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[HIGH COURT OF JUSTICE]
DIVISIONAL COURT

Re Ontario Film and Video Appreciation Society and Ontario Board of Censors

J. HOLLAND, BOLAND AND LINDEN JJ. — 25TH MARCH 1983.

Constitutional law — Charter of Rights — Freedom of expression — Censorship — Provincial legislation authorizing board to censor films — Whether limitation on freedom of expression — Theatres Act, R.S.O. 1980, c. 498, ss. 3(2)(a), (b), 35, 38 — Canadian Charter of Rights and Freedoms, s. 2(b).

Constitutional law — Charter of Rights — Limitation of rights and freedoms — Provincial legislation limiting freedom of expression by authorizing board to censor films — Neither legislation nor regulations providing standards for board — Whether limitation demonstrably justifiable in a free and democratic society — Whether limitation reasonable — Whether limitation prescribed by law — Theatres Act, R.S.O. 1980, c. 498, ss. 3(2)(a), (b), 35, 38 — Canadian Charter of Rights and Freedoms, ss. 1, 2(b).

Constitutional law — Charter of Rights — Limitation of rights and freedoms — Burden of proof — Once interference with fundamental freedom shown onus on government to justify it — Canadian Charter of Rights and Freedoms, s. 1.

Section 2(*b*) of the *Canadian Charter of Rights and Freedoms* guarantees to all Canadians "freedom of . . . expression, including freedom of the press and other media of communication". The fundamental freedoms guaranteed in the Charter are not absolute. The Charter recognizes that it is sometimes necessary to restrict freedom of expression to an extent to protect the interests of society. Consequently, it is possible for our government to circumscribe the freedoms enunciated in s. 2. They may do so by invoking the "notwithstanding" clause (s. 33). Alternatively, they may do so by observing the provisions of s. 1 of the Charter, which indicates that the rights and freedoms set out in it are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". In the event that legislation is enacted which limits any of these freedoms, the government bears the onus of demonstrating that the limit comes within the language of s. 1. The presumption of constitutional validity, which generally applies in cases of ordinary legislation, is not available once it is shown that there has been an interference with one of the fundamental freedoms.

Section 3(2)(*a*) and (*b*) of the *Theatres Act*, R.S.O. 1980, c. 498, give the board of censors the power "to censor any film" and "to approve, prohibit or regulate the exhibition of any film in Ontario". Section 35 of the Act provides that, before being exhibited in Ontario, all films must be submitted to the board for approval, and s. 38 provides that no person shall exhibit a film in Ontario that has not been approved by the board. Sections 3(2)(*a*) and (*b*), 35 and 38 impose a limitation on the freedom of expression guaranteed by s. 2(*b*) of the Charter. It is clear that all forms of expression, whether they be oral, written, pictorial, sculpture, music, dance or film, are equally protected by the Charter. The burden, therefore, falls upon the Attorney-General to satisfy the court on the balance of probabilities that the requirements of s. 1 of the Charter have been met, and the standard of persuasion to be applied by the court is a high one if the limitation in issue is to be upheld as valid. There are three requirements in s. 1: (a) any limit placed on the

guaranteed freedoms must be shown to be demonstrably justifiable in a free and democratic society; (b) it must be a reasonable limit; and (c) it must be a limit that is prescribed by law.

(a) *Demonstrably justifiable in a free and democratic society:* There must be a reasonable ground upon which a limitation can be based for it to be justifiable. The *Theatres Act* (and its predecessors back to 1911) primarily seeks, among other things, to prevent socially offensive films from being publicly shown in Ontario. Eight other provinces and many other free and democratic countries have similar legislation. Moreover, the federal criminal prohibition against obscenity is evidence that there is and has been sufficient concern in this country about this problem to enact legislation to combat it. Therefore, some prior censorship of film is demonstrably justifiable in a free and democratic society.

(b) *Reasonable limits:* The Crown argued that the limits are reasonable since they curtail only the freedom of those who wish to exhibit films to the public or for gain. Anyone may still make films, show them privately, rent them and sell them. Hence, it is said, freedom of expression is only curtailed to the extent that a person wishes to exhibit film to the public or for profit. However, the prime purpose of making films is to exhibit them to the public. If a film-maker cannot show his film to the public there is little point in making it. Moreover, the profit motive cannot be a valid reason to prevent a film-maker from showing his work, for one who shows film for profit can have no less freedom of expression than one who does so not for profit. The extent of freedom of expression cannot depend on that, for there is nothing wrong in making a profit from one's art or one's ideas. In addition freedom of expression extends to those who wish to express someone else's ideas or show someone else's films. It also extends to the listener and to the viewer, whose freedoms to receive communications is included in the guaranteed right. The argument that a prohibition can be reasonable if it applies only to film-makers, not to authors of books, publishers of papers, performers on the stage, TV producers, etc., cannot be accepted. The Charter, in allowing reasonable limits, does not countenance the total eradication of freedom of expression for those who use a particular form of expression such as film. If film is the medium in which an individual works, he could thereby be denied completely his only means of self-expression. To say that other media are available to him is no comfort at all. This argument involves the question of fair treatment between various forms of communication. Hence, although one particular form of expression may not be prevented completely, a legislative body, acting within its jurisdiction, may place limits only upon one type of expression and not on others provided that such limits meet the test set out in s. 1. Whether the standards issued by the board of censors would be considered to be reasonable limits need not be decided in view of the position taken by the court on the next issue. However, the courts will exercise considerable restraint in declaring legislative enactments, whether they be statutory or regulatory, to be unreasonable.

(c) *Prescribed by law:* Statute law, regulations and even common law limitations may be permitted. But the limit, to be acceptable, must have legal force. This is to ensure that it has been established democratically through the legislative process or judicially through the operation of precedent over the years. This requirement underscores the seriousness with which courts will view any interference with the fundamental freedoms. The Crown argued that the board's authority to curtail freedom of expression is prescribed by law in ss. 3, 35 and 38 of the *Theatres Act*. Although there has been a legislative grant of power to the board to censor and prohibit certain films, the reasonable limits placed upon freedom of expression of

film-makers have not been legislatively authorized. The Charter requires reasonable limits that are prescribed by law; it is not enough to authorize a board to censor or prohibit the exhibition of any film of which it disapproves. That kind of authority is not legal for it depends on the discretion of an administrative tribunal. However dedicated, competent and well-meaning the board may be, that kind of regulation cannot be considered as "law". Law cannot be vague, undefined and totally discretionary; it must be ascertainable and understandable. Any limits placed on freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law. There are no reasonable limits contained in the statute or the regulations. The standards and the pamphlets used by the Ontario Board of Censors do contain certain information from which a film-maker may obtain some indication of how his film will be judged. However, the board is not bound by these standards. They have no legislative or legal force of any kind. Hence, since they do not qualify as law, they cannot be employed so as to justify any limitation on expression pursuant to s. 1 of the Charter.

This does not mean that the censorship scheme set out in the *Theatres Act* is invalid. The classification scheme by itself does not offend the Charter. Nor are ss. 3, 35 and 38 invalid, but the problem is that standing alone they cannot be used to censor or prohibit the exhibition of films because they are so general, and because the detailed criteria employed in the process are not prescribed by law. These sections, in so far as they purport to prohibit or to allow censorship of films, may be said to be "of no force or effect", but they may be rendered operable by the passage of regulations pursuant to the legislative authority, or by the enactment of statutory amendments, imposing reasonable limits and standards.

Cases referred to

Nova Scotia Board of Censors et al. v. McNeil, [1978] 2 S.C.R. 662, 84 D.L.R. (3d) 1, 44 C.C.C. (2d) 316, 25 N.S.R. (2d) 128, 19 N.R. 570; *A.-G. Can. et al. v. Dupond et al.*, [1978] 2 S.C.R. 770, 84 D.L.R. (3d) 420, 19 N.R. 478 *sub nom. Dupond v. City of Montreal*, 5 M.P.L.R. 4; *A.-G. Can. et al. v. Law Society of British Columbia et al.; Jabour v. Law Society of British Columbia et al.* (1982), 137 D.L.R. (3d) 1, 66 C.P.R. (2d) 1, [1982] 5 W.W.R. 289, 37 B.C.L.R. 145, 19 B.L.R. 234, 43 N.R. 451; *Quebec Ass'n of Protestant School Boards et al. v. A.-G. Quebec et al. (No. 2)* (1982), 140 D.L.R. (3d) 33; *Federal Republic of Germany v. Rauca* (1982), 38 O.R. (2d) 705, 141 D.L.R. (3d) 412, 70 C.C.C. (2d) 416, 30 C.R. (3d) 97, 2 C.R.R. 131; affd 41 O.R. (2d) 225, 145 D.L.R. (3d) 638

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 1, 2, 33, 52
Constitution Act, 1982
Criminal Code
Statutory Powers Procedure Act, R.S.O. 1980, c. 484
Theatres Act, R.S.O. 1980, c. 498, ss. 1(c), 3, 35, 38, 63(1), paras. 9, 14

APPLICATION, *inter alia*, to quash a number of decisions of the Ontario Board of Censors.

Lynn King and *C. M. Campbell*, for applicant.
J. Polika, Q.C., for respondent.
Kenneth P. Swan and *Erika J. Abner*, for intervenor, Canadian Civil Liberties Association.

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BY THE COURT:—This application raises the question of the constitutional validity of the censorship (prior restraint) provisions of the *Theatres Act*, R.S.O. 1980, c. 498, and the standards and procedures of the Ontario Board of Censors pursuant to which the board has carried out its statutory mandate relating to films to be shown *to the public or for gain*. The application was precipitated by the enactment of the *Constitution Act, 1982*, and in particular by the guarantee of the right to freedom of expression as contained in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* which provides:

> 2. Everyone has the following fundamental freedoms:
>
> . . . . .
>
> (*b*) freedom of thought, belief, opinion and expression . . .

Any limitation upon this guaranteed freedom must meet the tests set out in s. 1 of the Charter, which reads as follows:

> 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.*

(Emphasis added.)

Section 52 provides for primacy in the following way:

> 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

We are asked to find that the censorship (prior restraint) provisions of the *Theatres Act* and/or the standards and procedures of the board do limit the freedom of expression so guaranteed and do not successfully meet the tests set out in s. 1 and accordingly must be constitutionally invalid.

Before setting out the particular sections of the *Theatres Act* which are impugned, we should record that the right of the province to enact such legislation is not in issue: see *Nova Scotia Board of Censors et al. v. McNeil*, [1978] 2 S.C.R. 662, 84 D.L.R. (3d) 1, 44 C.C.C. (2d) 316. Further, there has been no challenge to the system of film classification in operation in Ontario for some time, nor of the general regulation of theatres and projectionists and other matters dealt with in the statute. Nor has there been any assault upon the provisions of the *Criminal Code* of Canada which continue to proscribe forms of expression which unduly exploit sex and violence.

What is impugned in this proceeding is the power granted to the Ontario Board of Censors to "censor any film" (s. 3(2)(*a*)), to "prohibit . . . the exhibition of any film in Ontario" (s. 3(2)(*b*)), as well as the requirement that "all film" be "submitted to the Board for

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approval" (s. 35) and the prohibition against exhibiting "any film that has not been approved by the Board" (s. 38). It is vigorously contended by the applicants and the intervenors that this system of censorship is a prior restraint of expression, which cannot continue in this province in the face of the new Charter. The Crown has defended, no less strenuously, the constitutionality of the present censorship scheme.

In April of 1982, immediately following the proclamation of the new Charter, the applicant submitted four films to the board of censors, seeking approval for public showings. The "Art of Worldly Wisdom" and "Rameau's Nephew" were both approved for exhibition, but only at one time and at one place. "Not A Love Story" was rejected on the ground that the National Film Board, the owners of the film, had not released it for public exhibition by the applicant on a commercial basis. The fourth film, "Amerika", was rejected by the board of censors, which gave reasons having to do with the explicit portrayal of certain sexual activity. The members of this court have not viewed the films in question, because this was not felt to be necessary in disposing of the application. (There are several administrative law issues arising from the facts, which will be dealt with later.)

The provisions of the *Theatres Act* which are relevant include s. 3, which reads:

> 3(1) The board known as the Board of Censors is continued and shall consist of the Director who shall be chairman of the Board and the Assistant Director who shall be vice-chairman of the Board and such other persons as the Lieutenant Governor in Council may appoint.
>
> (2) The Board has power,
>
> (*a*) *to censor any film* and, when authorized by the person who submits film to the Board for approval, remove by cutting or otherwise from the film any portion thereof that it does not approve of for exhibition in Ontario;
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> (*b*) *subject to the regulations, to approve, prohibit or regulate the exhibition of any film in Ontario;*
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> (*c*) to censor any advertising matter in connection with any film or the exhibition thereof;
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> (*d*) subject to the regulations, to approve, prohibit or regulate advertising in Ontario in connection with any film or the exhibition thereof;
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> (*e*) to classify any film as adult entertainment;
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> (*f*) to classify any film as restricted entertainment; and
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> (*g*) to carry out its duties under this Act and the regulations.

[Emphasis added.] Section 35 stipulates as follows: