



Ottawa, February 14, 2008

MEMORANDUM D9-1-1

In Brief

CANADA BORDER SERVICES AGENCY'S POLICY ON THE CLASSIFICATION OF OBSCENE MATERIAL

1. This memorandum has been revised to reflect both legislative and administrative amendments, including revisions to the obscenity indicators made in keeping with changes to the law and the ever-evolving community standard of tolerance.
2. This revision replaces Memorandum D9-1-1, *Canada Customs and Revenue Agency's Policy on the Classification of Obscene Material*, dated September 9, 2003.



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Ottawa, February 14, 2008

MEMORANDUM D9-1-1

CANADA BORDER SERVICES AGENCY'S POLICY ON THE CLASSIFICATION OF OBSCENE MATERIAL

This memorandum outlines and explains the interpretation of tariff item 9899.00.00, paragraph (a), of the Schedule to the *Customs Tariff*.

Legislation

The *Customs Tariff* provides that the importation into Canada of any goods enumerated, described or referred to in tariff item 9899.00.00 is prohibited.

Tariff item 9899.00.00 reads, in part:

Books, printed paper, drawings, paintings, prints, photographs or representations of any kind that

(a) are deemed to be obscene under subsection 163(8) of the *Criminal Code*; . . .

Subsection 163(8) of the *Criminal Code* reads:

For the purposes of this *Act*, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

GUIDELINES AND GENERAL INFORMATION

The Uniqueness of Obscenity Decisions in the Canada Border Services Agency's (CBSA) Mandate

1. In the course of administering the many laws of Parliament that regulate, control or prohibit the importation of goods into Canada, CBSA officials deal with a wide range of goods.
2. One category of goods (tariff item 9899.00.00) differs from all others however, and involves material that is suspected of constituting obscenity under subsection 163(8) of the *Criminal Code*. The *Customs Tariff* prohibits the importation of such material into Canada, including written, visual and audio materials.
3. Unlike many other goods with which CBSA officials routinely deal, such expressive materials have been found by the courts to be protected by the freedom of expression guarantee set out in subsection 2(b) of the *Canadian Charter of Rights and Freedoms*.

The Courts and the CBSA's Role in Prohibiting Obscenity

4. The courts have found that, by seeking to prohibit certain types of expressive material, the *Customs Tariff* infringes upon the constitutional right to freedom of expression. However, the courts also found that the infringement of subsection 2(b) of the Charter is justifiable under section 1, because the overriding objective of the legislation is the avoidance of harm to society and that is a sufficiently substantial concern to warrant a restriction on freedom of expression. As a result, the courts affirmed the CBSA's mandate to prevent obscene material from being imported into Canada.

5. Although the courts upheld the CBSA's mandate to prohibit the importation into Canada of obscene material, they found that the legislative provisions that allow CBSA officials to detain and/or prohibit obscene material **do not allow CBSA officials to unreasonably detain and prohibit material that is not obscene**. The courts have ruled that decisions by CBSA officials to unreasonably detain or prohibit material that is not obscene unjustifiably infringe upon importers' rights under the Charter.

6. Therefore, the handling of potentially obscene material and the decision-making process for classifying material as obscene under tariff item 9899.00.00 have different repercussions for the CBSA and for importers than do comparable decisions made in relation to other goods that do not involve Charter issues.

Universality of Application

7. In a decision rendered by the Supreme Court of Canada in December 2000 (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*), the Court affirmed that the legislation applies equally to heterosexual and homosexual material, and is indifferent to whether harm arises in the context of heterosexuality or homosexuality. The Court also affirmed that the legislation applies to both depictions and descriptions and includes written material such as books.

Service Standard

8. In *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, the Supreme Court of Canada directed that decisions concerning the classification of goods detained as suspected obscenity must be made in a timely manner. In response to the guidance given by the Court, the CBSA provides a 30-day service standard at both the determination and re-determination levels. This means that,

in general, goods suspected of being obscene must be classified within 30 days of the date of detention, and that the importer must be promptly notified of the decision. Where an importer makes a request for a re-determination of the classification pursuant to Section 60 of the *Customs Act*, the decision must also be made within 30 days of the receipt of the importer's request. If a determination or re-determination is not rendered within the 30-day period, those specific goods should be allowed importation. It should be noted that the size and complexity of the shipment might have an impact on meeting the service standard.

Burden of Proof

9. The courts have ruled that subsection 152(3) of the *Customs Act* is not to be construed and applied so as to place the onus on an importer to establish that goods are not obscene within the meaning of subsection 163(8) of the *Criminal Code*. The burden of proving obscenity rests on the Crown, in this case the CBSA, who is alleging it.

10. When dealing with magazines, or other such compilations, where the undue exploitation of sex is a dominant characteristic, but not necessarily **the** dominant characteristic, the courts have said that the Crown does not need to prove that an entire issue is obscene. The entire publication will be obscene if it contains obscene passages or pictures that cannot be redeemed by other non-obscene content contained therein (*R. v. Penthouse International Limited et al.* and *R. v. Metro News Limited*).

Determining Whether Goods are Obscene

11. Goods are deemed to be obscene under the *Criminal Code* if the materials exhibit, as a dominant characteristic, the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty, and violence.

12. The courts have found that some of the material that the CBSA deals with is quite complex and difficult to evaluate. Since attempts to provide exhaustive instances of obscenity have failed, the only practical alternative for the courts was to strive towards a more abstract definition of obscenity that is contextually sensitive. In order for material to qualify as "obscene," the exploitation of sex must not only be a dominant characteristic, but such exploitation must be "undue." In determining whether the exploitation of sex will be considered to be "undue," the courts have provided specific tests: the community standard of tolerance test and the internal necessities test or artistic merit defence (*Butler v. Her Majesty the Queen* and *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*).

13. These tests help to determine whether sexually explicit material, when viewed in the context of the entire work, would be tolerated by the community as a whole. For the purposes of the CBSA, the community to be considered is the whole of Canada.

14. CBSA officials are required to apply these tests in order to determine whether or not goods may be classified as obscenity under tariff item 9899.00.00.

The Community Standard of Tolerance Test

15. The community standard of tolerance test is the first test that officials need to apply in determining whether the exploitation of sex is "undue."

16. The exploitation of sex will almost always be "undue" when the sexually explicit sections of the material fail the "community standard of tolerance test."

17. This test is concerned not with what Canadians would not tolerate being exposed to themselves, but with what they would not tolerate other Canadians being exposed to. **This is not a test of whether given material may be morally offensive to some people, but rather whether public opinion would perceive the material to be harmful to society.**

18. According to the courts, material will generally fail the community standard of tolerance test if it portrays sex with violence, or if it portrays sex that is degrading or dehumanising **and** the risk of harm is substantial.

19. The material referred to in paragraph 18 would generally fail the community standard of tolerance test, not because it offends against morals, but because there is an appreciable risk of harm to society in the portrayal of such behaviour.

20. Harm in this context means that the material predisposes persons to act in an anti-social manner; in other words, in a manner which society recognizes as incompatible with its proper functioning.

21. The stronger the inference of harm, the lesser the likelihood of tolerance.

22. Explicit sex that is not violent is generally tolerated in Canadian society and will not qualify as the "undue exploitation of sex," unless it employs children in its production.

23. Explicit sex that is either degrading or dehumanising but which does not have a substantial risk of harm does not qualify as the "undue exploitation of sex."

Note: Each item must be judged on its own merit and in its entirety.

The Internal Necessities Test, Also Known as the Artistic Merit Defence

24. The last step in the analysis of whether the exploitation of sex is "undue" is the internal necessities test, or the artistic merit defence.

25. Material that, by itself, offends the community standard of tolerance will not be considered "undue" if the portrayal of sex is required for the serious treatment of a theme.

26. The need to apply the internal necessities test arises only if a work contains sexually explicit material that might, in another context, constitute the “undue exploitation of sex.”

27. The portrayal of sex must be viewed in context to determine whether the exploitation of sex is the main object of the work or whether the portrayal of sex is essential to a wider artistic, literary or other similar purpose.

28. In other words, the internal necessities test, or the artistic merit defence, assesses whether the exploitation of sex has a justifiable role in advancing the plot or theme and, in considering the work as a whole, has a legitimate role in the work itself.

29. Any doubt in this regard must be resolved in favour of the freedom of expression, which, in practical terms, means that doubt as to whether or not goods constitute obscenity requires the release of those goods.

Obscenity Indicators

30. The CBSA has set out classification indicators, to help CBSA officials in the identification of obscene materials. These indicators are intended to reflect the evolving national community standard of tolerance for obscene materials. They have been drafted following consultations with various government and non-government bodies across Canada who are involved in the evaluation of adult sex books, magazines and films. These indicators are set out in detail in Appendix B to this memorandum. It should be noted that the indicators are subject to change, as the CBSA strives to ensure that they continually reflect the current community standard of tolerance, as it relates to obscenity.

31. The obscenity indicators apply equally to personal and commercial shipments, as the material is evaluated on its own merit and not its intended distribution.

32. If suspect goods are found to contain material falling under the obscenity indicators, they then must be further examined to determine if the portrayal of sex is essential to a wider artistic, literary or other similar purpose.

33. Goods may only be deemed to be obscene for the purposes of tariff item 9899.00.00 if a dominant theme of the material is the undue exploitation of sex (as described in detail above), **and** where the portrayal of sex is **not** essential to a wider artistic, literary or other similar purpose.

34. Goods not classified as obscenity under tariff item 9899.00.00 include the following:

- (a) goods which counsel, procure or incite persons to commit criminal offenses, unless they are determined to be obscene;
- (b) goods which communicate in a rational and unsensational manner information about a sexual activity that is not unlawful;
- (c) sex aids and toys; and
- (d) advertisements that simply promote the sale of goods which may themselves be prohibited. However, advertisements containing explicit descriptions or depictions of acts considered obscene will be prohibited.

Note: For the purposes of tariff item 9899.00.00, goods that are made (manufactured, printed, purchased, etc.) in Canada and subsequently exported are considered to constitute an importation on their return to Canada.

APPENDIX A

ADVANCE REVIEWS AND IMPORTERS' RIGHTS

ADVANCE REVIEWS

1. Individuals or commercial importers who encounter difficulty in determining whether goods are in compliance with these obscenity guidelines may submit a sample of the goods, prior to importation, to the Prohibited Importations Unit (PIU), at Headquarters, for review. An official from the Unit will then provide an opinion regarding the admissibility of the goods into Canada. This service is designed to promote voluntary compliance with the legislation in cases where the classification of specific materials is not immediately clear. Importers can arrange for an advance review by contacting the PIU in Ottawa, at 613-954-7049. It should be noted that any sample goods submitted to the PIU for the purposes of an advance review will **not** be returned.

IMPORTERS' RIGHTS

When Suspected Goods are Detained – Notification

2. An importer, whose goods are suspected of being obscene according to the legislation, will be provided with a written notice of detention containing the following information: a brief description of the goods detained as suspected obscenity; the port of entry where the goods are detained; the date of detention; and a contact name and telephone number. This information will be provided in the top portion of the Form K27, *Notice of Detention/Determination*.
3. Once a full review of the goods has been conducted, generally within 30 days of the date of detention, the importer will be notified of the determination in writing (i.e. whether the goods are prohibited or released).
4. If the goods are found to be admissible, the importer will receive a written notice of determination containing a brief description of the goods and the date of determination. This information will be provided by way of Part B of the Form K27. The goods will then be released to the importer, subject to the payment of any applicable duties and/or taxes.
5. If the goods are prohibited as obscenity, the importer will receive a written notice of determination containing the following information: a brief description of the goods; the date of determination; the reasons for prohibition; and a list of options available to the importer, including instructions for appeal. This information will be provided by way of Part B of the Form K27.
6. If a shipment contains more than one prohibited title, the Form K27A, *Continuation Sheet*, will be used by CBSA officials to indicate to the importer the specific reasons for which each title was prohibited. A completed Form K27A will then accompany the completed Form K27.

When Goods Are Prohibited – Importers' Rights

7. When goods are deemed to be obscene, and are therefore prohibited, the importer may exercise any one of the following options, as set out on the reverse of the Form K27, *Notice of Detention/Determination*:
 - a) the decision may be appealed by writing to the Customs Disputes Section of the Prohibited Importations Unit, at the address provided on the Form K27, within 90 days of the date of the determination, referring to the title of the material, the applicable Form K27 control number, and any other applicable information;
 - b) the goods may be exported, under customs control and at the importer's expense and arrangement; or
 - c) the goods may be abandoned to the Crown, pursuant to section 36 of the *Customs Act*, in which case the material will be destroyed, pursuant to section 142.
8. If the importer fails to appeal or to provide instructions either to export or to abandon the goods within 90 days of the date of decision, the goods will be considered forfeit and will be destroyed.

APPENDIX B

OBSCENITY INDICATORS

1. When dealing with material where a dominant theme is the portrayal of sex, the indicators set out below apply.

Note: For the purposes of determining obscenity under tariff item 9899.00.00, the term “sex” includes depictions and/or descriptions (including illustrations and animation) of any oral, anal or vaginal penetration, masturbation and/or the full or partial exposure of genitalia, pubic regions, anal regions and/or female breasts, for the purposes of sexual arousal.

2. Goods containing one or more of the following indicators may be found to be obscene and prohibited entry into Canada, if it is established that the portrayal of sex is not essential to a wider artistic, literary or other similar purpose.

Depictions and/or descriptions of:

- (a) Sex with degradation or dehumanisation, if the risk of harm is substantial, e.g.
 - (i) actual or implied urination, defecation or vomit onto or into another person, and/or the ingestion of someone else’s urine, feces or vomit, with a sexual purpose, excluding consensual urine onto another person;
 - (ii) ridicule and/or humiliation
- (b) Sex with pain
- (c) Sexual assault
- (d) Sex with violence
- (e) The taking of a human life for the purpose of sexual arousal
- (f) Incest
- (g) Bestiality
- (h) Necrophilia

Note: Depictions and descriptions of sexual activities involving children and/or juveniles (persons under the age of 18) will generally constitute child pornography.

Interpretation

The following represents the CBSA’s interpretation of several terms contained within its obscenity indicators. These definitions are intended solely for the purposes of classifying material as obscenity under tariff item 9899.00.00. **Please note that these terms apply only in situations where sexual context has been established.**

“Bestiality” is defined as a sexual act between a human being and a live animal, including implied or real acts.

“Humiliation” is defined as the practice of lowering an individual’s self-respect or dignity for the purpose of sexual arousal.

“Incest” is defined as a sexual act between parent/child, siblings or grandparent/grandchild, whether related by blood, adoption or fostering.

“Necrophilia” is defined as a sexual act between a live person and a dead person or a dead animal.

“Pain” is defined as clear discomfort expressed through visual, verbal or descriptive cues. Pain may be inferred where a reasonable person would conclude that the activity would result in pain. This may include, but is not limited to, situations involving striking, gagging, choking, cutting, burning, branding or similar activities resulting in areas of the body becoming red or bruised, welts being raised or the skin being broken. For the purposes of this indicator, the portrayal of pain must be for sexual arousal.

“Ridicule” is defined as the practice of mocking, making fun of or belittling an individual for the purpose of sexual arousal.

“Sexual assault” is defined as an activity where an individual is forced or induced to participate in a sexual act without their consent. This includes situations where sexual activity is induced:

- through the threat of bodily harm or death, which may include the use of a weapon (real or imitation)
- through the abuse of a position of power, trust or authority

This also includes situations where a person is clearly unable to consent to their participation in a sexual act.

“Taking of a human life for the purpose of sexual arousal” is defined as the portrayal of the killing of a human being with the intent to sexually arouse. This would not include instances where the portrayal of death occurs by accident, negligence, due to health reasons or for any other reason outside of sexual arousal, even if the death is portrayed in a sexual context.

“Violence” is defined as physical acts of aggression, which appear to cause, or are likely to cause, bodily harm. These may include, but are not limited to, situations involving beating, kicking, extreme limb twisting or asphyxiation. For the purpose of this indicator, the portrayal of violence must be for sexual arousal.

Note: While these indicators and definitions seek to capture the vast majority of obscene material that may fall under the provisions of tariff item 9899.00.00, they are not exhaustive and they are subject to change as the CBSA strives to continually reflect the evolving community standard of tolerance.

APPENDIX C**FORMS**

Paper copies of the forms K27, *Notice of Detention/Determination*, and K27A, *Continuation Sheet*, are no longer available. The current versions of these two forms are now available to all CBSA officials electronically, exclusively through the CBSA's intranet under "Forms and Templates."

REFERENCES

<p>ISSUING OFFICE –</p> <p>Prohibited Importations Unit Border and Compliance Programs Directorate Admissibility Branch</p>	<p>HEADQUARTERS FILE –</p> <p>5905-7-1</p>
<p>LEGISLATIVE REFERENCES –</p> <p><i>Canadian Charter of Rights and Freedoms</i>, section 1 and subsection 2(b) <i>Criminal Code</i>, subsection 163(8) <i>Customs Act</i>, sections 36, 58, 60 and 142 and subsection 152(3) <i>Customs Tariff</i>, tariff item 9899.00.00 of the Schedule</p>	<p>OTHER REFERENCES –</p> <p>N/A</p>
<p>SUPERSEDED MEMORANDA “D” –</p> <p>D9-1-1, September 9, 2003</p>	

Services provided by the Canada Border Services Agency are available in both official languages.

