

IN THE DISTRICT COURT OF ONTARIO

B E T W E E N:

THE QUEEN

Respondent

- and -

DAVID BIERK, SUSAN DITTA
and IAN MCLACHLAN

Appellants

STATEMENT OF FACT AND LAW OF THE APPELLANTS

PART I

1. This is an appeal by the Defendants, David Bierk, Susan Ditta and Ian McLachlan from their conviction by His Honour Judge Dodds on the 25th day of March, 1983 upon a charge of exhibiting or causing to be exhibited a film that had not been approved by the Board of Censors, contrary to Section 39 of the Theatres Act, R.S.O. 1980 c. 459 as amended. The said Appeal has been referred to this Honourable Court by Order of His Honour Judge Murdoch of the 24th day of August, 1983 and by Order of The Supreme Court of Ontario of the 1st day of February, 1984.

Appeal Book Tab 1, Notice of Appeal

Appeal Book Tab 2, Order of His Honour Judge Murdoch of the 24th day of August, 1983.

PART II - FACTS

2. The Defendants were charged by summons that on the 13th of March, 1981 they exhibited or caused to be exhibited a film "A Message from our Sponsor" that had not been approved by the Board of Censors contrary to Section 39 of the Theatres Act, R.S.O. 1970 c. 39 as amended. Following the case of the Crown, upon a motion for a directed verdict, charges were dismissed against the Defendant Razutis.

3. The Defendant Bierk is a member of the Board of Directors of Art Space Inc., a corporation that runs an art gallery in the City of Peterborough where the film was shown. The name of the art gallery is Artspace. The Defendant Ditta is the executive director of Canadian Images, a non-profit unincorporated organization that runs a film festival annually in the City of Peterborough. The Defendant McLachlan is a Professor of English and Cultural Studies at Trent University and is a member of the provisional board of directors of Canadian Images. The Defendant Razutis was the film maker of "A Message from our Sponsor".

4. The film "A Message from our Sponsor" was initially submitted to the Board of Censors in August of 1980. As of August 21, 1980 there were five members of the Board of Censors plus a Chairman.

Evidence, Mary Brown, Volume 3, p. 8

5. "Message" was first screened by two members of the Censor Board, namely Douglas Walker and Wendy Enright on August 21, 1980. At that time, these two members requested three eliminations namely, scenes of fellatio, rear copulation and masturbation. Their decision was approved by the other members of the Board who did not view the film itself. At no time did the full Board assemble to consider the decision of the two members who saw the film.

Evidence, Douglas Walker, Volume 2, pp. 34, 35

Evidence, Mary Brown, Volume 3, p. 8

Appeal Book, Tab 6, Exhibit 20, Board Decision, August 21, 1980.

6. The witness Walker acknowledged that he and Enright purported to exercise the jurisdiction of the Board of Censors under Sections 3(a), (b), (c), (f) or (g) of the Theatres Act, R.S.O. 1970 c. 459 as amended but certainly not under Section 3(c) and (d) of the Act, the latter sections dealing with the censoring of advertising material.

Evidence, Douglas Walker, Volume 2, pp. 53, 54

7. Following August of 1980, the new Chairman of the Board of Censors, Mary Brown, tried to formalize procedures and establish clear guidelines and rules so that the public would know the procedures available to them and the guidelines by which films were censored. This was not achieved. Even after August of 1980 only a quorum of the Board would make a decision to censor film.

Evidence, Mary Brown, Volume 3, p. 12

8. Prior to August 1980, there were internal guidelines which were agreed upon by the members of the Board of Censors. These guidelines stated in part:

"While it is necessary that each film be viewed on its own merit and guidelines do not necessarily exclude any material, the following would normally be considered to contravene community standards and are scenes for which eliminations usually would be requested ..."

Evidence, Mary Brown, Volume 3, p., 14

Appeal Book Tab 5, Exhibit 18 Minutes of Meeting of the Board of Censors, July 15, 1980

These guidelines were not approved or passed by the legislature.

9. Following August 1980, standards for classification and censorship of films were published. However, these standards did

not advise the public as to the procedure by which films would be censored. In particular, it did not advise the public as to the ad hoc appeal procedures which had been instituted by the new Chairman of the Board of Censors. Procedures were established and recorded by the Board of Censors for the classification and censorship of the film, but these procedures were not published.

Evidence, Mary Brown, Volume 3, pp. 19, 20

Appeal Book Tab 30, Exhibit 19, Standards for Classification and/or Censorship of Films

Appeal Book Tab 31, Exhibit 21, Film Classification and Censorship

10. Following August 1980, the Board of Censors continued in its practice of having only two members of the full Board screen any films submitted for review. The members of the Board screening the film would complete a report form. This report form would be discussed by a quorum of the Board, not the full Board itself.

Evidence, Mary Brown, Volume 3, pp. 77-85

Appeal Book Tab 31, Exhibit 21, Film Classification and Censorship

11. "Message" was again screened by two other members of the Board of Censors, namely James Walker and Kapal Saghu on

December 30, 1980. Although the witness Walker testified that the same three eliminations were requested by those members, in fact, they requested four eliminations namely, view of erect penis, view of fellatio, view of rear penetration and view of man masturbating. The decision of these two members of the Board was approved by the other members of the Board who did not view the film.

Evidence, Douglas Walker, Volume 2, p. 37

Evidence, Mary Brown, Volume 3, pp. 22-24

Appeal Book Tab 11, Exhibit 22 Board of Censors
Summary Report dated December 30, 1980

12. As of December 30, 1980 there were five members of the Board of Censors plus the Chairman.

Evidence, Mary Brown, Volume 3, pp. 82, 83

13. Canadian Images is an annual film festival. It is a non-profit organization which has incurred operating deficits for the three years that it has operated. With respect to the 1981 festival, over 11,000 minutes (190 hours) of film of various types were shown. One segment of the Canadian Images Festival for 1981 was the experimental film program.

Evidence, Ormond Mitchell, Volume I, p. 65,
pp. 58-60

Appeal Book Tab 9, Exhibit 6, Financial Statements, Canadian Images, Year Ending September 30, 1979

Appeal Book Tab 10, Exhibit 7, Financial Statements, Canadian Images, Year Ending September 30, 1980

Appeal Book Tab 25, Exhibit 8, Financial Statements, Canadian Images, Seven Months Ending April 30, 1981

14. Al Razutis, a premiere film maker, was one of the experimental film makers selected for the experimental film segment of the Canadian Images Festival. "Message" was selected for the experimental film program by a committee composed of Anna Gronau, Bruce Elder and Martha McIntosh.

Evidence, Anna Gronau, Volume 2, p. 120

15. In order to obtain admission to the Canadian Images Festival, a person was required to purchase a festival pass for \$3.00. The pass was available from the Canadian Images office, locations at Trent University and at other locations in the City of Peterborough.

Evidence, Ormond Mitchell, Volume I, p. 27

16. Prior to this time Brown had established procedures with the Board of Censors for the showing of films to the public even when those films contravened the guidelines of the Board, that is, when those films contravened the community standards perceived by the Board. Brown testified that these special permits were akin to special occasion, one time liquor licensing permits and took account of the special venue in which the film would be showed. However, at no time did the witness Brown advise Ditta that special procedures were to be followed in order to obtain a special permit and, in particular, at no time did Brown advise Ditta that considerations as to venue which would lead to the granting of a special permit would only be taken into account by the Board when there was an appeal from an initial decision of the Board.

Evidence, Mary Brown, Volume 4, pp. 17-20, p. 23

17. "Message" was screened at the Canadian Images Film Festival 1981 on Friday, March 13, 1981 at an artist's gallery called Artspace in the City of Peterborough. Artspace is an avant-garde art gallery. It is not a traditional theatre and has no fixed seating. As part of the experimental film program, the film was shown to approximately 70 to 80 people who were

academics, students, artists and persons associated with Artspace. Persons were assigned to the doors to check passes for people entering the gallery and persons under the age of 18 years of age were not admitted.

Evidence, Ormond Mitchell, Volume 1, p. 49,
p. 52

Evidence, Brant Frayne, Volume 1, p. 89,
p. 91, pp. 111, 112

Evidence, Christopher MacGee, Volume 2,
pp. 15, 16, 23, 27

18. It is clear that prior to March 13, 1981, the full Board had never seen "Message". On April 8, 1981, the film was again submitted for approval to the Board of Censors. It was seen by the witness Walker and five other Board members at this time. At that time the Board members required the three eliminations that had been required by Douglas and Enright in August of 1980.

Evidence, Douglas Walker, Volume 2, pp. 38-43,
p. 56

Evidence, Mary Brown, Volume 2, pp. 85-88

Appeal Book Tab 23, Exhibit 23, Appeal Board of
Censors - Summary Report, April 8, 1981 "A
Message from our Sponsor"

19. It was the view of the witness Walker that it is the function of the Board of Censors to release film for commercial distribution, that is, when there is paid admission.

Evidence, Douglas Walker, Volume 2, p. 45

20. The witness Walker also testified that the Board's guidelines prohibit the showing of any film which contravenes community standards or which is contrary to the Criminal Code. However, he acknowledged that even if "Message" was intended for private screening, the Board would require the three eliminations hereinbefore referred to and would give the film a restricted classification.

Evidence, Douglas Walker, Volume 2, p. 33,
p. 60, p. 58, p. 89, p. 77

21. The witness Brown, however, acknowledged that the jurisdiction of the Board is limited by Section 1(c) of the Act, that is, to the censoring of films exhibited to the public.

Evidence, Mary Brown, Volume 3, p. 3

22. Brown testified that the Board developed an ad hoc procedure of issuing "special occasion permits" where films are to

be screened by way of limited exhibition, that is, where there is a special community which will see the film or where there is a special venue. In these cases, the Board is more flexible with its guidelines and standards.

Evidence, Mary Brown, Volume 3, p. 39

23. There is nothing in the published guidelines of the Board that advises the public as to the precise manner in which an application is to be made for a special permit. Furthermore, the Board has established an ad hoc internal appeal procedure when films are censored. It is not until the appeal stage that the limited exhibition or special venue aspects are considered when a film is submitted for artistic exhibition. It is only in this context that the Board will give a special permit.

Evidence, Mary Brown, Volume 4, p. 23, p. 34

Appeal Book Tab 28, Exhibit 21, Letter from Canada Council dated June 21, 1982

Appeal Book Tab 34, Exhibit 25, Brochure, pamphlet of Censor Board

24. Even the witness Brown acknowledged that the distinction between a public and private showing of a film was a difficult distinction to make.

Evidence, Mary Brown, Volume 3, pp. 56, 57

25. This is particularly important when one considers the position adopted by the Board with respect to the film "Numero Deux" by Jean-Luc Godard which was screened at the film festival of the Festival of Festivals at Toronto on September 12, 1980. It contains scenes of explicit sexual activity similar to those in "Message". This festival was widely advertised in the City of Toronto and beyond. To gain entry to the screening one could purchase a pass from the Festival's offices or from the BASS outlets for \$25.00 or one alternatively could purchase a festival pass for \$90.00. The Board of Censors was consulted about the screening of the film and through its Chairman, Mary Brown, advised that in the circumstances, the screening of the film was a private screening and that the Board had no jurisdiction over it. The film was screened to some 400 persons at the Bloor Cinema in Toronto.

Evidence, Brant Frayne, Volume 1, p. 103

Evidence, Mary Brown, Volume 3, pp. 54, 55,
Volume 4, p. 97

Evidence, Anne McKenzie, Volume 4, p. 103,
p. 105, p. 106, p. 107

26. With respect to "Message", the film in total lasts approximately nine minutes. The three eliminations originally

requested by the Board in August of 1980 are of approximately 25 seconds in duration. The film itself uses a number of techniques. Firstly, it intersperses commercial advertisements with found footage from pornographic movies. With respect to the found footage from pornographic movies, the images are altered through a process of solarization or filtering which applies a tint or colour to the film.

Evidence, Ormond Mitchell, Volume 1, pp. 63,
64

Evidence, Professor Peter Harcourt, Volume 4,
pp. 56-59

Appeal Book Tab 36, Exhibit 5, Film Reel "A
Message from our Sponsor"

27. By decision dated the 25th of March 1981, the Board of Censors permitted the showing of a film by Michael Snow called "Rameau's Nephew" at the Art Gallery of Ontario. The film contains scenes of explicit sexual activity which are at least as equally explicit as the scenes of sexual activity in "Message". "Rameau's Nephew" was screened under the so-called authority of a "special permit" issued by the Board of Censors at the Art Gallery of Ontario and The Funnel Theatre in Toronto.

Evidence, Lynn King, Volume 1, p. 18

Evidence, Mary Brown, Volume 3, pp. 45, 46

Appeal Book Tab 22, Exhibit 10, Summary Report, March 25, 1981, "Rameau's Nephew"

28. With respect to "Rameau's Nephew", the Board, while acknowledging that the film contravened its guidelines, recommended "that the guidelines be set aside" and allowed the film to be shown at the Art Gallery of Ontario. The witness Walker was of the view that this was not a commercial distribution of the film notwithstanding that anyone could gain access to the screening and that admission was paid to gain access to the Gallery.

Evidence, Douglas Walker, Volume 2, pp. 63-68

Evidence, Mary Brown, Volume 3, pp. 45, 46

Appeal Book Tab 22, Exhibit 10 Summary Report, March 25, 1981, "Rameau's Nephew"

29. To view "Rameau's Nephew" at The Funnel Theatre, one gained access by purchasing a ticket or by purchasing a membership. Although the Board of Censors had initially refused to permit the film to be shown at The Funnel Theatre, it subsequently allowed it to be shown after the decision was made to permit the showing of the film at the Art Gallery of Ontario.

Evidence, Anna Gronau, Volume 2, p. 122

30. The film "Not a Love Story" contains scenes of explicit sexual activity which are at least as equally explicit as the scenes of sexual activity in "Message". "Love Story" has been screened under the so-called authority of a "special permit" issued by the Board of Censors at the following places:

- (a) Ryerson Polytechnical Institute (audience 100 persons)
- (b) Ontario Institute for Studies in Education (audience 300 to 400 persons)
- (c) National Film Board
- (d) Canadian Images 1982 Festival
- (e) St. Lawrence Centre
- (f) National Film Theatre at Kingston

Evidence, Lynn King, Volume 1, pp. 15, 16

Evidence, Brant Frayne, Volume 1, p. 98

Evidence, Douglas Walker, Volume 2, pp. 69-71

31. On all of the occasions that "Love Story" was shown by "special permit", the Board permitted it to be shown to the public even though the film contravened the guidelines of the Board.

Evidence, Mary Brown, Volume 2, p. 67

32. Professor Peter Harcourt, an eminently qualified professor of film studies at Carleton University, was called to give evidence and was qualified as an expert to give an appraisal of "Message" and "Love Story". Professor Harcourt testified as follows:

- (a) The Canadian Images Film Festival attracts a particular type of audience of professors, film makers and artists to see film that would not be seen elsewhere.
- (b) Canadian Images does not have a commercial aspect associated with the showing of its films as do other film festivals such as the Greerson Festival Niagara-on-the-Lake and the Festival of Festivals in Toronto.
- (c) The Canadian Images Festival is regarded by the artistic community to have a greater academic and artistic focus than other film festivals.

- (d) With respect to "Message", it is a critique of hidden obscenity in television advertising. The moral thrust of the film is to bring to the attention of the viewer the subliminal message in the advertisement without moralizing.
- (e) The process of solarization or colouring emphasizes the pun that the film intends to make. In this respect the purpose of the film maker is not to represent the body as itself but rather to portray an idea. It is essential that the proposed elimination remain in the film.
- (f) Razutis is considered to be an extraordinary film maker and in his films tries to show how popular images debase human values.
- (g) Comparing "Message" to "Love Story", Professor Harcourt testified that "Love Story" moralizes about the point that it tries to make, namely, that pornography is undesirable.
- (h) However, "Love Story" leads the viewer through hell to the point of despair. The film is to be admired but it

lacks an analysis that allows the viewer to understand what permits pornography to continue.

Evidence, Professor Peter Harcourt, Volume 4,
pp. 56-59

33. "Love Story" has an approximate viewing time of 72 minutes. It has explicit scenes of sexual activity contained in it including nude dancers, sexual intercourse, oral sex, fellatio, masturbation and portrayal of scenes of violence and sex. It was considered by the witness Professor Harcourt to be much more explicit than "Message".

Evidence, Professor Peter Harcourt, Volume 4,
pp. 56-59

Appeal Book Tab 37, Exhibit 24, Cassettes of
"Not a Love Story"

34. The learned Trial Judge found:

- (a) that The Charter of Rights and Freedoms ("the Charter") applied to these proceedings notwithstanding that the event giving rise to the charge occurred prior to the proclamation of the Charter;

- (b) that the Theatres Act did not offend the provisions of freedom of speech in the Charter.

Appeal Book, Tab 4, Reasons for Decision of His Honour Judge Dodds, pp. 13 and 19.

PART III - ISSUES TO BE RAISED

35. It is respectfully submitted that the Theatres Act contravenes the provisions of the Charter. Section 2 of the Charter provides:

"2. Everyone has the following fundamental freedoms:

- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communications."

36. Section 1 of the Charter provides:

"1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.:

37. It is respectfully submitted that the provisions of the Charter cast a burden upon the party infringing such right or freedom to demonstrably justify the reasonableness of such infringement on clear and cogent grounds by adducing appropriate evidence. No such evidence was adduced before his Honor Judge Dodds and in fact the evidence of the witness Professor Harcourt supports the proposition that the infringement of the freedom was unreasonable.

The Queen v. Southam Inc. (1980) 41 O.R. 2d
113 at 124-125

The Queen v. The Federal Republic of Germany
and Rauca (1983) 4 C.R.R. 42 (O.C.A.) at 58

Re Skapinker and the Law Society of Upper
Canada (1983) 40 O.R. 2d 481 at 487-488

Quebec Protestant School Boards v. The
Attorney General for Quebec (1982) 3
C.R.R. 114 at 137

38. It is respectfully submitted that the limits upon freedom of expression imposed by the Censor Board are not prescribed by law and accordingly are contrary to the provision of the Charter. The Charter requires reasonable limits that are prescribed by law and it is not sufficient to authorize the Board to censor or prohibit the exhibition of any film of which it disapproves. That kind of authority is not legal for it depends upon the discretion of an administrative tribunal.

Ontario Film and Video Appreciation Society
v. Ontario Board of Censors (1984), 45 O.R.
80 (C.A.); affg. (1983), 41 O.R. 583, at 592-594
(Div. Ct.)

39. The Theatres Act is unconstitutional because it infringes upon the Federal jurisdiction over criminal law.

40. Section 39 of the Theatres Act provides that no person shall exhibit or cause to be exhibited in Ontario any film that has not been approved by the Board. Subsection (c) of Section 1 of the Theatres Act provides:

"(c) 'exhibit' when used in respect of film or moving pictures, means to show film for viewing for direct or indirect gain or for viewing by the public and exhibition has a corresponding meaning".

41. The Ontario Theatres Act provides no standards by which film is to be censored. The Board has developed standards which conform to a test by which performances are deemed to be indecent under the provisions of the Criminal Code, namely, does the film unduly exploit sex or violence. The Board has by its actions assumed an authority which is not within the competence of the legislature of Ontario. Although the legislation on its face

does not speak of censoring indecent performances, it is clear on the evidence of the witnesses Brown and Walker that the legislation is being applied and administered in an unconstitutional fashion in that the Board purports to prohibit and define what constitutes an indecent or improper performance when the Province is not constitutionally competent to confer that power upon it. In this case the evidence is that the Board applies the standards of the Criminal Code when it discharges its duties under the Theatres Act. It prohibits the showing of film where there is a violation of community standards as exemplified by an undue exploitation of sex and violence.

Evidence, Douglas Walker, Vol. 2, pp. 58-61

Evidence, Mary Brown, Vol. 3, pp. 22-24

Evidence, Mary Brown, Vol. 4, pp. 17-20 and p.23

42. It is respectfully submitted that censorship legislation when administered and employed in this fashion is indistinguishable from the provisions of the Criminal Code which prohibit the public exhibition of an obscene performance. Similar legislation in the Province of Nova Scotia was struck down by the Supreme Court of Canada when the regulations passed pursuant to

the legislation in that Province purported to enable a censor board to define what constitutes an indecent or improper performance.

Nova Scotia Board of Censors vs. McNeil (1982)
2 S.C.R. 622 at p.698 and 699 per Ritchie

43. The Theatres Act is unconstitutional by reason of the fact that it infringes upon the civil liberty of freedom of speech. Freedom of speech has independent constitutional value which is inherent in the democratic society contemplated by the Constitution Act, 1867.

Reference Re Alberta Statutes, 1938 S.C.R. at p. 100 for Chief Justice Duff at p. 133 and Mr. Justice Cannon at pp. 145-146

Saumur v. The City of Quebec (1953) 2 S.C.R. 299, per Mr. Justice Rand at 329 and 330

Switzman v. Elbling and Attorney General of Quebec (1957) S.C.R. 285, per Mr. Justice Rand at 306

44. The ability of the legislature of the Province to restrict freedom of speech is limited to a valid exercise of its constitutional powers under Section 92 of the Constitution Act, 1867. That power is limited to the granting of a civil right.

to a person who has been injured by the improper exercise of freedom of speech by another in order to ensure to the former a means of redress.

Saumur v. The City of Quebec (1953) 2 S.C.R. 299, per Mr. Justice Rand at 329.

45. Freedom of speech and freedom of expression by the written word is the subject matter for legislative competence of the Federal Government only. These freedoms are enshrined in the Constitution Act, 1867 and are subject only to regulation by competent federal legislation. These freedoms enjoy a wide latitude, affected only by the Criminal Code which affords protection where the dominating characteristic is the undue exploitation of sex or violence.

46. It is respectfully submitted that the Theatres Act is unconstitutional by reason of the fact that it imposes censorship upon one type of art form namely, film and therefore denies to the defendants the right to equality before the law.

47. There is no complementary legislation in the Province of Ontario which provides for the censoring of other forms of media of the communication. The right to equality before the law is a fundamental freedom which existed in the Canadian Constitution by

reason of the fact that the Constitution Act, 1867 states that the Constitution of Canada be similar in principle to the Constitution of the United Kingdom. In the United Kingdom the rule of law is a fundamental principle of its Constitution. This means that there must be equality before the law or the equal subjection of all persons to the law. In Canada the concept of equality before the law has been interpreted to mean equality of administration of the law.

Dicey, Law of the Constitution, 9th ed, 1952
at p. 193 and pp. 202, 203

Regina v. Drybones (1969) 9 D.L.R. (3d) 473
(S.C.C.) per Mr. Justice Ritchie, p. 484

Attorney General of Canada v. Lavell (1973) 38
D.L.R. (3d) 481 (S.C.C.) per Mr. Justice
Ritchie, p. 495

Attorney General of Canada v. Canard (1975) 52
D.L.R. (3d) 548 (S.C.C.) per Mr. Justice
Beetz, p. 574


48. It is respectfully submitted that the Charter is applicable to the case at bar as it was in effect at the time the Defendants were arraigned.

R. v. Antoine (1983), 5 C.C.C. (3d) 97 (Ont.C.A.).

PART IV - ORDER REQUESTED

49. It is therefore respectfully submitted that the appeal be allowed and that the Defendants be acquitted of the charge.

All of which is respectfully submitted.



JOSEPH J. COLANGELO
of Counsel for the Appellants