import controls.[60] Of great assistance was a letter that Laurie Wright provided describing such things as when the

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[57] Including *Customs Tariff*, 1842; *Customs Tariff* 1847 and *Customs Tariff* 1867.

[58] *Supra*, note 53; see also *R.* v. *Oakes*, *supra* note 4.

[59] *Re Public Service Employee Relations Act*, *supra* at 348.

[60] This point was made in *Butler*, *supra* at 509. While some of these items were referred to in *Butler*, we thought it was necessary to have them before the Court in this case to ensure that it had a full and complete record of the constitutional facts supporting the argument that the legislation impugned in this case constituted a reasonable limit.

documents were signed, when they were ratified and the force that such documents have.[61]

This material included international agreements that Canada entered into relating to the suppression of the circulation of obscenity such as:

1. *Protocol Amending the Agreement for the Suppression of the Circulation of Obscene Publications*[62] in which Canada undertakes to supply all information tending to stop the importation of obscene publications or articles and to ensure or expedite their seizure.

2. *Protocol to Amend the Convention for the Suppression of the Circulation of and Traffic in Obscene Publications*[63] in which Canada agrees that it shall be a punishable offence to import, convey or export or cause to be imported, conveyed or exported any obscene matters.

3. *Convention on the Rights of the Child (with Reservations and Statement of Understanding).*[64]

4. *Universal Postal Convention*[65], which indicates that obscene or immoral articles shall in no circumstances be forwarded to their destination, delivered to the addresses or returned to origin.

5. *International Covenant on Civil & Political Rights with Optional Protocol*[66], which indicates that the right to freedom of expression is subject to restrictions necessary for the protection of public order, public health or morals.

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[61] It has been pointed out to me that the issue of whether Canada has ratified or has become a signatory to a particular instrument may be a matter of law or legal argument as opposed to evidence. Further, there may be legal texts that deal with the domestic and international effect of such instruments. Thus, it may not be necessary to tender evidence regarding these matters as part of the Brandeis Brief.

[62] May 4, 1949, Can T.S. 1951, No. 34.

[63] November 24, 1947, Can T.S. 1951, No. 33.

[64] May 28, 1990, Can T.S. 1992, No. 3.

[65] (1989) Articles 40 and 41.

[66] March 23, 1976, Can T.S. 1976, No 47, Article 19.

6. *The General Agreement on Tariff and Trade (GATT)* Article XX and *The Free Trade Agreement between Canada and the United States of America*, which indicates that the agreement shall not be construed to prevent the adoption or enforcement by any contracting party of measures necessary to protect public morals.

7. *European Convention for the Protection of Human Rights and Fundamental Freedoms*[67], which is consistent with the *International Covenant on Civil and Political Rights.*

8. *Treaty Establishing the European Community*[68], which is similar to the F.T.A. in indicating that the agreement shall not preclude restrictions on imports justified on the grounds of public morality.

6.6 Foreign Legislation, Policy Regarding the Application of Foreign Legislation and Articles Regarding the Operation of Foreign Legislation

In the summer of 1994 efforts were made to compile an updated and comprehensive brief of the laws of various countries together with the policies of those countries, as outlined in the following pages, that showed how the foreign government agencies applied the law. In *R.* v. *Big M Drug Mart Ltd.*,[69] *R.* v. *Hufsky*[70] *R.* v. *Morgentaler*[71] and *R.* v. *Oakes*[72] the Supreme Court of Canada referred to various foreign laws of other free and democratic societies.

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[67] Article 10; also included was the case of *Handyside* v. *The United Kingdom*, (1976), 1 E.H.R.R. 737, wherein the European Court of Human Rights considered the issue of whether the seizure and forfeiture of hundreds of copies of the *Little Red School Book* pursuant to the *Obscene Publications Act 1964* (U.K.) was a violation of Article 10.

[68] [1992] 1 C.M.L.R. 573. Also included was the case of *R.* v. *Henn*, [1980] 2 All E.R. 166 (Court of Justice of the European Communities), which indicated that a restriction of the importation of pornographic articles was permitted in accordance with Article 36 of the treaty.

[69] [1985] 1 S.C.R. 295.

[70] *Supra* note 52.

[71] *Supra* note 50.

[72] *Supra* note 4.

The laws of other countries were compiled in a Brandeis Brief in an effort to support the argument that Parliament's assessment of where the line is most properly drawn with respect to the competing values of protecting freedom of expression and preventing harm from obscene materials is consistent with the laws of other countries. Once a brief was compiled it was easy to see that many other free and democratic societies have in place a similar or more restrictive system of border control prohibiting the importation of obscenity or objectionable material.

Before seeking this information I discussed my strategy with Patricia Nicoll, a foreign service officer and Director of International Service, Litigation and Legal Issues, Citizenship and Immigration. She advised that the Department of Foreign Affairs and International Trade would likely have formal channels through which I could seek this information. However, the formal channels were probably not often the quickest or best method of obtaining the information. Given the time constraints that I was dealing with she suggested that direct informal requests of the agencies involved was the best method of operating.

Patricia Nicoll kindly agreed to send my request for foreign legislation to approximately 20 Canadian diplomatic missions. I received some information or leads from approximately 10 of those diplomatic missions.

The best method of obtaining information was to contact the foreign agencies directly by phoning or faxing letters to the relevant departments administering the foreign legislation or to foreign diplomatic missions in Canada. In this regard I obtained a great wealth of information from:

(1) the office of Her Majesty's Customs and Excise (U.K.);[73]
(2) the office of Australian Customs;[74]
(3) the office of the comptroller for New Zealand Customs;[75]

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[73] Which provided copies of legislation including the *Customs and Excise Management Act, 1979* (U.K.) 1979 c.2, the *Customs Laws Consolidation Act*, (1876) (U.K. 39 - 40 Vict., c. 36) and relevant extracts from *CD-34* a current book of guidance issued to British Customs Officers, which instructed Customs Officers as to what was prohibited entry into the U.K.

[74] Which provided legislation including the *Customs (Cinematograph Films) Regulations*, (Aust) 1956, No. 94 and the *Customs (Prohibited Imports Regulations*, (Aust.), 1956, No. 90 and the *Australian Customs Service Manual (Officer's Edition) Guidelines.*

[75] Which provided legislation including: *Customs Act, 1966*, (N.Z.) 1966, No. 19; *New Zealand Bill of Rights*, customs officers' guidelines, judgments of the Indecent Publications Tribunal, which inform the content of the guidelines and a copy of a new Act, the *Films, Videos and Publications Classification Act* about to be brought in force into New Zealand on the eve of the trial together with the new guidelines to be used by customs officers under the new Act.

(4) the office of the Chief Counsel for United States Customs;[76]
(5) the French and German diplomatic missions in Canada[77] (English translations were quickly provided by Multilinguistic Translation Services, Public Works and Government Services Canada);
(6) Michael Blanchflower, a former Department of Justice Canada prosecutor and now a prosecutor located in the Attorney General's Chambers, Hong Kong[78];
(7) the Attorney General's Chambers, Bermuda; and,[79]
(8) the Board of Film Censors, Singapore.[80]

An officer within the client department also provided information including information from Japan.[81]

7.0 WALKING, TALKING BRANDEIS BRIEFS

Both the plaintiffs and the defendants used the *viva voce* evidence, sometimes referred to as "walking, talking Brandeis Briefs" to provide legislative fact evidence.[82] It was the position of the plaintiffs' counsel that if articles and other materials are admissible as written Brandeis Brief evidence of certain legislative facts, live witnesses provide better Brandeis Brief evidence.

[76] Which provided *United States Customs Service Directive, Guidelines for Detention and Seizures of Pornographic Materials.*

[77] Which provided a copy of the *French Penal Code,* the *German Criminal Code* and the *Basic Law of the Federal Republic of Germany* (equivalent to the Charter).

[78] *Control of Obscene And Indecent Articles Ordinance,* CAP 390; *Hong Kong Bill of Rights Ordinance, 1991* (Ord. No. 59), judgments of the Obscene and Indecent Articles Tribunal and a learned article written about the nature of the Hong Kong system of prohibition written by Johannes Chan, "The Control of Obscene and Indecent Articles Ordinance, 1987" (1987), 17 *H.K.L.J.* 288.

[79] The *Obscene Publications Act, 1973* (Bermuda) 1973, title 10 and the *Bermuda Constitution Order, 1968,* (Bermuda) 1968, title 2.

[80] *Censorship Review Committee Report 1992* (Singapore: Ministry of Information and the Arts, 1992); Board of Film Censors, *Censorship Guidelines for Videotapes/Discs, Video Games*; *Films Act* (Singapore) CAP 107 (Rev. ed 1985); *Undesirable Publications Act,* (Singapore) CAP 338 (Rev. ed.) 1985.

[81] The *Customs Tariff Law* and excerpts from the *Japanese Ministry of Finance, Customs and Tariff Bureau (Policy Manual).*

[82] A phrase apparently first coined by the plaintiffs' counsel Joseph Arvay, Q.C.

It was recognized that counsel would have to be careful in deciding when to call *viva voce* evidence. The Chief Justice of British Columbia apparently prefers the use of the Brandeis Brief method of introducing extrinsic evidence or the calling of live witnesses. He has noted that it is much more efficient to adduce evidence of legislative facts through the submission of materials rather than call viva voce evidence. He has stated that:

> Today most judges are inclining strongly to the view that they will not, and I say *should not*, allow the court to be held captive to endless *viva voce* extrinsic evidence, except in the most exceptional cases. This is not to say that the material which counsel need to support his or her argument should not be before the court, provided it is relevant. It does mean that the traditional inefficient method of adducing oral testimony must be reviewed. [emphasis in original]

He concluded by stating that:

> I hope that all levels of judges will stop referring in their reasons for judgment to inadequacies or deficiencies in the evidence in *Charter* cases because that terrorizes counsel into calling more and more evidence. What we need is less, not more, *viva voce* evidence in *Charter* cases.[83]

Nevertheless, it was clear that it would be necessary for a witness to provide the court, for example, with an outline of the types of material that Canada's customs legislation is designed to catch. This was relevant to whether or not the objective of preventing the importation of this type of material was pressing and substantial.

7.1 Customs Evidence

One of the first witnesses, Linda Murphy, Director of the Prohibited Importations Directorate, and the person ultimately responsible for, among other things, considering appeals from decisions to prohibit the entry of certain materials into Canada, gave evidence as to the types of material that Canada Customs would routinely prohibit. The plaintiff's counsel had filed a large library of materials (which evidenced some problematic decisions to detain or prohibit). To give the court a

[83] Allan McEachern, "*Viva Voce* Evidence in Charter Cases", (1989), 23 *U.B.C. L.R.* at 591.

more accurate idea of the types of material that Customs officers routinely prohibit, I introduced, through Linda Murphy, several videos and a couple of dozen books.[84] I also introduced through Linda Murphy a binder of training material that she indicated would be the type of material that could be prohibited entry into Canada.

At the outset the plaintiff's counsel objected to this evidence on the grounds that he had not been given notice of this material seven days prior to the commencement of trial as was contemplated by the *Canada Evidence Act*. The Court overruled this objection indicating that the Court required a full and complete record of all relevant legislative facts, and this factor outweighed any technical non-compliance with the *Canada Evidence Act* requirements.

The plaintiff's counsel objected to the giving of such testimony where it related to a video entitled *Mistress Ann*, which had not been forwarded to the Prohibited Imports Directorate and had not been prohibited entry into Canada. He also objected that it was highly inflammatory. Mr. Justice Smith, in overruling the objection noted that it was essential that he have some knowledge of the kinds of material that would be prohibited entry into Canada by the operation of the legislation in question.[85]

7.2 Police Evidence

Several police witnesses were called to give evidence regarding relevant matters. It was clear that the plaintiff's counsel would be arguing that Canada has an unconstitutional system involving the "prior restraint" of speech and that this should be abandoned in favour of a system of "subsequent punishment". Here the "walking, talking Brandeis Brief evidence" was essentially aimed at showing that the argument of the plaintiff's counsel did not take into account practical living facts[86] and that the suggested alternative to Canada's customs legislation was completely unworkable.

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[84] Videos with such titles as: *Brothers in Bondage: Headlights and Hardbody*; *Mistress Ann*; *Shit For Dinner*; and *Total Restraint*; and written materials with titles such as *Sex Stop*, *Bear Issue No. 9*, *Hot Tricks-True Revelations and Strange Happenings* (items that were found to be obscene in *Glad Day Bookshop Inc. and Gerald Moldenhauer* v. *Deputy Minister for Customs and Excise*, File No. 619/90 released July 14, 1992 (Ont. H.C.).

[85] *Little Sisters Book and Art Emporium* v. *The Minister of Justice*, ruling of the Honourable Mr. Justice Smith, November 8, 1994.

[86] As is suggested by the Supreme Court of Canada in *United States of America* v. *Cotroni*, [1989] 1 S.C.R. 1469.

At the beginning of the trial plans had been made to call Detective Noreen Wolfe of the Combined Law Enforcement Unit in Vancouver, British Columbia who was in charge of the pornography portfolio. During the course of the trial the decision was made to call Detective Maitland of the Vancouver Vice Squad, and Detective Mathews of Project "P" in Ontario.

Their evidence indicated, among other things, that:

(1) Police officers in Canada do not have the resources to conduct proactive investigations of obscenity or child pornography or to even deal with all of the cases referred to them by Canada Customs during the past year.

(2) The costs of police investigations and prosecution of obscenity and child pornography are extreme.

(3) The customs scheme of prohibition is the "first line of defence" in the two pronged system of law enforcement (involving Customs and police officers).

(4) The absence of a Customs prohibition on obscenity would be an open invitation to those who seek to import obscenity.

(5) Customs officers performing their role in examining, detaining and prohibiting the entry of items provide invaluable assistance to police officers in enforcing the *Criminal Code* obscenity and child pornography provisions.

7.3 Using Section 37 of the *Canada Evidence Act* to Restrict the Cross Examination of Police Witnesses Providing Section 1 Evidence

One of the problems in using police witnesses was that they were subject to cross examination on matters relating to their testimony involving police sources, methods and ongoing investigations. I led evidence through Detective Wolfe that indicated that the police would be significantly hampered in dealing with *Criminal Code* offenses if Customs officers did not notify them of material detained at the border.

In the course of a spirited cross examination of Detective Wolfe, the plaintiff's counsel asked whether a particular magazine *Asia File* had been intercepted by Canada Customs and forwarded on to the intended recipient. This question related to an ongoing criminal investigation and a prosecution was pending. I was advised that

the subject of this criminal investigation was sitting in the courtroom gallery. It was clear that this question and any similar line of questioning of Detective Wolfe could prejudice the outcome of a criminal prosecution.

I objected to this question on the grounds that the information asked for was privileged from disclosure. I asked the court to treat my objection as an oral certification, pursuant to section 37 of the *Canada Evidence Act*, that the information should not be disclosed on the ground that the public interest in the secrecy of the government operations outweighs the public interest in litigants having access to all evidence that may be of assistance to the fair disposition of the case.[87] Counsel for the Province of British Columbia, Frank Falzon supported my objection, referring to common law principles.[88]

The plaintiff's counsel argued that Detective Wolfe was compelled to testify in relation to the ongoing criminal investigation as the answer was relevant to s.1 evidence. He indicated that an affirmative answer would demonstrate that the *Customs Act* does not require Canada Customs to detain material suspected of contravening the *Criminal Code* to enable them to investigate suspected criminals.

Mr. Justice Smith sustained my objection and certification pursuant to section 37 of the *Canada Evidence Act* without requiring me to specify the particular prejudice anticipated from the disclosure. He held that to require me to do so would be to imperil the interest sought to be protected.[89] He also ruled that the three-step

[87] Section 37 of the *Canada Evidence Act* indicates that:

37. (1) A Minister of the Crown in right of Canada or other person interested may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.

(2) Subject to sections 38 and 39, where an objection to the disclosure of information is made under subsection (1) before a superior court, that court may examine or hear the information and order its disclosure, subject to such restrictions or conditions as it deems appropriate, if it concludes that, in the circumstances of the case, the public interest in disclosure outweighs in importance the specified public interest.

[88] *Carey* v. *The Queen* (1986), 35 D.L.R. (4th) 161 (S.C.C.).

[89] *Little Sisters Book And Art Emporium* v. *The Minister Of Justice*, Ruling Of The Honourable Mr. Justice Smith, Vancouver, B.C. November 24, 1994.

approach to be followed in a criminal trial to deal with evidence to which a section 37 objection had been taken should be adapted to this constitutional case.[90]

7.4 Expert Evidence

Former Department of Justice Canada counsel (Mary Humphries and Harry Wruck) had retained the services of two experts to support the argument that Parliament can have a reasonable apprehension of harm with respect to all obscene depictions and descriptions. Dr. Neil Malamuth, Professor of Communications and Psychology in the Chair of the Communications Studies Program and the Department of Speech at the University of California, Los Angeles, provided evidence that indicated among other things that:

(1) exposure to some media may effect people's attitudes and perceptions even if the audience is well aware that the media depictions are fiction;

(2) exposure to fictionalized media portrayal of sexually violent messages in the media may, like some other media content, affect people's attitudes;

(3) the effects of the messages may be more powerful when presented in the context of sexually arousing, pleasing stimuli than when presented in a neutral state of arousal and effect; and,

(4) once negative attitudes have been formed, they may not be easily reversed by educational interventions.

Dr. Malamuth, a very prominent expert in the study of the psychological effects of sexual imagery, also offered the opinion that to the extent that one can conclude that messages of heterosexual pornography might affect attitudes regarding the acceptability of some behaviours (e.g., sexually violent portrayals affected attitudes regarding sexually aggressive acts), it may be reasonable to assume that similar processes and effects would occur when such messages are incorporated within homosexual pornography.

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[90] *R.* v. *Meukon* (1990), 57 C.C.C. (3d) 193 (B.C.C.A.). The court must: (a) determine the nature of the public interest in the non-disclosure; (b) determine whether the public interest in disclosure is compelling; and, (c) if the interests are closely competing, embark on an investigation under s. 37(2) of the *Canada Evidence Act*.

8.0 CONCLUSION

This paper has discussed the nature of the evidence gathered, the arguments presented and the rulings made by the Court in *Little Sisters* in relation to section 1 of the *Charter*. The use of the expanded doctrine of judicial notice permits the admission of legislative or constitutional fact evidence of various types. The admission of Brandeis Brief material is the most practical way of providing a court with the facts that allow it to perform its role in examining the constitutionality of one of Canada's laws.

The task of investigating and obtaining section 1 evidence is often challenging, particularly because one does not know where the investigation will lead. A client department may not necessarily have the requisite expertise to be of much assistance in seeking out much of the relevant evidence. Once obtained, pieces of evidence will often suggest further lines of inquiry. Probably the most useful suggestion that I might make to those engaged in this process is to try to obtain litigation support from various sources to assist in the investigation and compilation of legislative facts and to keep a sporting attitude about the task.