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SECTION 15 JURISPRUDENCE IN THE SUPREME COURT OF CANADA IN 2000

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and
Jonathan Strug^{***}

I. INTRODUCTION

This paper reviews the four decisions of the Supreme Court of Canada in 2000 that considered equality rights issues under section 15 of the Charter.¹ Our goal is to summarize the cases and to comment upon each in terms of its significance for equality rights jurisprudence.

We do not find strong common themes among the four cases (aside from the fact that they were all decided in 2000). *Granovsky*² is a pure section 15 case, and involves an application of the *Law*³ case. In our view, *Granovsky* does not extend the law, but it does illustrate the weaknesses in the *Law* analysis. *Boisbriand*⁴ is a section 15 case involving Quebec human rights law. Again, we do not believe it extends principles of equality rights jurisprudence; the decision is consistent with a national normalization of human rights concepts.

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¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

² *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 (L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.).

³ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

⁴ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665.

*Lovelace*⁵ is an equality rights case, but one where the legislation underlying the alleged discrimination was not placed in issue. As a result, the logic in the case does not extend equality rights principles, although it does raise questions about the strategies to be used in future cases where laws of both levels of government are the basis of the alleged discrimination. Finally, *Little Sisters*⁶ is not really an equality rights case at all; it is really about freedom of expression. The breaches in that case were established clearly, so the real issues in the case concerned identification of the source of those breaches, and determination of the appropriate remedy. However, the appellants sought to argue that Canada's obscenity laws discriminate on the basis of sexual orientation, and the Court does consider those arguments, even after it concluded that those issues were not properly raised in the case.

II. GRANOVSKY V. CANADA (MINISTER OF EMPLOYMENT AND IMMIGRATION)⁷

In *Granovsky*, the appellant sought a disability pension under the *Canada Pension Plan*. The Plan is a contributory scheme designed to provide benefits to workers who contribute to it. It includes provisions for payment of disability pensions to persons who are totally and permanently disabled and are thus forced to leave the work force. Since the Plan is designed to protect employment income, it requires that recipients have a "sufficient connection to the work force" as demonstrated by a record of contributions to the Plan. In particular, to be eligible for the disability pension, a claimant must have contributed to the Plan in two of the previous three years, or in five of the previous 10 years.

Granovsky had a long history of back problems. He had been able to work from time to time, but had been unable to maintain long-term full-time employment. Granovsky had contributed to the Plan only once in the previous 10 years, although he had contributed in roughly half of the 15 years prior to that.

Granovsky alleged that the Plan discriminated against partially disabled persons, by making it more difficult for them to qualify for benefits on account of their inability to work as a result of disability.

In the proceedings below, decision-makers had been unsympathetic to Granovsky's claim of disability, characterizing his chronic back ailment as a "back ache." The Court noted that if it found for Granovsky, then the matter would have

⁵ *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 (L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache and Arbour JJ.), *per* Iacobucci J.

⁶ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.

⁷ *Supra*, note 2.

to be sent back for a determination of whether he really was disabled as claimed. This factor should have no bearing on the constitutional argument, but it did seem to merit detailed comment by the Court. Although it is not stated in the decision, the Court may have been mindful that the threshold for an obligation to contribute to CPP is not high, and the Court may have had trouble in accepting the proposition that a person could be so disabled so as not to be able to contribute to CPP at all for nine out of 10 years, yet have been disabled only from time to time during that period. In reading the decision, one gets the sense that the Court may have felt, without finding, that the claimant must have been malingering in order to compile such a record.

The Court found that Parliament did make allowances for persons temporarily out of the work force when it crafted the eligibility provisions for disability pensions by allowing non-contribution in one of the previous three or five of the previous 10 years. This is “line drawing,” and the Court found that Parliament had drawn the line in an appropriate place. Line drawing is inherently arbitrary. Here, workers are allowed some absences from the work force, but they must have a sufficient connection to the work force to engage the underlying purpose of the program: protection of employment income.

There is one comment in the decision that deserves greater focus than was given by the Court. The complainant argued that if the Court ruled against him, he would be “thrown on” the welfare roles. The disability pension provision of the Plan is not a social benefit program standing in isolation from other income support programs. If, as a result of not being eligible for the disability pension, the complainant was “thrown on” the welfare roles, he would be in receipt of social assistance. There was no analysis of the relative levels of financial support the alternative programs would provide. A person who has been disabled his or her entire working life, and thus has had no opportunity to contribute to the CPP at all, would be treated no differently than the complainant, but presumably would be in receipt of other social assistance.

The Court’s logic does not resonate as strongly as it might, given the absence of a contextual analysis of other income support programs. In broad terms, Parliament has created a class of persons whom we may call “disabled workers.” The complainant did not qualify as such because he was not a “worker.” The complainant says that he was not a worker because of his long-term partial disability — he was disabled for too long to qualify as a worker.

Justice Binnie seemed to deny this contextual approach in his characterization of the Plan: “The CPP was designed to provide social insurance for Canadians who experience a loss of earnings owing to retirement, disability, or the death of a wage-earning spouse or parent. It is not a social welfare scheme.”⁸ It is not clear

⁸ *Granovsky, supra*, note 2, at 712.

why a “social insurance” plan is not a “social welfare scheme,” unless a “social welfare scheme” is, by definition, a program of universal application solely based on a needs test. If so, the distinction is driven purely by definitions rather than functional distinctions, and is a tautology.

Without placing the CPP in the context of the overall scheme of income support, it is well-nigh impossible to assess the effect of exclusion from that particular program. Thus, the analysis devolves to a review of “line drawing” by Parliament, and the usual sorts of questions that arise under such an analysis:

The less severely disabled will no doubt argue that their interests are no less worthy of protection than those whose disabilities are more severe. Is the legislature then precluded from targeting the permanently disabled for special programs or services (special paratransit public bus facilities for example) without making the same services and programs available to those whose disabilities are temporary, and if so, *how* temporary would be sufficient to qualify?⁹

This reasoning does not do justice to Granovsky’s claim. He was not seeking to extend a program that is targeted to the permanently disabled. His claim is based on a permanent disability and is premised on the argument that he should not be denied benefits because he was temporarily disabled for many years prior to his permanent disability.

The Court applied the *Law* test¹⁰ in finding that Parliament’s line drawing is not discriminatory. *Law* calls for a “comparative approach,” where “[t]he identification of the group in relation to which the appellant can properly claim ‘unequal treatment’ is crucial.”¹¹ The appellant claimed that his situation should be compared to persons who were able-bodied during the years leading up to their disability. During those years, able-bodied persons are able to work and contribute to the CPP. Thus, when they become disabled, they qualify for a pension. Granovsky, solely by reason of disability, was unable to work sufficiently to make contributions. The effect, therefore, is to deny him a pension as a result of the long-term partial disability.

The Court found that the appellant chose the wrong “comparator group.” Instead, the Court found that Granovsky should be compared to persons who were permanently disabled during the time he was partially disabled. If this comparison is correct, then the appellant received differential treatment because he did not receive a disability pension at the time that the members of the comparator group did receive one. This comparison, though, seems to

⁹ *Id.*, at 714.

¹⁰ *Supra*, note 3, at 548.

¹¹ *Granovsky, supra*, note 2, at 729.

mischaracterize the appellant's claim. He did not claim (as he might have) that restricting pensions to permanently disabled persons was constitutionally unsound. It was only when he became totally disabled that he claimed to be eligible for the pension. Thus, on the appellant's analysis, only persons who become permanently disabled are eligible for disability pensions. During the time preceding his total disability, he was not "like" those then in receipt of disability pensions, and did not seek to classify himself as such. He was treated like those who were not permanently disabled, and he did not challenge this classification in so far as he was not then in receipt of a pension.

The Court's finding that Granovsky should be compared with permanently disabled persons does not affect the decision under the first branch of the *Law* test, and the Court concluded that Granovsky did suffer differential treatment. However, the choice of comparator group impacts on the later analysis:

The appellant's argument depends upon the correctness of his choice of able-bodied workers as the comparator group. He says "The appellant Granovsky wishes to make it clear that his submission is that he is relying on a comparison between temporary disabled persons and able-bodied persons. The fact that some adjustment has been made for 'permanently disabled' persons is not the gravamen of Mr. Granovsky's complaint." If, as I believe, he has picked the wrong comparator group, the rest of his analysis collapses under the weight of an erroneous premise.¹²

If the proper comparator group is permanently disabled persons, then it was open to the Court to find that the program had been targeted to a group that is more disadvantaged than Granovsky. As is noted above, it must be the case that Parliament can target benefits to the permanently disabled in priority to the temporarily disabled. The problem with the comparison is that the appellant is permanently disabled now and seeks a benefit that is available to other persons who are permanently disabled. The reason he is denied that benefit is that in the past, he was partially disabled, and those receiving benefits were not (or at least were not to the same extent as the appellant).

The Court's conclusion includes a recapitulation of the human dignity principles of which we will hear much more over the coming years:

In these circumstances, in my opinion, the appellant fails to show that viewed from the perspective of the hypothetical "reasonable" individual who shares the appellant's attributes and who is dispassionate and fully apprised of the relevant circumstances ... his dignity or legitimate aspirations to human self-fulfilment have been engaged.

¹² *Id.*, at 737-38.

In other words, the appellant has not demonstrated a convincing human rights dimension to his complaint....¹³

As is noted in many cases (and in particular in *Boisbriand*, discussed below), disabilities have both subjective and objective dimensions. If we place the most positive gloss on the facts of Granovsky's case, here is a person with significant impairment of his ability to work as a result of disability. It has plagued him for many years. He struggles with it as best as he can, and continues to work, as best as and as much as he can over the years. He doesn't make much money during those long and painful years, but he does have work from time to time, and enjoys the participation in the work force and the dignity that comes with being a contributing member of society. Another person might have given up and claimed total and permanent disability at a much earlier stage. This sounds romantic and idealized, but there are many such people who work long past the time that others have given up and left the work force. Now, Granovsky reaches the stage where he simply must give up — his pain and functional limitations have progressed to the point where he simply cannot do it any more. He looks at those who gave up earlier, and they enjoy a pension because of their disability. He gets nothing. Why? Because he tried to work when he was seriously disabled. It is hard for us to understand how the denial of a pension to Granovsky under these circumstances would not engage his sense of self-worth and human dignity.

The "human dignity" principle is, at least in this context, a rhetorical way of saying that a complaint is not a serious or profound one. We doubt that the "dispassionate" person in Granovsky's position would tell a personal tale of indifference. His story would sound more like our rendition of Granovsky's history than the Court's analysis of comparator groups and "drop-out" provisions.

As an aside, the "immutability" principle seems to have re-emerged in the Court's section 15 analysis in this case: "Some of the grounds listed in s. 15 are clearly immutable, such as ethnic origin. A disability may be, but is not necessarily, immutable, in the sense of not being subject to change."¹⁴ It had been thought by many that immutability had been rejected as a characteristic of protected grounds under section 15 in *Egan*,¹⁵ where the Court (unanimous on the point) found that the protected grounds are inherent characteristics that cannot be changed except at unacceptable personal cost.¹⁶ Immutability is a troubled concept and may serve to confuse section 15 analysis if it is reintroduced. As Justice Binnie acknowledged, disabilities may not be immutable, and often are not static.

¹³ *Id.*, at 740.

¹⁴ *Granovsky*, *supra*, note 2, at 720.

¹⁵ *Egan v. Canada*, [1995] 2 S.C.R. 513.

¹⁶ *Id.*, at 528.

Modern medicine is able to perform sex change operations, so even sex may be considered mutable. Age is an ever-changing characteristic, but one over which the individual can exercise no control. Political, philosophical and religious beliefs are clearly subject to change, but not simply as a product of will. Sexual orientation is a manifestation of desire, often coupled with chosen behaviour. One's innermost sexual desires are not matters of choice, but inevitably, decisions to have sex are so. The "immutability" concept could serve to cloud the application of the law to protected groups and, in our view, should not re-enter Canadian equality rights discourse.

III. QUEBEC (COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE) V. MONTRÉAL (CITY)¹⁷

The unanimous decision of the Court was written by Madam Justice L'Heureux-Dubé, and concerns three cases of persons who were rejected for employment or dismissed based on "physical anomalies" that do not result in functional limitations for the purposes of the employment for which they had applied or were engaged in prior to dismissal. The prospective employers took the position that the anomalies in question were not "handicaps," and therefore were not protected under the Quebec *Charter of Human Rights and Freedoms*.¹⁸

The prospective employees were as follows:

- (1) Mercier was trained for and applied for a job as a gardener-horticulturalist with the City of Montreal. In a pre-employment medical examination, she was found to have a "minor thoracolumbar scoliosis." The medical experts determined that Mercier was not at greater risk for lower back pain in the short, medium and long term.
- (2) Troloi was hired as a probationary employee for 12 months by the Boisbriand police force. He performed his duties admirably until he suffered an acute attack of ileitis. He was subsequently diagnosed with "Crohn's disease," a chronic disease of the digestive tract that may remain benign, or may require several operations for treatment. Although Troloi enjoyed a complete recovery and was fully able to perform his duties as a police officer, Boisbriand dismissed him anyway, saying that it preferred to fill its complement with officers "who present the lowest risk of absenteeism."

¹⁷ Boisbriand, *supra*, note 4.

¹⁸ R.S.Q. 1977, c. C-12.

- (3) Hamon was refused employment with the Montreal police on the basis of anomalies in his spinal column that are asymptomatic and do not result in any discomfort, disability or limitation. The police department took the position that persons such as Hamon can be excluded because there is a risk that they will develop incapacitating and recurring lower back pain.

The Court found that “handicap” is not restricted to handicaps that cause functional limitations, but includes ailments that do not give rise to any limitation or functional disability.¹⁹ As a result, all three of the prospective employees had been discriminated against on the basis of handicap since they all had ailments that did not create functional limitations on their abilities to work, but nonetheless were perceived as being obstacles to their employment.

Although the decision runs for 87 paragraphs, it is straightforward. The proscription against discrimination on the basis of handicap in the context of employment, as set out in the Quebec Charter, is similar to human rights legislation found in other Canadian jurisdictions, and has at its core the goal of assisting handicapped persons “to take part in the life of the community on an equal level with others.”²⁰

It would be strange indeed if the legislature had intended to enable persons with handicaps that result in functional limitations to integrate into the job market, while excluding persons whose handicaps do not lead to functional limitations.²¹

Indeed, “subjective and erroneous perceptions regarding the existence of such limitations” is the very essence of discrimination on the basis of handicap. It is the perception that an individual cannot perform work ably that is at the core of what is legally protected, and permitting even more arbitrary discrimination where there is no physical basis for the conclusion at all would be perverse.

There is a second and complementary rationale for the decision. A “handicap” may not result in functional limitations today, but may do so tomorrow. Indeed, that fear lay at the heart of the decisions by the prospective employers to refuse to employ the complainants. “[T]he *Charter* also prohibits discrimination based on the actual or perceived possibility that an individual may develop a handicap in the future.”²²

This reasoning is consistent with the jurisprudence concerning the nature of discrimination on the basis of handicap/disability. It may also foreshadow future

¹⁹ *Boisbriand*, *supra*, note 4, at 697.

²⁰ *Id.*, at 700, citing McKenna, “Legal Rights For Persons With Disabilities in Canada: Can the Impasse Be Resolved?” (1997-98), 29 Ottawa L. Rev. 153, at 163-64.

²¹ *Boisbriand*, *supra*, note 4, at 688.

²² *Id.*, at 700.

reasoning concerning the use of predictive tools to identify persons at higher risk for future medical problems, and then using that identification as a basis for imposing disadvantages on them (such as refusing them employment).

From a business perspective, it makes sense that an employer would wish to hire employees that it hopes will have low rates of absenteeism and little risk of paid leave by reason of disability. Strict application of this business logic could potentially lead to the use of DNA testing of potential employees to obtain long-term predictions about their health history in order to predict the long-term risks that they will cause the employer in terms of greater expense by reason of ailment over the course of their working life.

On the other hand, as is recognized in the Quebec Charter and similar legislation in other jurisdictions, an employer is entitled to satisfy itself that prospective employees are able to function in their jobs (i.e., to be satisfied that any functional limitations are not inconsistent with their ability to do their work). For example, an airline might fairly preclude persons with insufficient visual acuity from flying airplanes. This policy would not extend to an airline excluding a person with some abnormality of the eye that does not affect her ability to see at an acceptable level. The grey area arises where the prospective employee can see well enough now, but has a predisposition to premature loss of visual acuity that poses a greater than average risk of expense to the employer at a later stage. That question, however, is left to be determined within the second part of the human rights analysis: once there is a finding of discrimination based on handicap, the prospective employer may seek to justify that discrimination. That issue was not before the Court in these cases.

Of note for future cases is the Court's reliance on section 15 of the Charter in reaching a conclusion that tends to harmonize human rights concepts among Canadian jurisdictions. It seems clear that nothing will turn on the use of differential terms such as "handicap" and "disability" in different human rights legislation and in the Charter. Although the Court has not stated that human rights legislation must "mirror" the protection afforded by section 15 of the Charter, when *Boisbriand* and *Vriend*²³ are read together, it does seem that the Court is finding a nucleus of human rights protection that is national in scope. These decisions do not go so far as mandating such a national structure of human rights protection, but the discussion concerning remedy in *Vriend* suggests that the Court is inferring a common will across the country to develop and maintain consistent human rights standards.²⁴ Although these standards may not be

²³ *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

²⁴ In *Vriend*, eight of the justices found that it was appropriate to "read in" sexual orientation to Alberta's human rights legislation, on the basis that such a remedy was really less intrusive than striking down the impugned portions of the law. This conclusion is only warranted where it is presumed that the defect is minor relative to the entire legislation. The majority

required by section 15 of the Charter, consistent reinforcing of these standards by the courts does contribute to a national rights culture that is bound to influence the political climate in which rights legislation is devised.

Boisbriand is not as controversial as *Vriend* because the subject matter is less charged with religious and moral overtones. Within Quebec there may be resistance to what we see as a policy by the Court to find national standards — the national nature of which may be offensive to Quebec nationalists, who wish to promulgate their own made-in-Quebec standards. Seen in this light, we view *Boisbriand* as significant, more for what it says about the Court's role as a national institution than for the development of equality rights jurisprudence.

IV. LOVELACE V. ONTARIO²⁵

1. Summary of the Decision

Ontario established a program for the distribution of proceeds from a new casino to Ontario First Nations communities registered under the *Indian Act* (Canada).²⁶ Various aboriginal communities not registered as bands under the Act sought to be included in the program. Ontario refused to include them, and, consequently, the appellants brought these proceedings. The Court held that Ontario's exclusion of non-registered communities did not constitute discrimination within the meaning of section 15(1). This finding did not necessitate a determination of whether the program was an "affirmative action program" protected under section 15(2). However, the court inclined to the view that section 15(2) is "confirmatory and supplementary to" section 15(1), rather than an exception to section 15(1).²⁷ Since the program was found not to infringe section 15, there was no need to consider section 1 of the Charter.

The Court also found that the program was *intra vires* Ontario: section 91(24) of the *Constitution Act, 1867*²⁸ does not preclude provincial programs aimed at aboriginal peoples or communities. Ontario did not define which groups of aboriginal peoples are "First Nations" for the purposes of the casino project. Rather, Ontario used the definition of "band" found in the *Indian Act*,

concluded that Alberta would prefer to have human rights legislation. Justice Major, writing for himself, would not have read the protection into the Act, and instead would have left it to the legislature to respond. Neither approach precluded a broad range of responses from the legislature (including re-enacting the discriminatory legislation by use of the override provision).

²⁵ *Supra*, note 5.

²⁶ R.S.C. 1985, c. I-5.

²⁷ *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, at 1009.

²⁸ (U.K.), 30-31 Vict., c. 3.

and in so doing “has done nothing to impair the status or capacity of the appellants as aboriginal peoples.”²⁹

The heart of the appellants’ argument was the plight of non-registered aboriginal communities. A compelling argument can be made that the classification systems promulgated by the *Indian Act* are discriminatory, but that argument was not before the court, and the Court declined to deal with a collateral attack on the federal law: “these important collateral issues are not properly raised in this appeal and, therefore, cannot be decided herein.”³⁰

The program, by directing substantial sums to bands registered under the *Indian Act*, has the effect of supporting and strengthening the institutions that arise as a consequence of federal policy. This institutional structure has, itself, led to distinctions between band communities and non-band communities in respect to land, government and gaming/casino issues. Although the categories of registered bands and non-registered communities are not hermetically distinct (each community having a distinctive history and situation), as a rule, registered bands are reserve-based, have a political infrastructure regulated by the *Indian Act* and have a history of government-to-government relations with the provinces and Canada. Ontario’s program is designed to address the needs of registered bands, particularly in respect to the issues of land, self-government and ameliorating impoverished conditions through the distribution of resources to the bands.³¹

The program, therefore, is said to be tailored to the circumstances of band communities, and those circumstances are, at least in part, a by-product of federal law and policy, which was not in issue in the case.

The Court’s reasoning is tautological once consideration of the discriminatory impact of federal law and policy is eliminated from the analysis. Canada has established institutional structures under the *Indian Act* which have influenced the structure of First Nations governance. Those communities included under the *Indian Act* have received certain benefits as a result of their inclusion, and have unique status under Canadian law. So-called “non-status” First Nations individuals and communities can argue (as they did in *Lovelace*) that they are the most disadvantaged of the disadvantaged, and that they suffer because of their wrongful exclusion of benefits under an unfair legal regime. It is a compelling argument, and for the sake of this comment, we presume it to be true.

Ontario did not create the distinctions between First Nations persons and communities under the *Indian Act*. First Nations communities tend to be

²⁹ *Lovelace*, *supra*, note 27, at 1013.

³⁰ *Id.*, at 960.

³¹ *Id.*, at 996.

centred on identifiable reserve lands that have both political and proprietary significance. Self-governance is based, at least in part, on land and race, just as national and provincial claims to jurisdiction are based on territorial autonomy and definitions of the people who are included in or excluded from membership. Those who are excluded face the double burdens of being affected by the negative impacts of the institutional structures created by or supported by the *Indian Act* while simultaneously being excluded from benefits conferred by the Act on status bands and the members thereof.

Further, issues have arisen as to the rights of First Nations to pursue gaming activities. Among other things, First Nations communities have taken the position that provincial regulation of gaming activities within the province do not apply to band reserves. If First Nations are permitted to conduct unlimited and unregulated gaming operations on reserves, then the province could face serious social problems extending far beyond the borders of the reserves.

On this basis, the Court finds that Ontario's program is tailored to respond to the particular interests of bands under the *Indian Act*. Such discrimination as there may be arises by operation of policy decisions made by Canada rather than Ontario. For the purposes of *Lovelace*, the *Indian Act* is presumed to be constitutional, but it is from the *Indian Act* that the real problems arise.

This decision may presage difficulties for equality rights litigation in the future, given the many overlapping areas of jurisdiction between federal and provincial levels of government. In *Egan*,³² the Court found that Canada could not rely upon provincial legislation to cure discrimination in a federal law. Now, in *Lovelace*, the Court has held that Ontario does not discriminate if it bases its categories of exclusion and inclusion on federal legislation that may itself be discriminatory. At first glance, this approach may be the most sensible way in which to structure constitutional discourse in a federal state: any attack on a law must be made directly, and not on a collateral basis. If the discrimination arises by reason of the *Indian Act*, then that Act must be put in issue, and Canada should be called upon to defend it. However, it is possible that (hypothetically) there could be discrimination in the *Indian Act* that could be saved under section 1, whereas the discriminatory impact of extending the application of the *Indian Act* to a provincial program could not be so saved. In a federal state, there must be some integration of legal concepts if policy and programs are to be harmonized and work together. It seems, for the moment at any rate, that where a section 15 challenge is made in an area of joint jurisdiction and action, the wisest course to take would be to challenge the legislative structure at both levels of government to avoid having a discriminatory

³² *Egan v. Canada*, *supra*, note 15.

basis for one jurisdiction's laws used as a basis to justify another jurisdiction's laws.

V. LITTLE SISTERS BOOK AND ART EMPORIUM V. CANADA
(MINISTER OF JUSTICE)³³

1. Summary of the Decision

Little Sisters Book and Art Emporium ("Little Sisters") is a bookstore in Vancouver catering to the lesbian and gay communities. It is not a "XXX Bookstore" carrying predominately pornographic materials, but it does carry a range of materials about sex and sexuality including erotica aimed at lesbians and gay men. Little Sisters alleged that it had been discriminated against by Canada Customs officials going back to 1984, by outright prohibitions on the importation of legal materials and extensive delays and costs associated with confiscations and reviews of legal materials that Little Sisters sought to import for sale in its store.

The *Customs Act* and the schedules under the *Customs Tariff* legislation authorize Customs officials to intercept materials imported into Canada, and to reject their importation if those materials are found to be obscene within the meaning of that term under section 163 of the *Criminal Code*.³⁴ Little Sisters claimed that this legislation contravened its rights to free speech, and discriminated on the basis of sexual orientation. Little Sisters also claimed that the conduct of Customs officials pursuant to the impugned legislation contravened these same rights.

Little Sisters placed a rich factual record before the trial court, establishing systematic differential treatment by Customs officials over a period of several years. The evidence established that :

- (1) materials imported by Little Sisters were detained for lengthy periods, and in some cases ruled obscene by Customs officials when those same materials were freely imported by "mainstream" bookstores, and in some cases were available in local public libraries;
- (2) Customs officials had little training and inadequate resources to make determinations of "obscenity," and frequently did so on the basis of superficial reviews of the materials before them;

³³ [2000] 2 S.C.R. 1120 (*per* McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Major, Bastarache and Binnie JJ., and *per* Iacobucci, Arbour and LeBel JJ., dissenting in part).

³⁴ *Customs Tariff*, S.C. 1987, c. 49, Sch. VII, Code 9956(a); *Customs Tariff*, S.C. 1997, c. 36, s. 166, Sch., Tariff item 9899.00.00.; *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), ss. 2, 71, 99, 152(3), 164; *Criminal Code*, R.S.C. 1985, c. C-46, s. 163(8).

- (3) standards applied by Customs officials included a proscription against depictions of anal intercourse despite court rulings and opinions from the Department of Justice that depictions of anal intercourse are not obscene in and of themselves;
- (4) the administrative structure put in place for the exercise of Customs' jurisdiction to prevent importation of "obscene" materials was cumbersome, slow, impenetrable, and involved a reverse onus clause imposed on the importer once an initial determination of obscenity had been made by Customs officials; and
- (5) the treatment suffered by Little Sisters over the years was specifically targeted against it, and there was no basis for this targeting other than an apprehension by Customs officials that erotica aimed at lesbians and gay men was more suspect than other forms of erotica. Little Sisters had been subjected to more intense scrutiny than adult bookstores catering to a heterosexual clientele.

The majority of the Court found that the impugned legislative scheme is a *prima facie* violation of the right to free speech, and thus must be justified by the state under section 1 of the Charter. The same justifications for laws prohibiting obscenity, which were upheld in *Butler*,³⁵ were available to justify prohibitions on the importation of obscene materials into Canada. However, the actions of Customs officials pursuant to the legislation were not justifiable: the officials must apply the community standards harm test in accordance with *Butler* to determine whether materials are obscene. On the facts of this case, Customs officials had applied the standard erroneously, and in the process had infringed Little Sisters' freedom of speech and right to be free from discrimination. The impugned legislation did contain a reverse onus provision that was constitutionally impermissible, but aside from that provision, the legislation itself was found to be constitutional. The appropriate remedy in this case must respond to the unconstitutional conduct by officials.

Given the time that had elapsed since the trial commenced, and the changes Canada has made since that time in the way in which it administers the legislation, it was not appropriate for the Court to do more than uphold the declaration by the trial judge that rights and freedoms had been infringed in the past. Any future problems in the application of the legislation as regards Little Sisters could be the subject of further proceedings, based on the reasoning in the decision.

³⁵ *R. v. Butler*, [1992] 1 S.C.R. 452.

2. Comments

(a) Discriminatory Standards of Obscenity

There are serious problems with the *Butler* decision, and those problems colour the decision in *Little Sisters*. Little Sisters argued that the principles in *Butler* focus on community standards and harm done as a consequence of the publication and consumption of certain kinds of graphic materials. The Court was unwilling to entertain a collateral attack on the constitutionality of the obscenity provisions of the *Criminal Code*: “No constitutional question was stated regarding the validity or constitutional limits of s. 163 of the *Criminal Code*. The absence of notice of such a constitutional question precludes the wide-ranging reconsideration of *Butler* sought by the appellants and some of the intervenors ...”³⁶ Thus, the decision in *Little Sisters* proceeds on the presumption that *Butler* is good law. Within that framework, the appellants asked the Court to find that there should be differential application of *Butler* to gay and lesbian erotica.

Butler is premised on a “harms”-based analysis. The “harms” in question conflate sex, violence and objectification of the body, usually to the detriment of women.³⁷ Assuming (without agreeing) that there is such harm in some heterosexual pornography, the same cannot usually be said to hold true for same-sex erotica, which does not reinforce delimited sexual stereotypes and power imbalances. On a philosophical level, it could be argued that same-sex pornography actually undermines typical gender stereotypes, rather than reinforcing them. As a matter of common sense, depictions of sexual activity between members of the same sex do not implicate power imbalances between genders. That does not mean, however, that same-sex erotica/pornography is free from power imbalances or degradation.

It is also arguable that pornography has an educative function in the lesbian and gay communities in a way that heterosexual pornography does not. Popular culture includes pervasive images of sexualized behaviour between heterosexuals — from the clinical forms of sex education available in schools to depictions of sex on television, in the movies and in literature. Until quite recently, there have been few comparable sources of information for lesbians and gay men about how to be sexual with each other, and pornography has served the function of illustrating a range of same-sex sexual practices. It is at least arguable, then, that pornography in the lesbian and gay communities is an important source of information for lesbians and gay men. It may perform an

³⁶ *Little Sisters*, *supra*, note 33, at 1158.

³⁷ We avoid any discussion of exploitation of children, which is one of the “harms” addressed by *Butler*. An analysis of this topic may be appropriate when considering the decision in *R. v. Sharpe*, [2001] 1 S.C.R. 45, a decision rendered in early 2001, and thus not considered here.

even more important task by normalizing the conduct it depicts. Photographs and videos are artefacts, and the fact that they exist and are permitted to exist bestows upon them a legitimacy and reality that may normalize same-sex sexuality itself, an important side effect for lesbians and gay men struggling with the minority status of their sexual desires. However, the argument can be turned on its head: the more significant the images, the greater the need to draw some boundaries between acceptable depictions and those that promote degradation. Put another way, if lesbians and gay men are learning how to be sexual from pornography, it is perhaps all the more important that they are not learning that degradation is part of healthy sexual conduct.

Theoretical discussions about sex and the body are interesting, and we agree that there are important cultural differences between heterosexual and same-sex sexual norms. However, of what practical use is the discussion for the Supreme Court of Canada? The Court was asked to find that different standards should apply to same-sex pornography. Justice Binnie held that taking this argument to its logical conclusion “would mean that gay and lesbian publications would not be subject to the ordinary border regime applicable to other forms of expression.”³⁸ In addition, these publications would not be subject to the same criminal prohibitions found in the *Criminal Code*.

In essence, these arguments cannot form the basis for a section 15 claim without addressing the general law of obscenity and the test in *Butler*. The test applied under *Butler* is whether the depictions are “degrading or dehumanizing” and fails the community standards tolerance of harm test.³⁹ This is a minefield for lesbian and gay erotica. As was argued to the Court by the appellants, the record of the Customs officials is evidence, in and of itself, that principles of general application as to what constitutes “degrading or dehumanizing” depictions, and what the community perceives to be harmful to society, is ineluctably shaped by a heterosexual view of the world. On no view of the test would consensual vaginal intercourse between consenting partners, by itself, violate the *Butler* standard. On the view of Customs personnel for over a decade, consensual anal intercourse between consenting same-sex partners was obscene.

It is simply unacceptable, however, that a group of persons should be exempted from the application of a provision of the *Criminal Code*. We say this not as a statement of legal principle, but of political reality. The lesbian and gay community cannot take itself out of the criminal laws of general application simply on the basis that its communities are different, and that majoritarian standards of sexual propriety are discriminatory. However, the majoritarian standards of sexual propriety *are* inherently discriminatory: what a heterosexual

³⁸ *Little Sisters*, *supra*, note 33, at 1154-55.

³⁹ *Butler*, *supra*, note 35, at 478.

man would find degrading, if done to him, may well be the height of desire for a gay man. As has been stated repeatedly by the Supreme Court,⁴⁰ gay people have suffered a long history of disadvantage. Although discrimination in the law has been reduced by legislation and court decisions over the past two decades, and the pace of that reduction has accelerated in recent years as a consequence of authoritative decisions from the Supreme Court of Canada, it would be naïve to suggest that social discrimination has been eliminated. It is here that the community standards harms-based test becomes problematic, and where Justice Binnie's reasons fail to address the underlying difficulties with state supervision of lesbian and gay erotica under the rubric of *Butler*. The problem is best captured in the following passage:

The test is therefore not only concerned with harm, but harm that rises to the level of being *incompatible* with the proper functioning of Canadian society. The Canadian Civil Liberties Association (CCLA) argues that “for gays and lesbians erotica and other material with sexual content is not harmful and is in fact a key element of the quest for self-fulfilment” (factum, at para. 14). So described, the CCLA has defined the material safely outside the *Butler* paradigm. *Butler* placed harmful expression — not sexual expression — at the margin of s. 2(b).⁴¹

It should be obvious why such a result is troubling for lesbians and gay men. The general standard is a heterosexual one. It is by definition majoritarian.

Justice Binnie found that “gay and lesbian culture as such does not constitute a general exemption from the *Butler* test.”⁴² Put another way, “the attempt to carve out of *Butler* a special exception for gay and lesbian erotica should be rejected.”⁴³ How could the Court find otherwise? And yet, the Court's refusal to carve out a special exception leaves unanswered the justified critique of the *Butler* principles as they are applied to lesbian and gay erotica: how can “community standards” for sexually explicit material be applied fairly to lesbian and gay erotica when the standards are heterosexual and are applied by heterosexuals? The answer is more rhetorical riposte than analytical conclusion. If there is a variable standard to be applied, then whose standard is it to be?

[Little Sisters] operate[s] a bookstore in a very public place open to anyone who happens by, including potentially outraged individuals of the local community who might wish to have the bookstore closed down altogether. If “special standards” are to apply, whose “special standard” is it to be? There is some safety in numbers, and

⁴⁰ In, for example, *Egan v. Canada*, [1995] 2 S.C.R. 513; *Vriend v. Alberta*, *supra*, note 23; and *M. v. H.*, [1999] 2 S.C.R. 3.

⁴¹ *Little Sisters*, *supra*, note 33, at 1162.

⁴² *Id.*, at 1164.

⁴³ *Id.*, at 1166-67.

a national constituency that is made up of many different minorities is a guarantee of tolerance for minority expression.⁴⁴

This argument provides cold comfort for those negatively affected by the current obscenity standard, but it is an inevitable by-product of the reasoning in *Butler*. If the test for harm is based on the community's sense of what is harmful, and is not to collapse into hopelessly subjective considerations, then there must be a fictional "national constituency" where the trier of fact looks to find a measuring stick that is something other than the trier's own personal sense of what is not to be tolerated. Justice Binnie reviewed the recent applications of the *Butler* standard and concluded that "[w]e have no evidence that the courts are not able to apply the *Butler* test, and the reported decisions seem to confirm that the identification of harm is a well understood requirement ..."⁴⁵

(b) *Remedies*

Little Sisters traced the violation of its rights to the impugned Customs legislation. Justice Binnie found that one provision of the law is unconstitutional: the reverse onus obligation on an importer to show that materials are not obscene once the state has decided that they are. This finding does not alter the general administrative structure of the applicable customs law, which provides a general instruction to Customs officials to prohibit the importation of materials that are "obscene" within the meaning of the *Criminal Code*. It is left to the state to establish the means by which this general requirement is to be carried out.

Little Sisters argued that "a regulatory structure that is open to the level of maladministration described in the trial judgment is unconstitutionally underprotective of [its] constitutional rights and should be struck down in its entirety."⁴⁶ On this point, the majority and the dissent part company. Justice Binnie found there is nothing wrong with the legislation itself, and that the fault lies in its implementation by the servants of the Crown: "A failure at the implementation level, which clearly existed here, can be addressed at the implementation level."⁴⁷

... an importer's rights may be protected in fact by statute, regulation, ministerial direction or even departmental practice. What is crucial, at the end of the day, is

⁴⁴ *Id.*, at 1161.

⁴⁵ *Id.*, at 1163.

⁴⁶ *Id.*, at 1167-68.

⁴⁷ *Id.*, at 1172.

that *Charter* rights are in fact respected. The modalities for achieving that objective will vary with the context. There is nothing unconstitutional about the option selected by Parliament in this case.⁴⁸

This analysis is persuasive: many protections afforded under the criminal law, for example, are not spelled out in legislation, but instead are entrusted to law enforcement agencies to enforce. Charter requirements should inform the exercise of public power, whether that exercise derives directly from legislation itself, or as a result of action taken pursuant to the law. These general propositions do not seem controversial.

What is missing from the analysis, though, is a practical assessment of the prospect of constitutional enforcement of obscenity laws by agents of Canada Customs. It is possible, of course, for Canada Customs to expend the resources necessary to train its personnel properly for the task, but it should be remembered that the primary focus of the work of Customs is not to enforce the *Criminal Code*. Customs is engaged in regulating trade across the border, levying and collecting taxes associated with imports, and prohibiting the import of items that are not permitted in the country. “Obscene” materials are only a small subset of items that may be imported illegally.

The record was replete with references to the inadequacy of the job done by Customs in respect to potentially “obscene” materials. Printed matter was not read thoroughly, but rather was scanned to determine if various salacious references were found with minimum frequency. Such a review could not possibly provide a basis for assessing the artistic merit of the reviewed work. Customs officials had minimal training. The task of reviewing materials for obscenity is an unpopular one in the Customs bureau, and most staff members do not stay in that position for very long.

The record did not disclose the proportion of reviewed materials that was destined for retail sale. The argument concerning institutional competence may well depend on such an analysis. If, as we suspect, the vast majority of intercepted materials are destined for retail businesses where they are offered for sale to the public, then it would seem to be folly to assign the task of review to Customs, rather than to local police, who are charged with enforcing the very same obscenity standards. If a retailer imports an obscene publication, it can be charged when the material is offered for sale to the public.

Justice Binnie adverted to the question of institutional competence throughout his reasons without putting that question squarely in issue: “The problem here is not with the legislators but with the failure of those responsible to exercise the powers that they possess, including, according to the trial judge,

⁴⁸ *Id.*, at 1196.

the failure of Customs to make available adequate resources to do the job effectively.”⁴⁹

Justice Iacobucci, writing in dissent, found that where legislation “lends itself to the repeated violations of *Charter* rights, as does the legislative scheme here, the legislation itself is partially responsible and must be remedied.”⁵⁰ The proper test is not whether the legislation is facially neutral and could be applied in a constitutionally sound manner. “Instead, the crucial consideration is that the legislation makes no reasonable effort to ensure that it will be applied constitutionally to expressive materials. It lacks an adequate process to ensure that s. 2(b) rights are fully considered and respected.”⁵¹

Justice Iacobucci’s conclusion — as a matter of practical common sense — simply must be correct: “The need for structural reform is reinforced by Customs’ long history of excessive, inappropriate censorship. ... These are not the kinds of problems that can be solved by simply directing Customs to behave themselves.”⁵² Justice Iacobucci provided detailed suggestions as to the sorts of institutional reform that could lead to proper safeguards when reviewing imported materials for obscenity. At the core of Justice Iacobucci’s reasoning is the underlying conclusion — driven by the factual record set out in the decision — that Customs, as currently organized, simply lacks the institutional competence and will to make determinations of obscenity in conformity with *Charter* guarantees. Although the decision in the case will not require legislative action by Parliament, Justice Iacobucci advocated that it do so nonetheless: “I hope that Parliament ... will address the problems identified in this appeal even without an order from this Court.”⁵³

To this extent, both Binnie and Iacobucci JJ. are correct. Justice Binnie concluded that the law itself is facially neutral, and that Customs can enforce the law in compliance with the *Charter*. Justice Iacobucci found that the record and the evidence of institutional limitations are such that although it may be possible for Customs to comply with the *Charter*, it is unrealistic to expect that it will do so without firm and direct guidance from Parliament. Both being correct, in our respectful view, Justice Iacobucci’s approach is the more pragmatic. It is to be hoped that Parliament heeds his call for reform, even though it is not compelled to do so by order of the Court.

On the face of the decision, it seems odd that the Court chose to comment on the practical application of *Butler* after already holding that it could not embark upon a consideration of the constitutional status of that decision. However, the

⁴⁹ *Id.*, at 1200.

⁵⁰ *Id.*, at 1226.

⁵¹ *Id.*, at 1229.

⁵² *Id.*, at 1257.

⁵³ *Id.*, at 1259.

comment is a proper response to the concerns raised by *Little Sisters*: an inappropriate application of *Butler* is a failure by Customs officials (as the Court concludes). An inherently discriminatory test for obscenity, arising from the logic and natural application of *Butler*, is a proper section 15 claim for discrimination on the basis of sexual orientation. Although the Court expressly declined to deal with the challenge to *Butler*, it effectively did so and found that *Butler*, properly interpreted and applied, would not lead to discriminatory results. It may be that the Court will be prepared to reconsider these points in a case where *Butler* is put squarely in issue, but the logic of the decision suggests that the Court is not favourably disposed to such a challenge. In our view, advocates for sexual minorities will have to return to the drawing board to devise an analysis that protects minority tastes within the structure of *Butler*, at least for the foreseeable future.

VI. CONCLUSION

While we do not find a unifying theme among these cases, the deference shown legislatures in these cases does support the view that the Court has moved away from the more “activist” days of the Dickson and even the Lamer Courts. The application of *Law* in *Granovsky* seems to lead towards a rather mechanical exercise in comparison that focuses more on the choices that the state faces in drawing its lines than upon the effect of those choices on disadvantaged persons. If *Law* continues to be applied in this fashion, we expect that equality rights cases will prove increasingly more difficult to win. Although the Court found for the claimants in *Boisbriand*, the question was one of interpretation of legislation, rather than its constitutionality. Effectively, the Court found that Quebec chose a standard consistent with the national standard. In *Lovelace*, the Court upheld Ontario’s program without placing emphasis on the effect the program has upon the appellants. The federal legislation that creates the distinctions relied upon by Ontario became part of the context of the case, rather than an integral aspect of the constitutional challenge itself. Finally, in *Little Sisters*, the Court showed great deference to Parliament in its choice of remedy.

We are critical of the “human dignity” test in *Law*. We see it as rhetorical rather than analytical, but we do agree that human dignity is the central interest protected by equality rights. A true assessment of the impact of a law on human dignity requires a close and careful consideration of the effect of the law on the claimant. Effective equality rights protection requires that there be effective remedies available once a violation of equality rights has been identified. One would expect that an analysis of these aspects of an equality rights claim would be at the forefront of any section 15 decision. We are uneasy that such was not

the case in *Lovelace* and *Little Sisters*, and we believe that the focus in *Granovsky* was misplaced. However, the Court has not rejected an effects-based equality rights analysis, and it remains to be seen how that analysis will be balanced against the need to accord the state sufficient latitude to develop and implement social policy.