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Prof. Bahdi Quoted on SCC decision in the *Little Sisters* case



Poor litigants dealt legal blow

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No fund award for tiny store up against Canada Customs, Supreme Court rules

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Supporters of a small Vancouver bookstore caught in an expensive legal fight with Canada Customs say governments face new pressure to improve access to the justice system now that the country's highest court has confirmed litigants stand little chance of having wealthier opponents fund their cases.

In a 7-2 ruling yesterday, the Supreme Court of Canada refused to order the federal government to pay legal costs in advance to Little Sisters Book and Art Emporium, a gay and lesbian bookstore challenging Customs' enforcement practices and its seizure of four books.

Drained by 12 years of litigation with Ottawa, the bookstore, which has never made more than \$25,000 a year, hoped to benefit from a 2003 Supreme Court ruling that handed judges the power to award advance funding to parties who can't afford to go to court – as long as their case involves important public issues.

The Supreme Court majority said yesterday these awards should only be made in rare cases, as a "last resort."

The legal issues raised in Little Sisters' latest battle do not justify having its expenses paid from the public purse, said Justices Michel Bastarache, Louis LeBel, Marie Deschamps, Rosalie Abella and Marshall Rothstein.

At its heart, the case is about a fight over Customs' seizure of allegedly obscene homosexual erotica and the bookstore's constitutional challenge to enforcement practices is not essential to its claim, they said.

The ruling dealt a blow not only to Little Sisters, but to public interest groups who hoped the case would open new avenues for Canadians with important legal claims but who risk being ruined financially by the costs of litigation, particularly if their opponents have deep pockets.

"Access to justice is becoming an important public policy issue," said Reem Bahdi, a law professor at the University of Windsor who specializes in the subject. "The issues raised in this case will not soon go away."

"The reality is that a good number of Canadians are prevented from accessing the courts because of the costs associated with litigation. Schemes like legal aid and the current costs rules create some access, but are clearly insufficient."

In a blistering dissent, Justices Ian Binnie and Morris Fish said it takes an "un-businesslike litigant" like Little Sisters to "elbow aside purely financial considerations" to fight for its civil liberties.

Binnie, who wrote the minority judgment, said he disagreed with the majority about what is at stake.

Far from being a fight about four books, the government is being accused of defying a 2000 Supreme Court ruling that found Customs was targeting Little Sisters as an importer of obscene material, he

said.

"The government is in effect being accused of fighting a war of attrition. Today four books, tomorrow another four books. Litigation follows litigation until the rational businessperson is forced to throw in the towel."

"This is how civil liberties can be eroded, little by little, yielded in small increments that case by case are not worth the cost of the fight."

Bahdi said the significance of their dissenting judgment, which would have awarded Little Sisters advance legal costs capped at \$300,000, should not be lightly brushed aside. "Dissents often define the future," she said.

Although Little Sisters lost its claim, the case could also have "positive" implications for efforts to improve access to justice because the court "appeared to go out of its way to recognize that the high costs of litigation have meant that many individuals in Canada are denied justice," Bahdi said.

In their judgment, Bastarache and LeBel said "financial constraints put meritorious claims at risk every day." While governments have devised some solutions, the court suggested they're inadequate.

"Legal aid programs remain underfunded and overwhelmed. Self-representation in courts is a growing phenomenon." Advance costs awards, however, were never intended to serve as a "parallel" legal aid system, they said.

Robert Wright, counsel to the Sierra Legal Defence Fund, which intervened in the case, said it's now up to society "to respond to the challenge."