

**Worried About the Misfiring:  
Mapping Lesbian and Bisexual Women's Erotic Agency and  
Identity Under Canadian Obscenity Laws**

by

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## Introduction

In 1970 Glad Day Bookstore opened in the heart of Toronto, offering to the community a large selection of LGB<sup>1</sup> themed material. On April 15th of 1983, Little Sister's Book and Art Emporium opened its doors in Vancouver's West End, offering a selection of LGB themed literature and art work. Little Sister's store provided access to specialized literature, academe, art, advisory material and erotica that were not widely available, making the store a cultural and communal hub for Vancouver's LGB community.<sup>2</sup>

On June 14th of 1983, Little Sister's Christmas order was seized at the border by Canada Customs, on the grounds that it violated obscenity law.<sup>3</sup> Shipments to Little Sister's continued to

the *Canadian Charter of Rights and Freedoms*, particularly with respect to equality under the law.<sup>5</sup> Little Sister's legal battle ended up in the Supreme Court which ruled predominantly in favour of Little Sister's, though the Supreme Court case did not conclude until 2000, over fifteen years after the initial seizures.<sup>6</sup>

Both the court cases of *R v. Scythes*, and

*Literature Review*

The historiography on the censorship of *Glad Day* and *Little Sister's* is minimal, but  
scGlad

analyzing how trial outcomes

## *A History of Homophobia*

In 1983, the government of Pierre Elliot Trudeau introduced a *Charter of Rights*



particular delicacy which took shape as a sort of paternalism over, and infantilization of gay people, which resulted in harmful protection measures such as censorship.<sup>17</sup>

MacDougall's work is supported by the later scholarship of historian Tom Warner, who wrote *Never Going Back: A History of Queer Activism in Canada*. Warner similarly notes that individuals who worked in law enforcement grew up and were socialized in a homophobic society and were not exempt from being prejudiced.<sup>18</sup> His research extends beyond the judicial system to demonstrate how law enforcement and social services also had a history of homophobia. Warner's work looking at the 1970s and 1980s identifies bathhouse raids, entrapment, over involvement of Child Services with LGB parents, authorities colluding with the media, police negligence towards LGB people experiencing violence, and verbal, physical and institutional violence at the hands of law officials, as pivotal examples of homophobic law enforcement.<sup>19</sup>

Within this history, LGB women occupied a particularly ambiguous position legally and socially. Sociologist Becki L. Ross in her book *The House that Jill Built: A Lesbian Nation in Formation* traces the emergence of lesbian politics and communities amidst broader gay rights and feminist movements. Her work demonstrates that gay liberation movements focused more on gay men because they were more explicitly and publicly targeted by anti-gay campaigns, and feminist work often centered around the experiences of heterosexual women, so lesbian and bisexual women have often existed in the periphery of gay rights issues in popular media, and public imagination.<sup>20</sup> For this reason, many lesbian and bisexual women sought out their own spaces; literally in establishments such as bars or political organizations and figuratively in the

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<sup>1</sup> Ibid., 234.

<sup>1</sup> Warner, *Never Going Back*, 99.

<sup>1</sup> Ibid., 100-118.

<sup>20</sup> Ross, *The House that Jill Built*, 6.

production of women-only literature, magazines, and art. Many lesbian and bisexual women found their emergence into their community in tandem with their awakening to feminist politics.

dependence on men, which discredited any consent given.<sup>25</sup> This theorizing on sex even implicated gender expressions, as both the embodiment of masculinity and femininity -including

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subordination and exploitation was facilitated, which is why these feminists were adamantly anti-porn.

Radical feminists, such as Dworkin and Mackinnon, understood perverse sexuality as a

standards.<sup>33</sup> In relation to S/M and the creation of erotic material, many feminists have argued that women's right to sexual expression is an integral element of women's liberation, and that stigma around such practices is rooted in a lack of understanding. This discourse resists the notion that sadomasochistic sex acts are a response to negative experiences such as trauma, or that women are not capable of participating in, and determining their own erotic interests. In fact, the position taken by pro-sex feminists suggested that framing women's participation in sex, including S/M sex, as inherently harmful or negative actually denied women's sexual agency.<sup>34</sup>

In this history and in these discourses women, particularly women who were romantically and sexually involved with other women, often occupied an unclear position. Although historically marginalized, lesbian and bisexual women did not face the same level of public ridicule and demonization as their gay male counterparts, even holding liminal positions in the law, as the criminalization of homosexuality in Canada explicitly targeted males. The dominant radical-feminist framework for thinking about S/M sex, was predominantly based on females who engaged in particular sex acts with males, which could not be aptly applied to similar acts willfully engaged in by two women.

Within the feminist discourses which ideologically underpinned the trials, lesbian and bisexual women faced erasure while simultaneously being prosecuted. As a result, ideas around womanhood and sexuality conjure contradictions and tensions which can be identified in the trials. One tension this thesis is particularly interested in, is the lack of consideration, or ability to ideologically situate, women who willingly engaged in same-sex S/M, and who created and consumed same-sex sexual material.

## Section One: The Butler Decision

### *Linking Radical Feminism to The Butler Decision*

The cases built against Little Sister's and Glad Day, both cited the precedent case of *R. v. Butler*. This 1992 Supreme Court case was to determine whether Donald Victor Butler was guilty under Canadian obscenity law, for owning and distributing pornography and sex paraphernalia from his adult entertainment store, which catered to a heterosexual (mostly male) clientele. After his success in the lower courts, Butler was tried at the level of the Supreme Court and was found guilty. The outcome of this Supreme Court case and the legal sanctity of the "Butler test" it generated, was a landmark for the applicat

interveners on the





persons to act in an anti-social manner...which society formally recognizes as incompatible with its proper functioning.”<sup>45</sup>

LEAF, acting as an intervener on the case, argued that a harms-based approach should



material.<sup>56</sup> Many feminists applauded this verdict as a victory for the rights of women.<sup>57</sup>

However, for feminists who were sex-positive and anti-censorship, particularly those whose lifestyles and identities were centred around their sexual identities, this outcome was cause for concern. In the years following, the precedent set by the Butler decision was wielded in court against both *Little Sister's* and *Glad Day*. Butler's loss in the Supreme Court meant that particular ideas about harm, women and pornography were entrenched into the Canadian legal system, which would later manifest in the erasure of bisexual and lesbian women's agency and the repression of their identities.

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Ibid., 525.

Cossman, *Censor, Resist, Repeat*, 51.

## Section Two: Glad Day Bookstore - A Case of Bad Attitude

*R v. Scythes (1993):*

John Bruce Scythes, the owner of Glad Day, an Ontario based LGB bookshop, was charged with multiple counts of obscenity for possession and distribution of materials containing lesbian S/M erotica.<sup>58</sup> Particularly, he was charged for owning and selling the lesbian erotic magazine *Bad Attitude* in his downtown Toronto Store in 1992. *Bad Attitude* was a magazine that contained articles by lesbian authors writing about their sexual fantasies and experiences, usually on S/M themes, with photographs that loosely complemented the stories.<sup>59</sup>

When the charges were brought before the court, Scythes' legal team including lawyers and a series of expert witnesses attempted to persuade the courts that lesbian S/M erotica could not be understood using the same analytical framework as heterosexual S/M erotica and pornography. Similar to Butler's legal team, the main line of argument in Scythes' defense was that owning and distributing the erotic material should be protected by the Charter of Rights and Freedom under the right to expression, section 2(b).<sup>60</sup>

The prosecutor -the Crown-



The lawyer continued quoting Butler to insist that obscene material “would apparently fail the community standards test not because it offends against morals but because it is perceived by public opinion



pyramid. Sex that is outside of those parameters or includes pornography, fetish objects or role playing, exist on the lower echelons of the sexual hierarchy.<sup>71</sup>

The domino theory of sexual peril suggests that if sex from the lower branches of the sexual hierarchy become morally and socially accepted, then the line between good and bad will be lost and people will participate in ‘problematic’ sexual behaviours in increased numbers.<sup>72</sup> This anxiety, quite opposite to Rubin’s notion of constructionist sex, is rooted in the belief that there is a single type of sex that is healthy and natural, and everything outside of that is abnormal and threatening.<sup>73</sup>

Similarly, Ummni Khan is a legal scholar whose work focuses on S/M practices in relation to what she calls the “social imaginary.” She defines the social imaginary as,

an epistemic site, not wholly stable, but not without discernible patterns where ordinary people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations.<sup>74</sup>

She asserts that unlike sociological theory which has a discursive focus on, and about, the most privileged people in society, the social imaginary emphasizes collective ideas and understandings which are heavily shaped by media consumption.<sup>75</sup> In her essay, “A Woman's Right to be Spanked,” Khan analyzes various movies involving themes of S/M and she concludes that films portraying S/M often depict tragic endings, conflate sadomasochism with criminality, and separate sadomasochistic practice from notions of health and love.<sup>76</sup> This aligns with Rubin’s argument that sex outside of the golden standard is seen as unhealthy and unsafe.

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<sup>1</sup> Ibid., 151.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid., 154-155.

Khan, “A Woman's Right to be Spanked,” 83.

Ibid., 83-84.

Ibid., 85-93.





According to Ross, the Crown called upon expert witness, Neil Malamuth (whose work was also used in the Butler trial), whose studies in psychology asserted there was a causal link between porn consumption and violence against women.<sup>80</sup> Though none of his work had studied the impacts of pornographic material produced by and for LGB people, Malamuth testified that the materials found in

Califia defines sadomasochism as, “an erotic ritual that involves acting out fantasies in which one partner is sexually dominant and the other partner is sexually submissive.”<sup>87</sup> He argues that S/M scenes are always “preceded by a negotiation process that enables participants to select their roles, state their limits, and specify some of the activities which will take place.”<sup>88</sup> He concludes his definition by emphasizing that, “the basic dynamic of sexual sadomasochism is an eroticized, consensual exchange of power -not violence or pain.”<sup>89</sup>

Califia’s work offers a deeper understanding of the norms of lesbian S/M practice during and before the trials, which challenges the assumptions of radical feminist analysis and the ‘harms-based’ framework utilized in the Butler test. Califia says that the top only has power

comfort and arousal of the bottom,” which contradicts the idea that S/M inherently victimizes women.<sup>93</sup>

Legal scholar Maneesha Deckha offers a compelling argument regarding S/M practice and Canadian law, by drawing parallels between S/M and more socially accepted practices involving pain. In doing so, she highlights the inherent moral undertone of legislating against S/M. Deckha defines S/M play as, “consensual sexualized encounters involving an orchestrated power exchange characterized by domination and subordination typically involving the infliction of pain.”<sup>94</sup> Deckha concedes that, “acts do not occur in a social void and together constitute a cultural and social fabric that we can subject to critical evaluation,” and therefore her analysis is not based on a notion of individual sexual agency.<sup>95</sup> Although she does argue that “the ability of individuals to make choices with less than ideal alternatives... cannot negate those choices outright.”<sup>96</sup>

For this reason she does not necessarily take a stance that condones S/M practice, or discourages people from critically examining certain sexual practices. However, she does indicate the absurdity that society tries to legislatively regulate certain painful sex practices, but does not impose the same limits on other practices of pain that could also be interpreted as oppressive.<sup>97</sup> Deckha points to other painful practices that women engage in to highlight the social stigma held against S/M. She states that:

In pursuit of an oppressive and elusive aesthetic ideal, many women book regular appointments for waxing, electrolysis or other painful beauty treatments and push their bodies through exercise, straining tendons, muscles and ligaments to the next level despite the resulting burn. And, of course, women get pregnant and give birth -not

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<sup>3</sup> Ibid., 120.

Deckha, “Pain as Culture,” 130.

Ibid., 139.

Ibid., 141.

Ibid., 136

exactly

### Section Three: Little Sister's Book and Art Emporium - Identity and Erotica

“Little Sister's Book and Art Emporium” (hereafter Little Sister's) in Vancouver, started having its orders from the United States routinely held at the border in the early 1980s due to materials being deemed ‘obscene’ i

rather found that the issue lay in the incorrect application of legislation which it attributed to lack of funding, inadequate training and the volume of material customs was expected to assess.<sup>102</sup>

Little Sister's appealed its case to the Supreme Court of Canada, positing the same arguments, especially since the discriminatory practices at Canada Customs continued after the ruling of the previous court case.<sup>103</sup> The main arguments of both sides were reiterated at the level of the Supreme Court, with Little Sister's case being strengthened by the compounded issues that had occurred at the border during and after the previous court case.

Little Sister's argued was often misplaced. In addition to this accusation, Little Sister's argued that the Canada's *Customs Act* was unconstitutional due to its "burden of proof" exemption rule.<sup>104</sup> Section 176(4) of the *Customs Act* states that:

In any prosecution under this Act, the burden of proof in any question relating to the matters referred to in paragraphs (3)(a) to (d) lies on the person who is accused of an offence, and not on Her Majesty, only if the Crown has established that the facts or circumstances concerned are within the knowledge of the accused or are or were within his means to know.<sup>105</sup>

This legislation means that in the event of a prosecution the accused are responsible for matters outlined in 3(a) through (d) which means the ability to prove the identity or origin of the goods, the time and place of importation, the payment of duties and "the compliance with any of the provisions of this Act or the regulations in respect of any goods."<sup>106</sup> Essentially, this meant that when Little Sister's was accused of obscenity by Canada Customs, it was the responsibility of Little Sister's to prove the charges of obscenity were false and not the job of Customs to prove that they were true.<sup>107</sup>



production company of the goods” dealt with obscene material.<sup>109</sup> This resulted in particular importers and exporters being flagged for “heightened inspection” at particular customs centres, for example the Vancouver Mail Center examined “virtually all imported mail addressed to Little Sisters.”<sup>110</sup> Once material was flagged as obscene under code 9956, the officer had to fill out a

British Columbia Civil Liberties Association (BCCLA), requested the manager of a traditional bookstore in Vancouver to import titles that had been withheld from Little Sisters, and she was successful.<sup>116</sup>

The Customs defense team acknowledged that “the defining characteristic of homosexuals... is their sexuality” and that therefore homosexual erotica served a more

homosexual material.<sup>120</sup> To further the argument, the prosecutor of the Butler trial was quoted directly:

While a direct link between obscenity and harm to society may be difficult, if not impossible to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs...Parliament [is] entitled to have a "reasoned apprehension of harm" resulting from the desensitization of individuals exposed to materials which depict violence, cruelty, and dehumanization in sexual relations.



This is reflected in the testimonies of lesbian women at the trial. For example, Janine Fuller, the long time lesbian-identified manager of Little Sister's, testified in the court that it was due to reading Pat Califia's book *Sapphisty* that she was able to understand her own sexual feelings, overcome isolation and come out.<sup>129</sup> She also said that as she was first emerging in the lesbian scene, finding the Toronto Women's Bookstore was an integral part of finding information about lesbian identities.<sup>130</sup> Fuller's story was highlighted by LEAF who used it to demonstrate the importance of lesbian materials in "facilitat[ing] the emergence and development of lesbian identity," particularly when public and school libraries often did not offer books with lesbian and gay themes.<sup>131</sup>

interested in [S/M] sexual practices that there was someone else...who was available to discuss those things with them.”<sup>133</sup> Califia further testified to the impact of not being able to find yourself, and your sexuality, reflected in literature:

If you cannot find any fiction that describes people who are like you...people who have the kind of relationships you would like to have, people who have the kind of sexuality you would like to have, then you begin to feel as if you are crazy. You don't exist. You're marginal, you're not important, and this creates a great deal of self-hatred and self-doubt.<sup>134</sup>

Califia's discussion of representation in literature combined with Fuller's testimony and Landr Landr Landr -10

lesbians.<sup>136</sup> More articulated feeling that there was a ‘new home’ for her in black lesbian communities when reading the work of Audre Lorde, after having only been a member of white lesbian communities.<sup>137</sup> Grahn recalls crying upon seeing a poster about an organization of Gay American Indians and stating that she felt that, “a huge burden of isolation, and of being defined only by [her] enemies, left [her] on that enlightened day.”<sup>138</sup>

The intersection of sexuality and working-class experiences was another area where representation was sparse. In her writing, Dorothy Allison argues that her working-class background fundamentally shaped her sexual identity, and that the woman she will like is

will show that books about racialized and classed experiences were withheld as they were coming to Little Sister's. For example, *Black Looks, Race and Representation* by scholar bell hooks and Dorothy Allison's own book, *Trash*, were both held at the border.<sup>142</sup>

Beyond the structural and symbolic harm caused by censorship through the repression of



! The production of lesbian erotic material was of great significance to its lesbian and bisexual readers in regards to identity, community and information. Materials pertaining to minority lesbian and bisexual women were of particular importance due to the underrepresentation of minorities amidst lesbian materials. Considering the importance of erotic material in the formation of minority sexual identities and the importance of information pertaining to safe-sex for those who practice S/M or those facing epidemics such as AIDS, it is



categories. The result was that discussions about the erotic agency, identities and communities of LGB women were often dismissed by the courts as extraneous or minute. In this thesis I explored the relationship between bisexual and lesbian women and the censorship of the two LGB bookstores. To demonstrate how the trials specifically impacted lesbian and bisexual women, I analyzed discussions around consent in lesbian S/M practice and porn production, and the

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