

## Little Sister's declares defeat in the wake of 7-2 Supreme Court ruling

### FREEDOM OF EXPRESSION / With no money to fight censorship, bookstore says seizures will go unchecked

*Marcus McCann / National / Friday, January 19, 2007*

The Supreme Court's latest decision means Canadians have virtually no way to fight systemic discrimination, legal experts say. The Jan 19 decision leaves Little Sister's bookstore without the financial means to take the Canada Border Services Agency (CBSA, formerly Canada Customs) to task for 20 years of censorship.

"We have to put our case to bed and declare defeat," says Little Sister's co-owner Jim Deva. He says that if the pattern holds, more books will begin disappearing on their way to the bookstore within a week or two.

In 2003, a trial judge awarded Little Sister's — the Vancouver-area gay bookstore embroiled in 20 years of freedom of expression lawsuits — \$300,000 in "advance costs" to challenge Canada Customs through the court system for a second time. That decision was overturned at the BC Court Of Appeal. And in the wake of the Supreme Court decision, Little Sister's will never see that money.

"What the court has done is failed to recognize that this is a systemic problem," says Cynthia Petersen, the Toronto lawyer who wrote an intervener brief on behalf of Egale Canada.

The cash was earmarked to fight what Little Sister's calls "systemic" discrimination by CBSA against books and magazines destined for gay bookstores. Little Sister's was asking the court to stop border officials from seizing anything at the border until they can prove they're not abusing the process.

"The court has characterized [the Little Sister's challenge] as a narrow case. The majority judges seemed to think this is about four books," says Petersen.

In 2000, the Supreme Court justices ordered the border agency to stop harassing gay bookstores. This time round, the majority of justices ignored the fact that 70 percent of all CBSA seizures are gay and lesbian materials. Justice William Binnie's dissenting opinion clearly grasped the intransigence of a government agency refusing to follow instructions from the Supreme Court and the need to find some way to protect the public interest from such abuse.

And while Binnie understood that average Canadians need help to defend themselves from an abusive government bent on abusing the Charter, activists wonder why so many others — even in our own community — fail to grasp the issue.

"The community has a really false sense that their rights are being honoured and cherished by the government," Deva says.

Little Sister's was also arguing that the conservative definition of "obscene material" — based on "community standards" — is no longer appropriate in the wake of a 2005 Supreme Court of Canada decision involving Montreal swinger's clubs.

The court has been considering the case since April, 2006. At that time, the bookstore's lawyer, Joe Arvay, said that without the border agency fronting the money, there would never be a trial, which could last 12 weeks and cost more than \$1 million.

The losing side of a legal battle is often required to pay part of the winner's legal bills but the process of "awarding costs" comes after a trial. In the wake of Okanagan, a 2003 case where an aboriginal band won "advance costs" to fight a land claim, Little Sister's sought to win advance costs for its ongoing — and expensive — battle with CBSA.

Instead, Chief Justice Beverley McLachlin wrote: "Notwithstanding some sympathy for the appellant, I find nothing in this case which establishes the special circumstances necessary to support the extraordinary remedy of an order that the respondents pay the appellant advance costs to defray the interim expense of litigation. If advanced costs are justified here, they will be justified in a host of other cases. I cannot read Okanagan as requiring this result."

Two other Supreme Court judges, Michel Bastarache and Louis Lebel, also writing for the majority, echoed her sentiment. "The Court did not seek to create a parallel system of legal aid," they wrote in the 73-page judgment.

The 20-year David-versus-Goliath battle began in 1987. Frustrated that gay material was regularly seized, destroyed or censored at the border by officials, Little Sister's headed into the first of a series of court challenges. In 1990, Little Sister's launched a formal Charter challenge. The bookstore's argument — that Customs officials' censorship contravened Canada's newly minted Charter Of Rights And Freedoms because we have a right to view "expressive materials" — took 10 years to wind its way to the Supreme Court.

In 1996, a BC judge ruled that Little Sister's was mistreated, noting that the law had been misapplied by biased Canada Customs administrators who held material destined for Little Sister's even when the same titles were available at other bookstores. The BC Court Of Appeal dismissed Little Sister's appeal in 1998 and Customs persisted in detaining gay material as the case went to the Supreme Court.

In 2000, the high court chastised Canada Customs for its homophobic administration of the law — but it left the laws intact. The majority decision also scolded Customs for taking months, even years, to review materials it had seized. Finally, the court struck Customs' "reverse-onus," which meant importers had to prove that seized materials were not obscene, but shied away from declaring Canada Customs' censorship policy unconstitutional.

In the wake of the latest Supreme Court decision, we've lost the possibility of taking CBSA to task for systemic prejudice, says Petersen.

"That mechanism is simply out of reach," she says.

"The gay and lesbian community will have to challenge Canada Customs on a case-by-case basis."

If not, says Deva, we will see our rights eroded.

"[Supreme Court Justice William] Binnie has it right," Deva says. "One book at a time, we'll lose our freedoms."