stitution, the judiciary is one of the co-equal 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 confirmation hearings, camera access to courtrooms, 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 demands 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 doubtful that the appeal will succeed. It is far from self-evident that the Canadian 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 governance in Canada.

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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 uncertain 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 Supreme 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 expression. One is the censorship powers of Canada Customs, and another is the recently enacted federal child and youth pornography law.

The Butler Decision

The Charter was largely responsible 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 conservative morality. The purpose of obscenity laws, the court said, is to prevent harm to women and children. On this view, sexually explicit materials coupled with violence or cruelty, or that use children in their production, are presumed to be harmful 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 obscenity provision of the *Criminal Code* to be a justifiable limitation on freedom of expression.

The *Butler* decision has thus transformed 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 harmful. This view has been expressed, for example, in several cases involving materials depicting gay and lesbian sexuality. However, the dominant view sees *Butler* as a major 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 landscape 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 devoted exclusively to the explicit depiction 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") signalled the triumph of freedom of literary sexual expression in Canadian obscenity law, the *Butler* decision will likely be seen as ushering in an era of free expression for non-violent adult sexual materials that are devoid of artistic pretences. However, imported materials subject to Canada Customs do not enjoy this freedom.

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"Porn Again," continued from page 97.

Standing on Guard: Canada Customs and Imported Obscenity

As is the case with the United States Customs Service, Canada Customs has the legislative authority to detain and destroy imported materials deemed to be obscene. Shipments of material arriving at the border or via international mail are routinely screened by Customs officials who have a multitude of responsibilities and little training or expertise regarding obscenity law.

Customs officials are guided in the exercise of their powers by an internal memorandum that is seriously at odds with the current Canadian law of obscenity that it purports to describe. Memorandum D9-1-1 makes no mention of a defence of serious artistic, literary, or educational merit. The memorandum also declares, contrary to *Butler*, that depictions of anal penetration are per se obscene.

Placing censorship powers in the hands of inexpert, poorly trained, and misadvised Customs officials across the country is obviously a recipe for national embarrassment. Indeed, Customs has made some ludicrous decisions over the years, including recent detentions of books on subjects such as child sexual abuse and feminist vegetarianism, works by scholars such as bell hooks and Andrea Dworkin and by acclaimed writers of fiction such as Marguerite Duras and David Leavitt. Nor has the exercise of Customs' powers been randomly despotic — bookstores specializing in feminist, lesbian, or gay materials have suffered a pattern of detentions that has threatened their financial viability.

If material is detained as obscene by Customs, an importer can appeal to a "Tariff and Values Administrator" and, if unsuccessful, can appeal further to the deputy minister. The importer must convince Customs' authorities in written submissions that the material is not obscene. In most cases, the deputy minister's decision will not be released until roughly six months has passed from the time of the initial detention. Only then may an importer seek a judicial determination of the obscenity issue.

Canada Customs' process of prior restraint of obscene materials would not pass constitutional muster in the United States. In *37 Photographs* (1971), the U.S. Supreme Court upheld the power of Customs officials to detain obscene material pursuant to section 1305 of the *Tariff Act*, so long as court proceedings were commenced within 14 days of the seizure and a judicial decision released within 60 days. The procedures in the Canadian *Customs Act* fall far short of this standard. The two levels of internal review that must be pursued before having access to the courts means that wrongfully detained material may not be released for anywhere from six months to several years.

Customs' practices and procedures are in dire need of reform. Officials could be better trained; Memorandum D9-1-1 needs to be redrafted; detentions could be made only after review by experts on art, literature, and obscenity; and judicial review could be made available more promptly. Until changes are made, Customs' powers appear vulnerable to a constitutional challenge. Such a challenge will be made in the long-delayed case initiated by a Vancouver bookstore, Little Sisters, now set to be heard this fall.

Child and Youth Pornography

Last summer, in the final days of the Mulroney government, Parliament hastily passed Bill C-128, adding to the Criminal Code a prohibition on the creation, sale, or possession of child or youth pornography. This law goes well beyond the already existing prohibition on sexually explicit material that uses children in its production. It captures any sexualized depiction of the genital area of a person under the age of 18, and any depiction of a person who is or appears to be under the age of 18 engaged in explicit sexual activity. These prohibitions apply to all visual material whether or not children are employed in their production. The law is thus not limited to the more conventional concern with protecting children and youth from exploitation in the production of images; it seems to reflect the sweeping view that all depictions of child or youth sexuality are harmful to society.

A number of charges have already been laid under the new law. The most controversial has been the extraordinary prosecution of Toronto artist Eli Langer. Langer and the director of the Mercer Union gallery were charged last December after police viewed an exhibit of Langer's paintings. In February, after an outcry from the artistic community, the Crown decided to prosecute the art in a forfeiture proceeding and drop the personal charges against the artist and the gallery owner.

There is little doubt that Langer's paintings fall within the broad net cast by Bill C-128; they depict children engaged in explicit sexual activity with other children and with adults. But Langer did not use models, so the question of exploitation does not arise. And it would be difficult to conclude that serious artistic exploration of themes of childhood sexuality, including child sexual abuse, causes harm. For these reasons, Bill C-128 may be found to be fatally overbroad

when challenged on constitutional grounds. Even if it is constitutionally valid, the police had no business in the Mercer Union. When the Cincinnati Contemporary Arts Centre was charged in the Mapplethorpe obscenity case, jurors found that the prosecution had failed to establish the third element of the test for obscenity set down by the U.S. Supreme Court in *Miller* (1973) — namely, the absence of serious artistic merit. Similarly, material with artistic merit is expressly exempted from the terms of Bill C-128. Like Mapplethorpe's photographs, Langer's paintings should never have been charged. It will be up to the trial court to defend artistic freedom from the zeal of local prosecutors.

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CW UPDATE

The Month in Review

by Michael Rutherford

House Resumes Sitting

The House of Commons resumed sitting on January 17 and MPs elected **Gilbert Parent**, a little-known Liberal MP from Ontario, as the new speaker of the house.

Air Canada, PWA End Dispute

Air Canada announced on January 26 that it was abandoning attempts to block a proposed deal between **PWA Corp.** and **AMR Corp.** of Fort Worth, Tex. AMR has agreed to buy one-third of PWA's subsidiary, **Canadian Airlines International Ltd.**

Bhaduria Quits Liberal Caucus

Member of Parliament **Jag Bhaduria** resigned from the Liberal caucus on January 27. Bhaduria's decision came after questions were raised regarding the law degree claimed on his resumé. Bhaduria had already apologized in the House of Commons for writing a threatening letter to Toronto school board officials.

Liberals Approve Cruise Tests

Defence Minister **David Collenette** announced that the federal government would allow a new set of tests of U.S. Air Force cruise missiles in the Canadian north. The decision on February 3 divided the Liberal cabinet and reversed the anti-testing position held by the Liberals in opposition.

Alberta NDP Chooses New Leader

Delegates to a provincial NDP convention in Calgary chose **Ross Harvey** as their new leader on February 6. Harvey takes over a party that lost all 16 of its seats in the Alberta election last June.

Ottawa Cuts Tobacco Taxes

In a bid to stem the contraband tobacco trade, the federal government announced tax cuts and stepped-up enforcement measures on February 8. The Quebec government immediately followed suit with tax cuts of its own. The Ontario government reluctantly reversed its opposition to tax cuts on February 21, lowering retail prices to Quebec levels.

B.C. Report Urges Logging Cuts

The Commission on Resources and Development released a three-volume report on February 9 that recommends a 6 percent cut in logging on Vancouver Island. The report, requested by the British Columbia NDP government, aims to achieve a balance between logging interests and environmental concerns.

Death of Rodriguez Sparks Debate

Sue Rodriguez, the woman who fought unsuccessfully for the right of the terminally ill to end their lives, died as the result of a doctor-assisted suicide. With New Democrat MP **Svend Robinson** at her side, Rodriguez died at her home in Victoria on February 12. Prime Minister **Jean Chrétien** promised a free vote in the House of Commons on the possible legalization of doctor-assisted suicides.

Continued, see "The Month in Review" on page 100.