THE *LITTLE SISTERS* CASE, ADMINISTRATIVE CENSORSHIP, AND OBSCENITY LAW©

BY BRUCE RYDER*

I. INTRODUCTION

Little Sisters Book and Art Emporium might have expected that the Supreme Court of Canada ruling in its *Charter of Rights and Freedoms*[1] challenge to Customs censorship powers would bring closure to the bookstore's fifteen-year fight to remove unreasonable obstacles to the importation of queer literature. Instead, the Court's ruling[2] appears to have simply opened a new chapter in that struggle. The extent to which the *Little Sisters* decision will foster a new era of restrained Customs censorship, or make it possible for

---

* Associate Professor, Osgoode Hall Law School, York University. The author provided legal assistance to the Toronto Women's Bookstore in 1993–1994 in the Bookstore's attempts to secure the release of imported material detained by Canada Customs. He testified regarding his experiences with the vagaries of the Customs' administration as a witness for Little Sisters at the 1994 trial.

[1] Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[2] *Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 [hereinafter *Little Sisters*].

Customs to continue the same "appalling level of over-censorship,"[3] remains to be seen. The Court's ruling is disappointing because it does not do enough to reduce the risk that over-censorship will simply recur.

The majority of the Court upheld the provisions of the *Customs Act*[4] and *Customs Tariff*[5] that confer the power to detain obscene material at the border on individual Customs officers. The legislation says nothing about the training or expertise of these officers. Nor does the legislation provide a right to even a rudimentary hearing with the Customs' bureaucracy. It does not give importers the right to view detained material or to make submissions to Customs officials. Remarkably, the majority absolved Parliament of any constitutional obligation to improve this obviously flawed legislative regime of border censorship. This result took some effort since there was no evidence that Parliament had given serious consideration, in light of the *Charter,* to redesigning the procedures in the *Act* by which expressive material is detained at the border. Since Little Sisters was denied the remedy it sought—a declaration that Customs' power to prohibit imported obscenity was invalid—and had not sought an injunction as an alternative remedy,[6] the result was that no effective remedy was issued to correct the violations of expressive freedoms and equality rights.[7]

The decision not to strike down the legislation leaves us with the impression that, in the face of heightened public scrutiny and attacks on its legitimacy, the Court was unwilling to spend any of its institutional capital on such an inflammatory political subject as the defence of imported sexual representations. By upholding the legislation, and simultaneously affirming the hardships unfairly imposed on Little Sisters by Customs, the Court could have it both ways: it presented itself as the defender of sexual pluralism and minority

---

[3] *Ibid*. at 1250 per Iacobucci J. dissenting.

[4] R.S.C. 1985 (2nd Supp.) c. 1 [hereinafter the *Act*].

[5] S.C. 1987, c. 49, Sch. VII, Code 9956(a) (now S.C. 1997, c. 36. s. 166, Sch., Tariff Item 9899.00.00).

[6] In earlier proceedings not part of the appeal to the Supreme Court of Canada, Little Sisters applied to the British Columbia Supreme Court for a structural injunction to monitor Customs' compliance with the *Charter* and the steps taken to correct the deficiencies identified in Justice Smith's judgment at trial. Justice Smith denied the request for a structural injunction on the grounds that "[t]he executive branch of government must be allowed some flexibility in how it responds to the Court's judgment" and "Customs is moving with dispatch to reform its administrative system": *Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)*, [1996] B.C.J. No. 670 (QL) (S.C.) at paras.11 and 19. Justice Smith did issue an interim injunction restraining Customs officials at the Vancouver Mail Centre from targeting Little Sisters for special scrutiny until the Crown satisfied the court that their discretion was guided by appropriate standards. And he left it open to Little Sisters to renew its request for a structural injunction should problems persist.

[7] For a full account of the trial, see J. Fuller & S. Blackley, *Restricted Entry: Censorship on Trial*, 2d ed. (Vancouver: Press Gang Publishers, 1996).

rights, without having to suffer the charge that it opened our borders to the vilest forms of pornography and hate propaganda.[8] The majority opinion includes positive sentiment—including validations of Little Sisters' struggles,[9] affirmations of the cultural importance of queer sexual expression,[10] and denunciations of Customs discriminatory and excessive censorship practices[11]—alongside implausible claims that the law had nothing to do with Customs' failures. Similar to much of the Court's section 2(b) jurisprudence, its rhetoric on the importance of freedom of expression is not matched by an appropriately demanding standard of review at the section 1 stage of *Charter* analysis.

Justice Binnie, who wrote for the majority of six judges,[12] absolved Parliament of any remedial obligations by making two contradictory moves. First, he claimed that the legislation bore no causal responsibility for the many unjustifiable restrictions of freedom of expression demonstrated by the evidence. The problems, Justice Binnie said, were solely a result of faulty administration of the discretionary powers conferred on officials by the *Act*.[13] Despite this, he rewrote the legislation to eliminate one of its most obvious flaws, the failure to include a legal requirement that internal appeals regarding detained material be resolved within a specified period of time. All the challenged legislation did was specify that initial determinations be made within thirty days and that internal appeals be resolved with "all due dispatch."[14] Justice Binnie gave the vague exhortation of due dispatch some content by stating that it too must mean thirty days.[15] Consequently, instead of sometimes facing delays of many months (as was the case in the past), importers should

---

[8] While the *Little Sisters* case involved a challenge to the portion of tariff item 9899.00.00 that prohibits the importation of obscenity, if the Court found the procedures set out in the *Act* for administering the tariff were deficient, Customs' power to detain hate propaganda and child pornography (set out in the same Tariff Item) would also have been put in doubt.

[9] *Supra* note 2 at 1136–37, 1152–53.

[10] *Ibid*. at 1188–89.

[11] *Ibid*. at 1152–54 and 1201–2.

[12] Chief Justice McLachlin and Justices L'Heureux-Dubé, Gonthier, Major, and Bastarache concurred with Justice Binnie.

[13] *Supra* note 2 at 1167–82, 1189–1201.

[14] *Ibid*. at 1175–56.

[15] *Ibid*. at 1176. As a result of recent amendments, the *Act* no longer uses the phrase with "all due dispatch"; it now specifies that decisions on appeals and accompanying reasons must be delivered "without delay": ss. 60(4) and (5) of the *Act*, *supra* note 4. Presumably this phrase too, should now be interpreted as meaning "within 30 days."

now receive a final determination from the Customs administration within sixty days of the initial detention. At that point, dissatisfied importers will be able to pursue a further appeal to court where Customs has the burden of proving on the balance of probabilities that detained material is obscene. Neither the *Act*, nor the Court's ruling, places a time limit on the issuance of a judicial ruling on obscenity. The process, although still time consuming and cumbersome,[16] is an improvement in comparison to Little Sisters' experience.[17]

Justice Binnie also made clear that Customs has to take other steps to improve its administrative processes and decision making in order to avoid suppressing constitutionally protected expressive material. However, the Court trusted Customs to identify and implement the needed changes, and the burden of monitoring compliance was left to future litigation. If problems persist, Little Sisters and other importers can take Customs to court. Since the mid-1980s, Little Sisters has spent significant time and resources trying to correct a dysfunctional Customs administration. While the Court noted sympathetically that the bookstore had been "a reluctant participant" in a fifteen-year "running battle with Canada Customs,"[18] the effect of its ruling may be to conscript Little Sisters and other bookstores into further service to ensure that Customs cleans up its act.

In his dissent, which was joined by two other members of the Court,[19] Justice Iacobucci held that the absence of adequate procedural safeguards in the legislation meant that it did not constitute a minimal impairment of freedom of expression.[20] He was harshly critical of the majority's failure to provide a remedy to the grave systemic problems evident in Customs' administration of

---

[16] Justice Binnie stated, at 1176, that the time frame he forged "compares favourably with the 60-day limit stipulated" in American constitutional jurisprudence. In fact, the American requirements are much more onerous. In the United States, if Customs seeks to prohibit expressive material at the border, it must initiate judicial proceedings within fourteen days, and those proceedings must be *completed* within sixty days of their initiation: *U.S.* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971) at 373 [hereinafter *Thirty-Seven Photographs*]. By contrast, the Canadian legislation, as improved upon by Justice Binnie, requires that importers be permitted to *initiate* judicial proceedings within sixty days of their initial detention.

[17] The 1994 trial evidence demonstrated that delays of months or even more than a year occurred in reaching final determinations within the Customs bureaucracy: *Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)*, (1995) 131 D.L.R. (4th) 486 (B.C.S.C.) at 519. Parliament improved the situation to some extent by eliminating one stage of the internal review process that importers must follow before appealing to court: S.C. 1997, c. 36, s. 166.

[18] *Supra* note 2 at 1136.

[19] Justices Arbour and Le Bel joined the dissent.

[20] *Supra* note 2 at 1243-46.

the law.[21] He would have declared Customs' power to detain obscenity at the border invalid, and suspended the declaration of invalidity for eighteen months to enable Parliament to enact a new regime of border censorship more respectful of freedom of expression.[22] This was a cautious remedy, one that gave Parliament plenty of time to address the issue, and, in the meantime, left Customs' censorship powers intact. The dissenters did not oppose all administrative censorship at the border; instead they favoured a more carefully considered regime that was capable of prohibiting the importation of obscene material without such a large impact on lawful expression. It is troubling that six members of the Court could not support such a modest affirmation of Parliament's role in respecting civil liberties.

Despite the fact that the majority of the judges upheld the law, there is reason to hope that Little Sisters' objectives will be achieved in the years ahead. For one, the Court provided importers with new legal arguments that may be effective in encouraging a more cautious approach by Customs' officials to their powers of border censorship. Also, the Court gave notice that if the need for systemic reform persists, the next time the courts will not let Customs off the hook. Injunctions or other remedies pursuant to section 24(1) of the *Charter* would be issued to reform Customs' practices and procedures.[23]

Since the Crown conceded that the Customs legislation interferes with freedom of expression, the main issue in *Little Sisters* was whether the legislation could be upheld as a reasonable limit pursuant to section 1 of the *Charter*. The section 1 issues raised by the regime of Customs censorship related to the substance of the obscenity prohibition and the procedures by which it is enforced. The former had been fully articulated and defended by the Court in the 1992 *Butler* ruling,[24] so it was not surprising that the challenge to the content of the obscenity standard itself failed. It is wrong to suggest, as Professor Benedet does in her comment in this volume, that attacking the *Butler* decision was Little Sisters' "underlying goal."[25] Their basic goal was to end Customs' violations of their rights. To support the bookstore in this goal, it was not necessary to share the bookstore's view that *Butler* was a significant part of the problem. Whatever one's views on the definition of obscenity in *Butler*, or the value of sexual expression more generally, one ought to be troubled by the

---

[21] *Ibid*. at 1250-58.

[22] *Ibid*. at 1265.

[23] *Ibid*. at 1203–35.

[24] *R*. v. *Butler*, [1992] 1 S.C.R. 452.

[25] J. Benedet, "*Little Sisters Book and Art Emporium* v. *Minister of Justice*: Sex Equality and the Attack on *R*. v. *Butler*" (2001) 39 Osgoode Hall L.J. 187 at 189 [hereinafter "Attack"].

procedural deficiencies of the *Act*. A poorly designed administrative censorship scheme will miss the mark too frequently however the target is defined. The majority's conclusion that the *Act* constituted a reasonable limit on freedom of expression despite the *Act*'s failure to include a range of modest procedural safeguards, and despite the absence of any evidence that Parliament had even considered the issue, was startling. In the discussion below, I will examine in more detail the substantive and procedural aspects of the *Charter*'s section 1 issues.

II. WHETHER THE PROHIBITION ON IMPORTING OBSCENITY CONSTITUTES A 'REASONABLE LIMIT' ON EXPRESSION: THE *BUTLER* ISSUES

The Court's *Butler* ruling has generated a great deal of criticism and controversy, especially in feminist circles, where the polarized and passionate nature of debates regarding sexual expression seem to foster extreme positions.[26] For some, *Butler* should be celebrated and rigorously defended as a sacred feminist text.[27] Benedet's comment appears to reflect such an uncritical assessment of *Butler*. For others, *Butler* confirmed and consolidated obscenity law's role in upholding a repressive sexual morality.[28] Both positions are exaggerated, but both contain an element of truth. The *Butler* ruling's harm-based approach to obscenity was an improvement over previous approaches. At the same time, the *Butler* opinion did not leave behind the view that representations of sex are bad if unredeemed by art or some other higher social

---

[26] For a sampling of the range of commentary on *Butler*, see B. Cossman *et al.*, *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision* (Toronto: University of Toronto Press, 1997); C. MacKinnon, *Only Words* (Cambridge, Mass: Harvard University Press, 1993); K. Busby, "LEAF and Pornography: Litigating on Equality and Sexual Representation" (1994) 9 C.J.L.S. 165; J. Toobin, "X-Rated" The New Yorker (3 October 1994) 70; A. Scales, "Avoiding Constitutional Depression: Bad Attitudes and the Fate of *Butler*" (1994) 7 C.J.W.L. 349; J. Cameron, "Abstract Principle v. Contextual Conceptions of Harm: A Comment on *R.* v. *Butler*" (1992) 37 McGill L.J. 1135; R. Moon, " *R.* v. *Butler*: The Limits of the Supreme Court's Feminist Re-Interpretation of Section 163" (1993) 25 Ottawa L. Rev. 361; and L. Green, "Pornographies" (2000) 8 J. Pol. Phil. 27.

[27] For example, controversy erupted within the Women's Legal Education and Action Fund (LEAF) because the factum LEAF submitted to the Supreme Court in *Little Sisters* dared to suggest that adjustments were necessary to *Butler*'s harm-based approach to obscenity. LEAF's factum was the product of extensive consultation that sought to respect a diverse array of feminist views on sexual expression. It affirmed that the "harm-based equality approach to obscenity law articulated by this Court in *Butler* must remain the cornerstone of obscenity law" (para. 28). The factum is available online: <http://www.umanitoba.ca/Law/Courses/Busby/Gender/factum.html> [date accessed: 15 August 2001].

[28] See, for example, N. Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* (New York: Doubleday, 1995) at 229-46; B. Cossman *et al.*, *supra* note 26.

purpose. Moreover, the definition of obscenity remains vague and open ended, a disturbing state of affairs for any criminal offence.

In *Butler*, Justice Sopinka divided obscenity into three categories: representations of sexual violence; representations of non-violent adult sexuality that are degrading and dehumanizing and pose a substantial risk of harm to society; and sexual representations that used children in their production.[29] Other sexual representations—most representations of non-violent adult sexuality—were excluded from the category of obscenity. While the terms "pornography" and "obscenity" both figured prominently in Justice Sopinka's analysis, he did not equate the two. Pornography is not a term used in the *Criminal Code*[30] to refer to representations of adult sexuality. When Justice Sopinka used the word "pornography" in *Butler*, the context made clear that he was referring to all explicit sexual representations. Obscenity law, he said, only captures harmful pornography. It should not suppress "good pornography."[31]

Professor Benedet's comment in this volume does not make clear that she is relying on an understanding of pornography that is very different from Justice Sopinka's use of the term in *Butler*. She defines pornography as sexually explicit material that causes gender subordination. On this understanding, good pornography is an oxymoron, pornography being by definition harmful.[32] Justice Sopinka called harmful sexual representations obscenity; Professor Benedet calls them pornography. Justice Sopinka called harmless sexual representations good pornography; it is not clear what Professor Benedet would call them. Indeed, it is not clear whether there is any such thing as a harmless sexual representation in her analysis.

Given these differences in usages, Professor Benedet is wrong to assert that the Court in *Little Sisters* and *Butler* "recognized pornography … [as] the practice of sex inequality."[33] It would be more accurate to say that the Court recognized obscenity, a harmful subset of pornographic (that is, sexually explicit) representations, as a practice of sex inequality. Indeed, the only time

---

[29] *Supra* note 24 at 484-85.

[30] R.S.C. 1985, c. C-46.

[31] *Supra* note 24 at 500, quoting R. West, "The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report" (1987) 4 A.B.F. Research J. 681 at 696.

[32] Professor Benedet's definition has much in common with the definition that Andrea Dworkin and Catharine MacKinnon use in their work. See A. Dworkin, "Against the Male Flood: Censorship, Pornography and Equality" (1985) 8 Harv. Women's L.J. 1; A. Dworkin & C. MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* (Minneapolis: Organizing Against Pornography, 1988); and C. MacKinnon, *Only Words*, *supra* note 26 at 22.

[33] "Attack," *supra* note 25 at 188.

Justice Binnie used the term "pornography" in *Little Sisters* was to emphasize that sexually explicit material is lawful "unless it comes within the narrow category of pornography that Parliament has validly criminalized as obscene."[34] One suspects that one of the reasons that Professor Benedet appears so untroubled by Customs' censorship is that she, like many Customs' officials in the past, has difficulty seeing obscenity as a "narrow category" of sexually explicit material. She devotes no attention to articulating the scope of constitutional protection that should be accorded to freedom of sexual expression. One wonders how the presumption of harm she appears to attach to sexual expression can be displaced.

While Professor Benedet's analysis obscures the differences between her anti-pornography views and the Canadian law of obscenity, on the other side of the debate anti-censorship feminists have tended to exaggerate *Butler*'s impact on expressive freedoms. Some critics of obscenity law have unfairly pinned the blame on *Butler* for what they see as the intensification of a campaign of suppression against feminist, gay, and lesbian sexual expression.[35] Critics point to one case that followed closely on the heels of *Butler*, the 1992 ruling of Justice Hayes in *Glad Day*[36] that condemned as obscene a number of magazines containing explicit descriptions of gay sex. The opinion in *Glad Day* was indeed regrettably infused with a crude heterosexism that thankfully one witnesses rarely in judicial decisions these days. But one conviction does not a campaign make. Critics also pointed to the harassment of gay and lesbian bookstores by Canada Customs that continued following *Butler*, and a 1993 court ruling upholding Customs' prohibition of an issue of the lesbian magazine *Bad Attitude*.[37] But that pattern of harassment predated *Butler*. One of the main challenges in the 1990s in this area was compelling Customs to abide by *Butler*—that is, to stop detaining material that depicted non-violent adult sexuality.[38] The truth is that obscenity law has become more enlightened in the past decade compared to the pre-*Butler* situation. Criminal prosecutions based on material depicting non-violent adult sexuality are now rare. And since

---

[34] *Supra* note 2 at 1199.

[35] *Supra* note 28.

[36] *Glad Day Bookshop* v. *Canada (Deputy Minister of National Revenue, Customs and Excise)*, [1992] O.J. No. 1466 (Gen. Div.), online; QL (OJ).

[37] *R.* v. *Scythes*, [1993] O.J. No. 537 (Prov. Div.), online QL (OJ).

[38] For example, until the eve of the *Little Sisters* trial in 1994, Customs Memorandum D9-1-1, the chief internal means of informing officers regarding the content of obscenity law, continued to suggest that all depictions of anal penetration were obscene. See *Little Sisters* (B.C.S.C.), *supra* note 17 at 557.

Customs amended its internal memorandum to conform to *Butler* in 1994, detentions of non-violent queer sexual expression have diminished.[39]

While signs of feminist-inspired influence began to be felt in the 1970s and 1980s, prior to the *Butler* ruling obscenity law was dominated by a conservative morality that sought to suppress the circulation of most depictions of explicit sexuality. Modest and restrained depictions of sexual activity were permitted according to an explicit hierarchy of sexual value: straight sex good; queer sex bad. The *Butler* test displaced this older conservative paradigm with a reoriented hierarchy of sexual value: consensual adult sex good; violent sex (including sex with children) bad. The older distinction based on a division between "natural/unnatural" or "normal/perverse" sex was not acknowledged in *Butler*, but it was implicitly rejected. The *Butler* ruling reoriented the legal definition of obscenity around contemporary understandings of gender equality and sexual autonomy.

Obscenity law, Justice Sopinka wrote in *Butler*, is not designed "to inhibit the celebration of human sexuality."[40] The state should not seek to enforce conventional standards of propriety by eliminating representations of sexuality from the public sphere. Rather, he held, depictions of consensual adult sexuality are "generally tolerated in our society."[41] While he presented this as a fact, there was a normative or prescriptive element to the Court's description of community standards in *Butler*. Indeed, *Butler* significantly altered the landscape of lawful sexual expression in Canada. The most important effect of the *Butler* ruling has been to decriminalize the production, circulation and consumption of representations of non-violent adult sexuality.[42]

This aspect of the *Butler* decision was confirmed in *Little Sisters*. Justice Binnie noted that "*Butler* affirmed constitutional protection for sexually

---

[39] Customs has made significant improvements to its internal guidelines and procedures in response to the *Little Sisters* litigation. The current version of Memorandum D9-1-1 instructs officers to exercise their power to detain obscenity cautiously, and to resolve any doubts in favour of freedom of expression. It also provides that importers of detained goods that may have artistic merit (including all shipments to the book trade) have a right to inspect the goods and make submissions on their admissibility. See online: <http://www.ccra-adrc.gc.ca/E/pub/cm/d9-1-1eq/d9-1-1eq.html> [date accessed: 15 August 2001]. In an effort to promote consistent determinations by informed decision makers, all disputes regarding prohibited expressive material must now be forwarded for decision to the Prohibited Importations Unit in Ottawa. See Customs' Notice N-330, 2 June 2000, online: <http://www.ccra-adrc.gc.ca/E/pub/cm/cn330eq/ cn330eq.html> [date accessed: 15 August 2001].

[40] *Supra* note 24 at 500.

[41] *Ibid*. at 485.

[42] See, for example, *R.* v. *Hawkins*, (1993) 15 O.R. (3d) 549 (C.A.) [hereinafter *Hawkins*].

explicit expression."[43] He held that gay and lesbian erotica is "perfectly lawful"[44] and, so long as it is not harmful, "safely outside the *Butler* paradigm."[45] "A flourishing of sexual expression," he added, "may have no connection whatsoever with harm-based obscenity."[46] The Court's approach requires that the field of sexual representations be divided into positive expression that celebrates consensual adult sexuality and harmful sexual representations that promote gender inequality. The key issue is how harm is to be defined and established.

The risk of harm alluded to in *Butler* is the risk that the attitudes and behaviour of men exposed to violent or degrading sexual representations will change to the detriment of the physical and emotional security of women and children. In a number of passages in *Butler*, Justice Sopinka articulated the state's objectives in such explicitly gendered terms. For example, he described the goal of obscenity law as the prevention of the circulation of material that contributes to the formation of "negative attitudes against women."[47] This raised the question of whether the *Butler* formulation should apply in the same way to representations of gay or lesbian sexuality. The Court disposed of this issue quickly, concluding that *Butler*'s concern with preventing negative attitudinal and behavioural changes applied to any violent or degrading representations.[48] If one accepts that exposure to representations of sexual violence or degradation creates a risk of harm, then only reliance on crude forms of gender or sexual essentialism could serve to limit that concern to heterosexual men or heterosexual materials. The Court wisely refused to go down this path.

The more difficult issues raised by *Butler* have to do with the identification of harm. The test is supposed to catch only material that poses a risk of causing harmful changes in attitudes or behaviour. But since risk of harm is difficult to prove, or incapable of proof, whether material is obscene becomes a matter of faith, not evidence. The application of the *Butler* test can therefore hinder the "flourishing of sexual expression," especially representations of minority sexual practices that can be easily presumed to cause harm. As Brenda

---

[43] *Supra* note 2 at 1158.

[44] *Ibid*. at 1188.

[45] *Ibid*. at 1162.

[46] *Ibid*. at 1186.

[47] *Supra* note 24 at 508.

[48] *Supra* note 2 at 1162–67.

Cossman has argued,[49] the decision can be read as simply adding a new feminist gloss to conservative morality and its hierarchy of sexual value. The vagaries of criminal prosecutions and Customs administration of the obscenity prohibition at the border confirm that *Butler* is open to multiple interpretations and leaves room for the reassertion of old prejudices.[50] Indeed, the anti-pornography views of some feminists, which helped shape the Court's reformulation of obscenity law in *Butler*, have increasingly come under fire from anti-censorship feminists for their insensitivity to the importance of sexual expression and their willingness to tolerate the negative impact of state censorship on expression that challenges dominant sexual practices and mores.[51]

The "degrading and dehumanizing" portion of the *Butler* test is particularly problematic in its application. The other two components of the definition of obscenity—depictions of sexual violence or depictions of sexual activity that employed children in their production—create some uncertainty around the margins, but are relatively clearly understood. But the third category—representations of consensual adult sexuality that are "degrading and dehumanizing"—is much more elusive and vulnerable to subjective or even discriminatory evaluations. The potential subjectivity is supposed to be reined in by reference to "community standards of tolerance." Since judges have to determine those standards themselves, normally in the absence of evidence, it is hard to see how they can serve to constrain judicial subjectivity, existing as they do primarily in the judicial mind.

In the *Little Sisters* ruling, the Court denied that these problems existed, and offered instead an idealized portrait of the community standards test. While

---

[49] B. Cossman, "Feminist Fashion or Morality in Drag?: The Sexual Subtext of The *Butler* Decision" in B. Cossman *et al*., *supra* note 26 at 107. See also Strossen, *supra* note 28 at 234.

[50] For a demonstration that the *Butler* opinion embodies (and has generated) multiple and shifting understandings of harm, see M. Valverde, "The Harms of Sex and the Risks of Breasts: Obscenity and Indecency in Canadian Law" (1999) 8 Social & Legal Studies 181.

[51] Early critiques of the anti-pornography focus of some 1970s and 1980s radical feminist thought can be found in C. Vance, ed., *Pleasure and Danger: Exploring Female Sexuality* (Boston: Routledge & Kegan Paul, 1984), M. Valverde, *Sex, Power and Pleasure* (Toronto: Women's Press, 1985) at 121-45; and V. Burstyn, ed., *Women Against Censorship* (Vancouver: Douglas & McIntyre, 1985). More recently, see B. Cossman *et al*., *supra* note 26; Strossen, *supra* note 28; D. Lacombe, *Blue Politics: Pornography and the Law in the Age of Feminism* (Toronto: University of Toronto Press, 1994); *Kiss & Tell, Her Tongue on My Theory: Images, Essays and Fantasies* (Vancouver: Press Gang Publishers, 1994); A. Carol, *Nudes, Prudes and Attitudes: Pornography and Censorship* (Cheltenham: New Clarion Press, 1994); K. Johnson, *Undressing the Canadian State: The Politics of Pornography from Hicklin to Butler* (Halifax: Fernwood Publishing, 1995); L. Segal & M. MacIntosh, eds., *Sex Exposed: Sexuality and the Pornography Debate* (London: Virago Press, 1992); A. Asseter & A. Carol, *Bad Girls and Dirty Pictures: The Challenge to Reclaim Feminism* (London: Pluto Press, 1993); and P. Gibson & R. Gibson, eds., *Dirty Looks: Women, Pornography, Power* (London: BFI Publishing, 1993).

it would be comforting to be able to share Justice Binnie's view that the community standards test is based on "a national constituency that is made up of many different minorities," and thus "is a guarantee of tolerance for minority expression,"[52] he seems to be treating an aspiration as a realized fact.

Another way in which *Butler* sought to constrain judicial subjectivity was by holding that "degrading and dehumanizing" material is not obscene unless the risk of harm it poses to society is substantial. It is not clear, however, how this substantial risk of harm is to be established in any given case. In *Butler*, Justice Sopinka intimated that evidence may be desirable but that it is not necessary. In some cases, judges can draw inferences of harm simply by inspecting the allegedly obscene materials.[53]

In practice, after *Butler*, where judges draw the line on the need for evidence of harm determines the boundaries of obscenity. The Crown will not be required to adduce evidence if the judge concludes that an inference of harm can be drawn from the materials themselves. If the Crown is required to adduce other evidence to prove that materials pose a risk of harm beyond a reasonable doubt, then the prosecution will fail since (as the Court acknowledged in *Butler*) social science evidence is inconclusive on the issue of harm.

In the leading post-*Butler* ruling on the meaning of obscenity, *Hawkins*,[54] Justice Robins of the Ontario Court of Appeal stated that material "portraying necrophilia, bondage or bestiality, or sex associated with crime, horror, cruelty, coercion or children" can be assumed to be harmful without expert or other evidence.[55] This list is composed primarily of representations of sexual activities that are crimes. On the other hand, he held that material "in which the participants appear as fully willing participants occupying substantially equal roles in a setting devoid of violence or the other kinds of conducts just noted, the risk of societal harm may not be evident."[56] In other words, it is not apparent that a substantial risk of harm will result from exposure to depictions of lawful sexual conduct. To succeed in prosecutions of such material, the Crown will be required to adduce evidence to establish a substantial risk of harm beyond a reasonable doubt. Since such evidence does not exist, the effect of *Hawkins* is that the Crown will not waste resources

---

[52] *Supra* note 2 at 1161.

[53] *Supra* note 24 at 485.

[54] *Supra* note 42.

[55] *Ibid*. at 567.

[56] *Ibid*.

prosecuting material for obscenity if it does not involve sexual violence, the use of children, necrophilia, bestiality or bondage.

It is clear that the Court in *Little Sisters* was content with the post-*Butler* judicial definition of harmful material. Citing *Hawkins* and two other cases that followed the same approach,[57] Justice Binnie stated that "the identification of harm is a well-understood requirement."[58] What this really means is that depictions of non-violent sexual behaviour involving consenting adults are not obscene since the evidence does not establish that they pose a substantial risk of harm. This reminds us that it is a mistake to associate the Canadian definition of obscenity with the definition of pornography used by anti-pornography feminist theorists. For example, Catharine MacKinnon includes in her understanding of pornography any material, including *Playboy*, "in which women are objectified and presented dehumanized as sexual objects or things for use."[59] Anyone who believes that the criminal law should suppress all pornography that falls within MacKinnon's definition should be a harsh critic of the *Butler* and *Little Sisters* rulings.

III. WHETHER *CUSTOMS ACT* PROCEDURES CONSTITUTE REASONABLE LIMITS ON EXPRESSION: PRIOR RESTRAINT THROUGH ADMINISTRATIVE CENSORSHIP

In *Little Sisters*, the Court was asked for the first time to measure a regime of state censorship that operates by way of a prior restraint on expression against the requirements of the *Charter*. Previous *Charter* challenges to the powers of administrative bodies exercising censorship powers, including an earlier challenge to Customs censorship[60] and challenges to the powers of

---

[57] In *R.* v. *Jacob* (1996), 112 C.C.C. (3d) 1 (Ont. C.A.), the accused was acquitted of committing an indecent act by exposing her breasts in public because there was "no evidence of harm that is more than grossly speculative." In *R.* v. *Erotica Video Exchange* (1994), 163 A.R. 181 (Prov. Ct.), the court held that the evidence did not satisfy the requirement of proving a substantial risk of harm beyond a reasonable doubt; however, since the material was violent, it could be presumed to be harmful in the absence of evidence.

[58] *Supra* note 2 at 1163.

[59] *Only Words*, *supra* note 26 at 22-23.

[60] *Luscher* v. *Deputy Minister, Revenue Canada, Customs and Excise*, [1985] 1 F.C. 85 (C.A.) (striking down a provision of the *Customs Act* prohibiting the importation of material of "an immoral or indecent character" on the grounds that it constituted an overly vague restriction on freedom of expression). Three weeks after the Federal Court of Appeal ruling, Parliament replaced the former provision with a prohibition on the importation of obscene material: S.C. 1985, c. 12.

provincial film and video review boards,[61] had not reached the top court. As a result, the Court's jurisprudence on freedom of expression has been focussed on standards not procedures. The Court's section 2(b) *Charter* jurisprudence is preoccupied with whether the contents of legal prohibitions constitute justifiable restrictions on expression. The case law examines restraints imposed as a result of criminal prosecution[62] or in other proceedings by courts or tribunals at the conclusion of public hearings.[63] The fairness of the procedures employed to enforce censorship standards has been taken for granted in these decisions.

In contrast to criminal prosecutions, prior restraints on expression take place when material is suppressed before it is even published or disseminated. Most regimes of prior restraint are implemented through administrative decisions made by members of the executive branch of government. There are a number of typical features of administrative censorship regimes that make them particularly serious threats to freedom of expression.

First, officials make censorship decisions routinely in a hidden and unaccountable manner, before members of the public have any awareness of the material at issue. Officials may not be provided with adequate training, time or resources to make consistent or legally intelligible decisions on a routine basis. Public announcements of decisions or the reasons for suppressing materials are not issued. As a result, no public debate takes place about the merits of individual decisions or the value of suppressed works. An important safeguard against overzealous censorship is thus absent. Moreover, informed democratic debate about the appropriate boundaries of freedom of expression is hindered.

Second, administrative censorship decisions ordinarily take place without the benefit of a hearing. There may be no means of introducing evidence or otherwise defending the merits of targeted material. Parties do not receive a fair hearing initially, and the costs and delays involved may inhibit interested parties from pursuing a remedy in court. As a result, expressive

---

[61] *Re Ontario Film & Video Appreciation Society* (1984), 5 D.L.R. (4th) 766 (Ont. C.A.) (provisions of Ontario *Theatres Act* declared unconstitutional for failure to prescribe standards or impose limits on board's censorship powers); and *Re It's Adult Video Plus and McCausland* (1991), 81 D.L.R. (4th) 436 (B.C.S.C.) (upholding censorship powers conferred by the British Columbia *Motion Picture Act*).

[62] For example, the rulings upholding the *Criminal Code* offences dealing with hate propaganda (*R.* v. *Keegstra*, [1990] 3 S.C.R. 697); obscenity (*Butler*, *supra* note 24); communicating for the purposes of engaging in prostitution (*Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123); and criminal libel (*R.* v. *Lucas*, [1998] 1 S.C.R. 439).

[63] For example, the rulings upholding the awarding of damages for defamation in *Hill* v. *Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, the orders of the human rights commissions in *Canada (Human Rights Commission)* v. *Taylor*, [1990] 3 S.C.R. 892; and *Ross* v. *New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; and the order of the labour arbitrator in *Slaight Communications* v. *Davidson*, [1989] 1 S.C.R. 1038.

material is more likely to be suppressed in a regime of administrative censorship.

Third, administrative censorship tends to create a self-serving institutional bias or momentum towards censorship. In contrast to the courts, whose job is to determine the boundaries between legal prohibitions and constitutionally protected expression, individuals or departments assigned the task of censoring are more likely to measure success by reference to the quantity of material suppressed.

These problematic features of administrative censorship are not inevitable. They can be tempered by requiring censors to operate according to clearly articulated standards in an open and accountable process, by ensuring that initial determinations can be promptly reviewed at a hearing where evidence can be presented, the legality of expressive material defended, and where the state has the burden of proving that suppression is justified by legal and constitutional norms. Whether a legislature has been attentive to these kinds of protections in formulating a regime of administrative censorship ought to be a key consideration at the minimal impairment stage of the *Charter*'s section 1 analysis. A law that lacks reasonable procedural protections to check the potential excesses of a regime of administrative censorship is likely to result in unnecessary impairment of freedom of expression.

In the United States, the imposition of prior restraints on speech through administrative censorship is presumptively unconstitutional.[64] However, the First Amendment will not be violated if procedural safeguards are in place, including a right to a prompt judicial determination of the legality of the targeted expression. For example, in *Freedman* v. *Maryland*,[65] the Court noted, in striking down a statute establishing a film review board, that

> Unlike a prosecution for obscenity, a censorship proceeding puts the initial burden on the exhibitor or distributor. Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression.

---

[64] For an excellent discussion of prior restraint, one that anticipated subsequent developments in U.S. constitutional doctrine, see T. Emerson, "The Doctrine of Prior Restraint" (1955) 20 L. & Contemp. Probs. 648. See also, T. Litwack, "The Doctrine of Prior Restraint" (1977) 12 Harvard C.R.-C.L. Law Rev. 519; and J. Jeffries, "Rethinking Prior Restraint" (1983) 92 Yale L.J. 408.

[65] 380 U.S. 51 (1965).

> Applying the settled rule of our cases, we hold that a non-criminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.[66]

The Court concluded that only a prompt judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression.[67]

Applying the *Freedman* reasoning to the regime of border censorship administered by U.S. Customs, the Supreme Court in *Thirty-Seven Photographs*[68] held that Customs censorship powers could survive constitutional scrutiny only if time limits on the initiation of judicial hearings were read into the statute. The Court held that Customs has to commence forfeiture proceedings in court within fourteen days and judicial determinations must be completed within sixty days of their commencement.[69] If these time limits are not met, material must be released to importers. These onerous requirements were necessary, the Court said, to ensure that administrative delay does not in itself become a form of censorship.

The precise conclusions reached by the U.S. Supreme Court in *Freedman* and *Thirty-Seven Photographs* may not be appropriate in Canada where the distrust of administrative censorship—and the accompanying idealization of judicial proceedings—is not so severe. The general concern with ensuring that the potential excesses of administrative censorship are curtailed by procedural protections should resonate in any free and democratic society. In the Canadian context, ensuring that expressive material cannot be suppressed in the absence of fair procedures ought to be an important component of the *Charter*'s section 1 analysis of section 2(b) violations. In particular, this is a concern that is directly relevant to the minimal impairment branch of the *Oakes* test.[70]

The evidence presented at trial demonstrated that the problems in the administration of Customs' censorship powers were precisely what you would expect in a poorly designed regime of administrative censorship. Little Sisters was systematically targeted by Customs, subject to inconsistent and implausible

---

[66] *Ibid*. at 57-58. The reasoning in *Freedman* was applied by the Supreme Court in *Teitel Film* v. *Cusack*, 390 U.S. 139 (1968) (invalidating a municipal film censorship ordinance) and *Blount* v. *Rizzi*, 400 U.S. 410 (1971) (invalidating postal censorship of obscene materials).

[67] *Ibid*. at 58.

[68] *Supra* note 16.

[69] *Ibid*. at 371-72.

[70] *R.* v. *Oakes* [1986] 1 S.C.R. 103. This case articulated the test to be used when dealing with section 1 of the *Charter*.

rulings, the detention and prohibition of much non-obscene imagery and text, lengthy delays, and a general pattern of what Justice Binnie characterized as "high-handed and dismissive" behaviour.[71] The record demonstrated that the Customs legislation, in Justice Iacobucci's words, "resulted in an appalling level of over-censorship."[72] This was not anything new. While the targets of Customs' censorship powers have shifted over time, the problems in its administration existed long before they were exposed in the *Little Sisters* trial.[73] As Justice Iacobucci noted, Customs has a "long and ignominious record of excessive censorship throughout this century."[74] Heterosexism is just the most recently exposed of a number of moral, religious and political prejudices that have influenced Customs' exercise of its censorship powers over the years.

The government conceded that the *Act*, by empowering individual Customs officers to detain and prohibit imported expressive material at the border, violated freedom of expression.[75] The government also conceded that a provision placing the onus of proving that material was not obscene on importers could not be justified.[76] The issue was whether the rest of the legislation violated freedom of expression in a manner that could be upheld as a reasonable limit pursuant to section 1 of the *Charter*.

The majority reached the conclusion that the *Act*, if it was properly administered to avoid prohibiting non-obscene sexual expression, would be a justifiable restriction on *Charter* freedoms. While the prohibition of non-obscene material could not be justified, Justice Binnie concluded that these errors had nothing to do with the legislative scheme. The problems were a result of faulty administration. Accordingly, apart from the reverse onus provision, he upheld the legislation.

Justice Binnie's judgment is remarkable for absolving Parliament of any responsibility to build procedural protections into the legislation establishing a regime of administrative censorship. The usual understanding of section 1 of the *Charter* is that the government has the burden of demonstrating that legislation constitutes a minimal impairment of *Charter* rights and freedoms. However,

---

[71] *Supra* note 2 at 1188.

[72] *Ibid*. at 1250.

[73] See B. Ryder, "Undercover Censorship: Exploring the History of the Regulation of Publications in Canada" in A. Hutchinson & K. Petersen, eds., *Interpreting Censorship in Canada* (Toronto: University of Toronto Press, 1999); B. Cossman & B. Ryder, "Customs Censorship and the Charter: The *Little Sisters* Case" (1996) 7 Constitutional Forum 103.

[74] *Supra* note 2 at 1265.

[75] *Ibid*. at 1154.

[76] *Ibid*. at 1180.

Justice Binnie did not require the government to show that it had given any consideration to including procedural protections in the legislation that might have curtailed the excesses of Customs' censorship. Indeed, in reading the judgment, it is easy to forget that we are dealing with legislation that violates freedom of expression and therefore the government is operating in a section 1 environment where it supposedly has the burden of justifying its legislation. Instead of demanding that the government defend its legislative design as a minimal impairment, Justice Binnie repeatedly characterized the issue as whether the legislation *is capable* of being administered in a manner that respects *Charter* rights.[77] The majority upheld the legislation because of the *possibility* of proper administration in the future, despite Customs' utter failure to do so in the past, and even though Parliament had made no apparent effort to design the legislative procedures in a manner that respects the constitutional status of freedom of expression.

Absent from the majority judgment is any recognition that constitutional doctrine needs to respond to the special dangers of a system of prior restraint or administrative censorship. The only comment Justice Binnie made on the issue seemed to miss the point completely: "The only expressive material that Parliament has authorized Customs to prohibit as obscene is material that is, by definition, the subject of criminal penalties … The concern with prior restraint … operates in such circumstances, if at all, with much reduced importance."[78]

This comment seems to suggest that the only issue is standards, not procedures, and since the *Criminal Code*[79] and the *Customs Tariff* rely on the same definition of obscenity, the section 1 issues raised by their provisions are identical. It is as if Justice Binnie is suggesting that legal standards are self-executing, as if the mechanisms and procedures followed in their implementation have no impact on the meaning that is given to them and the scope of their operation.

However, while Justice Binnie failed to analyze the statutory scheme of prior restraint as a section 1 issue, much of his judgment is informed by an understanding that reform of Customs procedures is necessary to prevent over-censorship. While he absolved Parliament of the need to draft a better law, he sent a clear signal to Customs that it can no longer be "business as usual."[80]

---

[77] *Ibid*. at 1155, 1193, 1199–1200.

[78] *Ibid*. at 1170.

[79] R.S.C. 1985, c. C-46.

[80] "Business as usual" here meaning Customs' practices as documented at the 1994 trial.

Inadequate procedures amounted to "a failure at the implementation level," he said, and need to be addressed there.[81]

Justice Binnie undertook a detailed review of Customs' practices and procedures and made a number of suggestions for minimizing the negative impact they have on freedom of expression. He began by noting that complaints about the absence of a fair hearing have some substance.[82] The initial classification of goods at the border is nothing more than "a rough and ready border screening procedure"[83] and, if an importer seeks the release of prohibited goods, the question "is whether the Department is ready, willing and able, if required, to establish in court that detained material is obscene."[84] The absence of a fair hearing at the departmental level means that the goal should be to move the issue as quickly as possible to the courts. A court is "the proper forum for resolution of an allegation of obscenity" because it is "equipped to hear evidence, including evidence of artistic merit, and to apply the law."[85] If a court concludes that Customs has acted oppressively, it should consider making an award of costs on a generous scale.[86]

To help expedite internal reviews, Justice Binnie suggested that the thirty day time limits on initial determinations and on review should be made enforceable by regulation, or failing that, importers should bring court actions against the Crown.[87] In the latter situation, he urged courts to make substantial awards of costs to help deter the illegal detention of shipments beyond these time limits.[88]

More generally, Justice Binnie told Customs to supplement the bare legislative framework of the *Act* by putting in place detailed procedures appropriate for the processing of constitutionally sensitive material.[89] While it was up to the Minister to decide what methods are best to ensure that *Charter* rights are respected,[90] he did offer a catalogue of problems that need to be

---

[81] *Supra* note 2 at 1172.

[82] *Ibid*. at 1170.

[83] *Ibid*. at 1171.

[84] *Ibid*. at 1180.

[85] *Ibid*. at 1181.

[86] *Ibid*. at 1182.

[87] *Ibid*. at 1174.

[88] *Ibid*. at 1174-75.

[89] *Ibid*. at 1195.

[90] *Ibid*. at 1195-96.

addressed. These problems included: inadequate staffing, training and manuals, failure to ensure expeditious review, failure to provide officials with updated legal advice, failure to provide importers with notice of the basis for detention, access to the disputed materials or an opportunity to make submissions, and failure to provide equal benefit of the law without discrimination on the basis of sexual orientation.[91]

If these problems are not addressed, Justice Binnie suggested that the courts should be willing to fashion a more structured remedy pursuant to section 24(1) of the *Charter*.[92] Indeed, he expressed frustration that Little Sisters had put all of its eggs in one remedial basket—the bookstore sought to invalidate the law, and had not framed a request for a structural injunction if the Court upheld the law. The Court's findings, Justice Binnie offered, will provide Little Sisters with a "solid platform" from which to launch further court action should their problems with Customs censorship persist.[93]

III. CONCLUSION

While the Court's ruling in *Little Sisters* glosses over problems with the definition of obscenity and with prior restraint of expression through administrative censorship, there is nonetheless reason to hope that the process will improve. The scrutiny brought to bear on Customs since 1994 by the *Little Sisters* litigation, and the Court's insistence that Customs' practices and procedures be overhauled to better respect freedom of expression, may mean that high levels of Customs' censorship will become a thing of the past. On the other hand, as Justice Iacobucci noted, Customs has not yet earned our trust.[94] A weakness of the majority judgment is that any improvement depends on voluntary compliance, or, failing that, continued pressure being brought to bear on Customs through litigation. It is unwise and unfair to cast the burden of achieving constitutional compliance and accountability on individuals and cultural institutions, many of whom will have limited time and resources to devote to the task.

As in the *Sharpe*[95] ruling on child pornography released a month after *Little Sisters*, the Court absolved Parliament of any responsibility for designing

---

[91] *Ibid*. at 1201–03.

[92] *Ibid*. at 1203–05.

[93] *Ibid*. at 1204.

[94] *Ibid*. at 1252.

[95] *R*. v. *Sharpe*, [2001] 1 S.C.R. 45.

a better law. In both cases the Court was confronted with poorly designed and crafted laws that cast the net too broadly in their zealous approach to censorship, and had resulted in extreme incursions on civil libertarian values. It was easy to imagine more moderate, balanced means of pursuing Parliament's important legislative objectives. However, in both cases, the Court appeared to strain to let Parliament off the hook, in part by rewriting the laws to correct some of their most egregious flaws. The Court's rulings in *Sharpe* and *Little Sisters* encourage Parliament to be cavalier about its constitutional duties, and they discourage future democratic deliberation about the appropriate scope of freedom of expression in the context of border censorship or possession offences, even though none occurred in Parliament in the first place. In these areas, the interpretive partnership between courts and legislatures that ought to animate the *Charter* has been stalled by the Court's rulings at the outset.