Québécois last fall. Recall how clearly Bouchard stated his sovereignist commitment in the French and English debates. These statements did not prevent him from winning with the support of many federalist voters. These two campaigns, and perhaps the 1992 referendum campaign as well, suggest that sovereignists can announce, and even promote, their option at little cost, at least until the final decision comes in sight. The next Quebec election should provide a further instance of the same pattern: a battle between sovereignists and federalists over plain economic and good government issues.

But where do such strategies leave sovereignists in the event of a referendum? At this time, in Quebec, separation is obviously harder to sell than sovereignty, a more positive concept that also suggests that ties with Canada would be maintained. Two interpretations of the new sovereignist discourse seem possible. Either both Lucien Bouchard and Jacques Parizeau were careless and made a mistake, or they took a risk and acted strategically. Given the consistency with which Quebec sovereignists have avoided, and even denounced, the separatist term in the past, the second interpretation appears more convincing. Bouchard and Parizeau may have had something like the following reasoning: first, in the short run, there are low electoral costs associated with the promotion of sovereignty, even in separatist terms; second, in a referendum on sovereignty, separatism will come out in the meantime, it may be best to seize the bull by the horns and de-dramatize the idea of separation. This gamble carries some risks, but may well be rewarded. Because sovereignty and separation describe essentially the same thing, differences in perception could disappear once sovereignists start using the terms indifferently.

As debates surrounding political correctness suggest, naming and renaming is central to contemporary politics. In Quebec, support for sovereignty is broadly diffused, and associated mostly with perceptions of identity. With such symbolic foundations, sovereignists may be wise to try to take the lead and define the linguistic battleground while doing so entails little costs.

THE ECONOMICS OF ELECTIONS

Meanwhile, Daniel Johnson and the Quebec Liberals are working hard on their conversion from fiscal conservatives to a version of Jean Chrétien’s Liberals, for whom jobs have become a priority. Last week, Quebec’s new finance minister, André Bourbeau, explained that the budget deficit, which a year ago Daniel Johnson himself deemed intolerable, could now be tolerated. “Savage deficit reductions,” explained the minister, would “handicap the economic recovery.”

While economic studies give no support for the idea of stimulating the economy after a recovery has started, electoral studies indicate that good economic conditions and, in particular, improvements in the unemployment rate help a government get re-elected. The author of the pioneering work on the question, however, added a cautionary advice. In his book The Political Control of the Economy, Edward Tufte concluded, with Nixon in mind, I believe, that “sleazier efforts at manipulating economic policy for short run advantage cannot survive public scrutiny.” Five days after his “savage deficit reductions” declaration, and in the wake of outraged editorials that only stopped short of calling for his resignation, Bourbeau explained that he did not mean to say, after all, that the deficit was tolerable.

Alain Noël is an Assistant Professor, Département de science politique, Université de Montréal.
States. This time the issue was "free trade in ideas," not softwood lumber.

The war quickly transcended "A Current Affair" to reach the upper echelons of the American press. Commenting on this "bizarre episode," the New York Times pontificated that "[t]wo centuries of strife over freedom of the press have taught that gags ... are instruments of tyranny." Meanwhile, the Washington Post denounced the border incidents as "international censorship."

Canadians who were divided on the ban remained recalcitrant in the face of such lectures on the virtues of a free press. The self-righteous tone of American editorials and media "feeding frenzy" offended Canadian sensibilities. Many asked, what self-respecting news organization would violate a court order? The answer was obvious: all those whose object was to "sell more newspapers [or] glue more ghouls to their television sets." Profit, not principle, was truly at stake.

Though the furor has subsided, it remains puzzling how an incident that was widely regarded as a "bad idea" to give judges anywhere the power to decide which cases and proceedings can be publicly discussed.

In the United States the press are regarded as the "watchdogs" of democracy. That is, in part, because, under the American Constitution, "[t]he people, not the government, possess the absolute sovereignty": the people are the governors and not the governed. Restrictions on the press interfere with the people's access to information and debate that is needed to inform the vital exercise of self-government. A free press ensures that "the censorial power is in the people over the Government, and not in the Government over the people."

The people's sovereignty is also protected by the constitutionalization of limited government, a separation of powers, and checks and balances. Thus it follows from "we the people" that the institutions of government are artifices exercising delegated authority, which, accordingly, is circumscribed by the Constitution. Prospective abuses of authority that might undermine the system of checks and balances are further minimized, if not pre-empted, by a separation of powers and elaborate system of checks and balances.

Precisely because it stands between government and the people, the press forms part of this theory of democracy. As an agency that is external to and independent from the state, the press is in a unique position to check the actions of government and provoke the robust and uninhibited debate that is the lifeblood of a democracy. For the people to exercise their prerogative as the governors, the press must be free. And it is powerful because the First Amendment has protected its status as watchdog of democracy.

From "A Current Affair" to the Washington Post, the decision to break the Homolka publication ban was not just about profit but also, about a fundamental principle of democratic accountability.

Since the Charter's adoption in 1982, the Canadian press has aspired to a similar role. In court it has been met instead by an epidemic of publication bans and other restrictions.

"NOT A POLITICAL DECISION"

As cars, trucks and computer networks carried contraband reports of the Homolka proceedings into Canada, the premier of Ontario implored: "[The ban] is not a political decision. This is not a decision of government, but of an Ontario judge."

Such a claim might not have been challenged before the Charter, when Canada's judges were viewed as "neutral arbiters." Since 1982, the Charter has unquestionably "politicized" the judiciary and justice system. It has opened judicial decisions to public scrutiny and debate through adjudication on controversial issues like abortion and hate propaganda. It has spurred demands that judicial appointments, which are mainly a matter of executive prerogative, be made open and democratized. It has brought the press into court to protect its rights of access and publication.

In some cases it has been acknowledged that the justice system is "the public['s] business." Recently, disciplinary proceedings against a provincial court judge, which resulted in a recommendation of removal from office, were televised. On at least two occasions, the Supreme Court of Canada has permitted its proceedings to be broadcast. Yet as the Homolka and a variety of other cases demonstrate, publication bans are issued in Canada with remarkable ease.

Once again, a comparison may be instructive. Under the U.S. Con-
stitution, the judiciary is one of the
coequal branches of government. It
is explicitly part of the system of
democratic government and, as such,
is subject to public scrutiny in a
variety of ways: through confirma-
tion hearings, camera access to court-
rooms, and the presumption against
publication bans, to name just a few.

In Canada, meanwhile, the press
has run up against a judiciary that is
reluctant to relinquish its protected
status as neutral arbiter to the de-
mands of public accountability.

JUSTICE, DEMOCRACY,
AND THE PRESS

Though the court order in Karla
Homolka’s case is pending in the
Ontario Court of Appeal, it is doubt-
ful that the appeal will succeed. It is
far from self-evident that the Cana-
dian press should enjoy the same
status as its watchdog counterparts
in the United States. At the same
time, it is worrying that the justice
system is so unwilling to see its
processes as part of democratic gov-
ernance in Canada.

Jamie Cameron is Director of York
University’s Centre for Public Law
and Public Policy and is an
Associate Professor at Osgoode
Hall Law School, York University.
Legal Report is a regular feature
of Canada Watch.

PORN AGAIN:
OBSCENITY
LEGISLATION AND
FREEDOM OF
EXPRESSION
AFTER BUTLER

by Bruce Ryder

The definition of obscenity has long
bedevilled Canadian courts. Only
recently has the shifting and uncer-
tain line between legal and illegal
sexual expression been determined
under the guarantee of freedom of
expression in section 2(b) of the
Charter of Rights. The 1992 Su-
preme Court of Canada decision has
attempted to clarify matters in R. v.
Butler, yet a number of problem
areas continue to exist in the heated
battles over freedom of sexual ex-
pression. One is the censorship pow-
ers of Canada Customs, and another
is the recently enacted federal child
and youth pornography law.

THE BUTLER DECISION

The Charter was largely respon-
sible for the reformulation of the
definition of obscenity in Butler:
there, the Supreme Court involved
a feminist morality that it saw as more
consonant with Charter values than
the previously dominant conserva-
tive morality. The purpose of ob-
cenity laws, the court said, is to
prevent harm to women and chil-
dren. On this view, sexually explicit
materials coupled with violence or
cruelty, or that use children in their
production, are presumed to be harm-
ful and thus obscene. In addition,
depictions of sex that are degrading
or dehumanizing will be found to be
obscene if they pose a substantial
risk of harm to society. Limited in
this way, the court found the ob-
cenity provision of the Criminal
Code to be a justifiable limitation on
freedom of expression.

The Butler decision has thus trans-
formed the legal language of the
debate regarding freedom of sexual
expression in Canada. No longer is
the suppression of “dirt for dirt’s
sake” constitutionally permissible.
The question in most contested cases,
rather, will be whether the materials
are “degrading or dehumanizing” in
a manner that poses a substantial
risk of harm to society. Some judges
have deprived Butler of any
transformative impact by holding
that “dirt for dirt’s sake” is per se
degrading, dehumanizing and harm-
ful. This view has been expressed,
for example, in several cases in-
volved materials depicting gay and
lesbian sexuality. However, the
dominant view sees Butler as a ma-
jor shift: depictions of consensual
adult sexuality are not criminal in
the absence of degradation and proof
of harm.

In the long run, the Butler ruling
is likely to alter the Canadian land-
scape in much the same manner as
the First Amendment jurisprudence
has since the U.S. Supreme Court’s
decision in Roth (1957). Books,
magazines, films, and videos de-
voted exclusively to the explicit de-
ception of non-violent, consensual
adult sexuality are likely to become
far more prevalent. If the Supreme
Court’s 1964 decision in Brodie
(“Lady Chatterley’s Lover”) sig-
nalled the triumph of freedom of
literary sexual expression in Cana-
dian obscenity law, the Butler de-
cision will likely be seen as ushering
in an era of free expression for non-
vio!ent adult sexual materials that
are devoid of artistic pretences. How-
ever, imported materials subject to
Canada Customs do not enjoy this
freedom.

Continued, see “Porn Again”
on page 98.