



WOMEN'S LEGAL EDUCATION AND ACTION FUND

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By Courier

September 12, 1994

The Honourable David Anderson
Minister of National Revenue
7th Floor
Connaught Building
McKenzie Avenue
Ottawa ON K1A 0L5

Dear Minister:

I am writing to you on behalf of the Women's Legal Education and Action Fund ("LEAF") to express our concern that lesbian and gay bookstores appear to be targeted for discriminatory treatment by Canada Customs. Customs' treatment of the Little Sister's Bookstore in Vancouver, a business which serves the lesbian, gay and bisexual communities, provides a prime example of this discrimination. This letter will focus on this discriminatory treatment as it relates to lesbians.

Little Sister's Book and Art Emporium and the British Columbia Civil Liberties Association and James Eaton Deva and Guy Allen Bruce Smythe v. The Minister of Justice and Attorney General of Canada and Minister of National Revenue is an action brought in 1990 against Canada Customs challenging discriminatory enforcement of customs regulations¹ against writers, readers, and distributors of sexually explicit materials about lesbians and gay men. The trial is scheduled for 40 days of hearing, beginning in October 1994. As you are aware, one of the issues set out in the Statement of Claim is whether there is an infringement of section 15 of the Canadian Charter of Rights and Freedoms in the application of the Customs Tariff in a way that discriminates on the basis of sexual orientation. In our view, Customs' application of the Tariff does indeed violate section 15 of the Charter on the basis of sexual orientation.

This letter has four parts. It was prepared by a volunteer working group coordinated by the

¹ Customs Tariff, S.C. 1987, c. 41 (3rd Supplement) made pursuant to the Customs Act, S.C. 1986, c.1 (2nd Supplement).



West Coast LEAF Association, which is a branch of the national organization. Part One, The Work of LEAF and Part Two, Women's Rights to Equal Benefit and Protection of the Law, are included to provide some background to our concerns. Part Three, R. v. Butler², focuses on the equality analysis of pornography developed by LEAF. Part Four is LEAF's Concerns Regarding the Policy and Practices of Canada Customs. Part Five is Recommended Action. Attached as an appendix to this submission is a copy of LEAF's factum in R. v. Butler.

Part One - The Work of LEAF

LEAF is a national, federally incorporated, non-profit organization founded in April, 1985 to secure equal rights for Canadian women as guaranteed by the Canadian Charter of Rights and Freedoms. To this end, it engages in test case litigation, research, and public education.

LEAF engages in advocacy on sex equality rights and public education in many forums including: the courts and tribunals, government committees and commissions, workshops and conferences, and through publications. As well, LEAF members have published books and numerous publications on sex equality.

LEAF's expertise in the area of freedom of expression as it interacts with the right to equality has been recognized by the Supreme Court of Canada. The Court granted LEAF intervenor status in the now leading cases on hate propaganda and obscenity: R. v. Keegstra³, and R. v. Taylor⁴, which involved challenges to the Criminal Code sanctions against hate propaganda, and R. v. Butler, which involved a challenge to the obscenity provisions in the Criminal Code.

LEAF has also worked extensively in the area of lesbian rights. In 1992-93 LEAF conducted consultations with lesbians from diverse communities across the country and produced a substantial report on lesbian rights and the results of the consultations, "Litigating for Lesbians" (1993).

Part Two - Women's Rights to Equal Benefit and Protection of the Law

Since the guarantee of sex equality in section 15 of the Charter came into effect, LEAF has developed expertise in a range of equality issues: (1) equality issues for women who may

² [1992] 1 S.C.R. 452.

³ [1990] 3 S.C.R. 697.

⁴ [1990] 3 S.C.R. 892.

experience compounding and uniquely damaging effects of multiple discrimination, for example, women who also experience discrimination on the basis of lesbian identity, race, class, aboriginal status, or disability; (2) equality issues for women in particular contexts such as employment, criminal law, and enforcement of criminal law; (3) equality issues as they relate to issues of fairness in the legal process.

Equality jurisprudence has developed significantly over the past decade. In the early years of Charter litigation, many courts took the view that equality is achieved when "similarly situated" persons are treated similarly. The initial and widespread judicial approval of the "similarly situated" test arose from cases which were not, generally speaking, brought on behalf of disadvantaged groups.⁵ In the first Supreme Court of Canada case to consider the equality guarantee, LEAF intervened to argue an "eradication of disadvantage" approach. The Court rejected the "similarly situated" test and instead adopted a view of equality consistent with LEAF's argument.⁶

The majority of judges in that case (Andrews v. The Law Society of British Columbia) indicated that the factors which lead to the conclusion that a person is being treated unequally include whether (s)he belongs to a group lacking political power (non-citizens in Andrews) and the place of the group in the entire social, political, and legal fabric of our society. Furthermore, in R. v. Turpin⁷, the Supreme Court of Canada said that "most but perhaps not all [cases of alleged discrimination] necessarily entail a search for disadvantage that exists apart from and independent of a particular distinction being challenged"⁸. The Court found it important to look "not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context"⁹. This search may include stereotypes, historical disadvantage or vulnerability to political or social prejudice.¹⁰

There also has been some recognition at the Supreme Court of Canada level of the importance of recognizing the unique and heightened vulnerability experienced when more

⁵ See Gwen Brodsky and Shelagh Day, Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?, (Ottawa: Canadian Advisory Council on the Status of Women, 1989).

⁶ Andrews v. The Law Society of British Columbia, [1989] S.C.R. 143.

⁷ [1989] 1 S.C.R. 1296.

⁸ *Ibid*, p. 1332.

⁹ *Ibid*, p. 1331.

¹⁰ *Ibid*, p. 1331.

than one basis of discrimination operate together. In Canadian Human Rights Commission v. Department of Secretary of State and Mossop¹¹ Chief Justice Lamer, writing for the majority, explicitly declined to rule out the possibility of overlapping grounds of discrimination. Also in Mossop, Mme Justice L'Heureux-Dube, in dissent on other issues, wrote:

It is increasingly recognized that categories of discrimination may overlap, and that individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex ...Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals.

The particular form of inequality about which we are concerned here is a complex mixture of discrimination on the basis of sex and lesbian identity. This mixture of discrimination may also include other sources of disadvantage, the manifestation and resulting harms of which will vary. In our view, the place of lesbian women in the entire social, political and legal fabric of society requires that the laws and state practices which put them at a disadvantage be subjected to particular scrutiny for conformity to s.15 of the Charter. This is not to suggest however, that a hierarchy of harms must evolve, rather that women experience differing harms according to the sources of their disadvantage.

Part Three - R. v. Butler

The Little Sister's case relates to the broad question of state regulation of sexually-explicit material. The most significant area of law in this context is the criminal law of obscenity which is incorporated by reference in the Customs Tariff. R. v. Butler is the leading case on obscenity.

Originally, obscenity law was meant to prevent moral corruption through exposure to sexually explicit materials. An overlapping but broader purpose was to prevent offence to public sensibilities. Underlying assumptions informing these views were rooted in negative perceptions about sex, sexuality in its varied forms and women's bodies in general.¹²

Even after the statutory amendment of 1959 (when the statute took its present form), the courts continued to interpret the phrase "undue exploitation of sex" according to measures of sexual explicitness.

¹¹ [1993] 1 S.C.R. 554 at 645.

¹² LEAF factum in R. v. Butler, para. 9.

LEAF intervened in Butler because it believed that the law as it stood inadequately addressed the interests of Canadian women and of all those concerned with equality and the regulation of sexual expression. The arguments that LEAF made were intended to encourage the court to shift from a conservative morality-based paradigm that contributed to a host of problems in the law¹³ to a harms-based paradigm that was capable of recognizing the effect of pornography on women in society. Central to that argument was the recognition of the gender specific harm that pornography perpetrates on women and the implications for their equality rights in Canadian society.

The Supreme Court, through the majority judgment of Sopinka J., accepted this basic shift in the way pornography is conceptualized and evaluated. The Court recognized that it was not the sexual explicitness of materials that warranted categorizing them as obscene. It was only those materials that were linked to harm that fell under the definition. In fact, the Court emphasized that sexually explicit material that is not linked to harm **should not** be included in the definition under s.163.

Further, the Court in Butler did not explicitly deal with the impact and significance of woman-produced materials. It was clearly focussing on materials produced for heterosexual men, by heterosexual men. However, the Court did, in the following statement, clearly recognize the oppressiveness of imposing the moral standard of the majority on minorities:

To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract.

It can also be said that:

In Butler, LEAF advanced, and the Supreme Court of Canada accepted, an analysis which renders moral censorship unconstitutional. Butler therefore makes possible a political argument, one that has been articulated within lesbian and gay communities and that may advance lesbian and gay equality rights without undercutting the substantive equality case law. The argument is that these representations affirm the identities of members of communities systemically vilified and abused on the basis of sexuality, culture, and intimate social arrangements. They claim visibility and celebrate the diversity of and within communities whose existence is denied and coercively suppressed. (Imagine, for example, the powerful effect of a billboard presenting a romantic embrace between two teenagers of the same sex.) Sometimes the images may provide information on safe sex practices. These are equality arguments. Butler creates legal space--space which did not exist

¹³ These included vagueness, subjectivity, gender bias, potential for abuse as a mechanism of censorship and difficulties of proof and effective enforcement (LEAF factum, para. 14).

under the former obscenity law--for such arguments to be constitutionally credited.¹⁴

Butler creates the legal space for such equality arguments to be taken seriously. Unfortunately, post-Butler, the opportunity for an equality-based rethinking of state practices respecting lesbian and gay materials has so far been missed.

Part Four - LEAF's Concerns Regarding the Policy and Practices of Canada Customs

We will set out three concerns regarding Canada Customs policies and practices in this section: first, we are concerned that Canada Customs is thwarting the purpose of the Supreme Court of Canada's decision in R. v. Butler; second, it is our view that Canada Customs is targeting lesbian and gay bookstores in a discriminatory manner; and, third, we would like to bring to your direct attention the effects that this discriminatory conduct has on lesbian and gay bookstores, including Little Sister's, in order to compel your action to stop this conduct.

i) The Purpose of the Supreme Court of Canada Decision in R. v. Butler

The Supreme Court of Canada's decision in R. v. Butler radically reinterpreted the law of obscenity in Canada. That reinterpretation was, as a matter of law, automatically incorporated into the Customs Tariff, the regulations which guide the work of Canada Customs. While Butler ought to have changed the policy and procedures of Canada Customs, Canada Customs appears to have entirely ignored the decision. LEAF is unaware of any regulatory or administrative changes to Canada Customs policies and procedures made in response to Butler. For example, the Customs and Excise Procedural Guidelines still prohibit the importation of materials depicting anal penetration, contrary, we would argue, to the spirit of Butler and indisputably contrary to language in the 1993 judgment of the Supreme Court of Canada.¹⁵

Also importantly, the eradication of disadvantage approach to Charter equality rights¹⁶ should lead government to scrutinize its own practices to ensure that they do not promote or

¹⁴ Karen Busby, "LEAF and Pornography: Litigation on Equality and Sexual Representations", (1994) 9 The Canadian Journal of Law and Society 165, at 182.

¹⁵ It is noteworthy that the Supreme Court of Canada in R. v. Tremblay (1993) 84 C.C.C. (3d) 97 at 116 quoted with approval a passage from an Ontario case which stated that, "Contemporary community standards would tolerate the distribution of films which consist of scenes of group sex, lesbianism, fellatio, cunnilingus, and anal sex."

¹⁶ As described in Part Two, above.

deepen the disadvantage of the most vulnerable groups in society.¹⁷

Butler ought to have led to a review and revision of Customs policy and procedures that would have improved the treatment of lesbian and gay bookstores like Little Sister's in Vancouver. Instead, discriminatory enforcement of the Customs Tariff against lesbian and gay bookstores appears to have continued. Such discriminatory enforcement is entirely contrary to the spirit of Butler, to the eradication of disadvantage approach to equality rights and to the Charter.

ii) **Discriminatory Treatment of Lesbian and Gay Bookstores**

There is evidence that lesbian and gay bookstores are being subjected to unreasonably close scrutiny simply because they serve the lesbian and gay community. That in itself is enough to bring the practices of Canada Customs officials into question. While there is no doubt that the books and magazines going to stores such as Little Sister's represent lesbian and gay perspectives and/or lifestyles, it is no corollary that the material is more likely to be obscene in the sense defined by Butler. There seems to be a concerted effort on the part of Customs officials to scrutinize shipments to Little Sister's with a zeal that is lacking for the majority of the rest of the booksellers in the city, particularly when those shipments originate from distributors known to carry lesbian and gay materials, such as Inland Distributors.

LEAF is aware that many of the materials seized by Canada Customs en route to lesbian and gay bookstores are ordered and received by bookstores which cater to a general clientele. The very same books seized by Canada Customs en route to Little Sister's are neither scrutinized nor withheld by Customs when shipped to general audience bookstores not specializing in lesbian and gay materials. For example, in December 1993 a shipment of the lesbian love story, Claire of the Moon, was seized and detained by the Customs division of Canada Post (Vancouver Central office). This text, however, had long been--and continues to be--distributed and sold in Canada by general audience bookstores where it is widely available. In fact, this book is in the general collection of the Vancouver Public Library. Neither its widespread availability nor the fact that this book has become a major motion picture prevents Customs from indefinitely detaining this Little Sister's shipment. Although Customs (Vancouver) was immediately formally notified that this book had already been cleared at other Customs offices, to date Little Sister's has still not received this December

¹⁷ While sexual orientation has not yet been explicitly recognized by the Supreme Court of Canada as included among the grounds of discrimination set out in s.15 of the Charter, in Mossop v. Treasury Board, the Court indicated that it would be willing to accept sexual orientation as an analogous ground under s. 15. Lower courts have made such a finding, including the Ontario Human Rights Commission (Leshner v. The Queen in Right of Ontario (1992), 92 C.L.L.C. 17 035) and the B.C. Supreme Court (Knodel v. B.C.(Medical Services Commission) (1991), 58 B.C.L.R. (2d) 356).

shipment.

Canada Customs has recently seized a variety of materials en route to Little Sister's. These include:

Under My Skin by Jaye Maiman, The Naiad Press, 1993, a very good detective story with explicit lesbian sex, milder than descriptions of heterosexual activity easily found in any Vancouver bookstore.

Bushfires: Stories of Lesbian Desire, edited by Karen Barber, Boston: Lace Publications, 1991, explicitly sexual lesbian fantasies in short story form, not involving violence or the promotion of inequality in any way.

Butch by Jay Rayn, Boston: Free Women Press, 1991 - a short novel describing a lesbian growing up and her sexual experiences.

Desert Hearts, a film in video form directed by Donna Deitch, a gentle love story involving very mild lesbian sexual activity. This film has been exhibited at the Vancouver International Film Festival, shown on network television and is available for rent at neighbourhood video stores in Vancouver on the general shelves. It is based on a novel by the well-established Canadian author, Jane Rule.

Samples of the print works discussed above are enclosed for your review.

Adding to the lists of hundreds of books seized over the past ten years in which Little Sister's has been known to serve the lesbian, gay and bisexual communities, 33 copies of 8 additional titles have been seized in the month of July 1994 alone. These new seizures are not of books that have been newly released. Rather, they are of books published in the late '70's and mid '80's, including, for example, Prick Up Your Ears, a critically acclaimed biography of Joe Orton first published in 1985 and later made into a major motion picture; Noel Coward, a biography published in 1986; and Three Literary Friendships, published in 1983. These texts have been available in Canada since their release. Three Literary Friendships, for example, provides a literary and speculative account of the relations between the poets Byron, Shelley and Rimbaud. Although it has been widely circulated in bookstores, public libraries and college literature courses, it is still randomly and indiscriminately seized and withheld until Canada Customs clears the title yet again.

In contrast, bookstores and neighbourhood video stores throughout Vancouver routinely stock and rent fully explicit descriptions and depictions of heterosexual sex, including anal penetration and group sex, as well as explicit depictions of sex between women.

The purpose of referring to these materials is not merely to make the point that Canada Customs made errors in seizing the noted materials en route to Little Sister's; it is to demonstrate a consistent bias against materials that depict or discuss lesbian life, particularly

materials depicting sexual activity, and to suggest that an entirely different, discriminatory standard is being applied to those materials, not the Butler standard.

Butler explicitly states that mere prurience is not sufficient grounds to prohibit sexual imagery. Neither is it meant to regulate that which some may find offensive on religious or moral grounds. The general characteristics of the lesbian materials listed above are exactly those qualities that obscenity law **should not** regulate and which are not proscribed by Butler.

iii) **The Effects of Canada Customs' Discriminatory Treatment of Lesbian and Gay Bookstores**

The effects of this discrimination go beyond denying certain readers access to materials of their choice. The unavailability and stigmatization of lesbian materials undermines the development of lesbian identity and culture. As well, the economic impact on bookstores such as Little Sister's is undeniable:

- * seized materials must nevertheless be paid for;
- * materials delayed in transit are sometimes damaged or lost;
- * magazines which are delayed become quickly unsaleable; and
- * customer goodwill is seriously undermined by the bookstores' inability to fill orders on a timely basis or at all.

The July 1994 seizure of 33 books, for example, effectively denied Little Sister's \$350.00 in potential retail sales for this shipment alone. Little Sister's remains financially liable for all such texts, including those seized "in error". Whether or not Canada Customs is mistaken in its random evaluation of the "obscenity" of the books it seizes, Little Sister's bookstore cannot recover revenues as long as the books are detained and not made available in the store for sale.

So too has Little Sister's been liable for numerous shipments of books "destroyed" and "lost" by Customs between 1984 and 1992. Only recently has Customs refrained from "destroying" books that it has deemed "obscene" and begun to return them to their American distributors. For example, two shipments of two magazines were detained at the border in June 1993. Although they were eventually returned by Canada Customs to the distributors, Liberation Publications Incorporated, it has taken one full year for Little Sister's to be credited the \$3,102.18 incurred when the magazines were first sent. Of the magazines seized yet eventually released to Little Sister's, monthly and quarterly publications are quickly outdated and fully de-valued when indefinitely detained for the several months required to appeal Customs' judgments.

Over the past 10 years, hundreds of titles and thousands of books en route to Little Sister's have been seized and either indefinitely detained or later released, resulting in hundreds of

thousands of dollars of lost revenues. In addition to these losses, litigation costs incurred by Little Sister's for the legal defence against Customs' discriminatory practices now approaches \$80,000.00. Little Sister's anticipates that these legal fees will triple in the course of the October trial.

The lesbian community is largely ignored in the mainstream media. Even when lesbians and gays are discussed generally as "homosexuals", the concerns of lesbians are often not addressed. Due to this invisibility, bookstores such as Little Sister's are a vital communication link. They are a safe forum where issues of concern to the lesbian community may be discussed. They alleviate some of the isolation and contribute to the political strength of the community. They serve the social values underlying the guarantee of freedom of expression: community, human flourishing and the pursuit of truth. They accomplish this through many of the materials they sell as well as through their very existence. The practices of Canada Customs threaten both.

In a truly equal forum, everyone would be able to contribute equally to the discourse on sexuality. However, because this is not yet an equal society, the discourse is dominated by one group to the detriment of others. The legal regulation of pornography is a way of promoting equality by creating a space for the less powerful to express themselves. Butler acknowledged this by creating a paradigm which justified the **promotion of equality**. That equality is attained in two ways. The first is the freedom from oppression due to the eroticization of inequality. The second is the freedom to explore what sex may mean without the eroticization of inequality. It is this second freedom that is jeopardized by Customs' discriminatory treatment of lesbian and gay materials.

Part Five - Recommended Action

In LEAF's opinion, litigation is an extremely costly, time-consuming, stressful, and piecemeal way to reform the law or change government policy and practices. Government should not wait for the outcome of litigation to act on its duties under the Charter. We therefore urge you to take the following specific actions:

1. Order an immediate stop to heightened and discriminatory scrutiny of materials going to lesbian and gay bookstores, including Little Sister's Bookstore.
2. Order an immediate review of Canada Customs existing regulations, policy and practices for compliance with section 15 of the Charter and with the law as set out by the Supreme Court of Canada in R. v. Butler.
3. Organize a national consultation, bringing together concerned groups to examine discriminatory enforcement of the Customs Tariff and the practice of selectively detaining materials at the border. This process will ensure that a diversity of voices are heard on these

issues and shift the forum from the courtroom to the political realm. The consultation process which resulted in Bill C-49¹⁸ provides a workable model.

In closing, we would like to acknowledge the major contribution made to this letter by the volunteer working group coordinated by the West Coast LEAF Association.

Thank you for your attention to this letter.

Sincerely,



Mary Teresa Devlin
Acting Director of Litigation

Enclosures:

1. LEAF's Factum in R. v. Butler
2. Under My Skin
3. Bushfires: Stories of Lesbian Desires
4. Butch

¹⁸ Now incorporated in the Criminal Code in Part VIII at s. 273.1, 273.1, 276, 276.1, 276.2, 276.3, 276.4, and 276.5.