NOTE TO USERS

Regulatory Accountability and Responsiveness:
A Case Study of How Government Reacts to Judicial Decisions

by

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ABSTRACT

This thesis examines the issue of government accountability and responsiveness to judicial decisions. Case law frequently assists in determining what is in the public's interest, yet government action in response to judicial decisions is often neither apparent nor explicit. This thesis examines the regulatory responses to the case of *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* and the decision's follow-through into state practice. The case specifically concerns the control of obscenity-related matters at the border. Four main areas of the case and the respective responses by Canada Customs are examined, including burden of proof, lack of training and resources for Customs officers, centralization of obscenity decisions and the development of obscenity guidelines. The thesis examines how and when Canada Customs reacted to the various hearings and decisions in the case. This study is significant in demonstrating how case law can affect government regulatory processes even when legislative amendments are not mandated, as well as showing the need for better and more transparent tracking of such changes within affected agencies.

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INTRODUCTION

Government accountability is a long-standing issue for Canadian citizens. If a populace is to trust its state officials, the state must be accountable for its actions. Often, case law assists in determining what is in the public's interest. A concern for the public, however, is the perception that government action in response to judicial decisions is neither apparent nor explicit. This thesis takes a Supreme Court case involving the federal government and private citizens, and examines the decision's follow-through into state practice. This study is significant in demonstrating how case law can indeed affect government regulatory processes and that the state can and does take action even when legislative amendments are not mandated.

This study is particularly important in that it demonstrates the government's role and its responsibility to be accountable to its citizens. Lack of transparency for government action is problematic, specifically when judicial decisions are made in what is thought to be the public interest. Yet at times, public perception is that there is not any follow-through on the part of the government after a judicial decision has been rendered. Whether this is actually true or not can only be determined by what evidence is available in order to assess government actions. If departments do not maintain records of their actions, accountability can never ensured. A decision to change such things as administrative processes is not nearly as effective if one does not know why that change took place. Federal departments need to take this on as a priority in order to adequately respond to questions surrounding their actions.

The case in this examination centers on a small business catering to the gay and lesbian community in Vancouver that challenged the Canadian federal government in a groundbreaking attempt to prove that government officials had treated them in a prejudicial manner. Specifically, Little Sisters Book and Art Emporium[1] contended that Canada Customs[2] was treating importers in a prejudicial, unconstitutional manner and attempted to have their powers, in certain regards, struck down.

Several important aspects of *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* are examined in this study. The study attempts to define the ways in which Canada Customs administered and reacted to regulations and procedures at the border in relation to the evolving jurisprudence as the case proceeded through the various judicial levels. Although judicial decisions are often seen as isolated events divorced from the reality of day-to-day governing, this examination will demonstrate how judicial decisions are followed through in government policies and their application in the case of one government agency, Canada Customs. Specifically, I examine the actions taken by Canada Customs in response to the decisions made in the series of hearings in the *Little Sisters* case.

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[1] In addition to Little Sisters, the plaintiffs in this case included the B.C. Civil liberties Association and James Eaton Deva and Guy Allen Bruce Smythe. The defendants in the case were the Minister of Justice, the Attorney General of Canada, the minister of National Revenue and the Attorney General of British Columbia. Other parties in the case included the Attorney General for Ontario, the Canadian AIDS Society, the Canadian Civil Liberties Association, the Canadian Conference of the Arts, EGALE Canada, Equality Now, PEN Canada and the Women's Legal Education and Action Fund (LEAF).

[2] The Federal department currently known as the Canada Border Services Agency (CBSA) underwent several names changes during the course of the trial. I will simply be referring to the agency as Canada Customs.

As a small business catering to alternative lifestyles, Little Sisters' claims of prejudicial treatment by the federal government were significant. The bookstore argued that a substantial number of their importations were unfairly stopped by Customs on the suspicion of obscenity over a period of approximately 15 years. They claimed that the majority of the goods detained at the border were in fact not obscene. As such, Little Sisters main argument was that Customs' powers to control obscenity should be nullified and that the government should not be in the business of intercepting personal or commercial importations on the basis of suspected obscenity. In particular, Little Sisters argued that Canada Customs violated the rights of certain minority groups by practicing discriminatory procedures in the screening of importations, and as such should not be responsible for controlling such material from entering Canada.

The subject matter in the importations revolved around suspected obscenity; therefore, I begin my examination in chapter two by outlining the term obscenity as it relates to specific court cases within the recent past. Jurisprudence has assisted in framing how obscenity has been defined and particularly the subjective interpretations of the term. The *Little Sisters* case highlights and incorporates previous interpretations of obscenity, and the various cases help to elaborate on the complexities surrounding this term.

Chapter three details the main issues brought forth by Little Sisters in the case against Canada Customs. Specifically, Little Sisters called into question the Customs mandate to detain and prohibit expressive material. The bookstore felt that its equality rights had been violated by the action taken by the government and their alleged prejudicial

restrictions on gay and lesbian importations. In essence, the bookstore argued to have Customs' powers surrounding the detention and prohibition of suspected obscenity struck down. The principal aspects of the two hearings preceding the Supreme Court trial and their outcomes are also examined in order to provide a context and timeline for both the Supreme Court decisions and the actions of Canada Customs.

In chapter four, Customs' mandate surrounding the detention and prohibition of obscenity is outlined. These regulations stem from Customs' legislative mandate and jurisprudence. Given the central role they play in the case, these policies and procedures are examined in some detail. In particular, this chapter describes Customs regulations and policies regarding obscenity, along with their interpretation in training manuals and other tools, such as information bulletins.

In chapter five, the actions taken by Canada Customs are examined both in response to the decisions made in court and actions that may not have been in direct correlation to decision made in the Courts. This chapter examines and weighs the progress made by Canada Customs in amending their processes and procedures regarding their mandate to enforce the law on obscenity at the border.

The issues that I discuss in chapter five include several of the matters raised in the *Little Sisters* case and their effect on Customs regulatory processes. The matter of who should bear the burden of proof in suspected obscenity detentions is examined in detail, as the decision reversed the onus of proving obscenity on to the state, rather than the importer.

As well, two of the deficiencies discussed in this chapter are the lack of resources and the training for Customs officers. The chapter also examines the steps taken by Canada Customs to ameliorate the training processes for inspectors.

Additionally, I examine the decision to centralize obscenity decision functions to Ottawa, in order to produce more consistent decisions on suspected obscenity. The 30-day service standard set forth by the courts in order to provide importers with efficient, timely decisions is also detailed. Finally, I present the manner in which Canada Customs has attempted to maintain community standards in their development of obscenity guidelines. By explicating how the guidelines have changed over the years, I attempt to draw a parallel to the arguments and decisions in the *Little Sisters* case, in order to demonstrate their connection to policy and enforcement changes undertaken by the department.

The Customs documents referred to in this thesis have been obtained as a result of a request made under the Access to Information and Privacy Act (ATIP), therefore the information was limited to what the department determined was acceptable for public viewing. One difficulty I encountered in this study was that the ATIP materials, as given to me, were not explicit in their correlation to case law. It was also difficult to obtain material that showed a detailed historical timeline in the area of the control of obscenity within the department. In light of this, in some instances it was necessary to hypothesize on the association Customs policy changes may have had with issues arising in and decisions emanating from the courts.

It should also be noted that an area that was highlighted in the *Little Sisters* trial was the alleged inherently prejudicial treatment they received by Customs. I do not go into great detail on this matter as it was affirmed by the courts that Canada Customs did at times treat the bookstore in a prejudicial manner. The matter of freedom of expression was also an issue that could have been examined, as it was important to Little Sisters' argument regarding prejudicial treatment as a minority group. However, the focus of this paper is on the aspects of the case that relate more directly to the impact felt on government processes.

Though the matters discussed in this study deal with aspects of the *Criminal Code* as well as the *Charter*, this is not a constitutional analysis. Rather, this examination presents a clear example of the practical result of a Supreme Court case within one regulatory system. The effect of the case was, I argue, substantial and although there were some qualifications, such as how quickly Customs' responded to the court's decision, the evidence in this study shows that the criticisms and fears concerning the lack of government reaction to case law may, at times, be unfounded.

CHAPTER TWO - OBSCENITY

Society has constantly struggled with the meanings of morality and decency. Characterizing acts or material into certain categories, such as immoral or indecent, is a continuous debate. Obscenity is a term that cannot easily be defined. Criminal Code section 163(8) defines obscene material or publication as:

> 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**

This chapter focuses on the definition of obscenity as it is characterized in the *Criminal Code* and in jurisprudence. Examining various cases regarding obscenity will enable a more comprehensive study of the case of *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* and the issues at stake regarding the regulation of certain types of material. What is or is not considered obscene and whether the government should be involved in regulating this type of expression is at the crux of the debate. I examine how the government has responded to evolving jurisprudence, specifically when there have been no legislative amendments made to Customs mandate for prohibiting obscenity. The general theme of this chapter is the lack of clarity in the definition of what is or is not considered obscene, and that the term obscene is subjective (as will be demonstrated in a variety of case law).

In the *Little Sisters* case, the assertion made by Little Sisters Book and Art Emporium[3] was that their material did not constitute obscenity under the Canada Customs definition

[3] In addition to Little Sisters, the appellants in this case included the B.C. Civil liberties Association and James Eaton Deva and Guy Allen Bruce Smythe.

of the term, and that it consisted merely of erotica. Canada Customs uses the *Criminal Code* definition of obscenity in their regulatory guidelines when determining obscene goods imported into the country. A significant case that helped to explain the way obscenity is regulated is *R v. Butler*, [1992]. This case shed light on obscenity as a criminal matter and detailed the way in which community standards affect the definition and application of obscenity in the context of adult material being sold to the general public.

In 1992, the case of *R. v. Butler* was heard in the Supreme Court of Canada. Donald Butler owned a store that specialized in "adult" material, including pornographic videos and sexual paraphernalia. Butler was charged with various counts of selling obscene material, possessing obscene material for the purpose of distribution or sale, and exposing obscene material to public view. The issue at hand was not whether Butler was in contravention of an obscenity offence as defined in section 163 (8) of the *Criminal Code*, but whether the obscene material was protected by the guarantee of freedom of expression in s. 2(b) of the *Canadian Charter of Rights and Freedoms*.

Another issue was that if it was found that the obscenity related legislation did in fact infringe upon s.2 (b) of the *Charter*, could that infringement be justified under s.1 of the *Charter* - which states that rights are only protected to such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". In other words, the public right to freedom of expression is only protected up to a certain limit.

Section 1 of the *Charter* allows for there to be a limit to rights when they are not justified in the context of a free and democratic society.

In the *Butler* case, the Supreme Court found that the obscenity legislation did in fact infringe upon s.2 (b) of the *Charter*, as well as an individual's guarantee of freedom of expression, but that the infringement was justified by s.1 of the *Charter*. The *Butler* case helped to clarify how material can be considered "obscene" and when there is "undue" exploitation of sex. Drawing on previous cases, the three main tests that were formulated by the court to determine the quality of questionable items are: the community standard of tolerance test, whether material is "degrading" or "dehumanizing" and the internal necessities test (also referred to as the artistic merit defence).

The *Butler* case used the community standard of tolerance test as the integral part of its examination of the constitutionality of the obscenity legislation. In *R. v. Butler*, the judges affirmed that the test to determine what can be considered "undue" sex fell on the standards of tolerance set by the community. In other words, community standards are established by what a person would not tolerate other Canadians being exposed to as opposed a person's notion of what is obscene based on their own set of standards and what they would tolerate themselves. The struggle to determine the exact threshold of tolerance of an entire society was debated in the *Butler* case. According to *Butler:*

> The community standards test has been the subject of extensive judicial analysis. It is the standards of the community as a whole which must be considered and not the standards of a small segment of that community such as the university community where a film was shown...a city where a picture was exposed. The standard to be applied is a national one... With

> respect to expert evidence, it is not necessary and is not a fact, which the Crown is obliged to prove as part of its case...

It is affirmed in *Butler* that standards of tolerance should be applied as a national standard. The courts also affirmed that the Crown does not necessarily need to provide expert advice to prove the standard under which a specific piece of work is obscene. I discuss the various issues surrounding the burden of proving whether material is obscene or not later in this study.

Community standard of tolerance require one to envisage a majority view, yet people naturally bring in their own influences and experiences to each subject – leaving personal standards to be an inherently subjective task. In that regard, the tests referred to in Butler should be used to assess material in the context of determining obscenity. The main factor to consider in the tests mentioned above (i.e., Community Standard of Tolerance test, whether material is "degrading" or "dehumanizing" and the Internal Necessities test) when interpreting the "undue" exploitation of sex, is the element of harm (*R. v. Butler,* 1992). When goods show depictions that exploit sex in a manner that can be described as degrading or dehumanizing, it is seen as harmful to society. Therefore such material will almost certainly always fail the community standards test. It is confirmed in *Butler* that the appearance of consent does not nullify the degrading quality of the act. Therefore, as an example, consent to be treated in a degrading manner in a sexually explicit depiction would still render the depiction as offensive to the community as a whole.

One of the few instances in which material may be offensive to the community yet may not necessarily be "undue" is when the sex is being portrayed in the context of serving a wider artistic or literary purpose. The nature of the material could be an obvious exploitation of sex but if that component is required "for the serious treatment of a theme" (*R. v. Butler*) then it will not be considered "undue". This assessment is called the Internal Necessities Test. In such cases, the material must be viewed as a whole and not taken as just a part of the bigger picture in question. For instance, the portrayal of a sexually graphic scene in a video may on its own be considered undue exploitation but when viewed in the context of the whole work might be defended as serving a wider artistic purpose.

The main issue in determining whether sex has been unduly exploited is whether there is an element of harm as a result of the consumption of the material. The role of the courts is to determine "as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow form such exposure" (*R. v. Butler*). In *Towne Cinema Theatres Ltd. v. The Queen* [1985], it was determined that community standards are never constant because they depend on various factors, notably the audience consuming the images. Different audiences help to determine what type of standards would be tolerated in a specific community. A consensus among the community should be formed that establishes what types of standards would be acceptable and tolerated for the members of that community. The level of tolerance should be assessed objectively. In *R v. Mara* [1997], objectivity is key in determining when material is "undue" and has surpassed the level of tolerance that a community has

set for itself. The *R. v. Mara* case dealt with the owner of a tavern and his manager in charge of entertainment being charged with allowing indecent performances pursuant to s. 167(1)[4] of the *Criminal Code*. The standard for establishing the "undue" nature of certain material was not up to individual tastes or perceptions or some subjective judgment. In the *Mara* case, the different levels of court did not come to the same conclusions with regard to the type of acts that would exceed the community standards of tolerance. The Supreme Court determined that "a performance is indecent if the social harm engendered by the performance... is such that the community would not tolerate it taking place. The relevant social harm to be considered... is the attitudinal harm on those watching the performance as perceived by the community as a whole" (*R. v. Mara*, 1997, paragraph 34). In this case, there was a debate between what is even considered to be indecent and what the community would tolerate being exposed to. Ultimately, a majority perspective should be the arbitrator in determining what can be constituted as undue and intolerable. The tests described above are meant to assess whether the exposure to certain images or acts would cause harm, and to help determine what the community would tolerate others being exposed to and in the context of obscenity, whether that imagery is justifiable under an artistic or literary merit defence.

The quandary in the matter of a test for community standards of tolerance is that there are no specific terms laid out as to what the measures are for this test; however, some factors for community standards have been outlined in specific cases. The degree of harm to the

[4] Criminal Code section **167.** (1) Every one commits an offence who, being the lessee, manager, agent or person in charge of a theatre, presents or gives or allows to be presented or given therein an immoral, indecent or obscene performance, entertainment or representation.

community from the exposure of certain material is one important factor courts must consider when determining the undue nature of potentially obscenity (as per *R. v. Mara, R. v. Jacob, R. v. Butler).* In other words, the greater the potential of harm from exposure to certain material, the less a community will tend to tolerate others being exposed to it. Tolerance cannot be assessed independently of harm (*R. v. Jacob*). The level of harm then becomes a question. At what point does one consider harm to be so detrimental and intolerable that it crosses the limits that a community has set for itself.

In the *Butler* case, the court stated that harm in this context means that it "predisposes persons to act in an antisocial manner - in other words, a manner which society formally recognizes as incompatible with its proper functioning. The stronger the inferences of a risk of harm, the lesser the likelihood of tolerance." The court's definition, however, does not provide for a national standard by which harm can be measured, which is a clear problem for those reviewing potentially obscene material. One cannot view an indecent act or an obscene publication and assume it will result in the same reaction or behaviour by every audience.

An example of this type of subjectivity can be demonstrated in R. *v. Jacob* (1996). The question of indecency was brought forth when a woman was charged with indecent exposure for baring her breasts while walking down the street in her neighbourhood, a small city in Ontario. Jacob was charged with indecent exposure after the trial judge determined that she overstepped the bounds of the community standards of tolerance by baring her breasts in the streets. Nevertheless, the Supreme Court did not agree with the

trial judge. The court stated that the community standards were never actually defined with regard to this case and what would constitute an indecent act, and determined that the trial judge was erroneous in its judgment. Because the test for community standards of tolerance were used to determine obscenity and indecency generally associated with some context of sexuality, the court stated that the notion of sexuality had not been determined in this case. The appellant had not bared her breasts for a sexual purpose; therefore, the trial judge did not use the proper "standard" in determining what the community would tolerate. It seemed that the trial judge had presupposed that because most women in North American society choose not to bare their breasts in public that it was demonstrative of a community standard that could be tolerated with regard to female nudity. The court stated that the trial judge and the appeal court erred in this case. "They used a test of acceptance based upon the trial judge's assessment of how women choose to act, as opposed to what the contemporary national community would tolerate." Accordingly, the court felt that the previous judgments had not taken the issue of harm into consideration and had they done so it could not be more that "grossly speculative". In essence, all that the trial judge had before him was "some evidence indicating specific individuals' lack of acceptance of the appellant's choice of clothing." Since there was nothing degrading or dehumanizing about the specific act, the court felt that the appellant did not exceed the community standard of tolerance.

The case of *R. v. Jacob* is exemplary in noting how perceptions of indecency (and even obscenity) can be interpreted in different ways by different audiences – the basic struggle between objectivity and subjectivity. At trial, the defence had brought forth three

witnesses who testified that they had in fact seen the appellant walking down the street bare-chested but did not feel offended by her actions. In contrast, the Crown set forth that the appellant's actions caused one neighbour such discomfort and repugnance that she had to take her children away from the street to the back of her house away from the offensive, "dirty" sight. Even in this suburban neighbourhood, the community standard could not be clearly defined as evidenced by the divisive stance taken by residents. The trial judge based his decision on the fact that most women would not necessarily be seen in public bare-breasted, however, that did not mean that it was an action that the entire community would not necessarily tolerate.

The harm in this case was not determined. The court stated that in fairness to the previous courts' decisions, the *Butler* case (in which it was shown that harm was a determining factor of community standard of tolerance), was decided after the *Jacob* trial, and could not necessarily be used in the argument for indecency in the *Jacob* case. Based on *Butler,* in determining the community standard of tolerance, the issue of harm must always be considered. The standard of tolerance is dependent on the level of harm that may result from exposure to an image. The notion that one common standard may encompass the toleration levels of an entire community is nearly impossible. Just as different juries and judges will assess certain acts or images in certain ways, so will different communities.

In each of the cases mentioned in this chapter, there were no specific studies or surveys undertaken when attempting to determine a standard of tolerance. In every case, harm is

interpreted in ways particular to a specific situation. The tests used to ascertain the type of harm or the effect of a particular image or action on individuals consists more of what people involved in a specific case feel the community would tolerate based on a general notion rather than a scientific method of analysis. In the case of *R .v. Jacob*, the community standard was determined based on the trial court's notion of what women would generally do but not necessarily on what the community would tolerate. According to the Supreme Court of Canada, this analysis may be inaccurate since the community may tolerate much more than what one individual might feel that is appropriate or decent.

Indecency is not explicitly defined in the *Criminal Code*, however specific jurisprudence has contributed to the meaning of indecency, a matter that is discussed in *Butler*. Both obscenity and indecency share parallel issues with regard to questions of morality and debates around government control over such matters. For this reason, I have mainly used examples of cases in which indecency was the main issue of contention. The court stated that:

> Standards (that) escape precise technical definition, such as "undue", are an inevitable part of the law. The *Criminal Code* contains other such standards. Without commenting on their constitutional validity, I note that the terms "indecent", "immoral" or "scurrilous", found in ss. 167, 168, 173 and 175, are nowhere defined in the *Code*. It is within the role of the judiciary to attempt to interpret these terms.

In the same regard, in *R. v. Mara,* a performance that takes place in an adult club is considered "indecent if the social harm engendered by the performance, having reference to the circumstances in which it took place, is such that the community would not tolerate

it taking place". However, similar to obscenity, indecency takes on a definition that encompasses general assumptions, as was exemplified in the *Jacob* case. These general assumptions are then perceived to be what a society would hold as their moral norms.

Earlier, I discussed the three tests that help to determine whether material is considered obscene. The community standard of tolerance test encompasses all of these tests in some manner, including analyzing the degree of degradation or dehumanization involved in the material and the internal necessities test. When determining the level of harm, should degradation or dehumanization be present, the level of tolerance for the material appears to decrease. In *R. v. Mara*, the court concluded that certain sexual performances and specifically the ones presented in that case exceeded the community standards of tolerance. It was noted that the activities that took place between dancers and patrons went beyond what the community would tolerate in that environment. In this particular case, the elements that constituted harm to society are described below:

> It degrades and dehumanizes women and publicly portrays them in a servile and humiliating manner, as sexual objects, with a loss of their dignity. It dehumanizes and desensitizes sexuality and is incompatible with the recognition of the dignity and equality of each human being. It predisposes persons to act in an antisocial manner, as if the treatment of women in this way is socially acceptable and is normal conduct, and as if we live in a society without any moral values
>
> (*R. v. Mara*, 1997, paragraph 34)

The case illustrated that the specific acts assessed by different people can be considered harmful, i.e., publicly portraying women in a humiliating way. Moreover, they may even be perceived as a threat to the function of society. Although the *Mara* case focused on activities that took place in an adult club to establish indecency, the same elements can be applied when assessing obscenity.

The matter of a person's accountability for their actions comes into question as well. In other words, how is a person held accountable for certain unlawful acts when the legal limits for these actions are not expressly defined? The dilemma is that lines of moral decency (i.e., an explicit definition of indecency) are not clear and often are determined after the law has condemned a person's actions. The moral expectations of society are not explicit enough for a population to adhere to in order for a person to even know they have crossed the lines of moral decency. In the same respect, the predicament that citizens find themselves in is that there is no concrete standard as to what is considered obscene. Viewpoints differ on this subject tremendously based on several factors including background, education, ethnic origin, moral upbringing and so on. The *Jacob* case is a good example of how a common, everyday neighbourhood includes people with a wide range of viewpoints and clashing morals.

When there are no set standards in the area of obscenity, essentially people are expected to follow a law for which there are no specific limits. Each of the cases discussed thus far shows the discrepancies between opinions about decency and obscenity. Expecting individuals to conform to laws for which there are no specific criteria becomes difficult and unfair for the public. In many cases, different standards are used to assess similar situations. These discrepancies are evident when comparing the cases of *R. v. Pelletier*, [1999] and *R. v. Mara*. Both cases dealt with sexual touching between patrons and dancers in private nightclubs in exchange for a fee. *Pelletier* appears to apply a different standard than was used in *Mara*, where in *Mara* the Supreme Court found that similar touching in similar circumstances was "unacceptably degrading to women" and thus

constituted indecency (*R. v. Mara*, 1997, paragraph 35). However, in the *Pelletier* case the appellants were acquitted on the charge of indecency (*R. v. Pelletier*, 1999, paragraph 3). The inconsistency among the decisions can lead to confusion as to what actually constitutes indecency and in the same regard what would constitute as obscenity.

For the purposes of this paper, the issue is that obscenity has not been defined in strict terms and is therefore left for arguments about subjective decision-making by officials, whether in court, Customs regulations and enforcement, or elsewhere. As noted in *Butler,* "the *Criminal Code* did not provide a definition of any of the operative terms, "obscene", "indecent" or "disgusting"." Because of this lack of clarity, the main definition for obscene publications stems from the Criminal Code definition of the "undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence".

Other matters, such as basing decisions on sexual orientation, compound issues surrounding lack of clarity with regard to obscenity decisions. The appellants in the *Little Sisters* case had also accused the Canadian government of prejudicial treatment by detaining and prohibiting the material they imported, which consisted mainly of gay and lesbian material. However, *Luscher v. Deputy Minister, Revenue Canada, Customs and Excise*, (1985), was cited in *Little Sisters* in order to stress the importance that although obscenity was not clearly defined in the *Criminal Code* it most certainly does not characterize it based on sexual orientation. "The Criminal Code does not characterize "obscenity" based on sexual orientation and neither, it must be inferred, did Parliament

intend Customs officials to do so." (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 16). Essentially, Customs officials are not mandated to prohibit material outside the law and since the obscenity legislation stems from the *Criminal Code*, obscenity should not be determined by the sexual orientation it portrays. *Luscher* stressed that since Parliament has prohibited only material that it has criminalized (i.e. obscenity), Parliament apparently intended there to be a free flow of other materials across the border, including sexually expressive material, such as erotica. The aim was that sexual material could not simply be prohibited because of the nature of it being sexual, rather only material that is actually obscene under the *Criminal Code* should be prohibited.

In a recent case, *R. v. Labaye*, (2005) the appellant was accused of keeping a "common bawdy- house" for the "practice of acts of indecency" defined in section 210 of the Criminal Code[5]. The court noted that there is no clear definition of indecency and that it is left up to subjective interpretations based on an element of harm. This case focused on the appellant being the operator of a "swingers" club – a private club where members pay an annual membership fee. The only people allowed into the club were members and their guests. The premise of the club was for these people to engage in sexual activity within the confines of the club. Sexual acts that took place at the club were done

[5] Criminal Code Section **210.** (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.
(2) Every one who
(*a*) is an inmate of a common bawdy-house,
(*b*) is found, without lawful excuse, in a common bawdy-house, or
(*c*) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,
is guilty of an offence punishable on summary conviction.

voluntarily, and members did not pay for sex. There was also no indication that people were acting against their will while engaging in sexual activity. At trial it was found that the appellant did indeed exceed the limits of what could be considered decent. However, the Supreme Court found that the harm that the trial judge felt was apparent could in fact be subjective. The court states that:

> Incompatibility with the proper functioning of society is more than a test of tolerance. The question is not what individuals or the community think about the conduct, but whether permitting it engages a harm that threatens the basic functioning of our society. This ensures in part that the harm be related to a formally recognized value, at step one. But beyond this it must be clear beyond a reasonable doubt that the conduct, not only by its nature but also in degree, rises to the level of threatening the proper functioning of our society.
>
> (*R. v. Labaye*, 2005, paragraph 56)

The court affirmed that the "causal link between images of sexuality and anti-social behaviour cannot be assumed" and the risk would need to be proved (*R. v. Labaye*, 2005, paragraph 58). The court affirmed that in cases where harm was a factor behind a charge of indecency, the following two requirements had to be proven:

> 1. That, by its *nature*, the conduct at issue causes harm or presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and thus formally endorsed through the Constitution or similar fundamental laws by…
> 2. That the harm or risk of harm is of a *degree* that is incompatible with the proper functioning of society.
>
> (*R. v. Labaye*, 2005, paragraph 62)

In reviewing the lower courts' decisions, the Supreme Court found that the Crown did not prove that the sexual conduct at issue harmed individuals or society. The court noted that the Court of Appeal erred in "applying an essentially subjective community standard of tolerance test and failing to apply the harm-based test of *Butler*" (*R. v. Labaye*, 2005,

paragraph 70). The court overturned the lower courts' decision and set aside the conviction.

In this chapter I have outlined the ambiguity around the definition of obscenity in the context of past jurisprudence. While cases such as *R. v. Jacob (1996)*, *R. v. Mara (1997)* and *Luscher v. Deputy Minister, Revenue Canada, Customs and Excise*, (1985) have contributed to the landscape of the way obscenity legislation is mandated in Canada, no strict definition exists. The *Labaye* case is a recent example of the difference of opinions regarding the notion of indecency. Even in 2005 the courts were still struggling with a clear characterization of what is or is not considered indecent, particularly when the *Butler* test for criminal indecency is required as the lens through which an act is judged. Even the term harm cannot be simply established as one specific definition that all members of society can agree upon. In this regard, an objective view is often difficult to maintain. I have used the example of this case since the difficulties are synonymous with those that occur when the courts grapple with issues surrounding obscenity. As the courts wrestle with the debates surrounding obscenity, it is inevitable that departments such as Canada Customs, who are mandated to uphold obscenity legislation, would fall into the same struggles and face similar issues as the courts face.

In the next chapter I discuss the case of *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 where various challenges of the case are examined. The case spanned over five years in the courts, and the following chapter will highlight some of key decisions stemming from each of the trials. These key judgments are underscored in

order to identify the responses Canada Customs had to both the Supreme Court and lower court decisions later in this study.

CHAPTER THREE – LITTLE SISTERS CASE

This chapter outlines *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, a case that challenged, among other issues, the constitutionality of Canada Customs' government regulations and its interpretation of criminal law. In doing so, the plaintiffs attempted to highlight government's discriminatory practices towards a minority group within the Canadian population, as well as attack a flawed administrative process that left room for error and subjectivity. To facilitate an understanding of the outcome of the *Little Sisters* case, the chapter will first outline the two lower court cases that preceded the Supreme Court of Canada decision.

Little Sisters Book and Art Emporium, the B.C Civil Liberties Association, James Eaton Deva and Guy Allen Bruce Smythe (hereinafter referred to as *Little Sisters*) challenged the Minister of Justice and Attorney General of Canada, the Minister of National Revenue and the Attorney General of British Columbia in a lengthy trial that began in 1996 and concluded in the Supreme Court of Canada in 2000. The Minister of National Revenue was named as a defendant because the Department was responsible for the administration of the Customs legislation. For the sake of simplicity, the defendants are referred to as "Canada Customs" throughout the course of this examination[6].

The main issue in the case was the claim by Little Sisters Book and Art Emporium, a bookstore catering to the gay and lesbian community in Vancouver, British Columbia, claimed that Canadian Customs officials were unfairly targeting them at the border. The

[6] The Federal department currently known as the Canada Border Services Agency (CBSA) is no longer a line department and hence underwent several name changes during the course of the trial. I will simply be referring to the department Canada Customs

conflicts between Little Sisters and Canada Customs commenced well over a decade and a half before reaching the point of being heard in the Supreme Court[7]. The trial took place in 1996 in British Columbia Supreme Court when Little Sisters challenged the practices of Customs officials and the Canadian border processes. Little Sisters attempted to establish that Customs officials had discriminated against the gay community in their handling of importations by certain importers.

The initial trial, which is detailed below, concluded in 1996. Little Sisters then appealed the case to the British Columbia Court of Appeal, which heard the appeal in 1998. The reason for the appeal was that Little Sisters argued that the Customs legislation in question[8] was an infringement on their rights and could not be reasonably justified. They also sought a declaration that would render certain parts of the Customs legislation to be of no force and effect. The third reason for the appeal was to seek a declaration that the Customs legislation had been applied in a manner contrary to certain parts of the *Canadian Charter of Rights and Freedoms* and should not be justified pursuant to any defences. In essence, Little Sisters brought forth the appeal based on the same issues they brought forth in the initial trial. Their assertion was that the Customs legislation was in part the cause of the inadequacies of the administration of the legislation by customs officers. Ultimately, the appeal was dismissed. The case was then appealed by Little Sisters to the Supreme Court of Canada, where a decision was rendered in 2000. An examination of these three decisions follows below.

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[7] Little Sisters' complaints of Customs treatment began well before the trial, however this study only examines those issues brought forth at trial.
[8] The Customs legislation is discussed in the following chapter.

SUPREME COURT OF BRITISH COLUMBIA, 1996

Little Sisters Book and Art Emporium was established in 1983 and was owned by James Eaton Deva and Guy Bruce Smythe. Catering to the gay and lesbian community, the bookstore was compared to a community centre for the gay and lesbian population in Vancouver and the surrounding area (*Little Sisters Book v. Canada (Minister of Justice),* 1996, Paragraph 90). The store carried a variety of items, such as travel information, literature, general interest material, health related studies, academic research and other items specifically oriented towards the interests of the gay community. Another aspect of their business is that of gay and lesbian erotica. According to testimony given at the Supreme Court of British Columbia, Little Sisters is one of only four bookstores in Canada "dealing extensively in homosexual erotica" (*Little Sisters Book v. Canada (Minister of Justice),* 1996, Paragraph 129). The Supreme Court of British Columbia trial was heard over a course of two months. The final judgment was rendered on January 19, 1996. The case brought forth allegations by Little Sisters of discrimination by the federal government and infringements of fundamental freedoms and democratic values. The main arguments that the appellants (Little Sisters et. al) brought forth are outlined below.

Little Sisters' claims

Little Sisters claimed that most of the books and magazines it imported for sale in its store originated from publishers in the United States. The assertion the appellants made was that since 1985 ""hundreds" of books and magazines purchased by Little Sisters for importation into Canada (had) been seized, detained, prohibited and/or destroyed by

customs officials" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 1996, Paragraph 4). As such, Little Sisters challenged Canada Customs provisions[9] that were relevant to obscenity legislation and border enforcement by invoking s. 52(1) of the Constitution Act, 1982[10] and s. 24 of the *Charter*[11]. Little Sisters alleged that the Customs provisions had been "construed and applied in a manner contrary to ss. 2(b) and 15(1) of the *Charter*" and could not be saved under s.1 of the *Charter* (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 1996, Paragraph 16). Little Sisters specifically wanted certain declarations made by the court regarding tariff code 9956 (a) of the Customs Tariff and ss. 58 and 71 of the *Customs Act*.

Little Sisters asked that the court to declare that the tariff code and specific sections of the *Act* in question have:

1. no force or effect at all; or, alternatively
2. no force or effect to the extent that they are construed and applied to detain, seize, or prohibit the importation of books and printed paper into Canada on the ground that the written text is obscene

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[9] The Customs sections that are being challenged are code 9956 (a) of Schedule VII and s. 114 of the Customs Tariff, ss. 58 and 71 of the Customs Act. Section 58 of the Customs Act authorizes customs inspectors to inspect goods imported into the country. Section 71(1) of the Customs Act details the importer rights for re-determination under other sections of the Act, namely sections 60, 63, 64 and appeals may be taken under sections 67 and 68 in respect of the determination.

[10] The following section of the Constitution Act, 1982 are relevant to this discussion:

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

[11] The following *Charter* sections are relevant to this discussion:

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

2. Everyone has the following fundamental freedoms:
(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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

> within the meaning of s. 163(8) of the Criminal Code; and, in addition or alternatively,
> 3. no force or effect to the extent that they are construed or applied to detain, seize, or prohibit the importation of books, printed paper, drawings, paintings, prints, photographs or representations of any kind produced for homosexual audiences that are alleged to be obscene.
>
> (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 1996, Paragraph 15)

The main issue regarding these declarations was that Little Sisters contended that in the context of allegedly obscene publications, the tariff code and parts of the *Customs Act* should be nullified. Little Sisters also wanted material produced for homosexual audiences to be treated in a different manner than any other material imported into the country, in that sections of the *Customs Act* dealing with obscenity not be applied to those items.

Canada Customs' response

In response to Little Sisters arguments, Canada Customs initially submitted the following three defences:

> 1. That the plaintiffs are precluded from challenging the application of the customs legislation to Little Sisters' importations because Little Sisters did not exhaust its remedies under the legislation;
> 2. That the impugned legislation infringes neither s. 2(b) nor s. 15 of the *Charter*; and
> 3. That if the impugned legislation infringes either s. 2(b) or s. 15 of the *Charter*, it is saved by s. 1.
>
> (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 1996, Paragraph 12)

However, Customs did concede that the legislation being challenged did in certain circumstances infringe s. 2(b), but "denied that it infringed s. 15(1), and contended that...

it was a reasonable limit on expression and equality and was saved by s. 1" of the *Charter* (*Little Sisters Book v. Canada (Minister of Justice),* 1996, paragraph 3). Essentially, Canada Customs accepted that the legislation in question did infringe section 2(b) freedoms (i.e., freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication), however, they claimed that it was a reasonable limitation under section 1 of the Charter, which allows for freedoms to be based on "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 1996, paragraph 3). Customs, therefore, acknowledged that they did infringe on importers right but that there infringement was a necessary one in order to uphold their legislative mandate.

Trial Courts' Decision

At trial, the Court declared that the administration and application of the provisions of the *Customs Tariff* and the *Customs Act* relating to the allegations did contravene sections 2(b) and 15(1) of the *Charter*. However, the court determined that these infringements could be justified under s.1 of the *Charter*. The court stated that although section 24(1) was meant to allow the Court to grant any remedy appropriate to the specific case, Little Sisters sought a very broad declaration, i.e. that Customs mandate to detain, seize, or prohibit the importation of representations of any kind produced for homosexual audiences that are alleged to be obscene be nullified that the court decided could not be granted (*Little Sisters Book v. Canada (Minister of Justice),* 1996, Paragraph 282). Although Customs claimed that Little Sisters had not exhausted all their rights of re-

determination[12] (see *Chapter 4*), the Court agreed to issue a declaration pursuant to section 24(1) of the *Charter* (*Little Sisters Book v. Canada (Minister of Justice),* 1996, Paragraph 280). The court agreed that Little Sisters was entitled to a declaration based on the evidence provided regarding the erroneous application of some aspects of the Customs legislation. To that end, the Court declared that at times "during the period covered by the evidence at trial some customs officers have acted arbitrarily and have thereby infringed s. 2(b) and s. 15(1)" (Little Sisters Book v. Canada (Minister of Justice), 1996, Paragraph 282). The court agreed that the testimony showed that customs officers had "from time to time exercised their discretion in an arbitrary and improper manner" (*Little Sisters Book v. Canada (Minister of Justice),* 1996, Paragraph 279).

Nevertheless, the court affirmed that the Customs legislation itself did not explicitly discriminate against the gay and lesbian population, and therefore did not violate the plaintiff's equality rights. The manner in which this was determined was that for a law to be considered discriminatory, the legislation should be "neutral on its face and (apply) to all obscenity, whether tailored for heterosexual or homosexual audiences... and not draw a distinction between others and the plaintiffs" (*Little Sisters Book v. Canada (Minister of Justice)*, 1996, Paragraph 125). The law may "not create a distinction on its face, (but) it may still be discriminatory in its effect if it imposes burdens or disadvantages..." on a certain group (*Little Sisters Book v. Canada (Minister of Justice*), 1996, Paragraph 126). The result was an "adverse effect discrimination" where the law seemed neutral but has a "disproportionate impact on a group because of a particular

[12] The Federal Crown relied on subsections 58(6), 62(3), and 65(3), which provides that no remedy lies with respect to a classification determination except in accordance with the provisions of the *Customs Act* (Little Sisters Book v. Canada (Minister of Justice), 1996, Paragraph 280). This is discussed in Chapter 4.

characteristic of that group", and specifically in this context referring to being part of the gay population (*Little Sisters Book v. Canada (Minister of Justice),* 1996, Paragraph 126). In this case, the application of s.163 (8) of the Criminal Code in Canada Customs legislation is what could have caused the adverse effect discrimination against Little Sisters. Little Sisters, however, had not challenged that specific part of the Criminal Code, therefore the court determined that the "disproportionate impact (was) not the responsibility of the (Customs) legislation and it cannot be said that this legislation imposes a burden on the plaintiffs that would amount to an infringement of their rights under s. 15(1)" (*Little Sisters Book v. Canada (Minister of Justice),* 1996, Paragraph 131). Therefore, the court affirmed that Customs could not be held accountable for the impact that section 163(8) of the *Criminal Code* had on Little Sisters, particularly since Little Sisters had not challenged the validity of that section.

Little Sisters had argued there were systemic problems within the Customs procedures for handling potentially obscene importations. Their attempt to have an injunction to restrain Canada Customs from applying the legislation on the Little Sisters was determined by the court as granting "Little Sisters an exemption from what (the court) ... found to be a constitutionally valid law" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* 1996, paragraph 6). Little Sisters also focused on the shortcomings derived from the application of the customs legislation by customs officers. Their argument was that the legislation in itself was flawed, which led to the errors caused by customs officers, and this progressed to violations of rights and questions of constitutionality. The court disagreed with this line of reasoning, and instead held that the problems outlined in the

trial were caused by "systemic" difficulties in the Customs administration that could be "overcome with the benefit of appropriate and consistent training of customs officers, and with the necessary time and the availability of relevant evidence to allow them to properly perform their task" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* 1996, paragraph 257).

The court found that during the course of the initial trial, Canada Customs had quickly addressed some of the problems the plaintiffs brought up as systemic issues. These matters are discussed in more detail in Chapter 5. Therefore, in the court's final judgment, it was noted that the department had "revised its procedures... to require more careful consideration by qualified officers of possibly obscene books. The executive branch of government must be allowed some flexibility in how it responds to the Court's judgment, and the steps taken are reasonable first steps and should achieve the objective until a more comprehensive administrative scheme can be put in place" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* 1996, paragraph 11). This statement by the court acknowledged the fact that changes to administrative processes would take time and that it would not be logical to expect the effects of the amendments to take place instantly.

The court dismissed the Little Sisters' applications to nullify tariff code 9956(a) of the Customs Tariff, and ss.58 and 71 of the Customs Act. The court declared was that "Tariff Code 9956(a) of Schedule VII and s. 114 of the *Customs Tariff*... and ss. 58 and 71 of the *Customs Act*, S.C. ... (had) at times been construed and applied (by Canada Customs) in a manner contrary to s. 2(b) and s. 15(1) of the *Canadian Charter of Rights*

and Freedoms". The court declared that the Customs legislative provision had been construed in a manner "contrary to s. 2(b) and s. 15(1) of the Charter". The court also affirmed that Little Sisters had demonstrated that periodically (during the period covered by the evidence at trial) some customs officers had acted arbitrarily and had thereby infringed sections of the *Charter* (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* 1996, paragraph 282-283). Essentially, this meant that Customs legislation was upheld but that the court acknowledged that the department had made errors, and processes needed to be rectified.

BRITISH COLUMBIA COURT OF APPEAL, 1998

The appeal to the British Columbia Court of Appeal was brought by Little Sisters and was heard in March 1998, two years after the Supreme Court of British Columbia trial decision was rendered. Little Sisters had originally argued that certain sections of the *Customs Act* and the *Customs Tariff* violated its *Charter* rights and were unconstitutional. The remedies Little Sisters wanted to have invoked would in essence have nullified Customs legislative mandate to detain goods based on obscenity provisions. As discussed in the previous section, the lower court did not agree that the Customs legislation should in fact be struck down, however, it did affirm that there were times when sections of the *Charter* were contravened in Customs enforcement of its legislation. The court had stated that at certain times customs officers had applied customs legislation contrary to sections 2(b) and 15(1) of the *Charter*. The court also found that "ordinary human error (and) systemic defects" resulted in the arbitrary and improper classification decisions" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* 1996, paragraph

281). The court acknowledged these errors and the need for Customs to rectify the probability of such errors occurring in the future with a more rigorous administrative process. The court also noted that Customs was, in fact, in the process of rectifying these processes, as is discussed in further detail in Chapter 5.

Little Sisters' Arguments on Appeal

Little Sisters brought their appeal on the basis that they felt the trial judge was erroneous in determining that the Customs legislation did not violate s.15 (1) of the Charter. They also argued that although at trial the court had accepted that the Customs legislation violated s. 2(b) of the *Charter*, it erred in determining that the legislation could be justified under s.1 of the *Charter*. Another reason for the appeal was based on Little Sisters' primary concern in the initial trial, i.e., to have a declaration granted under s.52 of the *Constitution Act*, 1982, which would invalidate the customs legislation "to the extent that it authorizes the detention and prohibition of gay and lesbian material" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice),* 1998, paragraph 7).

Court of Appeal Decision

Ultimately the appeal was dismissed. The appellate court stated various reasons as to why the appeal should be dismissed. The court listed the positive effects of customs legislation, such as being a "deterrent" to the importation of obscene material; that customs acted as a sieve for such material entering into Canada; when compared to other similar international systems, the Canadian customs process is "less intrusive"; and that actually having such a system in place demonstrated the "recognition of the international

obligation" Canada set up to control obscene material (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice),* 1998, paragraphs 99-102). The court noted several positive and negative effects of the Customs legislation regarding obscenity. One of the negative effects was the delay on businesses because of material (both obscene and non-obscene) detained at the border. However, in this regard, the court stated:

> ...no screening system, whether administrative or judicial, can operate without some delay in the reception of material. It is difficult in many cases for an instant decision to be made that material is non-obscene... (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* 1998, paragraphs 96)

The court acknowledged that the Customs errors were made because of the lack of training and administrative flaws. The court noted that human error could not be avoided in any process related to judgment calls. Also, the initial decisions could be appealed based on the system in place for obscenity prohibitions made at the border (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* 1998, paragraphs 97).

As for the positive effects of the Customs legislative provisions on obscenity, the court noted that as a deterrent to the importation of obscene materials, the Customs legislation is not a perfect process. However, having such legislation in place at the border helps to "avoid proliferation of such material within Canada" and the system is "less intrusive than that found in certain other national systems, and constitutes a recognition of the international obligation of Canada to control the ... dissemination of obscene material" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* 1998, paragraphs 99-101). The court agreed with the trial judge in upholding Customs legislative authority in

controlling the flow of obscene material into the country. The appellate court stated that the negative effects on freedom of speech were minimal "or (had) been caused in the past by defects in the administration of the legislation" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice),* 1998, paragraph 102). The adverse effects (i.e., the limitations on freedom of expression and other issues such as the potential delays on business importing material) were "proportional to or outweighed by the positive effects to be gained by furthering the parliamentary objective" of preventing the propagation of obscene material within Canada (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* 1998, paragraph 102).

The appellate court agreed with the trial judge in saying that customs legislation did not and should not distinguish between heterosexual and homosexual material when determining obscenity (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* 1998, paragraph 142). The court stated that if harm was the basis for which obscenity was apprehended, then it should have been determined by an application of a general community standard, not a standard specific to the gay and lesbian community. This line of reasoning was seen in *Butler*, as is noted in Chapter 2. "The question is not whether harm will be caused to the gay and lesbian community by the importation of obscene material, but whether harm to society generally may be caused by importation and proliferation of such material" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 1998, paragraph 77). The court affirmed that one of the purposes of Customs legislation was to uphold the mandate of the Criminal Code and to prohibit the importation of obscenity as prescribed in the legislation, and not to prohibit random potentially obscene gay and lesbian material.

In summary, the court found that although the Customs legislation infringed upon the freedom of expression guaranteed by s. 2(b) of the Charter; the violation of s. 2(b) was a reasonable limit prescribed by law and was demonstrably justified in a free and democratic society. It was found that the Customs legislation did not infringe s. 15(1) of the Charter and dismissed the appeal.

SUPREME COURT, 2000

Little Sisters appealed the courts decision to the Supreme Court. The Supreme Court decision was rendered in 2000, five years after the initial trial had taken place. During this period of time, it was noted in the appellate courts decision that Canada Customs had indeed rectified some of the matters initially brought up by Little Sisters in the trial, notably better training and communication processes for border inspectors. These changes are discussed in detail in Chapter 5.

Little Sisters arguments on appeal

Little Sisters argued that although its material would be considered erotica, nothing it had imported should be classified as obscene according to s.163 (8) of the *Criminal Code*. Chapter 2 outlines the definition of obscenity and of an obscene publication and the ambiguities surrounding this term. Little Sisters made several arguments against Customs that were reiterated at the Supreme Court. Their issues comprised of the following areas that I examine in this study:

1. Burden of proof
2. Delays at the border and targeting of importers

3. Customs review processes including:
    a. Inadequate training and resources
    b. Customs' Interpretation of Criminal Code s. 163
    c. Community standards of tolerance test
    d. Test for Degradation and Dehumanization

These subjects are outlined below beginning with Little Sisters' arguments surrounding each issue and then the Court's eventual decision for each point of argument.

Canada Customs' Arguments

When Customs presented its side in the Little Sisters case, one of the key elements that were focussed on was the vast influx of material through the Canadian border on a day-to-day basis. During the trial, Customs officials had testified that nearly 10.5 million entry transactions occurred each year and that specific to this case 20,000 to 40,000 pieces of mail entered the Customs Mail Centre in Vancouver on a daily basis (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 14). Discerning whether goods were obscene was only one on a list of hundreds of tariff items for which inspectors are examining items. Attempting to pass "moral judgement" on goods on one hand, and in the next moment determining the tariff on a piece of fabric or food item is typical for border inspectors (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 15). The trial identified the issues of increased volumes of cross-border material versus reduced government resources. The reduced resources were not only at the inspector level with regard to number of available staff to review material, but also included the lack of time devoted to adequate obscenity

law training and administrative processes (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 17). These matters are integral to Little Sisters arguments listed below.

1. Burden of Proof

Another issue examined in the trial was that matter of who should bear the burden of proving whether goods indeed constituted obscenity or not. The argument made by Little Sisters was that:

> We challenge the entire scheme, not just the power of the Customs officer at the front line to do that detention and prohibition, but the scheme insofar as it puts the onus on the importer, whether the importer is a bookstore or a regular individual to seek a redetermination, or review, or appeal, would have you through a byzantine bureaucratic process and ultimately to the Courts in order to prove that the material is not obscene.
> (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 97)

The argument was that the importer should not be held responsible for proving that their detained material was not obscene after it had been detained. Instead, the person making the claim that certain goods were obscene should be responsible for proving that the material was in fact so.

Supreme Court Decision on Burden of Proof

The matter of reverse onus was acknowledged as being integral in the detention of suspected obscene material. Originally, the burden of proof rested with the importer to provide evidence that material that Canada Customs had detained was in fact not obscene. The court concluded that

> s. 152(3) [should] not to be construed and applied so as to place on an importer the onus to establish that goods are *not* obscene within the meaning of s. 163(8) of the *Criminal Code*. The burden of proving obscenity rests on the Crown or other person who alleges it. (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 105).

Hence, it was determined that the responsibility should lie with the Customs' to prove that material they have detained as suspected obscenity indeed was so.

2. Delays and Targeting

Delays at the border were a cause of great concern for Little Sisters. The court heard that Little Sisters' business had been negatively affected by the delays at the border. Due to their reliance on nearly 80-90 percent of their erotica from the United States, a large part of their business was continuously stunted whenever a shipment was stopped at the Canadian border. According to Little Sisters, foreign suppliers required payment within thirty days of delivering their export to their Canadian destination. In cases where material was held at the border, the plaintiffs often did not receive their shipments for months after their payments were made.

Due process did not deem that Customs inspectors review material in a timely manner, so Little Sisters could wait months for their shipments. Frequently, the causes of these delays were "administrative" and their orders were "seized or ordered returned to sender" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 5). The result from some of Little Sisters' suppliers was to refuse service to the bookstore as to providing them further shipments. Little Sisters also argued that they

were often given no reason for the seizure or return (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 5). The frequent impediments caused major problems for the bookstore including "disrupting planned book launches... loss of business to competitors stocking the same delayed or prohibited items, and items such as magazines, which depend on their shelf value on their timeliness" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 192).

The court concluded that there were indeed delays as a result of issues surrounding Customs' targeting practices. The court confirmed that Canada Customs had not only seized magazines, videos and photographic essays, but also consisted of books by "internationally acclaimed authors". Examples of such books are *Trash* by Dorothy Allison and *The Young in One Another's Arms* by Jane Rule. The court heard that these books were readily available in bookstores throughout Canada and 'mainstream' booksellers testified that they had no problems importing the same merchandise to their stores across the border (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 10). This seemed to indicate that there were signs of targeting by border inspectors for certain importers while others were simply overlooked. As an example of the unbalanced treatment of examining material, a mainstream bookstore owner placed an order for books that were prohibited by Customs when imported by Little Sisters, but were released without any cause for concern other than for the purpose of determining GST payments when ordered by the mainstream bookstore (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 10).

The difference in treatment of both types of importers by government officials was apparent but was not necessarily indicative of unfair targeting of certain importers on the basis of discriminatory practices. However, it was noted that small bookstores similar to Little Sisters in their specialized inventory of gay and lesbian material, and sometimes even feminist-oriented work, was treated in much the same way Little Sisters were. The court indicated that there was "no such blanket surveillance of heterosexual erotica" even in cases of importations to stores that only specialized in X-rated adult books (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 11).

The court noted that Canada Customs detained some items that Little Sisters had attempted to import into Canada, however, Customs officials had previously ruled them admissible. As well, many items that were prohibited entry by the government when Little Sisters ordered them were in fact readily available at the Vancouver Public Library (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 13). The inconsistencies in Customs detentions were enumerated in order to illustrate the apparent targeting of Little Sisters.

Supreme Courts' Decision on Delays and Targeting

The Supreme Court affirmed that Customs had indeed contributed to the significant delays in Little sisters' shipments and to the resulting loss of revenue by the bookseller. In turn, the court concluded that Customs' would be required to conduct an extensive review of its targeting practices. The court also instituted a thirty-day time limit in which

Customs would have to provide a determination on any detained items. The court stated that Customs provided the following failures:

- a failure to notify the appellants in a timely manner of the detention of their material in order to provide them with adequate time to submit evidence for re-determinations and provide reasonable access to disputed material; and
- a failure to establish internal deadlines for the speedy review of material.
  (*Little Sisters v. Canada (Minister of Justice)*, 2000, paragraph 154)

The court determined that the enactment of time-related service standards were necessary so as to avoid extravagant delays of shipments at the border. A 30-day service standard, from the time of detention to determination, was confirmed by the court as an appropriate amount of time in which the importer should receive a decision on the admissibility of their goods. Little Sisters had argued that in several instances, incorrect dates were entered onto the *K-27, Notice of Detention and/or* Determination. In these cases, it would have been impossible to know when a 30-day period would have begun for the determination process. Little Sisters had argued that their business had suffered economic losses due to the slow and seemingly limitless amount of time Customs took in providing importers with decisions on their goods. The 30-day service standard was a key instalment in the Customs review process, as it provided a reasonable time limit for the determination of goods detained at the border. The court affirmed that if "Customs does not make a classification within 30 days the importer's classification applies... (and that) the 30-day decision period was an important protection inserted in the *Customs Act* for the benefit of importers" (*Little Sisters v. Canada (Minister of Justice)*, 2000, paragraph 88). A review of Customs procedures would allow for time limits and any associated administrative flaws (such as incorrect dates entered onto forms) to be addressed and rectified.

3. Review Process

Inadequate training and lack of resources

At trial, the court identified a high error rate and inconsistent decision-making by Customs at all levels of the review process of material, with regard to Little Sisters importations. The court noted that the "high rates of error indicate more than mere differences of opinion and suggest systemic causes" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 6). The court found that there were several factors contributing to the high rates of error, including a lack of resources at the regional level. The most significant of these factors was the inadequate training provided to customs inspectors and other officials in the area of obscenity law. The specific concern regarding the lack of time provided to the officers as well as the lack of resources is of major importance to the case, since material was often prohibited without adequate evidence. In many instances, frontline inspectors are the only point to make contact with imported material and are the only ones inspecting items and providing a determination as to its prohibition or entry.

In cases where importations included publications, more time and effort was required in the review process. In cases where material may have contained artistic or literary merit, further evidence was required for the reviewing officer to make an informed opinion. The court noted this dilemma in the following statement:

> There is no formal procedure for placing evidence of artistic or literary merit before the classifying officers. Consequently, many publications are prohibited entry into Canada that would likely not be found to be obscene if full evidence were considered by officers properly trained to weigh and evaluate that evidence.

> (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 1996, paragraph116).

Without the proper training, time or resources to effectively consider all of the evidence that is necessary in determining whether an item should be prohibited or not, Customs officers cannot be expected to provide consistent, error-free decisions. The lack of resources at Headquarters as well as at the regional levels meant that the administration of code 9956 would lead to arbitrary results. The court noted the historical difficulties in determining whether material could be considered obscene or not. In past cases, stemming from before 1959, Customs inspectors would have their own opinion based on whatever criteria they felt was critical to their evaluation processes, leading to contradictory assessments of material passing through border crossings (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 15).

Customs' Interpretation of Criminal Code s. 163

One of the key areas at issue in Little Sisters' argument stemmed from the manner in which s.163 of the Criminal Code was interpreted in *R. v. Butler*, hence the way obscenity was interpreted in Customs legislation. Little Sisters brought forth several arguments against the interpretation of obscenity as defined in *Butler*. It should be noted that the plaintiffs did not question the validity or constitutional limits of s. 163 of the *Criminal* Code. Little Sisters questioned the suitability of *Butler* and the approach demonstrated by the case towards obscenity. Little Sisters argued that the *Butler* approach to obscenity was one based on a "harm-based" methodology. They felt that such an approach was not necessarily applicable to gay and lesbian erotica in the same

way it was to heterosexual erotica, if at all. The plaintiffs also felt that by using *Butler's* interpretation of obscenity to define a national standard for regulating the importation of a specific type of material, the government was overtly discriminating against minority populations. The reasoning was that the harm-based approach assumes that certain acts or images are perceived as harmful to the "majority" of the population. This view alienated the minority perspective, which may not view certain material as harmful. Utilizing the *Butler* interpretation, which in essence defines the way obscenity is read into Customs legislation, set a single community standard across the country without giving consideration to the minority standpoint. Since Customs legislation had as its basis s.163 of the *Criminal Code*, and more specifically the *Butler* interpretation of this part of *Code*, Little Sisters' argument was that gay and lesbian material should be excluded or treated in a different manner than other material crossing the border for examination.

At trial, however, it was concluded that the *Butler* analysis did not discriminate against the gay and lesbian community and the approach to obscenity in that case simply meant to prevent harm regardless of the context of sexual orientation. The court had gone on to state that Customs legislation did not discriminate against the gay and lesbian community and that the government has the right to impose restrictions on border importations (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 25).

Community Standards of Tolerance

Another criticism brought forth by Little Sisters was in relation to the community standard of tolerance test. The community standard of tolerance test had as its premise

the notion that one cannot determine whether material is obscene based on one's own set of standards or on what they would tolerate themselves. Instead, obscenity should be determined by what a person would not tolerate someone else being exposed to. Little Sisters contended that because a national community ends up being defined by what other citizens' feel is right for their neighbours, or in the case of government, for the rest of the country, the decisions are usually made based on a majoritarian stance (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 55). They argued that the community standard of tolerance suppresses minority speech, including homosexual expression. The basis of their argument was that the whole idea of the community standard of tolerance test was "incompatible with *Charter* values that were enacted to protect minority rights" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 55).

The court concluded this issue by stating that the community standard of tolerance test had originally been set up in order to *protect* minority rights. The court stated that in *Butler*, the concern was raised as to who may be the authority when determining what may be considered obscene. The court concluded that "a national constituency that is made up of many different minorities is a guarantee of tolerance for minority expression" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 57). The court noted that on the one hand there is a level of tolerance citizens have amongst themselves to suppress material to uphold a certain level of functioning for Canadian society; yet on the other hand it must be reasonable to assume that there is a level of toleration so as not to suppress minority expression. The issue surrounding a

community standard was not to be based on taste; it was based on the notion of harmful expression as was established in *Butler* (see chapter 2). In essence, it would seem that since Customs worked on behalf of the Canadian public, the role that the courts upheld for Customs was that of a gatekeeper, filtering out those items that may be contrary to the community standard of tolerance.

Test for Degradation and Dehumanization

Another concern for Little Sisters with Customs' interpretation of s. 163 of the *Criminal Code* was with the test that determined whether material could be considered degradation or dehumanization. Little Sisters argued that *Butler's* test of degradation left room for subjective interpretations since there were no specifications set out in the case around this area. The plaintiffs felt that the test could lead to "homophobic prejudice" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 60). Little Sisters also argued that the harm-based approach was "morality in disguise" and that a "harm-based test effectively rests on [a] discredited moral foundation" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 61). The assumption is that a study into obscenity by a national community standard "cannot be targeted on harm and will inevitably be overwhelmed by majoritarian taste" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 61). In effect, however, the court upheld the *Butler* interpretation of obscenity, and the method by which Customs interpreted that standard in their mandate to review material at the border.

Supreme Court Decision

Though the issue of inadequate resources and the overload of Customs responsibilities was unfortunate, the court noted that these process-oriented matters could not affect the Parliamentary mandate directed to government officials (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 17). The court affirmed that mass importations at border points should not outweigh the bigger issue regarding *Charter* rights and public interests. For this reason, one of the features in the trial was a scrutiny of the Customs border scheme and administrative process from both the plaintiffs' perspective and Customs officials' perspective. The enquiry into the border process was essential since in lower courts Little Sisters had proven that the process was ineffectual and left room for highly erroneous actions. Little Sisters argued that Customs procedures were cumbersome and administratively flawed. The court heard that the procedural deficiencies led to Customs being incapable of administering consistent decisions, and thereby compromising the protection of the Little Sisters' *Charter* rights to freedom of expression. The court agreed that Little Sisters did experience many obstacles when importing material into Canada that were unjustified.

The Supreme Court affirmed that the appellants' rights under s. 2(b) and s. 15(1) of the Charter were infringed on the basis of several factors. The appellants were targeted as importers of obscene material without any substantial evidence that gay and lesbian erotica should be targeted any more than heterosexual material (*Little Sisters v. Canada (Minister of Justice*), 2000, paragraph 154). The unsubstantiated targeting in turn caused economic losses due to unnecessary delays. The Court described the type of

treatment the appellants received by the federal government as, on occasion, prejudicial. They stated that Customs' shortcomings contributed to "excessive and unnecessary prejudices" (*Little Sisters v. Canada (Minister of Justice)*, 2000, paragraph 154).

The Supreme Court concluded the case with remedies in relation to the above-noted deficiencies. Customs was required to perform a thorough examination of the review process, which they followed in order to determine whether goods were obscene or not. The following deficiencies named by the court were pertinent in the analysis of this review process:

- an inadequate amount of officers conducting preliminary reviews of material at the border in a timely manner;
- inadequate training of officers;
- a failure to make manuals and guides readily available to officers and to properly update the Memorandum D9-1-1 (Customs officers obscenity guidelines);
- a failure to develop "workable procedures" to handle the review and classification of books consisting wholly of written test;
- a failure to incorporate Department of Justice advice into departmental guides and memos; and
- a failure to allow the appellants the right to fair and expeditious treatment of their imported goods without discrimination based on sexual orientation.

(Little Sisters v. Canada (Minister of Justice), 2000, paragraph 154)

Customs' assessment must take into consideration the amelioration of the training of Customs officers and the method by which decisions are rendered at the border. A review of the training process was necessary in order to examine the prejudicial methods of detention used previously by Customs inspectors when deciding which material was to be examined. In essence, any notion of detaining material based on the pornographic nature of the goods would have to be justified as being potentially obscene and not simply because the material was pornographic or meant for a specific audience (i.e., in

the matter of this case a homosexual audience). Customs officers would need specific, more stringent training on how to differentiate between erotica and obscenity in a non-prejudicial manner. This type of training could be seen as essential to avoiding similar issues to those arose, sparking this case. Chapter 5 details the way in which these changes have been implemented in the Customs' regime.

Conclusion

In sum, this chapter set the background of the *Little Sisters* case and provided the context for this study. The main purpose of the case was to highlight problems that Little Sisters claimed they suffered as a consequence of prejudicial treatment by Canada Customs. The case stressed that administrative and systemic flaws within the Customs procedures and that at times the government department had indeed handled imported goods in a prejudicial manner. Little Sisters argued that Customs legislation should be nullified as it relates to the detention and prohibition of material suspected of obscenity, but the court did not see this as an acceptable response. Instead, the court directed Customs to review its processes and procedures in relation to the detention of suspected obscenity at the border. This review would include all facets surrounding the training of Customs officers, the development of service standards and the administrative errors previously made by Customs.

The next chapter will examine the Customs regulatory framework in the context of obscenity regulation. The chapter will specifically focus on Customs mandate and legislative authority to examine and detain potentially obscene material. The chapter will

assist in the analysis of the trial, as well as provide interpretation to the components of the Customs schema that Little Sisters had argued should be struck down.

CHAPTER FOUR – CANADA CUSTOMS POLICIES AND REGULATIONS

This thesis examines how Canada Customs responded to and adapted its regulatory frameworks to evolving jurisprudence. The focus of this examination is the development of policies stemming from decisions of the courts and the effect on regulations, procedures, policies and training manuals at the border. This chapter outlines and describes the relevant Canada Customs regulations that are applied on goods imported into the country. The regulations in this chapter relate to those that are specific to the *Little Sisters Book and Art Emporium v. The Minister of Justice* case, and are not an exhaustive inventory of all Canada Customs guidelines. The chapter also outlines the various legal authorities that give Customs officials the power to detain and prohibit imported material.

Canada Customs regulates the flow of people and goods across the Canadian border under the authority of several legislative frameworks. The process of importing material into Canada can be simply described in the following manner: material is exported to Canada, it is examined at the border, material is detained and either released or prohibited after a classification has been made.

Customs' legislative powers are outlined in the *Customs Act* (1985), the main governing authority for border enforcement. The *Customs Act* provides Customs officers and inspectors with the powers to perform their duties, including examining goods and opening "packages that they reasonably suspect may contain goods referred to in the *Customs Tariff*" (*Little Sisters v. Canada*, 2000, paragraph 19). The *Customs Act* also

bestows authoritative powers upon officers to determine the tariff classification on imported goods. Certain aspects of the Customs Act that are relevant to this discussion will be detailed below. The specific sections of the *Customs Act* relevant to this examination are sections 58, 60, 63, 67, 71, 152 and 164.

The Customs Tariff is the legislative authority that guides officers in the proper determination of how goods are classified (see Appendix A). The *Customs Tariff* is a schedule that contains an extensive list detailing tariff item numbers, items that require inspection, units of measurement and any applicable tariffs to those goods. In certain cases, the Customs Tariff stipulates goods that may be prohibited. In the case of obscene goods, the *Customs Tariff* is applied and inspectors are responsible for the proper administration of the tariff based on guidance from officers at Headquarters in Ottawa. Guidance may be obtained in the form of internal directives and communicating with a Quality Control Officer detailed further in this chapter. Tariff item 9899.00.00 of the *Customs Tariff* relates to the aspects relevant to this discussion as it relates specifically to obscenity, hate propaganda, treason and sedition, and child pornography.

I will also discuss the Departmental Memoranda which are guidelines related to specific tariff items. Departmental Memorandum D9-1-1, *Jurisprudence and Revenue Canada's Interpretative Policy for the Administration of Tariff Item No. 9899.00.00 on Goods Deemed to be Obscene under Subsection 163(8) of the Criminal Code*, summarizes and

clarifies the interpretation of the tariff item dealing with obscenity and is specific to the *Little Sisters* case[13].

Furthermore, I will discuss the role that Information Bulletins play in the Customs administrative process. Information Bulletins inform Customs officials of updates regarding changes in policies or procedures. The bulletins are internal documents, meant to provide more concise guidelines to officers and to clarify issues related to the administration of certain tariff items. The Bulletins explain what border inspectors should be doing in certain circumstances where the Departmental Memoranda falls short in providing specific details.

Finally, I will detail the obscenity guidelines that Customs officials are directed to follow when classifying material as obscene or not. These guidelines are derived from evolving jurisprudence and legislative requirements mandated to Customs.

The *Customs Act* – Section 58 and 59

As noted above, the Customs Act provides the legal basis by which officers inspect and detain goods coming across the border. Section 58 of the Customs Act authorizes customs inspectors to inspect goods imported into the country. It states:

> Any officer within a class of officers, designated by the Minister for the purposes of this section, may determine the origin, tariff classification and value for duty of imported goods at or before the time they are accounted for under subsection 32(1), (3) or (5).

[13] The Departmental Memorandum is a document available to the public.

This section of the *Act* also allows inspectors to determine the origin of the goods and whether duties and taxes are applicable on the material. When items are suspected of falling within certain tariff items, they are detained and recorded on certain forms. In the event that material is suspected of containing obscenity, i.e., in reference to tariff item 9899.00.00, officers would record the details of the material on a Customs form K27, *Notice of Detention and Determination.* This form is sent out to importers to inform them of their detained goods and the rights they have with regard to appeals.

Section 59(2) of the *Customs Act* states that an "officer who makes a determination under subsection ...58(1)... shall without delay give notice of the determination... including the rationale on which it is made, to the prescribed persons." There is a clear requirement for officers to inform importers that their goods have been detained and/or prohibited under the specific sections of the *Customs Act*. One of the issues in the *Little Sisters* case was that the rationale on the notices of detention and determination was not transparent to importers. It was argued that importers were not informed of the reasons behind the detention or prohibition of their goods in a clear manner. I will discuss the ambiguities around informing importers of their rights in the next chapter.

As stated above, the first level of determination for goods entering the country occurs as a result of section 58 of the *Customs Act*. Should an importer not be satisfied with the decision rendered at that level, they are given the right to request a re-determination under section 60 of the *Act*. In some exceptional cases, re-determinations are granted under section 59, which allows officers to re-determine "origin, tariff classification, value

for duty or marking determinations of any imported goods at any time within ...(ii) four years after the date of determination, if the Minster considers it advisable..." Generally, however, re-determinations are made under section 60, which states that requests for re-determinations may be made within ninety days after the preliminary decision on the origin, tariff classification, value for duty or marking.

The steps in a re-determination involve a client making a formal request under this section to the department. The timeframe in which re-determinations are made begins at the moment of receipt of a request for re-determination. The department then has several options as to how they may respond to the request, as per section 60(4) below:

a) re-determine or further re-determine..." (in the case that a section 59 decision had been rendered previously on the items) " the origin, tariff classification or value for duty;
b) affirm, revise or reverse the advance ruling; or
c) re-determine or further re-determine the marking determination.

Subsection 60(5) states that Canada Customs should provide notice of the decision and the rationale on which the decision was made to the requester. Essentially, these sections of the *Act* authorize officers to examine and detain goods, however, they stipulate in clear terms the rights of the importers, who are to be informed of the reasons for a detention and of their rights to appeal a prohibition.

The *Customs Act* - Section 61 and 63

Section 61 of the *Customs Act* allows for the re-determination or further re-determination of the origin, tariff classification or value for duty of imported goods at any time after an initial re-determination is made. If an importer accounting for their goods does not

comply with the provisions or regulations of the *Customs Act* or commits an offence (specifically under the *Customs Act*) with respect to the goods, then the department may also choose to re-determine or further re-determine the goods in question. Another basis upon which the department may decide to re-determine the tariff classification or other such issues regarding imported goods at any time is if that further assessment would "give effect to a decision of the court, the Federal Court of Appeal, or the Supreme Court of Canada made in respect to the goods".

Section 63 stated that a person who has had a determination made on their material under section 58 and subsequently appealed it under section 60, may request a further re-determination under section 63, to the Deputy Minister. This step was redundant, and was repealed in 1997.

The *Customs Act* - Section 67

The next level of appeal is section 67, Provincial Court. For certain provinces, this represents different tribunals. For example in the Province of Ontario, the "court" refers to the Superior Court of Justice, and in the province of British Columbia it refers to the Supreme Court[14]. Should an importer not be satisfied with the decisions made by Canada Customs, they may appeal the decision to the court in their respective province within ninety days after notice was given to them regarding their previous re-determinations on

[14] The term "court" refers to the following for each province: (1) the Province of Ontario, the Superior Court of Justice; (2) the Province of Quebec, the Superior Court; (3) in the Provinces of Nova Scotia and British Columbia, in Yukon and in the Northwest Territories, the Supreme Court; (4) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench; (5) in the Provinces of Prince Edward Island and Newfoundland, the Trial Division of the Supreme Court, and (6) in Nunavut, the Nunavut Court of Justice.

goods. In addition, extensions for time for an appeal may be granted to persons requesting such should the court find it justifiable to do so.

The Customs Tariff

The Customs Tariff details a schedule of specific regulations for goods that may be referenced by the public in determining what type of material may or may not be permitted to enter into the country. The Tariff is updated by Orders-in-Council to keep up with legislative and regulatory changes to the schedule. *Tariff item 9899.00.00* relates specifically to the *Little Sisters* case, as it primarily deals with obscenity. The tariff item lists any 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*,
> (b) constitute hate propaganda within the meaning of subsection 320(8) of the *Criminal Code*,
> (c) are of a treasonable character within the meaning of section 46 of the *Criminal Code*, or
> (d) are of a seditious character within the meaning of section 59 and 60 of the *Criminal Code*;
>
> Poster and handbills depicting scenes of crime or violence; or
>
> Photographic, film, video or other visual representations including those made by mechanical or electronic means, or written material that are child pornography within the meaning of section 163.1 of the *Criminal Code.*

Each of these parts relate to sections of the *Criminal Code*, save the section dealing with posters and handbills, and would be prohibited under the Customs regulations.

In earlier versions of the Customs Tariff, Tariff item 9899.00.00 was referred to under other sections of the Customs Tariff. The tariff has undergone various changes through the years. In 1982, for example, the tariff item related to obscenity was listed under tariff item 99201-1, which read that "books, printed paper, drawings, paintings, prints, photographs or representations of any kind of treasonable or seditious, or of an immoral or indecent character" should be prohibited (*Departmental Memorandum D9-1-1*, July 1, 1982). In 1985, the Customs Tariff was amended to include references to the specific parts of the *Criminal Code* dealing with obscenity (section 159(8) of the Code) and hate propaganda (section 281.3(8) of the Code) (*Departmental Memorandum D9-1-1*, May 15, 1985). By 1988, other sections of the *Criminal Code* were referenced including those related to treason and sedition (sections 46, 59 and 60 respectively) (*Departmental Memorandum D9-1-1*, January 1, 1988). In 1988, the tariff item was listed as tariff code 9956 until 1998[15]. This study refers to the tariff item as code 9956 since the majority of the issues related to the time period prior to 1998.

Canada Customs Departmental Memorandum D9-1-1

Departmental Memoranda serve as guidelines that outline the provisions of specific parts of the *Customs Tariff*. In the case of Memorandum D9-1-1, the memo specifically details what is currently known as tariff item 9899.00.00 of the *Customs Tariff*. Customs officers were to use the memo as a guideline that details the prohibition of entry of goods that included any "books, printed paper, drawings, paintings, prints, photographs or representations of any kind of a treasonable or seditious, or an immoral or indecent

[15] I will use both tariff item 9899.00.00 and tariff code 9956 interchangeably based on the timeframe to which I am referring.

character" (*Memorandum D9-1-1*, July 1, 1982 - see Appendix B). The aspect regarding representations of an immoral or indecent character specifically dealt with obscenity.

The memorandum detailed the responsibility Canada Customs had with regard to specific parts of the *Customs Tariff*. It referred to sections of the *Criminal Code* and court decisions for its directives. Original directives stated that goods that are of a treasonable, seditious, immoral or indecent character were subject to examination by Customs Officers at the point of entry (*Memorandum D9-1-1*, July 1, 1982). Any material that was unclear as to how it should be classified was to be forwarded to the Headquarters office in Ottawa for a more detailed inspection. Decisions made at Headquarters were then communicated to the regional offices from which material had been forwarded. The importer was informed of the decision and of their rights to appeal. The memorandum also explains that Customs role is not to act as a censor, rather officers are meant to simply determine whether goods could be classified under the specific tariff items.

Earlier versions of Departmental Memorandum D9-1-1 did not go into great detail as to what constituted "immoral" or "indecent" (*Departmental Memorandum D9-1-1*, July 1, 1982); however, the section of the *Criminal Code* that relates to obscenity is referenced as the guiding factor when reviewing goods. Previously, section 159(8) of the *Criminal Code* [now under section 163(8)] stated 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.

Departmental memoranda were significant because they were designed to explain in detail to both an internal (within government departments) and external (general public) audience the guidelines related to specific tariff items. Departmental Memorandum D9-1-1, *Jurisprudence and Revenue Canada's Interpretative Policy for the Administration of Tariff Item No. 9899.00.00 on Goods Deemed to be Obscene under Subsection 163(8) of the Criminal Code*, summarizes and clarifies the interpretation of the tariff item dealing with obscenity. In the past, other sections of tariff item 9899.00.00, i.e., hate propaganda, sedition and treason, were included in the same memoranda, however later versions of the memo regarded these subjects separately under Departmental Memorandum D9-1-15.

Though not force of law, the departmental memorandum reaffirms Customs "responsibility for administering the *Customs Tariff*". The memos were published online and available to the public, i.e., both commercial and non-commercial importers, publishers, and so on, and provide the operational requirements both Customs officers and the public should be aware of with regard to certain goods. For officers, the memo provided a functional guide to assessing material, whereas importers were made aware of Canada Customs provisions on the importation of certain items.

In an early version of Memorandum D9-1-1 from 1982, the importation of goods that were suspected of being of a "treasonable, seditious, immoral or indecent character" was subject to examination by Canada Customs. Though the areas of sedition and treason were not elaborated upon, officials were guided by the *Criminal Code* and associated jurisprudence in order to determine what would be considered "immoral" or "indecent"

under the law. At the time of the publication of this memo, section 159(8) of the *Criminal Code* specified that publications would be considered obscene would be such that had as a dominant characteristic "the undue exploitation of sex, or of sex and...crime, horror, and violence..." The memorandum did not refer to hate propaganda or child pornography (as is stated in the current *Customs Tariff*) but these two subjects were included at later dates. Since its inception, the departmental memorandum customarily directed that any material examined at the border by regional inspectors, but that may be doubtful as to its determination, should be forwarded to the central office in Ottawa (Headquarters) for a more detailed review and classification (*Departmental Memorandum D9-1-1*, 1982).

As noted previously, the memorandum referred to the section of the *Criminal Code* dealing with obscene publications; however, the first part of the guidelines does not specifically come from the Code. The aspect referring to degradation and dehumanization stemmed from various cases. *R v. Brodie* (1962) debated the moral value of the book "Lady Chatterley's Lover" by D.H. Lawrence. The book was deemed to be obscene by lower courts in Quebec and was taken to the Supreme Court. Section 150 of the *Criminal Code* included subsection 8 (enacted July 18, 1959) which defined what was considered to be obscene in 1962 at the time of the trial. This subsection specifically included the notion of obscene publications. The section read as follows:

> 150 (1) Every one commits and offence who
> (a) makes, prints, publishes, distributes, circulates, or has in his possession... any obscene written matter, picture, model, phonograph record or other thing whatsoever...
> (2) Every one commits an offence who knowingly, without lawful justification or excuse,

> (a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, (etc)...
> (b) publicly exhibits a disgusting object or an indecent show...
> (3) No person shall be convicted of an offence under this section if he establishes that the public good was served by the acts that are alleged to constitute the offence...

The subsections above refer to the offence of possessing, creating and distributing obscene materials. However, the *Criminal Code* failed to delineate what constitutes obscenity other than to add the following subsection:

> 150 (8) For the purposes of the 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.

The phrase "undue exploitation" is never clearly defined, leaving room for subjectivity(as witnessed in Chapter 2). The Act notes that a judge may decide that goods are obscene and in turn has the authority to have that material seized. The issue is that obscenity is only defined in terms of the undue exploitation of sex and sex coupled with crime, horror, cruelty or violence. Invariably, goods assessed for their obscene nature would then have had subjective assessments since clear indicators are not detailed in the *Criminal Code*. One test that was referred to in *R. v. Brodie* was the *Hicklin* test stemming from *R. v. Hicklin* (1868). The *Hicklin* test defined obscenity based on its intent to do harm to consumers. Specifically, material would be considered obscene if its propensity was "to deprave and corrupt those whose minds are open to such immoral influence, and into whose hands a publication of this sort may fall" (*R. v. Brodie*, 1962). The *Hicklin* test was a precursor to further tests to assess the immoral nature of certain representations. The courts continuously affirmed that objective tests were required in order to judge the immorality of a specific item is it a book, drawing, or movie (*R. v. Brodie*, 1962). The

Hicklin test left room for a great deal of subjectivity since the intent and result of the actual material formed the premise for the test. The question of subjectivity by the Courts and other officials was raised in the *Little Sisters* trial, and factored into the guidelines generated by Canada Customs for goods being classified as suspected obscenity. The cases that are outlined in Chapter 2 are relevant to this section as well as they created the backdrop by which many issues surrounding obscenity and indecency was debated. The *Little Sisters* case was heard after many of the previous cases discussed in Chapter 2 and judgments from those cases were factored into the Supreme Court decision. Cases such as *Butler* and *Luscher* were also relevant to the development of Canada Customs policies and guidelines at the border with regard to the detention and prohibition of obscene material.

Canada Customs held that obscene material would consist of sexual representations that are "degrading and dehumanizing" to the participants (as per *R. v. Butler*). Several examples are listed in Departmental guidelines as early as 1985, such as sex with violence, exploitation, humiliation and so forth (*Departmental Memorandum D9-1-1*, May 15, 1985 – revised June 1, 1986). A Customs notice was issued on February 11, 1988 to the effect of providing further clarification on the terms "degradation" and "dehumanization" as they were applied in the *Customs Tariff.* The Customs Notice was to provide both Customs officials and the general public with explanations from court jurisprudence on these terms and the manner in which the government was applying it in relation to the classification of imported goods. An example of the details used in the Customs Notice is indicated in the first section:

> (1) Goods which depict or describe degrading or dehumanizing acts tend predominantly to de-individualize and impersonalize sexual acts by inciting the reader or viewer to look upon the individuals involved as objects or means to be used for one's personal gratification. In particular, the individuals are deprived of unique human characteristics in that they are portrayed as sexual objects whose only redeeming features are their genitals
>
> (*Customs Notice N-198*, 1988)

The notice provided graphic elucidations in order to detail the type of material that officers should be classifying as obscene. The notice was meant both as an internal and external directive, in order to clarify any ambiguities in the departmental memoranda. In December 1998, a memorandum was circulated to all Trade Administration Services and Customs Border Services Directors on the discontinuation of the above-mentioned Customs Notice. The reason for the suspension of the Customs Notice was that it did not reflect current jurisprudence related to obscenity, and specifically the degradation and dehumanization aspect. This memo emphasizes the government's adherence to reflecting current ideologies and moralities as guided by the courts. As explained in *R. v. Butler*, "...the attempt to provide exhaustive instances of obscenity has been shown to be destined to fail, the only practical alternative is to strive towards a more abstract definition of obscenity which is contextually sensitive" (*R. v. Butler*, pg 455, 1992). The new departmental memoranda beginning in 1991 provided elaborate details with regard to the definitions of each section of the obscenity guidelines, but did not provide as much detail as Customs Notice N-198.

In Chapter 5, the amendments to the Departmental Memorandum D9-1-1 during the time of the *Little Sisters* court case will be discussed. The memoranda have been amended to

reflect changing legislation and jurisprudence and began to take on a more instructional tone by becoming more comprehensive in the details provided to Customs officials. At the same time, the importance of legislation was underscored by having the specific parts of the *Criminal Code* highlighted at the beginning of the document rather than deeper within it. Departmental Memorandum D 9-1-1 detailed what type of material would constitute obscenity and provided information for inspectors. As mentioned previously, the tariff item specifically covered books, printed-paper, drawings, paintings, prints, photographs, movie film, videotapes, audiotapes and representations of any kind. The term "representations of any kind" brought to light an issue not explicitly defined in the departmental memorandum. Issues such as the term "representations" have had some debate since the influx of modern technology, such as computers sent electronic images and other material collected from computers during searches. The characterization of this and other subjects are detailed in memoranda and information bulletins which I detail below.

Information Bulletins

Customs officials are also provided Information Bulletins in order to be informed of updates regarding changes in policies or procedures. The bulletins are strictly internal documents, meant to provide more concise guidelines to officers and to clarify issues related to the administration of tariff item 9956(a) (later tariff item 9899.00.00) of the *Customs Tariff* (Information Bulletin #1, November 1996 - see Appendix C). The Bulletins explain what border inspectors should be doing in certain circumstances where the Departmental Memoranda do not provide specific details.

The first Bulletin was issued in 1996, and bulletins have been issued periodically throughout the years, particularly when topics require elaboration to officers, either due to procedural or operational changes. In essence, Information Bulletins are supplements to the guidelines set out in the Departmental Memoranda. They do not hold any legal force, similar to the Memoranda, but are meant to provide supplemental advice and reasoning for changes to policies or procedures, as well as operational guidance to inspectors. The Information Bulletins provide on-going interpretations of the Departmental Memoranda and were not published on the Internet (unlike the memoranda).

An example of such a bulletin is Information Bulletin number 17 (August 2000) which dealt with the classification of goods that would be considered child pornography – representations of anatomically sexually correct child-like dolls. The Information Bulletin provided Customs officials with an explanation as to how inspectors could differentiate such a doll from others. As well, the meaning behind why an inspector may suspect that such a doll would be used for sexual purposes is clarified, so that the risk of improperly detaining an item that may not be considered child pornography is lessened. The Bulletin referred to the *Criminal Code* when providing the legislative backdrop to these regulations, quoting the specific section of the *Code* that contends with the "visual representation" of a minor under the age of eighteen for sexual purposes. The Information Bulletin also refers to case history and analysis, often including the reason behind the issuance of a notice.

In the case of the anatomically-sexually-correct child-like doll, the case analysis included specific examples from the Toronto police who were alerted by Canada Customs upon the "controlled" interception of the doll at the border. A search warrant was issued for the resident's house where the doll was found. There were clear indications that sexual activity had taken place with the item. The item was purchased and delivered from overseas and the local resident was charged with possession of the doll as child pornography, a charge to which he pled guilty. The fact that the item was purchased from abroad and had been delivered through the postal stream, meaning crossing Customs control, prompted the issuance of this Information Bulletin (Information Bulletin Number 17, August 2000). Such is the case with the various other bulletins that are issued to Customs inspectors/officers; a specific incident or occurrence may necessitate detailed guidelines to follow over and above what is laid out in the *Customs Act* or specific information that senior management may feel is relevant for officers to be made aware of. In Chapter 5, I will detail various Information Bulletins and their instructional guidance on obscenity related detentions and prohibitions, specifically in relation to the *Little Sisters* trial.

Advance Reviews

Another aspect of Customs responsibilities was the advance reviews of foreign magazines, books and other sexual adult material. The purpose of these advance reviews was to "have their material reviewed for admissibility in advance of importation" (Procedural Memorandum – *Procedures for Suspected Obscenity Tariff item 9899.00.00,*

February 1999). This service was not meant to function as editorial commentary, rather Canada Customs could offer suggestions on the material as falling within the obscenity guidelines and any alterations or removal of portions of the publications were done voluntarily on the part of the publishers or importers. Importers were given the option to submit samples of material to Headquarters prior to commercial importations to determine whether their goods are in compliance with obscenity guidelines and Customs official could provide an "opinion regarding the admissibility of the goods in Canada" (Departmental Memorandum D9-1-1, September 9, 2003)[16].

Obscenity Guidelines

There have been references to the guidelines by which Customs officers determine whether material is considered obscene at various points, but they have not been explicitly laid out. The obscenity guidelines, found in Departmental Memorandum D9-1-1, have evolved and shifted through time and are impacted by the norms of current society and jurisprudence. The guidelines that detail what constitutes as obscenity stem from section 163 (8) of the *Criminal Code* referring to obscene publications, as well as various other sections of the Code that deal with *Sexual Offences* and *Offences Tending to Corrupt Morals.*

The obscenity guidelines are a listing of categories into which depictions or descriptions could fall. The categories include such areas as sex with exploitation and/or coercion; sex with pain and/or mutilation; sexual assault; sex with violence; taking of a life for the purposes of sexual arousal; incest; bestiality and necrophilia. Material consisting of any

[16] It is not clear as to whether this function still exists as part of Customs mandate.

of these portrayals would generally be prohibited, unless a specific defence, i.e., artistic or literary merit, saved them.

The most non-explicit, and for that reason at times debatable, category in this list is that of sex with degradation. In the past, this category consisted of eight subcategories, the majority of which stemmed both from the *Criminal Code* but also from jurisprudence and community standards set out by various bodies referred to previously such as the Provincial Film Boards (see *Memorandum D9-1-1, May 1985* and *Memorandum D9-1-1, January 1988*). The Departmental Memoranda outlines these guidelines for inspectors and the public to be aware of what types of material would not be allowed entry into the country.

In formulating the obscenity guidelines, Canada Customs consulted with various stakeholders, including Provincial film classification boards. Adult sex films are classified differently from province to province as each province (or region) maintains its own set of standards by which adult sex films are classified. Comparing provincial adult film rating guidelines demonstrates these differences[17]. The process by which most provinces classify films is dependent on audiences pre-screening films before they are rated. In this manner, provincial film boards are able to target various sectors of the community to include wide-ranging views and a variety of perspectives. Most film boards consist of members of the general public. The Ontario Film Review Board

[17] Film classification occurs in various regions of Canada. The boards that classify films for viewing in theatres and in video stores include the British Columbia Film Classification Board, Alberta Film Classification Board, Manitoba Film Classification Board, Saskatchewan Film Classification Board, La Régie du Cinéma du Québec, and the Nova Scotia Film Classification Board.

(OFRB) is an example of a board whose membership represent a "cross-section of the many diverse communities across Ontario, and therefore reflect [Ontario's] current standards. [They] vary in age, gender, vocation, cultural background, and sexual orientation" (*Ontario Film Review Board - Who We Are*[18]). The OFRB considers itself a "community board", representing the needs and interests of society at a fundamental level. The OFRB receives its mandate through *The Theatres Act* and operates as an arms-length agency reporting to the Minister of Consumer and Business Services (*Ontario Film Review Board - Our Mission*, ibid). In total, excluding Ontario, there are six more provincial film classification boards: British Columbia, Alberta, Saskatchewan, Manitoba, Quebec and Nova Scotia.

The classification systems used by the film boards are all slightly different from one another, and are not necessarily reflective of any one set of standards either from the *Criminal Code* or any other legislative document. The OFRB's classification system, for example, is developed from the *Theatres Act* and a set of the board's own guidelines. The guidelines used in the classification of adult films are reviewed and updated on a continuous basis in order to serve community interests in an objective manner (*Ontario Film Review Board - How We Classify,* ibid.). According to the Board, the ongoing revision of the classification guidelines allows members to review films in an "objective" and "flexible" manner, by maintaining the "integrity of the community standards" as well as accommodating for any potential merit that may be inherent in the material. (*Ontario Film Review Board - How We Classify,* ibid).

[18] Information for the Ontario Film Review Board comes from the Board's website: ***www.ofrb.gov.on.ca***

The use of these guidelines, as well as of the general public in the screening process of the films at the review boards appears to allow for the process to take on an objective, community based approach. This community-based approach to reviewing films may be one of the reasons why Canada Customs employs the film boards' guidelines when developing a national set of guidelines for the review of obscenity. The film boards bring community standards to the forefront as community members are involved in the actual reviewing of material and their input is vital to the process.

As I have stated previously, Canada Customs employs community standards in the development of national obscenity guidelines for persons importing material across the border (*Departmental Memorandum D9-1-1*, September 9, 2003). The guidance from the film boards assists in the development of these guidelines since they are derived from the community - the general public who are affected by the guidelines.

Training Manuals and Guides

Border officers are also provided with training manuals and guides in order to accurately examine and classify material. In 1999, the Prohibited Importations Unit at Headquarters produced the *Program Monitoring Training Manual.* This manual directed officials on how to classify material that may consist of artistic or literary merit.

Officers were also provided with a Procedural Memorandum relating to suspected obscenity. The memorandum was issued in the same month as the *Program Monitoring Training Manual.* The memorandum detailed targeting techniques, artistic and literary

merit, and the roles of certain officers at Headquarters including the Quality Control Officer. Record-keeping was also addressed as well as accurate form-filling, and the memo reiterated that advance reviews could be done at Headquarters.

Another manual provided to officers is the *Customs Enforcement Manual*,[19] Part 2, Chapter 8, of the manual relates to "Prohibited Material – Obscenity and Hate Propaganda". The manual reinforces the legislative authorities for the examination and classification of prohibited material. The manual also details the guidelines and targeting techniques employed by Customs in the identification of suspected obscene material. The manual describes the roles and responsibilities of Customs officers as well as procedures related to detentions and determinations, and the control and disposal of goods. The Enforcement Branch that sets out this particular training manual is responsible for the enforcement provisions at the border, and includes obscenity as one of the subjects in its manual. However, the Enforcement Branch is not responsible for developing the obscenity-related policies, rather the Admissibility Branch is responsible for that function, including the production and dissemination of the departmental memorandum D9-1-1 and any related information bulletins and training manuals.

In 2003, the Training and Learning Directorate at Headquarters published the "*Centralizing the Determination of Obscenity and Hate Propaganda*" training guide. The guide detailed procedures for the examination and classification of suspected obscenity subsequent to the *Little Sisters* decision. This training guide is discussed in more detail in the next chapter.

[19] The year of the manual was not specified on the material obtained in my Access to Information request.

Conclusion

In this chapter, the various regulations formulated and employed by Canada Customs were outlined. The specific aspects of the *Customs Act* to demonstrate Customs officers powers and authority to detain and prohibit material being imported into the country have been detailed. The type of guidance inspectors at the border receive from policymakers at Headquarters (Ottawa) in the form of departmental memoranda, information bulletins and training guides were explained. The purpose of this chapter was to present the origins of Customs mandate for detaining and prohibiting goods at the border. Also comprehending the regulations and procedures utilized by Customs is fundamental to an analysis of the *Little Sisters* court case, as these procedures were questioned and debated throughout the course of the trial.

In the next chapter, the evolution of these policies and procedures, in relation to the *Little Sisters* trial are analyzed. The effects of the case on Customs procedures and regulations and the impact on the regulatory frameworks and practices Customs employed in examining and determining obscenity are examined.

CHAPTER FIVE – ANALYSIS

Obscenity has been a contentious topic that the courts have struggled with for a long period of time. Government departments such as Canada Customs have felt many of the effects of these debates. As the focus for this thesis is specifically the effects of the *Little Sisters* case, I will discus only the relevant aspects central to the outcome of the trial. In this chapter I investigate how Canada Customs responded to criticisms and challenges that had been made regarding the administrative and regulatory frameworks under which Customs functioned although no legislative changes were enacted. Since the case spanned several years, I focus mainly on the decision rendered by the Supreme Court of Canada.

During the *Little Sisters* trial (from 1996 and onward), Canada Customs kept their officers abreast of developments in the case, particularly since the litigation had important potential impacts on responsibilities and procedures employed by officers at the border[20]. Ongoing litigation was communicated to Customs officers in the form of specific directives. An example of such is seen in a 1996 version of the information bulletin issued to Customs inspectors and officers concerning the topic of Canada Customs' responsibilities regarding written obscenity. This bulletin clarified the role the Canadian government played in protecting its citizens from the admittance of "undesirable material" into the country. The bulletin also stated that the Courts have

[20] The issuing of several of the information bulletins discussed in this chapter culminates in the conclusion that legislative and judicial decisions impact the work done by officers. Many of the bulletins specify procedural changes as a result of jurisprudence, hence the purpose of keeping officers informed of ongoing litigation such as the *Little Sisters* case.

"confirmed that this is an appropriate role for customs to play" (Information Bulletin #1, 1996). This declaration stemmed from the Little Sisters trial decision rendered in 1996.

The status of the *Little Sisters* case was a subject that staff was informed of on an ongoing basis, including the outcomes of each phase of the trials. The *Little Sisters* case (the trial and appeals) were referred to in several of the Information Bulletins issued to inspectors and officers (for example, Information Bulletins numbers 8, 10, and 14). This indicates the significance senior officials placed the ensuing outcomes of the case and that issues should be communicated to all employees.

I examine four areas that were affected by the proceedings of the *Little Sisters* court case. Specifically, the issues I examine are burden of proof, the training of Customs officers, the decision to centralize functions to Ottawa, and finally the obscenity guidelines. This chapter examines certain aspects noted in the judgment while exploring the actions undertaken by Canada Customs in response to the outcomes of the case. I also examine some measures undertaken by Canada Customs that took place during the time period while the case was ongoing and also subsequent to the case.

Burden of Proof (Reverse Onus)

One of the issues brought forth during the *Little Sisters* trial was that of the burden of proving whether goods indeed constituted obscenity or not. Prior to the Supreme Court decision, the importer bore the responsibility of proving that their goods did not consist of obscenity. The decision of the Supreme Court in 2000 altered this burden by placing

the responsibility on the Government to prove that goods were obscene. The court stated "s. 152(3) is not to be construed and applied so as to place on an importer the onus to establish that goods are *not* obscene within the meaning of s. 163(8) of the *Criminal Code*. The burden of proving obscenity rests on the Crown or other person who alleges it" (*Little Sisters v. Canada (Minister of Justice)*, 2000, paragraph 105).

During the time before the trial, when an importation was detained at the border under the suspicion of obscenity, importers were provided with a written notice of detention on a K27 form, *Notice of Detention and Determination.* Once a full review had been conducted, the importer was notified in writing as to the reason for the prohibition (Departmental memorandum D9-1-1, October 4, 1999). Little Sisters argued that items detained on the form should be accompanied with a clear and concise explanation for their detention. The Court noted that the reasons typically given by Customs for a prohibition did not go beyond a tick in one of eight boxes located on the form, i.e. a box marked "incest" or "bestiality". In instances where officers could note one or two words to describe the ground for prohibition, rarely did they do so in sufficient detail to be informative (*Little Sisters v. Canada (Minister of Justice)*, 2000, paragraph 76).

Prior to the Supreme Court decision in 2000, importers were provided with the opportunity to submit evidence that would support their contention that their material was not obscene, i.e., an artistic or literary merit defence existed for their prohibited goods. Notice would be sent to the importers that allowed them access to their goods and to prepare a case as to its merits to Customs officials in order to allow for the release of the

goods under section 60 of the *Customs Act*. However, the option to provide evidence in support of certain merits was not permitted in all cases of detained material. Customs officials allowed for evidentiary support only in those cases where Customs officials had determined that "the portrayal of sex may be essential to a wider artistic, literary or other similar purpose" (*Information Bulletin #6, May 1997).* Should Customs officials determine that the "undue exploitation of sex is the main object of the work" importers were simply informed of the detention without the possibility of submitting any sort of evidence proving otherwise at that first point of detention (*Information Bulletin #6, May 1997*). However, importers were provided with the option of an appeal (under section 60 of the *Customs Act)* at which time they could submit evidence to support an artistic or literary defence. In cases where material was seized on the grounds of child pornography, importers were notified that there were no terms of release, and therefore no opportunity to provide any case for its potential merit (*Information Bulletin #6, May 1997*).

The issue of providing evidentiary support placed the responsibility of a defence for detained material on the importer. The Supreme Court of Canada decision changed this by declaring that the government officials who declared goods to be obscene were required to provide evidence as to why the material was prohibited. The reverse onus decision was integral to the development and implementation of new Customs procedures and training. The reverse onus mandate was defined in the September 2003[21]

[21] It was difficult to ascertain whether there were any communications instructing officers on the reverse onus provision earlier than 2003.

Departmental Memorandum issued to Customs officials and stems from section 152(3) of the *Customs Act*. Section 152(3) of the *Customs Act* states that:

> ...the burden of proof in any question relating to ... the compliance with any of the provisions of this Act or the regulations in respect of any goods lies on the person, other than her Majesty, who is a party to the preceding or the person who is accused of an offence, and not on her Majesty.

At trial, burden of proof was examined and the judge affirmed that the regulatory system in place by Customs at the time allowed for importers to provide the evidence that their goods did not constitute obscenity. The court noted that the system did not place "any limitations on the evidence and submissions they (Canada Customs) may receive" (*Little Sisters v. Canada (Minister of Justice)*, 1996, paragraph. 242). Essentially, importers had the option of providing as little or as much evidentiary support of their material for it to *not* be considered obscene. This type of evidentiary support could be seen as a method of treating importers in a democratic fashion – enabling people to have a say in the material confiscated on the grounds that they may be prohibited. On the other hand, it could be seen as a method by which the government put importers in a defensive position and compelled importers to prove merit where the material in question does not constitute obscenity, rather than having any specific redeeming qualities.

The Supreme Court referred to the reverse onus provision as part of the constitutional challenges to sections of the *Customs Act*. Specifically, Little Sisters challenged section 71 of the *Customs Act*, the section dealing with the re-determination process in cases where material is deemed obscene. Little Sisters challenged the entire Customs schema, but specifically that the onus was placed on the importer to prove that their material was not obscene. The appellants protested the "Byzantine bureaucratic process..." including

the court processes. (*Little Sisters v. Canada (Minister of Justice)*, 2000, paragraph 97). The many levels involved in the redetermination process placed the burden of proof on the importer and involved several steps before possibly attaining a determination that could prove that an importer's material was in fact not obscene.

One of the constitutional issues was that some importers might not possess the resources to prove that their goods are not obscene. In such cases, goods could be denied entry into the country even when the standard of obscenity was not met, but importers did not have the means to prove that their goods were not obscene. According to the Court, "an importer has a Charter right to receive expressive material unless the state can justify its denial" (*Little Sisters v. Canada (Minister of Justice)*, 2000, paragraph 101). The court referred to *R. v. Oakes* when noting that it is the government's responsibility to prove that a limitation on a Charter right is justified. In *R. v. Oakes*, limiting one's Charter rights had to be justified by the side limiting the right and they had to be able to prove its limitation as being "reasonable and demonstrably justified in a free and democratic society" (*R. v. Oakes*, 1986, paragraph 66). Essentially, without the reverse onus provision, material suspected of obscenity would inevitably be considered obscene unless proven otherwise by the importer.

The Supreme Court noted that the reverse onus provision would not necessarily apply in the decision rendered at the border only because a defence cannot be established in the initial detention stage. The reverse onus provision in the *Customs Act* [section 152(3)] could only initially be applied in the redetermination phase of an obscenity prohibition

process. The court referred to the problem as being at the point of re-determination, when importers are not provided with "sufficient notice nor a sufficient opportunity to be heard to discharge the onus" (*Little Sisters v. Canada (Minister of Justice)*, 2000, paragraph 102). In other words, once an importer is informed that their material has been detained and prohibited by Canada Customs, government authorities have already made a decision. It is only in the next phase of the appeal that the onus may be turned around so that the importer can provide evidence against the prohibition. Essentially, at that point, the designated government officials are in a position where they must defend their decision before the courts. At trial, this point was confirmed by the 1992 *Glad Day Bookshop Inc. v. Canada (Deputy Minister of National Revenue, Customs and Excise)* decision that confirmed that the onus should not be placed on the importer to prove that a section 152(3) decision by Customs officials is erroneous (*Little Sisters v. Canada (Minister of Justice)*, 2000, paragraph 103)[22].

After 1996, information bulletins explicitly stated instructions as to what should occur when material arrived at ports of entry with regard to notices to importers, i.e., importers were to be provided with notices that their material had been detained at the border. In this respect, importers' rights were considered from the first point of inspection, whereby upon determining that material was suspected as obscenity, customs officials informed the importer of the detention and "his or her right to submit evidence in support of artistic or literary merit" (Information Bulletin #1, November 1996). Bulletin Number Six dealt specifically with the topic of importers' rights and options where Customs suspects that material may fall within the guidelines of tariff item 9956(a) or 9899.00.00. Importer

[22] In spite of the earlier *Glad Day* decision, the reverse onus provision was still an issue.

options were outlined, as well as how Customs officers should be handling the case from the moment an item reaches a point of entry. The bulletin went on to explain when an importer should be made aware of his or her right to submit evidence in support of the material in question and whether the same procedures are utilized in cases of suspected child pornography (Information Bulletin #6, May 1997). The bulletin was a reminder to inspectors about importer rights in the determination process (since evidence can only be submitted after they are informed of their potentially suspect material). Interestingly, this bulletin was issued in 1997 after the initial trial and did not discuss the reverse onus provisions. In fact, the bulletin explicitly states that should Customs find the material obscene and of having no redeeming merit from their initial review, the importer is not required to be advised of the option to submit evidence in support of artistic or literary merit. These procedures changed after the Supreme Court decision.

In sum, the court affirmed that the burden of proof rested with Customs in situations where goods had been detained at the border on suspected obscenity. Customs was to take several factors into consideration prior to detaining goods, and only after it had fully ascertained that the material in question did indeed consist of obscenity, could the goods be prohibited. The importer was not to be held responsible for providing evidence to the contrary at the first level of determination. After an item had been proven as obscene, importers were then provided with recourse options, which would include providing supporting evidence that could overturn an obscenity provision.

Training of Customs Officers

Little Sisters had argued that Canada Customs targeted their material because they were a gay and lesbian bookstore. At trial, the court affirmed that Little Sisters' equality rights were not infringed by Customs legislation, but that government officials in practice systemically targeted them (*Little Sisters v. Canada (Minister of Justice)*, 1996, paragraph 100). The judge noted that the high rates of material that was improperly categorized indicated more than mere differences of opinion and suggested systemic causes. The court affirmed that the classification errors were understandable given the "volume of cross-border mail handled at the Vancouver Mail Centre[23] each day" (*Little Sisters v. Canada (Minister of Justice)*, 2000, paragraph 38). However, the court determined that prejudicial treatment that Little Sisters endured by Canada Customs stemmed from a "failure by Customs to devote a sufficient number of officials[24] to carry out the review of the appellants' publications in a timely way;" and "the inadequate training of the officials assigned to the task" (*Little Sisters v. Canada (Minister of Justice)*, 2000, paragraph 154).

One of the key debates at the Supreme Court hearing was whether the matters from the trial court and the Court of Appeal stemmed from the proper implementation of Customs legislative provisions or whether the legislative provisions were constitutionally valid. The implementation of certain provisions involved the consideration of how material was "classified as obscene and thus prohibited" (*Little Sisters v. Canada (Minister of Justice)*,

[23] The Vancouver Mail Centre was specifically noted since this was the mail centre through which Little Sisters generally received their goods.
[24] It is unclear as to whether there was an increase in the number of Customs officials devoted of the review of suspected obscenity.

2000, paragraph. 18). Close scrutiny was therefore required into the training and practices of Customs officials at the border as well as into the procedural guidelines governing the actions of these officers (*Little Sisters Book and Art Emporium vs. Canada (Minister of Justice)* 1996 paragraph 253). At trial, the court noted that "many publications are prohibited entry into Canada that would likely not be found to be obscene if full evidence were considered by officers properly trained to weigh and evaluate that evidence" (*Little Sisters Book and Art Emporium vs. Canada (Minister of Justice)* 1996 paragraph 116). For example, in explaining that targeting occurred by Customs in their review of material imported into the country, the Little Sisters pointed out that in some instances the titles of material would provoke suspicion among inspectors. Essentially, the lack of resources and inadequate training of officers to make decisions on obscenity resulted in high rates of error in goods that were detained and prohibited at the border.

Little Sisters referred to section 1(c) of Memorandum R9-1-1, an internal directive for officers that was not made public[25], which stated that officers should consider "importers and exporters known to deal in pornographic goods" when determining whether goods should be prohibited or not (*Little Sisters Book and Art Emporium vs. Canada (Minister of Justice)*, 1996, paragraph 51). The bookstore claimed they were one of several importers named by Customs as those who should be noted for "heightened inspection". Little Sisters claimed the Vancouver Mail Centre stopped nearly all of the shipments destined for their location for examination, regardless of the titles of the material (*Little*

[25] Memorandum R9-1-1 was revoked in 2003 (*Memorandum R9-1-1 – Revocation of Memorandum R9-1-1,* August 1, 2003),

Sisters Book and Art Emporium vs. Canada (Minister of Justice) 1996 paragraph 271). In its defence, Customs referred to heightened scrutiny of the bookstore being justified on the basis that the store had "a history of presenting obscene material", meaning they had prohibited such material destined for Little Sisters in the past (*Little Sisters Book and Art Emporium vs. Canada (Minister of Justice)* 1996 paragraph 271). However, the court noted that there was no strong basis for this procedure and it would "appear to be solely at the discretion of local officials" (*Little Sisters Book and Art Emporium vs. Canada (Minister of Justice)* 1996 paragraph 271). There was no evidence to suggest that the targeting of the bookstore was a formal directive from Headquarters.

Prior to the *Little Sisters* trial, the only educational prerequisite for Customs officers consisted of high school graduation and no further formal education (*Little Sisters Book and Art Emporium vs. Canada (Minister of Justice*, 1996, paragraph 38). New officers received a required 16-week training session at the Customs and Excise College in Rigaud, Quebec, before going on duty at a port of entry. Only a few hours out of the16 week training period were spent on formalized obscenity training, i.e., training associated with the interpretation and application of tariff code 9956, now tariff item 9899.00.00 (*Little Sisters Book and Art Emporium vs. Canada (Minister of Justice*, 1996, paragraph 38). "Commodity Specialists" were described as officers with more specific training who had attended a further three-week training session at the College. Some officers also moved on to Headquarters for an additional 3 days to two weeks of intensive training on obscenity. The guidance in the training manuals at the Customs College derived from litigation and policy decisions made at the Headquarters level at Canada Customs

(*Program Monitoring Training Manual, 1999*). In an attempt to ensure consistency and accurate decision-making, one set of guidelines was provided to all inspectors with like training on the classification of goods entering into the country.

Once this training was received, these specialists had the opportunity to compete for positions as Tariff and Value Administrators. At this point they would have be involved in section 60 determinations of the *Customs Act* (re-determinations). Officers chosen for this level of inspection would attend a training session in Ottawa for up to two weeks for instruction and guidance in the interpretation of this specific tariff item (*Little Sisters Book and Art Emporium vs. Canada (Minister of Justice*, 1996, paragraph 39).

The objective of the training was to provide certain officers in the region with enough technical knowledge to carry out the classification functions for material suspected of obscenity. Again, it should be noted that even with all of the formal training associated with these positions, an "expert" was available any time of day or night with whom officers may consult (this was noted in the 1996 trial). In parts of the country where there were high volumes of goods with the potential to be obscene, specialized units were put in place with officers specifically dealing with goods suspected of constituting obscenity. In those regions that did not have specialized units in place, inspectors were expected to review material suspected of obscenity as part of their regular duties. The court noted in the *Little Sisters* case, that the work carried out by inspectors and specialists relating to obscenity is highly undesirable (*Little Sisters Book and Art Emporium vs. Canada (Minister of Justice*, 1996, paragraphs 43-44). After the Supreme Court decision, the

Prohibited Importations Unit in Ottawa attempted to hire candidates with specialized university degrees, for example in the legal field or with an art history background, as was witnessed in recent employment posters[26]. This hiring decision was to address some of the issues raised at trial concerning officers involved in the review process possessing relevant experience.

Targeting

Targeting was a major point in the Little Sisters case. Targeting procedures during the course of the trial did not change radically although certain aspects were highlighted prior to the Supreme Court decision. The initial stage of examining whether or not material was deemed obscene began with either random checks of goods crossing the border or with targeting. In January 1999, guidelines for targeting by inspectors were published in a Procedural Memorandum entitled "*Procedures for Suspected Obscenity Tariff Item 9899.00.00*".

As noted earlier, internal Memorandum R9-1-1 directed inspectors to target importers *and* exporters known to deal in adult material. As of 1999 (before the Supreme Court decision), the procedures surrounding targeting were amended so as to ensure that importers were not targeted; however, certain exporters could still be targeted in certain situations (*Procedures for Suspected Obscenity Tariff Item 9899.00.00*, February 1999). Customs officers routinely inspect shipments in order to verify invoicing, however, officers should not use that type of examination as a pretext for verification for obscenity

[26] Evidence of the hiring practices of the Prohibited Importations Unit was obtained verbally.

– officers must follow the criteria set out in the procedural guidelines for targeting (*Program Monitoring Training Manual*, February 1999). Therefore, directives were laid out for officers as to what they should be targeting with regard to potential obscenity. Since this training manual was published in 1999, one can assume that the Little Sisters court case affected the content and reasoning behind the procedures. Given the courts' issues regarding targeting and the affirmation that Customs had indeed targeted little Sisters (and presumably other importers), a correlation can be made with the amendments made to the Customs training procedures.

The Supreme Court hearing had highlighted Little Sisters' struggle with government targeting. The court pointed out that mainstream book stores had ordered books of the same titles as those ordered by Little Sisters, and the mainstream orders were not stopped at the border (*Little Sisters Book and Art Emporium vs. Canada (Minister of Justice)*, 2000, paragraph 10). The court indicated that advance reviews were conducted on books and magazines from publishers who requested them. The court pointed out that had the same deference been given to pre-screen written material imported by Little Sisters, they may not have experienced the errors caused by Canada Customs review processes (*Little Sisters Book and Art Emporium vs. Canada (Minister of Justice)*, 2000, paragraph 190). With regard to targeting Little Sisters, in the government's defence, the head of Customs' program area at the time confirmed that they followed what they considered to be "normal enforcement practice". The Supreme Court pointed out that this perception of accurate procedures pointed to deep systematic problems in the Customs policy process. (*Little Sisters Book and Art Emporium vs. Canada (Minister of Justice)*, 2000, paragraphs

188-191). What may have been considered normal practices were examined in depth following the trial and new procedures were introduced in future training manuals as described in this chapter, such as the *Program Monitoring Training Manual*, February 1999 and the *Centralizing the Determination of Obscenity and Hate Propaganda,* Training Manual and Guide.

As stated at trial, Customs attempted to examine 8% of all goods imported into Canada (*Little Sisters Book and Art Emporium vs. Canada (Minister of Justice*, 1996, paragraph 49). This meant that the department selected particular items for examination based on their potential risk of non-compliance with the law. Books were not considered to be high risk in that they were not subject to Customs duty and did not ordinarily fall within the section of the *Customs Act* dealing with obscenity (*Little Sisters Book and Art Emporium vs. Canada (Minister of Justice*, 1996, paragraph 49). Customs officers, however, have the ability to determine which of the books and other goods should be subject to closer examination and which can be released.

Issues such as those brought up by Little Sisters as a legitimate bookseller prompted Canada Customs to regard the book trade in Canada in a slightly different manner than other importations. In procedural guidelines and training manuals for inspectors, books intended for commercial use in Canada had a separate set of procedural guidelines that officers are meant to follow[27] (*Program Monitoring Training Manual*, February 1999). The 1999 *Program Monitoring Training Manual* (noted in chapter 4) provided detailed

[27] It is unclear whether material intended for bookstores is still differentiated in the same manner.

instructions to Customs officers in assessing material that may be saved by artistic or literary merit. The training manual refers explicitly to the *Little Sisters* trial. The manual specified that the trial and decisions had "provided guidance with regard to qualities [one] must look for in fiction in order to determine whether it has literary merit" (*Program Monitoring Training Manual*, February 1999).

The guidelines underscored the need for particular attention to book trade importations. The presumption was that material en route to book trade importers had the potential to contain artistic or literary merit. In fact, training procedures prior to the Supreme Court trial directed inspectors to consider shipments destined for commercial book importers to be processed as though the material may be redeemed by some merit, regardless of the nature of the book (*Program Monitoring Training Manual*, February 1999)[28]. In these instances, should commercial importations be detained on the suspicion of obscenity, they would be examined with the clear presumption that the material may be saved by artistic or literary merit.[29] Several factors would be considered when an officer inspected book trade material, for example, the appearance of the book, information on the cover and the introduction. Officers consulted a reference guide entitled "*The Book Trade in Canada*" in order to identify commercial importers of books into Canada (*Program Monitoring Training Manual*, February 1999). A piece of work of high quality calibre

[28] Guidelines for commercial booksellers seemed to be instituted after the beginning of the initial trial, therefore it can be assumed that prior to the case Little Sisters would not have been on such a list. If Little sisters had been on the list as a commercial bookseller they were not treated by Customs as such on the surface.

[29] It is not clear whether personal importations were treated in the same manner.

and detailed cover information on book covers could still fall within the realm of "obscenity".

Along with guidelines on the treatment of commercial book trade material, the 1999 *Program Monitoring Training Manual* directed inspectors to call a "Quality Control Officer" (QCO) in Headquarters who could offer advice related to the classification of goods, when such advice was required (*Program Monitoring Training Manual*, February 1999). According to directives to border officials, this "expert" is a designated officer in the Prohibited Importations Unit in Ottawa who is on hand to provide advice to border officials seven days a week, twenty-four hours a day, specifically on those goods that may potentially contain artistic or literary merit[30]. This specialized officer is available to provide guidance on a number of issues that may arise at a port of entry, including advice on evidence provided to support goods suspected of obscenity and interpretation of previously held obscenity decisions. It was emphasized that officers should contact the Quality Control Officer at the earliest possible time, the most preferable being before a detention is actually made. For reasons of an impartial and independent review, if an item was appealed, the QCO would not review the material that he or she provided advice on in the initial stages of determination (*Program Monitoring Training Manual*, February 1999).

Each region was given the responsibility of maintaining communications with Ottawa. Officers were to contact their regional program officers when guidance on decisions is

[30] It is unclear as to when this position was instituted and whether it was as a result of the court case or not.

required (*Information Bulletin #4,* February 5, 1997). Reiterated in the training manuals is the requirement for officers to seek the advice of more "expert" officials in matters in which material is questionable in terms of whether they could be considered obscene. With explicit instructions in cases of uncertainty, it was difficult to ascertain how officers at one port (Vancouver Mail Centre) could have consistently prohibited material destined to one importer, i.e., Little Sisters, had they referred to Headquarters for advice. It is unclear whether the officers who prohibited material imported by Little Sisters, sought advice from Ottawa on the decisions referred to in the trial. As the option for further advice was available to officers, this would realistically leave little room for error in judgment and presumably may have prevented the case against Customs.

In sum, the Supreme Court affirmed that Customs training manuals and procedures required an overhaul. As a result, Customs made numerous changes to their training methods for Customs officers both at Headquarters and in the regions. The training manuals were explicit in their instructions to officers in every facet of the detention and prohibition process. Customs also ameliorated their means of communication in order to keep regional officers informed of procedural updates made at Headquarters. As mentioned above, a Quality Control Officer was established in order to provide 24-hour guidance to all officers across the country when obscenity related issues were raised. The only change that could be clearly deduced from the information obtained in this examination was that the Quality Control Officer was not referred to in documents after 1999. Information Bulletins, however, referred Customs inspectors to call their regional offices or Headquarters for any questions related to directives. The department issued

information bulletins and updates to its internal in an attempt to keep officers abreast on issues that would impact their work. The department also issued external directives on the Customs website in order to keep the public informed of changes to the Customs process and amendments that could affect the Customs landscape, such as the Departmental Memoranda.

Centralization of Obscenity Decisions

One of the central issues in the Little Sisters case was the inconsistent decisions made by Customs officers in determining whether material detained at the border was indeed obscene. High turnover rates among officers working with obscene material and inconsistencies among decisions led to an overhaul in the way Customs handled the examination and classification of obscenity related goods. In 2003, a decision was made to centralize all obscenity decisions to one location – the Prohibited Importations Unit in Ottawa. The considerations for the decision to centralize obscenity decisions to Headquarters stemmed from the *Little Sisters* decisions in the lower courts and the Supreme Court (*Canada Border Services Agency's Policy on the Determinations of Obscenity and Hate Propaganda*, September 29, 2003[31]). Centralization of the obscenity functions went into effect in 2003, with the publication of Canada Border Services Agency's policy on the determination of obscenity and hate propaganda. Instruction mandated that all goods suspected of obscenity or hate propaganda were to be forwarded to Ottawa (Headquarters) Prohibited Importations Unit where a determination would be

[31] From *Canada Border Services Agency's Policy on the Determinations of Obscenity and Hate Propaganda*, September 29, 2003 – it is unclear whether this policy was made public or if it was an internal directive communicated only to Customs employees. It has been made available through an *Access to Information* request.

rendered (*Canada Border Services Agency's Policy on the Determinations of Obscenity and Hate Propaganda*, September 29, 2003). In the *Little Sisters* case, it was affirmed that the government was within their powers to examine and prohibit material suspected of obscenity. The fact that procedures were not always consistent, nor were decisions resolved in a timely manner, led to the implementation of new training policies, and the creation of this centralized system of determination.

The impetus behind the centralization of obscenity decisions was to attain the common goal among Canada Customs and the public for fair and equitable examinations and treatment of goods coming into the country, as was required by the series of Little Sisters hearings. In an environment where over 4000 inspectors were examining a multitude of material entering the country every day, inconsistencies could happen. The appellants argued that decisions involving Charter rights should not be left to the bureaucratic decision-making methods that were in place up to that point. The courts acknowledged that there was a necessity for a more streamlined approach as well as a more objective judgment on the determinations made at the border, but also determined that the process involving civil servants as decision-makers would stand as constitutionally valid (*Little Sisters Book and Art Emporium vs. Canada (Minister of Justice*, 2000, paragraph 95). Canada Customs enacted the centralization functions after the *Little Sisters* trial highlighted the inaccuracies in the decision making process.

In response to the Court, centralization of obscenity classification to Headquarters attempted to create an environment in which decisions could be made with close scrutiny

and with consistency. Training procedures for officers clarified the necessity of a centralized determination function by offering the value of more accurate decisions, leading to improved prohibition rates (*Centralizing the Determination of Obscenity and Hate Propaganda,* Training Manual and Guide, 2003). By centralizing obscenity decisions, prohibition should occur on those items that absolutely necessitated it because of the close examination done by highly trained officials. The argument was that prohibition rates would increase because of more accurate decision-making in comparison to when material was classified at the border by inspectors posted there. Material would be pre-screened by border officials, and suspected obscenity would be sent to Headquarters for a determination based on the criteria set out for inspectors in the targeting portion of their training (*Centralizing the Determination of Obscenity and Hate Propaganda,* Training Manual and Guide).

At the inception of centralization, years of litigation had put Customs in the public limelight with regard to issues surrounding the *Canadian Charter of Rights and Freedoms*. The specific subjects that are relevant to the matter of obscenity and Tariff Item 9899.00.00 of the Customs Tariff were unique in comparison to other importation issues in that the effects are different for Customs and importers than in other importation matters. That specific tariff item dealt with *Charter* issues on importation cases and "have totally different repercussions for [Canada Customs] and for importers than do comparable decisions made in relation to other goods that do not involve *Charter* issues" (Departmental Memorandum D9-1-1, September 9, 2003).

Recognition of these issues led Customs to centralize the process of determination for obscenity to one main location (Ottawa). Issues surrounding "defensibility and credibility" also contributed to the decision to centralize obscenity determinations, as well as the need for more streamlined procedures to be introduced for handling this type of material (Training Manual – *Centralizing the Determination of Obscenity and Hate Propaganda*, Prohibited Importations Unit, 2003, page 1-2).

One focus of centralization of obscenity decisions was to ensure efficacy and consistency in the decisions made in suspected obscenity cases (Training Manual – *Centralizing the Determination of Obscenity and Hate Propaganda*, Prohibited Importations Unit, page 1-2). Border officials are trained in the area of accurate targeting of material by being provided certain criteria and told to use a "risk management" approach to the detention of goods that arrive at each port of entry. Examples of targeting criteria include titles of goods that may have previously been prohibited by Customs; a known exporter of obscenity (the manual explicitly stated that they do no target importers); the geographic origin of the production; and approved intelligence information relating to the shipment and so on (Training Manual – *Centralizing the Determination of Obscenity and Hate Propaganda*, Prohibited Importations Unit, page 1-5). Officers were reminded not to stop every single electronic or multimedia item that comes to the border.

The goal of these targeting techniques was to ensure "more accurate detentions and... a higher rate of prohibition" (Memo on CBSA's Obscenity/Hate Propaganda Policies, 2003), as opposed to inaccurate detentions that lead to high rates of release. In other

words, a high rate of release on detained goods does not necessarily show that a large number of importations are not falling within the obscenity guidelines; rather it may demonstrate inaccurate targeting by Customs officials.

In the new centralized environment, regional staff were responsible for the preliminary inspection of goods crossing the border. Preliminary examination of an item did not necessarily constitute a detention, since items could be released after the initial exam and not processed any further (Training Manual – *Centralizing the Determination of Obscenity and Hate Propaganda*, Prohibited Importations Unit). The absence of undue exploitation of sex in material suspected of obscenity inevitably led to the subsequent release of items. The Memo on (Canada Customs) Obscenity/Hate Propaganda Policies, published in 2003, explains that in cases where goods may consist of the undue exploitation of sex, border officers consult with the Technical Reference System (TRS), a Customs automated system that holds titles and decisions rendered previously by inspectors and at Headquarters to ensure matches. Goods appearing in the TRS that are prohibited after April 1, 2001, which is when the obscenity guidelines were updated, are automatically prohibited at the border. Goods that have been prohibited prior to that date must be forwarded to Headquarters in Ottawa for further determination. Should an inquiry result in the TRS showing that a title was previously examined and then released (not prohibited), the item may consequently be released if it is detained at any point afterwards. If the exact title of the goods detained did not appear in the TRS, a secondary examination is required (Memo on (Canada Customs) Obscenity/Hate Propaganda Policies, 2003).

Should there be indicators of obscenity evident in the secondary examination, the goods must be forwarded to Headquarters for a more detailed review. Importers were also provided with the option of abandoning their goods to the Crown, where they would subsequently be destroyed, should they desire. At every step of this process, it is pointed out in both the training manuals and policy memos that should there be no indication of obscenity apparent during the review, items should be released immediately (Memo on (Canada Customs) Obscenity/Hate Propaganda Policies; the Training Manual – *Centralizing the Determination of Obscenity and Hate Propaganda*, Prohibited Importations Unit and *Program Monitoring Training Manual, 1999*).

A component to the centralization of obscenity decision at Headquarters is that the general policymaking in obscenity-related matters occur there. Headquarters provides training manuals and slides detailing the centralized function which they hold in order to adequately guide officers with the proper procedures including the primary and secondary examination of material, the detention and subsequent forwarding of goods for further assessment. During training, officers are educated on the various aspects of the *Customs Act*, the *Customs Tariff*, the Departmental Memorandum, and obscenity guidelines. The training, along with an increase in program monitoring and in regular feedback to regions and individual ports for quality control purposes, support the purpose of the centralization framework currently in place at Canada Customs, that being to "increase (Customs) defensibility and credibility to the Courts and Canadians at large"

(Training Manual – *Centralizing the Determination of Obscenity and Hate Propaganda*, Prohibited Importations Unit).

Prior to 2003, decisions as to whether material that was detained at the border constituted obscenity were made by Customs officials at border points across the country. The decentralization of authority over these decisions necessitated a strong link with Headquarters for policy and legislative communications and direction; hence the issuance of communications products such as Information Bulletins for regular updates on these topics. Regional Intelligence Officers were mandatory personnel in each region so as to provide guidance in cases involving suspected child pornography; as well Regional Coordinators were available to provide expert opinions on classification issues (*Information Bulletin #20*). It is not clear whether this new directive was established only after the trial began. References to the Regional Intelligence Office appear in documents after 1996 but it may not have necessarily been a new policy. In cases where goods that were detained required further expert advice, inspectors were advised to contact the Prohibited Importations Unit at Headquarters. In addition, as noted above, a Quality Control Officer was on duty twenty-four hours a day, seven days a week, situated in Ottawa, whose responsibility it was to provide functional advice and guidance to Customs officers across the country at any given time regarding the classification of material suspected of obscenity (Information Bulletin #4, February 5, 1997).

The decision to centralize meant that individual inspectors at border points would no longer be responsible for providing determinations under tariff item 9899.00.00,

however, they would still remain responsible for accurately identifying material suspected of obscenity. In directives from 2003, in order for officers to correctly identify suspected obscenity, paper and electronic training manuals were developed by Headquarters to educate officers. The subjects covered in the training manuals included targeting, previewing material, the use of the Technical Reference System, the completion of forms, forwarding goods to Ottawa for review, identifying obscenity and where officers could get guidance should they require it when inspecting material (*Centralizing the Determination of Obscenity and Hate Propaganda,* Training Manual and Guide, 2003). These issues were also addressed in information bulletins; for example, Bulletin number 11 which specified changes to specific parts of the obscenity guidelines related to the category "Sex with degradation" (*Information Bulletin #11*, October 1998), and Bulletin number 4, which directed officers to contact regional contacts or Headquarters when guidance was required on obscenity decisions (*Information Bulletin #4,* February 5 1997).

As discussed previously, one of the main targeting techniques in determining whether goods fell within the obscenity guidelines is for inspectors to verify titles with the Technical Reference System (TRS) at the border to see whether titles have previously been examined by HQ and the result of the examination, i.e., was the material previously prohibited or released? This system is a timesaving mechanism and also improved consistency as more decisions were made at Headquarters and were entered in the system (*Centralizing the Determination of Obscenity and Hate Propaganda,* Training Manual and Guide). Inspectors were instructed to use the most recent decisions in the TRS, since

previous decisions may not necessarily be valid. The reason for multiple decisions on the TRS for one item is not based on subjective decisions; rather the decisions reflect the continual updating of obscenity guidelines. The possibility was that material that may have previously been prohibited would be considered admissible under new obscenity guidelines.

Officers were to examine all material in its entirety based on new obscenity guidelines, in order to properly identify material that should still remain prohibited or not. Another explanation is that some titles, particularly videos, have different versions of the same movie or book; therefore the specific item must be correctly identified (*Centralizing the Determination of Obscenity and Hate Propaganda,* Training Manual and Guide). Because the entire context of a given item would have to be taken into consideration when classifying material as obscene or not, border officials would perform a cursory review then forward the material to Headquarters for a more extensive review.

Another element to centralization was the implementation of a 30-day service standard to the rendering of decisions. The Courts noted that there was a failure for Customs to establish "internal deadlines and related criteria for the expeditious review of expressive material" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, para.154). As discussed earlier, Little Sisters' business relied on shipments being delivered in a timely manner. Many of their shipments consisted of magazines that were time sensitive. The bookstore claimed that book launches were frequently delayed because of the impediments they were subject to by border examinations and unnecessary

detentions of their material (*Little Sisters Book and Art Emporium vs. Canada (Minister of Justice*, 2000, paragraph 12). Unfair competition from bookstores stocking the same material when Little Sisters could not due to their items being detained at the border, contributed to business losses because of the border delays. Little Sisters pointed out that they were also concerned about the "the loss by a minority of the freedom to read and experience a broad range of writings and depictions... by (the) bureaucratic refusal to release perfectly lawful material into the country" (*Little Sisters Book and Art Emporium vs. Canada (Minister of Justice*, 2000, paragraph 12).

The system for reviewing material at the border was lengthy and led to losses for both businesses and the public. Customs officers were to determine the classification of imported goods within 30 days after the material in question was "accounted for" by the importer (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 86). The Supreme Court agreed that Customs must uphold a 30-day turnaround time for the determination of material detained at the border (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 86). The court noted that "evidence demonstrated that Customs, because of scarce resources or otherwise, failed to carry out the classification exercise sometimes for many months" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 89). Delays in decision-making on imported material could result in the subsequent release of the material in question without a prohibition, therefore the 30-day turnaround time needed to be strictly adhered to (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 86-88). The training given to officers reiterated the

30-day turnaround time mandate at various points in training procedures subsequent to the Supreme Court trial, including specifically stating that officers were to adhere to the time limits determined by the court (*Centralizing the Determination of Obscenity and Hate Propaganda,* Training Manual and Guide, 2003).

Centralizing decisions to one location also allowed for the 30-day limit to be monitored and adhered to. Departmental memoranda also affirmed the 30-day service standard in memos as of 2003 (Departmental Memorandum D9-1-1, September 9, 2003). Prior to this memo, importer options were outlined, however, there was no clear indication of the time restrictions for rendering a classification. The memo provided importers with the option to submit samples of material to Headquarters prior to commercial importations to determine whether their goods were in compliance with obscenity guidelines. Customs official could provide an "opinion regarding the admissibility of the goods in Canada" (Departmental Memorandum D9-1-1, September 9, 2003).

In summary, the court affirmed that the Customs process had many administrative flaws that led to years of erroneous actions, the consequences of which were felt by importers. Changes were required to the processes in order to avoid situations in which past errors could reoccur. The court accepted that human error was to be expected given the high volume of imports every day into the country, but that procedural amendments were still required. In response, Canada Customs made the decision to centralize all of the obscenity-related decision to one location. In doing so, the department attempted to streamline decisions to a group of people who would deal explicitly with this type of

material on a day-to-day basis, as opposed to border inspectors who dealt with hundreds of other subjects in the *Customs Act*. Border inspectors would still be required to assess material and determine whether they should be sent to Headquarters for further review and would still undergo training to assure that they are up to date with current guidelines and could properly target material.

Centralizing the obscenity functions to Headquarters also addressed issues with regard to respecting timeframes, a mandate that the court reiterated as having the utmost importance. It appears Customs was most responsive with regard to the courts' decisions in their policy to change to a centralized environment. By allowing for a decentralized environment to exist across the country, Customs was precipitating the on-going problems that were brought up in the hearings. The changes involved in the centralizing of decision-making to Headquarters would help to alleviate many of the issues surrounding Little Sisters' initial complaints. For example, the burden of proof element in cases in which material was detained at the border was dealt with in a more consistent manner when reviews were handled solely in one location. As a result of centralization, the argument can be made that many matters that were previously problematic for Customs would be alleviated.

Obscenity Guidelines

The Supreme Court decision noted a number of deficiencies, one of which dealt with manuals and training guides (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 154). The court stated that Canada Customs failed to make

manuals and guides readily available to officers and to properly update the Memorandum D9-1-1, the guide to procedures and policies related to classifying obscenity. The *Little Sisters* trial judge also noted that the failure to update manuals and procedural documents could not be defended by Canada Customs, and therefore concluded that the inaction by the state could be seen as deliberate (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 1996, paragraph 267). The trial judge also concluded that Customs' failure to make "Memorandum D9-1-1 conform to the Justice Department opinion on the definition of obscenity violated the appellants' *Charter* rights" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 85). However, between the various hearings, efforts were made to update procedures and guidelines in accordance with evolving jurisprudence on the meaning of obscenity. The Supreme Court confirmed that it was "not feasible for the courts to review for *Charter* compliance on the vast array of manuals and guides prepared by the public service for the internal guidance of officials" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 85). The courts focussed on the legality of the decisions made by Customs, not the "quality of the guidebooks", but noted that the decisions and the quality of the guidebooks were connected. This accepts that clearer guidebooks and training manuals have an influence on the quality of decisions Customs officers made. These findings led to the publication of comprehensive instructions to officers in the form of information bulletins and regularly updated memoranda beginning in 1996.

Obscenity Guideline Review Process

Following the Supreme Court trial with Little Sisters, Customs amended its guidelines pertaining to the classification of obscenity. The process by which the guidelines were amended involved consultation with various provincial and federal departments,as well as external agencies in order to come to a national consensus. Since taking into effect community standards of tolerance is of critical importance in the classification of obscenity (as per *R. v. Butler*), attaining that standard at a national level was one of the elements integral to devising the obscenity guidelines. The obscenity guidelines and classification indicators are "intended to reflect the evolving national community standard of tolerance for obscene materials" (Departmental Memorandum D9-1-1, September 9, 2003). When the guidelines were changed in January 2001, Customs officials consulted with provincial film boards, who were responsible for classifying adult sex films, the Periodical Advisory Committee, a board responsible for evaluating adult sex pocket books and magazines, and officials from the Department of Justice and the Canada Customs and Revenue Agency (Information Bulletin #20, 2001).

Customs officials were provided updates regarding the *Little Sisters* case in order to affirm Canada Customs responsibilities to uphold the legislation providing the Department the authority to "monitor the importation of obscene material entering Canada" (Information Bulletin #14, March 200). The courts' confirmation of Customs legislative and constitutional authority to detain material based on their potentially obscene nature is mentioned several times in each of the updates that was provided to Customs officials; however, another point that is underscored alongside that statement is

that Customs would continue to "improve its procedures related to the examination of obscenity at the border" (Information Bulletin #14, March 2000).

Procedural changes that reflected amendments stemming from jurisprudence and shifting community standards are outlined in various information bulletins. A number of bulletins dealt specifically with topics surrounding the changes in obscenity guidelines. The purpose of these bulletins was to provide clarification on official procedural changes being made and clarify issues related to the administration of the tariff item 9899.00.00 (Information Bulletin #1, November 6, 1996). For example, Information Bulletin number eleven provides notice that material depicting or describing pregnant and/or lactating women in a sexually explicit context would not be considered obscene as of October 1998, unless it was placed in a context which would render it so, i.e., sex with degradation and or sex with violence (i.e., Information Bulletin #11, October). The bulletins explicitly laid out information for Customs officials to interpret obscenity guidelines. In these cases, officers were guided to refer to Headquarters officials or a Regional Coordinator for their respective geographic location should they require additional assistance in their determinations.

Departmental memorandum D91-1-1 has been revised and updated periodically over the past 25 years. During the course of time since the inception of the Departmental Memoranda, the guidelines and procedures changed in an attempt to harmonize with evolving jurisprudence and legislative amendments. Since the Departmental Memoranda were used as guidelines for Customs officers in order to direct them while reviewing

material, the department acknowledged that the lack of explicit details could lead to inconsistent opinions by those classifying goods as obscene (*Departmental Memorandum D9-1-1*, July 1, 1982). As a result of jurisprudence, later versions of the departmental memorandum were amended to include detailed obscenity guidelines as well as references to the various bodies associated in the development of the guidelines, such as the Provincial Film Review Boards, for example, *Departmental Memorandum D9-1-1* September 9, 2003.

Community Standards of Tolerance and the Internal Necessities Test

One area that was an important element of the *Little Sisters* case was community standards of tolerance. Little Sisters had requested an "exemption, or differential treatment as to what materials the homosexual community should be permitted access"(*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 30). They argued that:

> ...in the context of the Customs legislation a "harm-based" approach which utilizes a single community standard across all regions and groups within society is insufficiently "contextual" or sensitive to specific circumstances to give effect to the equality rights of gays and lesbians.
>
> *(Little Sisters Book and Art Emporium v. Canada (Minister of Justice), 2000, paragraph 53)*

However, the Supreme Court affirmed that "the use of national community standards as the arbiter of what materials are harmful, and therefore obscene, remains the proper approach" and should also be applied to written text (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 194). In affirming that Customs should be basing its guidelines on what was prescribed in *Butler* as the

community standard, the court also acknowledged that "there was no recognition in the version of Memorandum D9-1-1 in use at the time of the events described at trial that the community standard related to tolerance of harm rather than taste" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000, paragraph 83). Therefore, it was imperative for Customs to use the community standards that they had established, stemming from *Butler* (i.e. harm vs. taste) and from their consultations with advisory boards such as the Provincial Film Boards.

In 1997, before the case went to the Court of Appeal, Memorandum D9-1-1 was amended to include the "community standards of tolerance" and the "internal necessities" tests. These "tests" provide methods by which officers may classify goods for their suspected obscene nature. The standards include what the "community" would not tolerate for the wider society as a whole. The test for community standards of tolerance consists not of "whether given material may be morally offensive to some people, but rather whether public opinion would perceive the material to be harmful to society" (*Departmental Memoranda D91-1-1*, January 31, 1997). The definition of harm in this context relates to the "anti-social predispositions the material may incite in members of a society", specifically if the behaviour is opposed to a society's general norms (*Departmental Memoranda D91-1-1*, January 31, 1997). According to Customs' directives, if "the community cannot tolerate the risk of harm, then the material will constitute the 'undue exploitation of sex'" (*Departmental Memoranda D91-1-1*, January 31, 1997).

Canada Customs policies emphasized the requirement for material to be judged on its own merit and in its entirety rather than by the individual parts that make up the whole of the entity. The notion of judging a whole representation was referred to in *R. v. Brodie*. That judgment indicated that the search for the dominant characteristic of a book, for example, involves reading the entire book, and not simply segmenting certain portions that may seem obscene. Another vital feature in deciphering the dominant characteristic of a certain work is in establishing the purpose of the author or creator (*R. v. Brodie*, 1962). These notions have led to the Internal Necessities Test or the Artistic Merit Defence, both relying on broader community perspectives of a given item. Custom officers were directed that in cases where the "serious treatment of a theme" was present, and artistic and or literary defence might be invoked (*Departmental Memorandum D9-1-1*, January 31, 1997). The internal necessities test was outlined in *R. v. Brodie*:

> I do not think that there is undue exploitation if there is no more emphasis on the theme than is required in the serious treatment of the theme of a novel with honesty and uprightness. The [obscenity] section recognizes that the serious-minded author must have freedom in the production of a work of genuine artistic and literary merit and the quality of the work... must have real relevance in determining not only a dominant characteristic but also whether there is undue exploitation.
>
> (*R. v. Brodie,* pp. 704-5, 1962)

The internal necessities test was also affirmed in *R. v. Butler* by asserting that the undue exploitation of sex may have a "legitimate role when measured by the internal necessities of the work itself" and therefore the work should not be considered obscene as a whole (*R. v. Butler*, 1992, pp 481-2). The court upheld the internal necessities test in the *Little Sisters* cases and in response the courts' decision, Canada Customs developed procedures that required officials to clearly comprehend how and when the artistic and or literary

merit defence may be required (*Departmental memorandum D9-1-1,* January 31, 1997). Such a defence does not nullify the fact that material may be offensive to society, and that it may be obscene, however, the defence allows the material to be viewed in a different context, by understanding the purpose of the work.

Earlier Customs policies before 1997 did not include the internal necessities test or the community standards of tolerance test (specifically the departmental memoranda). As a result of the ongoing litigation with Little Sisters, Customs officials were directed on how artistic or other merit may be gauged when reviewing goods in training procedures published in 1999, as well as in the abovementioned departmental memoranda. The requirement for such scrutiny allowed for material to be viewed as units that may embody more than what is presented outwardly (i.e., sexual themes) and was assessed on the sexual aspect inherently furthering a plot or theme (*Departmental Memoranda D9-1-1,* September 9, 2003). Various memoranda after 1997 explicitly stated that should material be questionable with regard to its potential merit, officials must err on the side of freedom of expression and release the goods in accordance with the Charter of Rights and Freedoms (*Departmental Memoranda D9-1-1*, 1997-2003). The main purpose of this test was to ensure that even if material is considered to contain the "undue exploitation of sex", that it cannot be defended under a literary or artistic merit defence. The directives related to the artistic or literary merit provisions came into effect during the period between the various Little Sisters trials (*Departmental Memoranda D9-1-1*, 1997-2003).

Classifying material when literary or artistic merit may potentially be an issue had been a subject that has been dealt with in various higher court rulings and litigation related to this subject (i.e. *Ontario (Attorney General) v. Langer* (1995)). There is a strong argument to be made of the connection between the ongoing litigation with Little Sisters and the publication of the *1999Program Monitoring Training Manual.* The detail in the training manual cannot be ignored, particularly as to how officials should go about classifying items that may be saved by an artistic or literary merit defence.

Customs officials were instructed to focus on certain aspects during the review process. Examples of this included whether the portrayal of sex was used for the "serious treatment of a theme" and whether "there is anything going on in the work besides the presentation of sex for the purposes of arousal" (*Program Monitoring Training Manual, 1999).* The manual pointed out that should there be any doubt to the answers to the questions above during the review and classification process of detained goods, Customs officials must err on the side of free expression (*Program Monitoring Training Manual, 1999).* The 1999 training manual stated that the advice is derived from a "Supreme Court ruling" and instruction from litigation, leading to the insertion of the statement "any doubt in this regard [that of suspected artistic and/or literary merit in certain material] must be resolved in favour of freedom of expression" (*Program Monitoring Training Manual, 1999).* The "court" was referred to extensively in the area of evaluation goods suspected of obscenity when artistic and literary defences may be appropriate.

At various points government officials were advised to consider guidance from the court in cases where:

1. Sexually explicit fiction is a vehicle for literary expression… [and]
2. Sexually explicit fiction with literary value plays a role in affirming the sexual identities of its readers…

Officials were directed to consider some other areas when reviewing material suspected of obscenity, including:

1. Sophisticated structure and plot development,
2. New and complex use of language,
3. Complex character development, and
4. Social and historical context.

Several other factors were to be taken into consideration as well when reviewing suspected obscenity, such as the general appearance of the book, information on the cover and the introduction, i.e., would there be any context from which one could "approach the book's content" (*Program Monitoring Training Manual, 1999*).

Emphasized throughout the manual was that if, as a whole, the prevalence of any of the factors noted above existed in material detained at the border, it may be presumed that the material was deemed to have some sort of merit and would not constitute obscenity. Nevertheless, the entire context of the material must be considered first. Should there be a question that such merit is evident, according to "the Supreme Court's decision" the material must be released[32].

[32] The Little Sisters case is not specifically referenced in the manual.

The Supreme Court affirmed that in most cases it may be relevant for an importer to prove the misclassification of an importation made by Canada Customs, for example in cases of duty applied to goods. However, in instances where constitutionally protected expressive materials are concerned, the onus should be on the government or the person alleging it to prove the infringement on one's constitutional freedoms is valid. The court confirmed that decisions made with regard to the obscene nature of material had to be justified by Canada Customs. In cases where certain parts of the material in question could be considered obscene but the obscene parts were not necessarily the dominant characteristic of the entire material, Customs could prohibit the material if it was not saved by any other redeeming non-obscene content (*Departmental Memorandum D9-1-1, 2003*).

In sum, the Supreme Court affirmed that amendments were required to the guidelines relating to obscenity. Judicial decisions needed to be considered in the revisions to obscenity guidelines in order to keep abreast of community standards of tolerance. Tests, such as the Internal Necessities Test, impacted on the way in which Customs reviewed and assessed goods suspected of obscenity. Such tests stemmed from the communities' perception of what could be tolerated in the Canadian sphere and which would be confirmed in jurisprudence. Customs responded to the courts by amending its guidelines and training methods in order to suitably assure that current standards were reflected it its policies.

Conclusion

Little Sisters Book and Art Emporium v. Canada (Minister of Justice) outlined the deficiencies in Canada Customs departmental policies and procedures with regard to detaining, reviewing and classifying suspected obscene material. Guidance by the courts paved the way for reformed, more coherent, more detailed approaches to the way in which Canada Customs develops and enforces its policies.

One of the key issues for the Courts and for the plaintiffs was the burden of proof in cases in which goods were detained as suspected obscenity. The Supreme Court ruled that the proof should rest with the state in providing evidence that a piece of work is obscene. The importer would no longer be held responsible to provide evidence to support a decision to the contrary as found in the 2003 obscenity guidelines.

A second major issue raised in the case was the lack of adequate training of Customs officers. In order to address this issue, a centralized structure for classifying goods as obscene or not was established at Headquarters in Ottawa. As of 2003, all goods suspected of obscenity detained at the border were to be sent to Ottawa where a group of trained officials would classify the material as obscene or not. The claim was that a team of experts in one centralized location could provide more consistent determinations rather than a multitude of border inspectors in several regions. The establishment of a centralized unit of experts at Headquarters also led the way to the introduction of specific service standards for the classification of goods.

After the Supreme Court decision, Canada Customs invoked a 30-day service standard in which detained goods must be classified as obscenity or else be released to the importer. Actions were also taken to offer importers ample opportunity to provide evidentiary support in cases where artistic or literary merit defences may be necessary.

Finally, the judgment in the *Little Sisters* case referred to Canada Customs' failure to incorporate advice received from the Department of Justice, as well as updated jurisprudence in their departmental guides and manuals. Canada Customs attempted to address the allegation of not remaining current in their policies and procedures by continuously revising and attempting to keep their guidelines in conformity to the law and court rulings. The assessments and revisions of Customs obscenity guidelines over the years demonstrate the department's dedication maintaining current community standards (as determined by the Courts) as guides in developing and amending policies that affect the country.

This chapter examined the Supreme Court judgment while exploring the actions undertaken by Canada Customs in response to the outcomes and challenges brought forth in the *Little Sisters* case. Measures undertaken by Canada Customs during the course of the trial and subsequent to the case were examined. The *Little Sisters* case highlighted administrative flaws that Canada Customs continued to suffer from over the course of several years. As such, I looked at the how the department amended its administrative

and regulatory frameworks with regard to matters surrounding the importation of certain materials. While there were no changes to its legislative mandate, Customs responded to the issues raised in the courts and in consultation with those bodies representative of the community to determine community standards of tolerance. Indeed, the *Little Sisters* court case contributed significantly to the evolution of the way in which Canada Customs regulates potentially obscene material at the border. Administrative flaws were addressed and corrected and amendments were made that greatly improved Customs procedures for targeting and reviewing potentially obscene material. The outcome of the case also facilitated in Canada Customs the refining of its training procedures and helped to streamline the entire classification process.

The *Little Sisters* case and Customs' response to the decision is a good example of the follow-through from jurisprudence to the enactment of policies and enforcement changes undertaken by a federal department. Customs' actions, whether proactively or in response to the final Supreme Court decision, exemplifies how change can be affected in government policies, even when legislative amendments are not mandated by the courts. In the *Little Sisters* case, Customs' mandate regarding their authority to detain and prohibit suspected obscene material was examined particularly since the manner in which the mandate was enforced was agreed to be prejudicial. In this case, Little Sisters argued that the mandate should therefore be nullified. The court did not agree, yet the result was an important change in Customs' regulatory workings in the matter of potentially obscene material.

CHAPTER 6 – CONCLUSION

This thesis examined the outcomes of the case *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*. The main aspects of the court cases were analyzed, notably the specific issues brought up in court that affected Customs operations. Ultimately, the steps taken by Canada Customs before and after the Supreme Court trial and the effect of the case on border policies and practices of an administrative agency, Canada Customs. The purpose was to examine the follow-through of case law into practice in government policies and procedures.

The thesis is an attempt to define the way in which judicial decisions have had a direct impact on policies and procedural guidelines at the federal government level. The trial examined in this thesis began in 1996, however the appellants (Little Sisters) and Canada Customs had been disputing government policies and procedures for several years before this time. This dispute brought to light a contentious issue being the accusation that Customs carried out its policies in a prejudicial manner.

The Crown attempted to prove that they did not act prejudicially. In spite of their arguments, the court found that administrative and systemic flaws contributed to many of Customs' errors that occurred in the past, which ultimately led to Little Sisters claims of inequitable treatment. The court also stated that at times Customs acted in a prejudicial manner. This judgment was significant in that it acknowledged that federal officials had acted in an unfair manner, a response that Little Sisters was ultimately seeking. Even so,

the court did not void Customs legislative authority to detain and prohibit obscene material. Instead, the court ordered several remedies to correct the past problems.

During the course of the trial and subsequent appeals, Customs procedures and policies were probed, including training methods and administrative processes. Little Sisters argued that border inspectors were not properly trained nor were they equipped to handle the level of scrutiny that was necessary in determining whether goods consisted of obscenity or not. In response, Customs amended its training methods and revamped the ways n which communications was distributed to its employees. Training manuals were updated to include relevant and pertinent information necessary for the on-going reviews performed at the border, including targeting procedures. Training was included in the mandatory training at the national Customs College for all inspectors. As well communiqués in the form of information bulletins were issued to officers in order to keep abreast of current policy changes and any administrative amendments that would be necessary for inspectors to perform their functions. The changes made to the training procedures were both in light of the Little sisters case and as a result of close examination into the best methods for ensuring that officers were as enlightened on policies as possible, given the many other responsibilities they endure in their day-to-day duties.

What is particularly interesting is that Customs made changes to their policies and procedures throughout the course of the continuing appeals. In spite of a final decision not having been rendered and a lack of finality with regard to a Supreme Court decision, the impact on Customs' policy amendments were felt as early as 1996, during the time of

the trial. In the trial decision, the court acknowledged that Customs had made many changes and the anticipation was that new policies and procedures would ameliorate the issues that had been raised at trial.

Another point examined in this case was the issue that previously when material was detained at the border under the suspicion of consisting of obscenity, the burden of proving that the material was in fact not obscene rested on the importer. The trial served to reverse the onus onto the federal government, since they were responsible for accusing the importer of importing obscenity. The reverse onus decision meant that Customs had to validate why they consider something to be prohibited, or eve detained, rather than the importers being required to justify that their material should not be detained. This decision placed the accountability on the government to justify their actions, in what could be seen as an attempt to alleviate future prejudicial actions, i.e. prohibitions made solely on the basis of the importer rather than on a plausibly defended reason.

It is interesting to note that many of Customs' procedural changes were put into policy and practice during the course of the case. In fact, it was difficult to detail all of the amendments that may or may not have been made by the department in response to the Supreme Court decision based on the material accessed for this examination. One can conjecture that the changes that were made before the Supreme Court hearing were put into place for several reasons – seemingly the changes that were the easiest to facilitate in a short period of time appear to have been implemented first, while more complicated areas such as an overhaul in training methods were delayed until after the Supreme Court

decision. Those remedies ordered by the court that seemed more onerous, tended to be implemented into policy later than those that had less of an impact, for example the procedures for using the Technical Reference System by Customs agents in 1997.

As another example, the issue of burden of proof was brought up at all levels of the hearing. Interesting to note is that in spite of the 1992 *Glad Day* decision of the burden being on the government to prove that materials were obscene, there was no specific evidence to support the fact that any significant changes were made to the Customs processes in this regard[33]. This point is important as it demonstrates the relevance Customs placed on certain aspects of the case by making changes proactively, while waiting for clear and explicit direction from the Supreme Court on other decisions.

The trial's central focus was on Customs detaining material consisting of obscenity. In this regard, the obscenity guidelines used by Customs to determine whether goods were obscene were examined in great detail. A criticism that came out of the trial was that the guidelines were not regularly updated to reflect changing norms and evolving community standards of tolerance. As a result of the trial and during the time leading up to the Supreme Court decision, Customs began amending its obscenity guidelines to adequately reflect current jurisprudence relevant to the guidelines. These changes coincided with the revisions made to the training procedures and to maintaining better and more consistent communication with officers on current policies.

[33] Based on the material obtained for this examination. It seemed that the reverse onus was not established in the Customs mandate until 1996 (or at least directives to Customs officers on this matter were only set into motion after the initial trial), however, changes may have been made earlier.

The final major outcome of the case was that Customs made the decision to centralize the obscenity decision functions to one location in Ottawa. This action stemmed from the need to assess material in a consistent manner and helped to justify the government's accountability to importers. A 30-day service standard was also mandated by the court, which meant that decisions on importations were required to be made within thirty days. If a decision could not be made within that time period, the importation would be released. Centralizing the functions to Ottawa was an attempt to ensure that decision would be made in a timely manner and that the decision-making process would be consistent. As mentioned previously, border inspectors would still be required to target certain material, but thorough training on targeting methods would attempt to better regulate the way in which material was initially detained. This significant procedural change was made in 2003, after the Supreme Court decision. The time between the decision and the implementation of this new direction appeared to allow Customs enough time to adequately establish a central decision-making agency in order to ensure more streamlined, consistent decisions on suspected obscenity cases. Centralization was in direct response to the Supreme Courts criticism of the Customs program to date, and the expectation was that past errors would be alleviated in the new, centralized environment.

It is evident that Customs made great strides in amending their polices and procedures both before and during the course of the hearing. Nevertheless one must note that there were some limitations that Customs had not addressed before the Supreme Court decision. The delays in incorporating up-to-date changes into the obscenity guidelines were one such issue. For example, departmental memoranda were only updated

periodically and there was no evidence to demonstrate that changes were made regularly before 1996 to keep guidelines current. As well, communication from Headquarters officials to regional officials was not particularly effective, which contributed to the inconsistent decisions rendered across the various border points. It is my conclusion however, based on the information obtained for this examination, many of the deficiencies noted in the Supreme Court decision had been addressed by Canada Customs as some point by 2003. In acting upon the decisions, Customs acknowledged the need for amendments to their system and acted diligently in their accountability to the court and the public.

A major area of concern in the course of my study was that some of the information I obtained was verbal, as there were no official records on many of the procedural changes made before 1996. Those pieces of information obtained for this study relating to the period prior to the trial was random and few in numbers. It was extremely difficult to acquire documentation that explicitly defined policy changes. It seemed that large portions of historical data were hidden or untraceable. For example, I was not able to definitively state whether the Quality Control Officer existed in the Customs process after 1999. One can only surmise whether more material was kept confidential and not released to the public. As a department whose public accountability is essential to its existence, it may be beneficial for Customs to perform an examination of its history in relation to the subject of obscenity-related decision-making. In this regard, a valuable future step may be to conduct an interview process with officials from Customs who had worked both at Headquarters and in the regions during the twenty years prior to the onset

of the *Little Sisters* case. One can assume Customs is not the only federal department in which a paper trail on policy changes is difficult to locate. Electronic files that did not exist in the past are now the norm for maintaining data. As such, structured interviews could help bring to light evidence that may not be readily available on paper and would help in any examination of the historical background of the control of obscenity by Canada Customs.

The *Little Sisters* case highlighted issues that had been raised for well over two decades. Issues of prejudicial treatment, administrative flaws and systemic errors in the Customs procedures were uncovered. Although the court did not strike down Customs' legislative powers to detain and prohibit material based on their potentially obscene nature, the court did lay out certain requirements and standards regarding Customs methods. An interesting point to note is that since the Supreme Court decision in 2000, Little Sisters has continued to file claims against Customs. In a recent example from 2007, Little Sisters filed an appeal regarding four books that had been prohibited by the department. In their appeal, they sought advance costs to be paid by the federal government. In addition to the appeal on the prohibitions, Little Sisters again brought forth the complaint that a systemic review of Customs practices was necessary. Accountability for effective change in administrative processes at Customs was lacking in their view. This illustrates again the need for the state to be transparent in their actions, particularly in response to court decisions.

Often judicial decisions are rendered and after a brief reference (if at all) in the headlines disappear from public view. What, if anything, happens with the decision is very often left to uncertainty and obscurity. The courts do not have a supervisory capacity nor a follow-up reporting system to evaluate the changes (detailed or general), which have been undertaken (or not) by the affected state agencies and actions. This is particularly true where administrative procedures and practices have been challenged. What is the real effect of such cases on the everyday workings of the state? In this thesis we see a specific example of judicial decisions followed through into government action by examining the responses by Canada Customs to the Little Sisters' litigation. It is an attempt to measure the impact of the courts' deliberations and decisions on Customs policies and their related practices.

In order for government to be responsible for their actions, real change needs to be made in the way in which the public sector views its role as being accountable to the Canadian population. One of the main issues that is problematic in this examination is the criteria used to determine what defines government accountability. In this case, the context was mainly centered on Customs administrative processes and the manner in which those processes were affected by the judicial decisions. As well, the communications methods employed by senior management in order to inform both internal staff and the general public of change were examined. The communication methods are one example of the criteria that could be used in measuring accountability. The entire notion of accountability is a difficult one and requires a close examination by the government in order to adequately respond to public concern.

Though the correlation between the courts' decisions and Customs' responses were not always explicit and the evidence at times tenuous, the changes implemented were clearly in line with the majority of issues and remedies outlined in the courts' decisions. What remains to be done to ensure better accountability and more effective responses to the courts' decisions - and ultimately to the public - is an enhanced record-keeping and tracking system which explicitly and coherently not only details the changes which have been made but also lays out the impetus and the rationales for those changes.

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Tariff Item	SS	Description of Goods	Unit of Meas.	MFN Tariff	Applicable Preferential Tariffs
9898.00.00 Continued		(a) "firearms" and "weapon" have the same meaning as in section 2 of the Criminal Code; (b) "automatic firearm", "licence", "prohibited ammunition", "prohibited device", "prohibited firearm", prohibited weapon, restricted firearm and "restricted weapon" have the same meanings as in subsection 84(1) of the Criminal Code; (c) "public officer" has the same meaning as in subsection 117.07(2) of the Criminal Code; (d) "authorization to transport", "business", "carrier" and "non-resident" have the same meanings as in subsection 2(1) of the Firearms Act; and (e) "visiting force" has the same meaning as in section 2 of the Visiting Forces Act.			
9899.00.00	00	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*, (b) constitute hate propaganda within the meaning of subsection 320(8) of the *Criminal Code*, (c) are of a treasonable character within the meaning of section 46 of the *Criminal Code*, or (d) are of a seditious character within the meaning of sections 59 and 60 of the *Criminal Code*; Posters and handbills depicting scenes of crime or violence; or Photographic, film, video or other visual representations, including those made by mechanical or electronic means, or written material, that are child pornography within the meaning of section 163.1 of the *Criminal Code*.	-	N/A	

Appendix B

Revenue Canada
Customs and Excise

Revenu Canada
Douanes et Accise

MEMORANDUM D9-1-1

Ottawa, July 1, 1982

Ottawa, le 1er juillet 1982

SUBJECT

PROHIBITED GOODS OF A TREASONABLE, SEDITIOUS, IMMORAL OR INDECENT CHARACTER (TARIFF ITEM 99201-1)

This Memorandum outlines and explains the provisions of tariff item 99201-1 of Schedule C to the *Customs Tariff* which prohibits the entry into Canada of certain goods.

Legislation

The tariff item 99201-1 reads:

Books, printed paper, drawings, paintings, prints, photographs or representations of any kind of a treasonable or seditious, or of an immoral or indecent character.

OBJET

MARCHANDISES PROHIBÉES, DE NATURE À FOMENTER LA TRAHISON OU LA SÉDITION, OU AYANT UN CARACTÈRE IMMORAL OU INDÉCENT (NUMÉRO TARIFAIRE 99201-1)

Le présent Mémorandum souligne et explique les dispositions du numéro tarifaire 99201-1 de la Liste C du *Tarif des douanes* en vertu duquel l'entrée de certains produits est interdite au Canada.

Législation

Le libellé du numéro tarifaire 99201-1 se lit comme suit:

Livres, imprimés, dessins, peintures, gravures, photographies ou reproductions de tout genre, de nature à fomenter la trahison ou la sédition, ou ayant un caractère immoral ou indécent.

GUIDELINES AND GENERAL INFORMATION

1. Customs has the responsibility for administering the *Customs Tariff*.

2. Schedule C to the *Customs Tariff* enumerates goods which are prohibited entry into Canada.

3. Among these goods are: books, printed paper, drawings, paintings, prints, photographs or representations of any kind which are of a treasonable, seditious, immoral or indecent character.

4. All importations of goods of this nature are subject to examination by Customs Officers at the point of entry for appropriate classification under the *Customs Tariff*.

5. If the importation is of a treasonable, seditious, immoral or indecent character, it is classified under tariff item 99201-1 and, therefore, prohibited entry.

6. All doubtful material will be forwarded to Headquarters in Ottawa for review and determination of tariff classification.

LIGNES DIRECTRICES ET RENSEIGNEMENTS GÉNÉRAUX

1. Les douanes ont la responsabilité d'administrer le *Tarif des douanes*.

2. La Liste C du *Tarif des douanes* donne l'énumération des marchandises dont l'entrée est interdite au Canada.

3. Ces marchandises comprennent: les livres, imprimés, dessins, peintures, gravures, photocopies ou reproductions de tout genre, de nature à fomenter la trahison ou la sédition, ou ayant un caractère immoral ou indécent.

4. Toutes les importations de marchandises de cette nature doivent être examinées par les agents de douane au point d'entrée pour être classifiées de façon appropriée en vertu du *Tarif des douanes*.

5. Si l'importation est de nature à fomenter la trahison, la sédition, ou si elle revêt un caractère immoral ou indécent, elle est classifiée en vertu du numéro tarifaire 99201-1 et est donc interdite au Canada.

6. Tout matériel douteux sera envoyé à l'Administration centrale à Ottawa afin d'être examiné et pour déterminer sa classification tarifaire.

Request for Re-determination

7. The decisions are then communicated to the Regional Collector of Customs who, in turn, advises the importer accordingly. The importer is also notified of his statutory right of appeal to the Deputy Minister for a re-determination of the goods under section 46 of the *Customs Act*. The written request in the prescribed form and manner mentioned in section 46 of the *Customs Act* is Request for Re-determination — Re-appraisal by a Dominion Customs Appraiser, form B2A or Request to Deputy Minister of National Revenue for Customs and Excise for re-determination or re-appraisal, form K 14D. However, for the purpose of this tariff item, Customs is also prepared to accept a letter addressed to the Deputy Minister.

8. Should the appeal under section 46 of the said Act be denied, the importer can further appeal to the judge of the relevant court as provided by section 50 of the *Customs Act*. The final decision, then, rests with the courts and not with Customs.

Policy Guidelines

9. Customs does not censor importations in the sense of deleting portions of films or magazines or set age limitations for their viewing or purchase. Customs' role is one of determinating whether specific goods are to be classified under tariff item 99201-1.

10. In determining whether goods are considered representations of an immoral or indecent character under tariff item 99201-1, Customs is guided by the provisions of the *Criminal Code*, and court decisions relating thereto, which deal with offences tending to corrupt morals. For example, publications which would be deemed to be obscene under section 159(8) of the *Criminal Code* are considered to be of an immoral or indecent character. Section 159(8) of the *Criminal Code* reads:

> "For the purpose 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."

Demande de nouvelle détermination

7. Les décisions sont ensuite transmises au receveur régional des douanes qui à son tour en fait part à l'importateur. L'importateur reçoit également un avis concernant son droit statutaire d'appel au sous-ministre pour la nouvelle détermination des marchandises en vertu de l'article 46 de la *Loi sur les douanes*. La demande écrite en la forme et la manière prescrites mentionnée à l'article 46 de la *Loi sur les douanes* est Demande de nouvelle détermination — nouvelle estimation à un appréciateur fédéral des douanes, formule B2A ou Demande au sous-ministre du Revenu national, pour les Douanes et l'Accise, ayant pour objet un nouveau classement ou une nouvelle appréciation, formule K 14D. Cependant, visant ce numéro tarifaire, une lettre tout simplement adressée au sous-ministre sera suffisante.

8. Si l'appel en vertu de l'article 46 de ladite loi est refusé, l'importateur peut faire appel au juge de la cour en question, tel que prévu à l'article 50 de la *Loi sur les douanes*. C'est donc à la cour, et non aux douanes, qu'incombe la décision finale.

Lignes directrices de la politique

9. Les douanes n'imposent pas de censure aux importations dans le sens de couper des parties de films ou de magazines, ou de fixer des limites d'âge pour les personnes désirant regarder ou acheter ces films ou magazines. Le rôle des douanes est de déterminer si certaines marchandises doivent être classifiées en vertu du numéro tarifaire 99201-1.

10. Pour déterminer si les marchandises sont considérées comme des reproductions ayant un caractère immoral ou indécent, aux termes du numéro tarifaire 99201-1, les douanes se guident sur les dispositions du *Code criminel* et sur les décisions des tribunaux à l'égard de celles-ci et d'infractions de nature à corrompre les moeurs. Par exemple, les publications qui sont censées être obscènes aux termes de l'article 159(8) du *Code criminel* sont considérées comme ayant un caractère immoral ou indécent. Le paragraphe 159(8) du *Code criminel* est libellé comme suit:

> «Dans l'application de la présente loi, toute publication dont le caractère dominant est l'exploitation injustifiable du sexe ou du sexe et d'un ou plus d'un des sujets suivants, nommément le crime, l'horreur, la cruauté et la violence, sera jugée comme étant obscène.»

REFERENCES

EFFECTIVE DATE –
November 30, 1906

ISSUING OFFICE –
Tariff Programs (Classification)

LEGISLATIVE REFERENCES –
Customs Tariff, section 14 and
Schedule "C", tariff item 99201-1
Customs Act, sections 46 and 50
Criminal Code, section 159(8)

HEADQUARTERS FILE –
3730-1

SUPERSEDED MEMORANDA –
D33-12/1

OTHER REFERENCES –
Post Office Act, section 7

SERVICES PROVIDED BY THE DEPARTMENT ARE AVAILABLE IN BOTH OFFICIAL LANGUAGES.

THIS MEMORANDUM IS ISSUED UNDER THE AUTHORITY OF THE DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS AND EXCISE.

RÉFÉRENCES

DATE D'ENTRÉE EN VIGUEUR –
le 30 novembre 1906

BUREAU ÉMETTEUR –
Programmes tarifaires (Classification)

RÉFÉRENCES LÉGALES –
Tarif des douanes, article 14 et
Liste "C", numéro tarifaire 99201-1
Loi sur les douanes, articles 46 et 50
Code criminel, article 159(8)

DOSSIER DE L'ADMINISTRATION CENTRALE –
3730-1

CECI ANNULE LES MÉMORANDUMS –
D33-12/1

AUTRES RÉFÉRENCES –
Loi sur les postes, article 7

LES SERVICES FOURNIS PAR LE MINISTÈRE SONT DISPONIBLES DANS LES DEUX LANGUES OFFICIELLES.

CE MÉMORANDUM A L'APPROBATION DU SOUS-MINISTRE DU REVENU NATIONAL, DOUANES ET ACCISE.

INFORMATION BULLETIN

TARIFF CODE 9956 (a)

This is the first of a series of bulletins, in which an attempt will be made to clarify issues related to the administration of tariff code 9956 (a) of the *Customs Tariff*. For the most part, this will be done in a Question and Answer format, and suggestions for content are welcome by calling or faxing the contact person listed on the bottom of the page.

WHAT ARE REVENUE CANADA'S RESPONSIBILITIES REGARDING WRITTEN OBSCENITY?

- Customs plays an important role in the interception of undesirable material entering Canada. Society looks to customs officials to keep these materials out of the country, and the Court has confirmed that this is an appropriate role for customs to play.

- When suspect material arrives at the port of entry or postal centre, a designated customs officer determines whether the material should be released or confirms that it is suspect. If it is considered suspect, customs will inform the importer of the detention and his or her right to submit evidence in support of artistic or literary merit.

- In addition to the border responsibilities, departmental officials review advance copies of foreign magazines, books and other adult sexual materials, and provide an opinion regarding any areas of concern that may cause importation into Canada to be prohibited. Any action to remove a portion of or alter a publication in any way is taken voluntarily by publishers or importers.

HOW DO DEPARTMENTAL OFFICIALS DETERMINE WHETHER AN IMPORTATION IS CONSIDERED TO BE "OBSCENE"?

- Decisions are guided by a comprehensive set of interpretative guidelines. The guidelines, which are developed by Revenue Canada, Department of Justice and Department of Finance officials, are based on specific definitions provided in the *Criminal Code*, along with guidance and interpretation provided by the Courts.

- A January 1996 ruling from the Supreme Court of British Columbia noted that "while much of the material presented at our borders may be capable of relatively quick decision in relation to code 9956(a), a substantial amount of material is more difficult to evaluate. The classifying officer must do more than merely identify, on an objective basis, whether the material presented falls within the categories of obscenity enumerated in Butler (see Memorandum D9-1-1). The officer must also make a subjective assessment of whether, in the context of the whole work, the exploitation of sex is "undue" and further, whether the exploitation of sex is overcome by an artistic, literary, or other similar purpose." This issue has been clarified in an updated version of D9-1-1, which is currently being published.

- When in doubt, the Department must err on the side of freedom of expression and release the goods.

Contact:
Telephone
Fax

Bulletin #1
November 6, 1996