

*LITTLE SISTERS BOOK AND ART  
EMPORIUM* v. *MINISTER OF JUSTICE:*  
SEX EQUALITY AND THE ATTACK ON *R.*  
v. *BUTLER*©

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Scholars and philosophers spend much of their time discussing what pornography means and whether it can be defined.<sup>1</sup> This debate persists despite the fact that most men, regardless of their sexual orientation, seem to understand quite well what pornography is, and what it is for: they produce it commercially, buy it in magazines, rent it in videos, and search for it on the Internet. Then they masturbate to it. Producers and consumers of pornography seem to be able to grasp what it is, as a product, without much more confusion than is produced by shopping for a mattress. One goes to the store that

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<sup>1</sup> See, for example, in Canada, B. Arcand, *The Jaguar and the Anteater: Pornography and the Modern World*, Wayne Grady, trans. (Toronto: McClelland & Stewart, 1993); and L. Green, "Pornographies" (2000) 8 J. Pol. Phil. 27.

advertises this product, describes the specific features one is looking for, and makes a purchase if the price is right.

Nonetheless, it can be useful for those in a particular business to point out the blurred boundaries of definitions: is an air mattress a mattress? What about a futon? This technique proves most useful when legislators are seeking to regulate or restrict certain products. And so the debate begins: What is pornography anyway? And if we can't agree on that definition, how can we regulate it under the legal label of "obscenity"? Of course, the pornography industry is not exactly like the mattress industry, at least as far as legal challenges to its regulation. The pornography industry has the distinct advantage of selling a product that, in legal terms, is considered "expression," and therefore a product that has been declared worthy of constitutional protection under section 2(b) of the *Canadian Charter of Rights and Freedoms*.<sup>2</sup>

The decision of the Supreme Court of Canada in *Little Sisters Book and Art Emporium v. Minister of Justice*<sup>3</sup> challenges the interest of those who want the traffic in pornography to be completely unregulated. Trying to use the courts to achieve this result is not new. The Court rejected this outcome in *R. v. Butler* almost ten years ago.<sup>4</sup> What is notable about *Little Sisters* is that this interest was packaged for the Court not only in the traditional civil libertarian guise of expression, but also under the banner of equality for gays and lesbians. Fortunately, the Court in *Little Sisters* recognized pornography for what it is—the practice of sex inequality—and held that gays and lesbians were no less entitled to legal protections that attempt to limit the inequality that pornography inflicts.

Some observers of this decision have expressed surprise that the majority of the Court, despite its sharp criticism of many of Canada Customs' actions, refused to strike down the legislation, which sets out a procedure for the detention and prohibition of "obscenity" at the border.<sup>5</sup> I do not share their surprise. I think the explanation for this result can be found in the reasons why

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<sup>2</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>3</sup> [2000] 2 S.C.R. 1120 [hereinafter *Little Sisters*].

<sup>4</sup> [1992] 1 S.C.R. 452 [hereinafter *Butler*]. In this decision, the Court defined "obscene" in s. 163(8) of the *Criminal Code*, R.S.C. 1985, c. C-46 [hereinafter *Code*] as sexually explicit materials combined with violence, the use of children, or where the sexual activity is degrading and dehumanizing and poses an undue risk of harm to sex equality rights. In this comment, I use the term "pornography" to mean the subset of sexually explicit material that I consider meets this definition.

<sup>5</sup> See, in this volume, B. Ryder, "The *Little Sisters* Case, Administrative Censorship and Obscenity Law" (2001) 39 *Osgoode Hall L.J.* 207. The Court did strike down a reverse onus provision in the legislation that placed the onus on the importer to show that a detained publication was not obscene.

the Court unanimously recognized that same-sex pornography threatens, rather than promotes, equality rights. The Court's decision can usefully be analyzed in the context of the arguments framed by the claimants, the bookstore, and interveners who supported their case, arguments which failed both to convince the Court that pornography plays a special, positive role for gay men and lesbians, and that pornography more generally is not harmful. This latter argument reveals the underlying goal of the *Little Sisters* litigation: to attack the *Butler* decision by claiming that feminist arguments about pornography were wrong, and inevitably provoke restrictions on the "expression" of "minority sexual practices."<sup>6</sup>

This comment begins by setting out some of the facts in *Little Sisters*, and ends by arguing that gay and lesbian pornography is a threat to sex equality. It does this by examining some of the exhibits at issue in the appeal, on the basis that an appreciation of the range of materials that were potentially affected by the bookstore's claim is important in order to evaluate the claim fairly. It then outlines and critically evaluates the arguments that were advanced by the bookstore, and the intervener groups in support of it. Finally, it situates the Court's decision in this context of fact and argument. Mainly, it supports the Court's decision in *Little Sisters*, which confirmed most of the findings of the trial judge, but did not strike down the legislation.

## I. THE EXHIBITS

*Little Sisters* was routinely portrayed in the media as a case about Canada Customs censoring gay and lesbian literature.<sup>7</sup> *Little Sisters*, it was stressed, was a bookstore and de facto community centre, not some seedy porn shop.<sup>8</sup> While it is true that *Little Sisters* imports and sells books of various kinds, it also sells pornography. Among the material that *Little Sisters* ordered from other countries, and objected to Canada Customs' delay or prohibition of, were: a magazine in which women are photographed hung from chains around their necks or wrists, their nipples compressed in clamps, being whipped by other women, who refer to them by sexually degrading names; a magazine with a photo of a naked woman with a gun who is presented as liking to insert the

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<sup>6</sup> *Ibid.*

<sup>7</sup> See, for example, "The Agents who Seize Books at the Border" *The Globe and Mail* (19 December 2000) A16; and L. Chwialkowska, "Supreme Court Ruling Viewed as 'Partial Victory'" *The National Post* (16 December 2000) A6.

<sup>8</sup> Justice Binnie, for the majority, makes this point in the opening paragraph of the majority reasons at 1135. I also found that many people assumed that *Little Sisters* was a lesbian or women's bookstore, presumably because of its name. In fact, the store is owned by two gay men who named it after their cat.