

# CUSTOMS CENSORSHIP AND THE *CHARTER*: THE *LITTLE SISTERS* CASE

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## INTRODUCTION

Little Sisters Book and Art Emporium is Vancouver's only bookstore specializing in gay and lesbian literature; it also has served as a focus of social and political activities of the local gay and lesbian communities since its inception in 1983. Canada Customs is the arm of the federal government empowered to prohibit the entry of obscene imported publications into the country, a power originally enacted in 1847.<sup>1</sup> It is hard to think of two better institutional representatives of the urban diversity of contemporary Canada and the country's fusty Victorian roots, respectively. For the past decade, they have been embroiled in dramatic and escalating legal battles — appropriately dubbed "*Little Sister v. Big Brother*" by the *Globe and Mail*.<sup>2</sup> It appeared at times that only one party might survive. Little Sisters has been at risk of financial collapse in the face of persistent detentions and seizures of its imported material. Customs censorship practices, in turn, appeared to be treading on constitutional thin ice. In its court challenge, Little Sisters argued that the provisions of the *Customs Act* and *Customs Tariff* that together empower officials to stop obscene representations at the border<sup>3</sup> constitute unreasonable restrictions on freedom of expression and equality rights protected by section 2(b) and section 15 of the *Charter*. Customs censorship practices, finally lifted from over a century of administrative darkness and exposed to the glare of a two month court proceeding in the fall of 1994,<sup>4</sup> appeared vulnerable to constitutional invalidation.

However, in a long-awaited judgment released in January 1996,<sup>5</sup> Justice Kenneth Smith of the British Columbia Supreme Court crafted a ruling that, in true Canadian fashion, found a middle ground. He managed to vindicate, and sought to preserve, both Little

Sisters and Customs by affirming the importance to the life of the nation of both homosexual literature and the existing legislative regime of border censorship.

It took Justice Smith a full thirteen months to ponder the evidence presented at trial and to prepare his decision. The care he took is evident in the thorough and meticulous presentation of the evidence and legal argument, and in the respect he accorded to all participants in the proceedings. He noted the cultural and political significance of Little Sisters as "a nerve-centre for the homosexual community."<sup>6</sup> A refreshing sensitivity to the importance of lesbian and gay sexual expression is similarly evident in his affirmation of testimony by Little Sisters' witnesses that:<sup>7</sup>

... sexual text and imagery produced for homosexuals serves as an affirmation of their sexuality and as a socializing force; that it normalizes the sexual practices that the larger society has historically considered to be deviant; and that it organizes homosexuals as a group and enhances their political power.

Moreover, Little Sisters' long-standing complaints regarding the vagaries of Customs censorship were vindicated by many of Smith J.'s factual findings. In particular, he found that since its inception in 1983, Little Sisters has suffered at the hands of Customs;<sup>8</sup> that gay and lesbian bookstores and publications are particularly vulnerable to the "arbitrary consequences" of Customs censorship far out of proportion to their relative share of imported material;<sup>9</sup> that "there are many examples of inconsist-

encies in Customs' treatment of publications";<sup>10</sup> that delays of months or even years in making determinations are not uncommon;<sup>11</sup> that a great many "qualitatively questionable" determinations are made, including the detention of a "disturbing amount of homosexual art and literature that is arguably not obscene";<sup>12</sup> that Customs continued to ban any depiction of anal penetration until the eve of the trial in 1994 despite the lack of legal authority to do so and despite the advice tendered by Department of Justice lawyers in 1992 that Customs was acting illegally;<sup>13</sup> that there is no mechanism in Customs' procedures for receiving evidence of a book's merits and thus many books are ruled obscene without adequate evidence;<sup>14</sup> that Customs officers are inadequately trained, many receiving only a few hours of instruction on obscenity law;<sup>15</sup> that highly publicized works like Madonna's *Sex* and Bret Easton Ellis' *American Psycho* are given the benefit of the doubt;<sup>16</sup> that Customs officers "do not have sufficient time available to consistently do a proper job" and thus take "short cuts" by "such expedients as thumbing through books";<sup>17</sup> and that few initial determinations of obscenity are appealed, and of the few that are, few succeed.<sup>18</sup> In conclusion, Justice Smith wrote with some understatement, there are "grave systemic problems in the customs administration."<sup>19</sup>

Surprisingly, this litany of disturbing factual findings did not spell the demise of the challenged legislation. Justice Smith held that the prohibition on imported obscenity did not discriminate against gay men and lesbians and, therefore, section 15 of the *Charter* was not implicated. It was, of course, beyond doubt that the prohibition of obscene representations at the border violated freedom of expression protected by section 2(b) of the *Charter*. This issue was conceded by the Crown. However, Smith J. went on to uphold the legislation as a reasonable limit under section 1 of the *Charter*. The constitutional validity of the legislation was sustained in large part by Smith J.'s attribution of the sole responsibility for the serious violations identified in his judgment to the flawed administration of the legislation by Customs officials rather than to the legislation itself. In the result, he held that the legislation was consistent with the *Charter*, and thus Little Sisters was not entitled to the declaration of invalidity it sought under section 52 of the *Constitution Act, 1982*. Justice Smith held that the proper remedy when an otherwise valid law has been administered in a manner that violates rights or freedoms is to issue a declaration under section 24 of the *Charter*. He therefore issued a declaration that "from time to time during the

period covered by the evidence at trial some customs officers have acted arbitrarily and have thereby infringed sections 2(b) and 15(1)".<sup>20</sup>

A month after Smith J.'s initial ruling, Little Sisters returned to court seeking an injunction to restrain Customs from detaining imported material destined for the bookstore until the systemic problems identified in the judgment had been remedied. Justice Smith declined to issue such an injunction, finding that Customs had already revised its procedures "to require more careful consideration by qualified officers of possibly-obscene books."<sup>21</sup> In his view, these were "reasonable first steps and should achieve the objective until a more comprehensive administrative scheme can be put in place."<sup>22</sup> However, he did issue a more limited injunction restraining Customs officials from subjecting Little Sisters to a policy of heightened scrutiny at the Vancouver Mail Centre "until the federal Crown satisfies this Court that the discretion of customs officers in that office is guided by appropriate standards."<sup>23</sup>

We have no quarrel with the declaration and the injunction issued by Smith J. — these remedies were amply justified on the evidence presented. With all due respect, however, it is our view that the judge erred in absolving the *Customs Act* and *Customs Tariff* of responsibility for the grave systemic problems that led to the violation of the claimants' *Charter* rights. In our view, these effects are closely tied to the deficiencies in the procedures set out in the *Customs Act* for the determination of whether imported publications are obscene, and thus a declaration of invalidity ought to have issued in relation to the impugned provisions.

The *Little Sisters* case raises complex issues that, as Smith J. noted, "are of great importance not only to the plaintiffs but to all Canadians."<sup>24</sup> The case is on its way to the British Columbia Court of Appeal, and, in all likelihood, will end up before the Supreme Court of Canada. We cannot possibly do justice to the issues raised here. We will restrict ourselves to brief comments on four aspects of Justice Smith's opinion that we find unsatisfying. The first is his conclusion that the effects of the legislation do not amount to discrimination against gay men and lesbians in violation of section 15 of the *Charter*. The second is his reliance on the reasoning of the Supreme Court in the *Butler* case to support the conclusion that homosexual representations pose a risk of harm to society and, therefore, can be suppressed without violating the *Charter*. The third is his

choice of a standard of review under section 1 of the *Charter* that was highly deferential to the government on the question of whether the Customs legislation constitutes the least restrictive means of regulating imported obscenity. In our view, a rigorous standard of review under section 1 is appropriate where legislation in its effects has a disproportionate impact on expression central to the cultural identity and political vitality of a disadvantaged minority. Finally, we want to challenge what we see as a crucial flaw in Smith J.'s reasoning, namely, his view that the violation of the plaintiffs' rights cannot be linked to the procedural deficiencies in the *Customs Act* itself.

## EQUALITY RIGHTS

To establish a section 15 violation, a claimant must first show that the purpose or effect of the impugned legislation is to impose a burden on the basis of an enumerated or analogous ground of discrimination. Then the claimant must demonstrate that the unequal treatment is discriminatory, meaning that it is the result of the stereotypical application of presumed group or personal characteristics.<sup>25</sup> While the prohibition on imported obscene representations does not have as its purpose the imposition of disproportionate burdens on gay men and lesbians, this is one of its effects. Justice Smith reached this conclusion by a circuitous and controversial route. After making some astute observations regarding the cultural and political significance of homosexual representations to gay men and lesbians, he wrote:<sup>26</sup>

Because sexual practices are so integral to homosexual culture, any law proscribing representations of sexual practices will necessarily affect homosexuals to a greater extent than it will other groups in society, to whom representations of sexual practices are much less significant and for whom such representations play a relatively marginal role in art and literature.

For this reason, he concluded that the legal category of obscenity, even when properly interpreted, will inevitably capture a disproportionate amount of homosexual expression. Hence, the plaintiffs "and other homosexuals" had been "adversely affected" by the law as a result of their sexual orientation.<sup>27</sup>

However, the Court went on to conclude that this unequal treatment did not amount to discrimination. Unfortunately relying on the minority approach to section 15 in recent Supreme Court cases,<sup>28</sup> Smith J.

noted that a distinction based on an analogous ground will only be discriminatory if it is irrelevant "to the functional values of the legislation." In his view the unequal treatment which gays and lesbians experience as a result of the prohibition on obscenity does not arise from "the stereotypical application of presumed group or personal characteristics." According to the Court, the "characteristic is a real one" that is relevant to the legislative values: "Sexuality is relevant because obscenity is defined in terms of sexual practices." Justice Smith reiterated his view that the disproportionate effect of obscenity law on gays and lesbians is inevitable because of the extent to which their very identities are constructed in and through sexual practices. He concluded that "homosexual obscenity is proscribed because it is obscene, not because it is homosexual. The disadvantageous effect on homosexuals is unavoidable...."<sup>29</sup> In his view, the distinction thus could not be seen to be discriminatory within the meaning of section 15.

In our view, there are a number of problems with Smith J.'s section 15 reasoning. Even if we accept his premise that artistic expression produced for homosexual audiences is permeated to a greater degree than heterosexual expression is by sexual themes, his conclusion regarding the disproportionate impact of obscenity law does not necessarily follow. Obscenity, after all, embraces only a subset of sexual representations. Depictions of non-violent adult sexuality are obscene only if they are degrading or dehumanizing and pose a substantial risk of harm to society. Thus, Smith J.'s conclusion that there exists a disproportionate share of homosexual obscenity is correct under existing Canadian obscenity law only if sexual violence, child sexuality, or sexual degradation are more commonly and unduly exploited as the dominant characteristics of expression produced for homosexual audiences than they are for others. No evidence was presented at trial to sustain such a controversial proposition; we know of no studies that could support it. Furthermore, Justice Smith noted that Little Sisters has a policy of not stocking material that depicts paedophilia, violence towards women, or misogyny,<sup>30</sup> and there was no indication in the judgment that this policy had been neglected. In sum, the premise that homosexual expression generally, and material imported by Little Sisters specifically, contains a disproportionate share of obscenity strikes us as implausible and certainly not sustainable on the evidence presented.

Further, in finding that the unequal burden on gays and lesbians was not discriminatory, Smith J.

conveniently shifted the focus away from the possibility that the state is targeting the representations of a marginalized sexual group. He saw the law's suppression of gay and lesbian sexual imagery as not a question of discrimination, but simply one of obscenity: publications are censored because they are obscene. The issue that is completely obscured in this reasoning is whether the material is considered to be obscene simply because it is gay or lesbian.

Justice Smith's conclusions here may be related to continuing problems with the obscenity standard, and particularly, with the meaning of degrading and dehumanizing. In *Butler*, the Supreme Court held that materials would be degrading if they were perceived to cause harm in the form of anti-social behaviour.<sup>31</sup> Although the Ontario Court of Appeal has subsequently held that some proof of harm is required,<sup>32</sup> the nature of that proof remains elusive.<sup>33</sup> The continuing reliance on notional community standards in deciding whether it is reasonable to apprehend harm means that sexually explicit material continues to be assessed in terms of whether judges believe that the community reasonably believes that the materials cause harm. In the context of gay and lesbian materials, social prejudices can and do continue to inform these community standards, so that the community can be said to believe these images *do* cause harm.<sup>34</sup> And the fact that no expert evidence is required to prove the community standard of tolerance only further heightens the vulnerability of gay and lesbian sexual imagery to being suppressed as obscene.

Justice Smith's decision did not challenge these problematic aspects of the community standards test. Despite his recognition of the importance of sexual expression to the gay and lesbian community, Smith J. was willing to assume that a greater share of gay and lesbian sexual material can be validly suppressed as obscene. This conclusion would satisfy those who believe that gay and lesbian sexual material is, by definition, more degrading and dehumanizing than heterosexual pornography. Although Smith J. would reject such prejudicial views, his reliance on unsubstantiated assumptions nevertheless allowed some of their implications to inadvertently creep back into the decision.

In our view, a section 15 violation was made out on the evidence without following the questionable chain of reasoning pursued by Justice Smith. Elsewhere in the judgment, Smith J. found that the arbitrary consequences of Customs censorship are

borne disproportionately by gay and lesbian bookstores and publications, and that a disturbingly large amount of homosexual art and literature that is arguably not obscene is detained.<sup>35</sup> These findings provide strong support for the conclusion that the legislation had a disparate impact on gays and lesbians resulting from the stereotypical application of group characteristics. However, Smith J. considered these findings to be irrelevant to the question of whether the legislation violated equality rights. In his view, the arbitrary burdensome effects were a product not of the legislation but of its flawed administration by Customs officials, a distinction we find untenable for reasons to be discussed in the penultimate section below.

## **BUTLER AND HOMOSEXUAL REPRESENTATIONS**

Justice Smith held that the government was correct to concede that the legislation violated section 2(b) of the *Charter*. He went on to find that this violation was a reasonable limit under section 1. In so holding, he relied heavily on the reasoning of the Supreme Court of Canada in the *Butler* decision, where the criminal prohibition on obscenity was similarly upheld as a reasonable limit on *Charter* rights.

Little Sisters attempted to distinguish *Butler* on the grounds that its reasoning should be limited to heterosexual obscenity. In discussing the risk of "harm to society" created by obscene representations in *Butler*, Sopinka J. repeatedly emphasized the alleged degradation of women in heterosexual pornography.<sup>36</sup> Little Sisters argued that the risk of such harm could not and should not be said to arise from lesbian and gay sexual representations.<sup>37</sup> Justice Smith did not agree. First, in his view, the pornographic materials at issue in *Butler* *did* include homosexual representations. While the Supreme Court did not directly comment on these representations, Smith J. argued that it is "implicit" in the *Butler* decision that they can be suppressed as obscene without violating the *Charter*.<sup>38</sup> The fact that these so-called homosexual representations were set within sexually explicit material directed primarily to a heterosexual audience was not discussed. Rather, the judge's view appeared to be that the depiction of same-sex sexual relations made the material homosexual.<sup>39</sup> Secondly, Smith J. followed the dominant view, expressed by Wilson J. in *Towne Cinema*,<sup>40</sup> that the community standards test does not

permit the courts to take into account the specific audience to which allegedly obscene material is directed. Rather, it is a single national community standard of tolerance that is determinative. This approach effectively ignores the specificity of gay and lesbian sexual representations. The point is not simply that the audience is different, but that the entire framework of production, distribution, and consumption of gay and lesbian sexually explicit material is fundamentally different; the meaning and importance of the materials cannot be measured according to a heterosexual framework, least of all one based on harm towards women.<sup>41</sup>

In the end, Smith J. held that implicit in the *Butler* decision was a finding of sufficient grounds to suspect a causal relationship between pornography produced for homosexual audiences and harm to society. He thus found it unnecessary to his decision to canvass the social science evidence on point. Nevertheless, he went on to do so. In assessing this evidence, he relied on the Supreme Court's view in *Butler* that the absence of proof of a direct causal link between pornography and harm to society is not fatal; it is enough to demonstrate a "reasoned apprehension of harm."<sup>42</sup> Applying this standard to the issue of gay and lesbian sexual expression, Smith J. found that it was enough that there was one expert who believed that this material presents a risk of harm, even though that expert's conclusions on this point were not supported by the other expert evidence presented at trial.<sup>43</sup> Despite Smith J.'s earlier recognition of the importance of sexual representations to the lesbian and gay community, here the unique nature of these representations was glossed over. Gay and lesbian pornography was simply assumed to cause the same harm to society — harm that need not be proven and, in fact, harm that need not even be clearly articulated. Justice Smith did not describe the precise nature of the harm, apart from commenting that the exposure to this material "may cause the kinds of changes in attitudes, emotions and behaviours identified in *Butler* as harmful to society."<sup>44</sup>

## SECTION 1 STANDARD OF REVIEW

In upholding the challenged Customs legislation under section 1, Justice Smith applied an extraordinarily lax standard of review, particularly at the minimal impairment stage of the *Oakes*<sup>45</sup> analysis. He acknowledged that the "means chosen here by Parliament are not the least drastic means available of

achieving the objective."<sup>46</sup> In his view, however, Supreme Court precedents that have watered down this aspect of the *Oakes* test have absolved the Crown of the responsibility "to establish that it has chosen the least drastic means available to achieve that objective."<sup>47</sup> In fact, the Crown made no attempt to explain why Parliament had rejected other systems of border censorship that might have a less serious impact on freedom of expression and equality rights.<sup>48</sup> Indeed, no such evidence could be forthcoming, since the adequacy of the existing system of Customs censorship has never been the subject of a serious examination in the House of Commons or in any other government forum prior to the *Little Sisters* case. Even as the legal landscape has been transformed over the decades by the increasing complexity of obscenity law and the advent of the *Charter of Rights and Freedoms*, Parliament has not undertaken a review of the wisdom of leaving determinations of the legality of publications with individual agents of the Department of National Revenue.<sup>49</sup> Similar legal developments in other democratic societies have prompted heated debates and attempts to reform Customs censorship to better secure fundamental freedoms.<sup>50</sup> In sharp contrast, an examination of the history of Customs censorship in Canada reveals a remarkable record of legislative complacency.<sup>51</sup>

Justice Smith's conclusion that Customs legislation imposes reasonable limits on freedom of expression was grounded, in part, on the view, expressed by Sopinka J. in *Butler*, that "obscenity is a base form of expression, far from the core values underlying free expression."<sup>52</sup> It is now well-established in Supreme Court jurisprudence that the rigour of the standard of justification to which governments will be held under section 1 will vary in direct relation to the degree to which the expression at issue enhances the purposes of section 2(b).<sup>53</sup> We would add that the degree to which expression is closely related to the purposes of other *Charter* provisions should also be taken into account in the selection of the appropriate standard of review.

The connection and interaction between equality rights and freedom of expression is a distinct and important feature of the *Little Sisters* litigation. For the gay and lesbian community, the violation of these rights are fundamentally intersecting. The concept of intersectionality and interactive discrimination has examined the ways in which individuals and groups may be subject to multiple and inseparable forms of discrimination.<sup>54</sup> Although these concepts were

initially developed in relation to the unique forms of discrimination experienced by women of colour which could not be adequately described as either sex or race discrimination, the concepts have since begun to be extended to the ways in which other groups similarly experience multiple and inseparable forms of discrimination. For example, in the context of the legal struggle for recognition of gay and lesbian relationships, the intervenors in the *Mossop* case at the Supreme Court tried to illustrate the way in which discrimination on the basis of familial status and sexual orientation were intricately connected for gay men and lesbians.<sup>55</sup> The concept of interactive discrimination has thus begun to focus on the different and unique ways in which particular groups experience multiple forms of discrimination.

In our view, this analysis needs to be extended beyond discrimination and equality rights to include the ways in which different rights violations also intersect and interact to produce distinct forms of disadvantage.<sup>56</sup> In the context of censorship of sexually explicit materials, the rights violations that are experienced by the gay and lesbian community cannot be adequately described by separating the violation of their equality rights and the violation of their freedom of expression. Rather, the way in which this censorship violates both of these rights is fundamentally interconnected. More specifically, the way in which the gay and lesbian community experiences the violation of their freedom of expression is not just like the way the heterosexual community experiences the violation of this freedom. The violation of the freedom of expression has a disparate impact on the gay and lesbian community because of the importance of sexual expression to the political identity of that community. It can be further argued that the nature of the violation of freedom of expression is discriminatory because of the way in which the obscenity law is applied to gay and lesbian materials. The unsubstantiated belief that there is a disproportionate amount of homosexual obscenity is informed by the underlying assumption that gay and lesbian sexual imagery is in and of itself disproportionately degrading. In the language of section 15 jurisprudence, the conclusion is one that is reached by the stereotypical application of presumed group characteristics, that is, the prevailing belief that gay and lesbian sexuality is itself degrading.

The evidence in the *Little Sisters* case established that one of the effects of the application of the *Customs Tariff* and the *Customs Act* was to catch, not just "base" forms of expression, but also a great deal

of homosexual expression closely related to the purposes of both section 2(b) and section 15. As Smith J. acknowledged, erotica produced for homosexuals furthers the values of "seeking and attaining truth, participating in social and political decision-making, and cultivating the diversity of forms of individual self-fulfilment and human flourishing in a tolerant and welcoming environment."<sup>57</sup> Similarly, by affirming homosexuality, by overcoming the stigma attached to sexual practices that the larger society has labelled deviant and depraved, and by helping form a political and cultural identity, sexual expression for gay men and lesbians is intimately tied to the purposes of section 15. It assists in promoting human dignity and freedom and in overcoming historical disadvantage by challenging attitudes that are the product of stereotype and prejudice.

A government scheme of administrative censorship that has a disparate impact on expression of crucial importance to the identity and political vitality of a stigmatized and historically disadvantaged minority ought to be a matter of serious concern in a free and democratic society. Unfortunately, the connections between equality and expressive interests were not made in Smith J.'s section 1 analysis. Instead of recognizing the equality dimension of the freedom of expression violation, he approached the question exclusively from the point of view of section 2(b) jurisprudence. As discussed above, Smith J. was content to simply follow the reasoning of the Supreme Court in the *Butler* decision, and to conclude that the harm caused by pornography, whether heterosexual or homosexual, was sufficient to justify the limitation on freedom of expression. As a result, the intersectionality of the rights violations for the gay and lesbian community — the way in which the denial of freedom of expression discriminates on the basis of sexual orientation, which is really the crux of the *Little Sisters* case — was left unexplored in the section 1 analysis.

## THE PROCEDURAL DEFICIENCIES OF THE *CUSTOMS ACT*

Justice Smith's conclusion that the challenged provisions of the *Customs Act* and the *Customs Tariff* were constitutionally justifiable limits on freedom of expression was supported in large part by his view that the egregious problems revealed by the evidence were not caused by the law, but rather were the result of the faulty application of the law by Customs officials.<sup>58</sup> With all due respect, we believe he was

mistaken in not concluding that the arbitrary and unequal impact of Customs' determinations are closely tied to the procedural deficiencies of the *Customs Act*.

For example, it is no great surprise that many qualitatively questionable determinations are made given that section 58 of the *Customs Act* empowers an officer, defined simply as a person employed in the administration of the Act, to determine the tariff classification of all imported goods, including whether publications should be prohibited as obscene. The statute makes no attempt to ensure that the designated officers have any relevant training or opportunity to develop expertise. The same is true of the officers empowered to render decisions on requests for re-determination, namely "Tariff and Values Administrators" at the first level of internal appeal (sections 59, 60), and the Deputy Minister of National Revenue at the second level (section 63). Whether these decision-makers will have any training, experience or expertise in relation to obscenity law is a matter the statute leaves to pure chance.

Consider further the matter of delays in making final determinations. Lengthy delays are a common experience, as Smith J. noted.<sup>59</sup> This is a particularly serious concern in the case of imported periodicals, the contents of which quickly become stale-dated. For example, when Little Sisters sought to appeal the prohibition of the gay magazine "The Advocate", their position was not vindicated until 16 months after the initial determination.<sup>60</sup> In the most recent of the rare occasions that an importer has had the persistence to appeal a Customs prohibition all the way to court, the *Glad Day* case, a court ruling was not obtained until two and one half years after the initial ruling.<sup>61</sup> The structure of the appeals process in the *Customs Act* fosters such lengthy delays. Importers can appeal to court (sections 67, 71) but only after they have pursued requests for re-determination under section 60 and section 63. The statute places no time constraints on the rendering of decisions on requests for re-determination: it contains only a vague and unenforceable exhortation to the officials in question to render decisions "with all due dispatch" (section 60(3); section 63(3)).<sup>62</sup> It would be a simple matter to design a more streamlined and expedited re-determination process. Specific time constraints could be added. Two levels of internal appeal are entirely unnecessary, especially since they are rarely successful and often amount to little more than *pro forma* ratifications of initial determinations.

The statute makes no assurance of an escalation in the quality of the "hearing"<sup>63</sup> or the competence of the decision-makers as one proceeds up the Customs hierarchy.

Furthermore, the statute does not require the section 58, section 60 or section 63 decision-makers to receive any evidence. No procedures for introducing evidence are set out, and none have been implemented by Customs. There is no requirement that a record be compiled or that reasons be given and, as a result, these things do not occur. Importers are not even informed of which parts of a periodical or book have been found to run afoul of obscenity law. All of these deficiencies render the appeal rights set out in the legislation illusory. The notion that the routine adjudication of the boundary between constitutionally-protected expression and obscenity by Customs officials is supervised by legal norms is a formal mirage rather than a practical reality.

Apart from the right to appeal the Deputy Minister's re-determination to court,<sup>64</sup> no special procedures are established by the Act for the determination of whether or not publications are to be classified as prohibited. The legislative policy of the Canadian government appears to be that such determinations are to be treated as raising legal issues no different in difficulty or importance than those raised by the determination of the correct tariff on other goods. The elementary point that other tariff classifications have nothing to do with freedom of expression appears to have been overlooked in the drafting of the legislation. The conclusion is inescapable, in our view, that the enforcement of Tariff Code 9956(a) through the procedures set out in the *Customs Act* cannot reasonably be characterized as a legislative scheme that minimally impairs *Charter* rights.

As obscenity law has become more complicated over time, the procedural deficiencies of the *Customs Act* have become increasingly anachronistic. Whatever the merits of giving censorship powers to Customs officers in the Victorian times when the law was first enacted, it is absurd to ask inadequately trained and qualified officers, without the benefit of even a rudimentary hearing, to determine whether publications fall within current understandings of the obscene. In the old days, in fact until the 1950s, smut was smut; all sexual representations were considered obscene. Whatever else can be said of it, at least this definition had the merit of simplicity. When Revenue Minister McCann said in Parliament in 1949 that



"you do not have to be a great literary critic to tell the difference between decency and filth,"<sup>65</sup> he was not mischaracterizing the obscenity law of the time, however wrong we may now think he was.

The law is much more complicated now. The 1959 amendments to the *Criminal Code* require judges to assess obscene works as a whole to determine whether they unduly exploit sexual themes as their dominant characteristic. Since the early 1960s, the courts have held that the presence of artistic merit, to be determined with the assistance of expert evidence, will rebut any finding of undue exploitation.<sup>66</sup> And since the 1992 *Butler* decision, non-violent depictions of adult sexuality are generally legal; they are obscene only if they can be said to be "degrading or dehumanizing" and if the Crown can prove that they pose a substantial risk of harm to society.<sup>67</sup> The tasks of determining artistic merit and substantial risk of harm to society, as well as the meaning of the notoriously vague concepts of degrading and dehumanizing, befuddle even our most intelligent judges who have had the benefit of days of expert testimony. Legislation that asks Customs officers to make the same determinations on a routine basis with no assistance places everyone, including those officers, in an absurd situation.

## CONCLUSION

In our view, the evidence and the law point clearly to the conclusion that the combined effect of the *Customs Act* and the *Customs Tariff* violate sections 2(b) and 15 of the *Charter* in the case of the administration of the Tariff Code prohibition on obscene representations. Justice Smith's findings on the importance of sexual expression to the gay and lesbian community, and on the disproportionate impact of Customs censorship on gay and lesbian materials, ought to have led to the conclusion that the legislation in its effects violates section 15. On the question of whether the violation of section 2(b) was a reasonable limit, we believe that Smith J. ought to have exercised greater caution in assuming that the reasoning in *Butler* could be extended, without hesitation or problematization, to gay and lesbian sexual imagery. Justice Smith acknowledged that many of the publications suppressed by Customs are integral to the cultural and political identity of a disadvantaged and stigmatized sexual minority. Thus their distribution fosters goals that lie at the heart of the *Charter's* protection of expression and equality interests in sections 2(b) and 15, respectively. For this reason, we believe that Smith J. erred in not

holding the government to a rigorous standard of justification at the section 1 stage of the analysis. We have also taken issue with Smith J.'s failure to implicate the procedural deficiencies of the *Customs Act* in the *Charter* violations identified by the evidence. In our view, at the very least, a system of administrative censorship cannot constitute a minimal impairment of *Charter* rights if it makes little or no attempt to ensure that decisions will be made expeditiously by expert decision-makers who have the ability to receive evidence of a publication's merits. The *Customs Act* fails this test. So long as Tariff Code 9956(a) is enforced through its procedures, the problems identified in the *Little Sisters* case are likely to persist. □

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## Endnotes

1. The 1847 *Customs Act* prohibited the importation of "Books and drawings of an immoral or indecent character". Province of Canada Statutes, 10 & 11 Vic., c.31 at p. 1427. This prohibition was reproduced in legislation passed in the first session of Parliament in 1867. *An Act imposing Duties of Customs*, S.C. 1867, 31 Vict., c.7, Schedule E. The prohibition remained in place until 1985, when the Federal Court of Appeal struck down the words "immoral or indecent" on the grounds that they constituted an overly vague restriction on freedom of expression guaranteed by the *Charter*. *Luscher v. Deputy Minister, Revenue Canada, Customs and Excise*, [1985] 1 F.C. 85 (C.A.). Within three weeks Parliament had passed an amendment to fill the gap and fully restore Customs censorship powers at the border; the vague prohibition on the immoral and indecent was replaced with an apparently clear prohibition on the obscene. S.C. 1985, c.12.
2. Chris Dafoe, "Little Sister v. Big Brother" *Globe and Mail* (8 October 1994) C1.
3. Code 9956(a) of Schedule VII and s.114 of the *Customs Tariff*, R.S.C. 1985, c.41 (3rd Supp.), and ss.58 and 71 of the *Customs Act*, R.S.C. 1985, c.1 (2nd Supp.).
4. A full account of the proceedings can be found in Janine Fuller and Stuart Blackley, *Restricted Entry: Censorship on Trial* (Vancouver: Press Gang, 1995).
5. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, (1996) 131 D.L.R. (4th) 486 (B.C.S.C.).
6. *Ibid.*, para. 90, at 513.
7. *Ibid.*, para. 128, at 522.
8. *Ibid.*, paras. 95-100, at 514-16.
9. *Ibid.*, paras. 105 and 251, at 517 and 553.



10. *Ibid.*, para. 109, at 518.
11. *Ibid.*, paras. 112-13, at 519.
12. *Ibid.*, paras. 115 and 252, at 519 and 554.
13. *Ibid.*, para. 267, at 557.
14. *Ibid.*, para. 116, at 519.
15. *Ibid.*, paras. 38-41 and 116, at 501-02 and 519.
16. *Ibid.*, para. 117, at 519-20.
17. *Ibid.*, paras. 81 and 113-15, at 511 and 519.
18. *Ibid.*, para. 82, at 512.
19. *Ibid.*, para. 250, at 553.
20. *Ibid.*, para. 281, at 560.
21. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1996] B.C.J. No. 670 (B.C.S.C.), 29 March 1996.
22. *Ibid.* at para. 11.
23. *Ibid.* at para. 13. The evidence at trial demonstrated that Little Sisters was subject to a policy of "heightened inspection" at the Vancouver Mail Centre and that the implementation of such policies was at the discretion of local officials. *Supra* note 5, paras. 52 and 270, at 504 and 557.
24. This was one of the reasons Smith J. gave for making an order of increased costs against the federal Crown: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1996] B.C.J. No. 671 (B.C.S.C.), 29 March 1996, at para. 15.
25. This methodology had the support of four members of the Supreme Court of Canada in *Egan v. Canada*, [1995] 2 S.C.R. 513 (per Cory J.) and *Miron v. Trudel*, [1995] 2 S.C.R. 418 (per McLachlin J.). Four other members of the Court would have added as a further precondition to a finding of discrimination a requirement that the personal characteristic at issue be irrelevant to the functional values underlying the challenged legislation: *Miron* per Gonthier J.; *Egan* per La Forest J. This attempt to graft a requirement of irrelevance on to the s.15 test was the minority view, one that was sharply rejected by the other five members of the Court. Unfortunately, Smith J.'s s.15 analysis was muddled by his reliance on the Gonthier/La Forest minority view as stating the law. *Supra*, note 5, paras. 133-36, at 523-24.
26. *Supra*, note 5, para. 128, at 522.
27. *Ibid.*, para. 130, at 523.
28. *Supra*, note 25.
29. *Supra*, note 5, para. 136, at 524.
30. *Ibid.*, para 91, at 514.
31. *R. v. Butler*, [1992] 1 S.C.R. 452.
32. *R. v. Hawkins*, (1993) 86 C.C.C. (3d) 246 (Ont. C.A.), rev'd on other grounds, [1993] 2 S.C.R. 157.
33. For a more detailed discussion of the problems with the *Butler* test for obscenity, see Cossman, Bell, Gotell and Ross, *Bad Attitude/s on Trial: Feminism, Pornography and the Butler Decision* (Toronto: University of Toronto, 1996 forthcoming)
34. A blatant pre-*Butler* example of judicial reliance on discriminatory community standards can be found in *Re Priape Enrg. v. Deputy Minister of National Revenue*, (1979) 52 C.C.C. (2d) 44 (Que. S.C.) at 49 ("...the community standard of contemporary Canada is less tolerant with regard to overt homosexual acts than with regard to similar acts committed between persons of opposite sexes... I have to take account of these differences in community standards of tolerance.")
35. *Supra*, notes 9 and 12.
36. *Supra*, note 31, at 479, 497, 500, 504, 508-09.
37. For a further discussion of the reasons why the *Butler* ruling should be limited to the context of heterosexual representations, see Brenda Cossman, "Feminist Fashion or Sexual Morality in Drag?" in Cossman et al., *supra* note 33.
38. *Supra* note 5, para. 186, at 537.
39. On the specific nature of lesbian sexual representations, and the tendency of courts to deny this specificity, see Becki Ross, "'It is Merely Designed for Sexual Arousal' Interrogating the Indefensibility of Lesbian Smut", in Cossman et al., *supra*, note 33.
40. *Towne Cinema Theatres Ltd. v. The Queen*, [1985] 1 S.C.R. 494, at 521.
41. For further discussion, see Carl Stychin, *Law's Desire: Sexuality and the Limits of Justice* (London: Routledge, 1995) at 55-90.
42. *Butler*, *supra* note 31 at 484.
43. *Little Sisters*, *supra* note 5, para. 195, at 539-40 (relying on the published findings of Professor Neil Malamuth).
44. *Ibid.*, para. 195, at 540.
45. *R. v. Oakes*, [1986] 1 S.C.R. 103.
46. *Supra* note 5, para. 213 at 543-44.
47. *Ibid.*, para. 210 at 543.
48. *Ibid.*, para. 214 at 544.
49. Remarkably, Parliament did not seize the opportunity presented by the *Luscher* ruling (*supra* note 1) in 1985 to reconsider the powers of administrative censorship conferred by the combined operation of the *Customs Act* and the *Customs Tariff*. Given that the *Customs Act* was not designed with a concern for safeguarding freedom of expression in mind, such a reconsideration seems long overdue in the *Charter* era.
50. In the United States, the reform of Customs censorship began in 1930: see the debates in 71 Congressional Record 4432-39, 4445-72 (October 1929) and 72 Congressional Record 5414-31, 5487-5520 (March 1930). Useful accounts of subsequent developments can be found in Zechariah Chafee Jr., *Government and Mass Communications* (Chicago: Chicago University Press, 1965) at 242-275 and *U.S. v. 37 Photographs*, 402 U.S. 1400 (1971). An account of the New Zealand experience leading to the establishment of a specialized tribunal established in 1963 can be found in Stuart Perry, *The Indecent Publications Tribunal: A Social*

- Experiment* (Christchurch: Whitcomb and Tombs, 1965). The Australian experience of attempting to curtail the excesses of Customs censorship by employing a variety of expert tribunals is recounted in Peter Coleman, *Obscenity, Blasphemy, Sedition: 100 Years of Censorship in Australia* (Sydney: Angus & Robertson, 1974). Even the experience of one society that was neither free nor democratic, apartheid-era South Africa, puts the procedures followed by Canada Customs in a dim light. A full account of the work of the Publications Appeal Board, established by the *Publications Act, 1974*, can be found in J.C.W. van Rooyen, *Censorship in South Africa* (Cape Town: Juta & Co. Ltd., 1987). The Act is currently the subject of a challenge before the Constitutional Court of South Africa.
51. Since the early 1920s, complaints about the arbitrariness and inaccuracy of Customs agents' application of the law have been raised: see Hector Charlesworth, "The Customs Department's Book Censorship" *Saturday Night* (19 April 1924) at 5; J. Ross McLean, "Bad Books in Canada" *Saturday Night* (6 April 1935) at 10; Morris L. Ernst and William Seagle, *To the Pure... A Study of Obscenity and the Censor* (New York: Viking, 1928) at 297; James T. Farrell, "Canada Bans Another Book" *Canadian Forum* (November 1946) at 176; Joseph Griffin, "James T. Farrell vs. The Dominion of Canada: A Case of Censorship" (1988) 68 *Dalhousie Review* 163; Blair Fraser, "Our Hush-Hush Censorship: How Books are Banned" *Maclean's Magazine* (15 December 1949) at 24. When these complaints have been raised in the House of Commons, they have received cursory responses from successive Ministers of National Revenue: see, e.g., House of Commons Debates, March 12, 1935, p.1652-53; February 20, 1948, p.1437-39; December 6, 1949, p.2815-17; February 28, 1957, p.1727.
  52. *Butler*, *supra* note 31 at 488; *Little Sisters*, *supra* note 5, para. 235, at 550-51.
  53. The most recent decision to follow this approach is *Ross v. New Brunswick School District No. 15*, [1996] S.C.J. No. 40. In addition to *Ross* and *Butler*, see also *Irwin Toy Ltd v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.
  54. See Peggy Smith, "Separate Identities: Black Women, Work and Title VII" (1991) 14 *Harv. Women's L.J.* 21. Smith uses the term "interactive discrimination" to describe the ways in which the discrimination that Black women experience cannot be divided into separate forms of discrimination based on sex and race. For further discussions of intersectionality, see Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women" (1991) 43 *Stanford L. Rev.* 1241; Nitya Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 *C.J.W.L.* 25.
  55. See Jody Freeman, "Defining Family in *Mossop v. DSS*: The Challenge of Anti-Essentialism and Interactive Discrimination for Human Rights Litigation" (1994) 44 *U.T.L.J.* 41.
  56. This concept is an intrinsic part of international human rights discourse, where the indivisibility of all human rights has been repeatedly emphasized. See in particular the Tehran Declaration, 1968, which stressed that civil and political rights, and social and economic rights, are inseparable and indivisible.
  57. *Little Sisters*, *supra* note 5, para. 223 at 546.
  58. *Ibid.*, para. 182 at 536; para. 198 at 540; para. 223 at 546.
  59. *Supra* note 11.
  60. *Supra* note 5, paras. 96-97 at 515.
  61. *Glad Day Bookshop Inc. v. Deputy M.N.R.*, (1992) 90 D.L.R. (4th) 527 (Ont. Ct. Gen. Div.).
  62. Justice Smith's statement that the "time periods within which the customs officers must exercise their powers are reasonable and are specified in the legislation" (*supra* note 5, para. 242, at 552) is true only of the initial determination under s.58, which must be made within 30 days of a detention.
  63. We use this term loosely since the statutory re-determination process gives importers no rights to know the case against a publication, to make submissions, or even to review the detained material.
  64. It is at this third level of appeal (ss.67, 71) that the *Customs Act* makes its only concession to the distinct nature of the responsibilities imposed on Customs officers by Tariff Code 9956. While the tariff classification of other goods must be appealed from the Deputy Minister to the Canadian International Trade Tribunal (formerly the Tariff Board), importers of publications classified as prohibited pursuant to Tariff Code 9956 by-pass the Tribunal and go to court if they appeal the Deputy Minister's decision. This provision was introduced following suggestions made by the Tariff Board after hearing its first, and as it turned out, last appeal of a decision to prohibit the importation of a publication in the "Peyton Place" case: *Dell Publishing Co. Inc. v. Deputy Minister of National Revenue for Customs and Excise*, (1958) 2 T.B.R. 154. The majority commented as follows: "We cannot bring ourselves to believe that either the officers of the Department of National Revenue, Customs and Excise, or ourselves are qualified to make the kind of decision involved in classifying books under tariff item 1201 [now 9956]. Essentially, this is a decision that a book would constitute an offence under the Criminal Code if publicly sold or publicly offered for sale in Canada. Such decisions, we believe, should be made by courts with appropriate jurisdiction in criminal matters." National Archives of Canada, Tariff Board, RG79, vol. 276, file 471. Later that year, an amendment was passed relieving the Tariff Board, but not Customs officers, of the task of passing judgment on prohibited publications: S.C. 1958, c.26, s.3.
  65. House of Commons Debates, December 6, 1949, p.2815.
  66. *R. v. Brodie*, [1962] S.C.R. 681 per Judson J. ("Lady Chatterley's Lover" held to be not obscene); *R. v. Coles* (1965), 49 D.L.R. (2d) 34 (Ont. C.A.) ("Fanny Hill" held to be not obscene).
  67. *Butler*, *supra*, note 31; *R. v. Hawkins*, *supra*, note 32.