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"total and permanent loss of sight" when only four-fifths of the vision was lost, although for an engineer it was practically loss of vision, an entire loss of future vision. There, the contract required a certificate of "total and permanent blindness".

In 1980, in *Grant v. British Pacific Ins. Co.*, [1980] I.L.R. para. 1-1225, 36 N.S.R. (2d) 137, 64 A.P.R. 137, where the coverage was for "irrevocable loss of the entire sight" where the vision, with or without glasses, was reduced to counting fingers at 18 in., Glube J. held that the loss came within the definition.

In *Home Life Ins. Co. of New York v. Stewart* (1940), 114 F. 2d 516, the Colorado Circuit Court of Appeals, Tenth Circuit, was considering the words "irrevocable loss of sight" where the parties had stipulated that "sight" as used in the policy, for the purpose of that case, meant useful sight in the economic or industrial sense and where the plaintiff, without the use of artificial lens, had no such useful sight, but with the use of the lens had, for the purpose of that case, normal vision. The court noted that the policy did not insure against loss of any physical part of the eye, but against loss of sight and so was limited to loss of function. It held [at pp. 518-9] that the provision in that contract embraced:

> . . . the loss of sight by atrophy of the optic nerve or in some other manner which is irrecoverable, but it cannot be reasonably construed to cover a case where sight was lost but through surgery and the use of glasses normal vision is again enjoyed.

In the policy before me, the insurer did not use the word "irrecoverable" and did not say "loss of useful sight". When one considers the vision that is left without glasses, it would be a total *loss of sight*. The condition is permanent, but the coverage is for total and permanent *loss of use* of sight. When there is almost normal vision for life with the use of contact lens, it is my opinion that there has not been the total and permanent loss of use of sight within the meaning of the policy herein.

Action dismissed.

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

[41 O.R. (2d) 583]

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).

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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 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 or 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.

NOTE: Pursuant to leave granted May 30, 1983 (MacKinnon A.C.J.O., Blair and Thorson JJ.A.), an appeal and cross-appeal from the above decision to the Ontario Court of Appeal were dismissed (MacKinnon A.C.J.O., Arnup, Dubin, Houlden and Tarnopolsky JJ.A.) February 6, 1984. The following was endorsed on the appeal record by

MACKINNON A.C.J.O.:—The Divisional Court thoroughly and carefully canvassed the issues that were raised on this appeal and cross-appeal. As we are in substantial agreement with their analysis of these issues and their reasoned conclusions, it would serve no useful purpose to repeat at any length the facts and the issues.

It is argued before us on behalf of the appellant that s. 3(2)(*a*) of the *Theatres Act*, R.S.O. 1980, c. 498, in view of its lengthy history and the manner in which it is interpreted and applied by the Ontario Board of Censors, is, in some fashion, a recognized restraint on the freedom of expression which falls outside s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. In other words, it is a pre-Charter recognized restraint on the freedom of expression, and there is no need to go to s. 1 of the Charter to salvage it.

Section 3(2)(*a*) reads:

> 3(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;

We cannot accept that argument. We agree with the conclusion of the Divisional Court that s. 3(2)(*a*) clearly imposes a limitation on freedom of expression as guaranteed by s. 2(*b*) of the Charter. We also agree that ss. 35 and 38 of the *Theatres Act* are capable of being interpreted and applied as part of that limitation. The Divisional Court concluded on this point [41 O.R. (2d) 583 at p. 593, 147 D.L.R. (3d) 58 at p. 68]:

These sections, in so far as they purport to prohibit or to allow the censorship of films, may be said to be "of no force or effect" . . .

We would go further than the Divisional Court on this issue. In our view, s. 3(2)(*a*), rather than being of "no force or effect", is *ultra vires* as it stands. The subsection allows for the complete denial or prohibition of the freedom of expression in this particular area and sets no limits on the Ontario Board of Censors. It clearly sets no limit, reasonable or otherwise, on which an argument can be mounted that it falls within the saving words of s. 1 of the Charter: "subject only to such reasonable limits prescribed by law". Further, like the Divisional Court, we conclude that s. 3(2)(*b*) and ss. 35 and 38 cannot be interpreted and applied in their present form to support the censorship of film although they have a valid role to play otherwise. As pointed out by the Divisional Court, there is no challenge in these proceedings to the system of film classification, nor to the general regulation of theatres and projectionists and other matters dealt with in the statute and regulations.

The Divisional Court stated that they were expressing no view whether the standards issued by the Ontario Board of Censors, if embodied in the legislation, or the regulations properly authorized by the statute, would be considered "reasonable limits" within the meaning of those words found in s. 1 of the Charter. This question is not before us and we express no opinion on whether there can be legislated guide-lines for the Ontario Board of Censors so as to be reasonable limits prescribed by law on the freedom of expression, demonstrably justified in a free and democratic society. In dealing with this point, the Divisional Court stated [at p. 591 O.R., p. 68 D.L.R.]: "One thing is sure, however, our courts will exercise considerable restraint in declaring legislative enactments, whether they be statutory or regulatory, to be unreasonable." We do not think, if they were purporting to enunciate a principle, that there is any such principle to be applied in the determination of what is "reasonable" under s. 1 of the Charter. In approaching the question, there is no presumption for or against the legislation but there are many factors to be considered, in light of the legislation itself and its background, which have been recited in a number of authorities: *Re Federal Republic of Germany and Rauca* (1983), 41 O.R. (2d) 225 at p. 244, 145 D.L.R. (3d) 638 at p. 658, 4 C.C.C. (3d) 385; *Re Southam Inc. and The Queen (No. 1)* (1983), 41 O.R. (2d) 113 at pp. 129-30, 146 D.L.R. (3d) 408 at pp. 424-5, 3 C.C.C. (3d) 515.

The appeal by the Ontario Board of Censors is dismissed.

On the cross-appeal by the respondents, we did not feel it necessary to call on the cross-respondents to respond to the argument. We are in agreement with the Divisional Court in their disposition of the issues in the cross-appeal and it is not necessary to add anything further. The cross-appeal is dismissed.

As success was divided there will be no order as to costs.

J. Polika, Q.C., for appellant.

L. King and *C. M. Campbell*, for respondent.

K. P. Swan and *E.J. Abner*, for intervenor, Canadian Civil Liberties Association.

[COURT OF APPEAL]

Re Essex County Roman Catholic Separate School Board and Tremblay-Webster et al.

ZUBER, THORSON AND CORY JJ.A. 23RD FEBRUARY 1984.

Education — Separate schools — Constitutional rights — Collective agreement providing for arbitration of grievances if no right to board of reference — Teacher dismissed by separate school board for denominational cause — Whether arbitrable — Education Act, R.S.O. 1980, c. 129 — School Boards and Teachers Collective Negotiations Act, 1975 (Ont.), c. 72, ss. 9, 52.

Constitutional law — Distribution of legislative authority — Education — Collective agreement providing for arbitration of grievances if no right to board of reference — Teacher dismissed by separate school board for denominational cause — No right to board of reference because of denominational rights protected by Constitution Act, 1867 — Whether arbitrable — Education Act, R.S.O. 1980, c. 129 — School Boards and Teachers Collective Negotiations Act, 1975 (Ont.), c. 72, ss. 9, 52 — Constitution Act, 1867, s. 93.

A collective agreement between a separate school board and a teachers' association provided that a teacher could not be dismissed without just cause and gave access to the grievance and arbitration procedure except in cases where the teacher had a right to a board of reference under the *Education Act*, R.S.O. 1980, c. 129. A teacher dismissed by the separate school board for denominational cause grieved, and the arbitration board held that it had jurisdiction to hear the grievance. An application for judicial review of that decision was dismissed by the Ontario Divisional Court. On appeal, **held**, the appeal should be dismissed.

Because of the guarantees of denominational rights in s. 93 of the *Constitution Act, 1867*, prohibiting any law which prejudicially affects any right or privilege with respect to denominational schools held by any class of persons at the time of union, a teacher dismissed for denominational cause has no right to a board of reference under the *Education Act*. The collective agreement, however, allows a teacher to seek arbitration of a dismissal for denominational cause, because there is no right to a board of reference and because the collective agreement prohibits dismissal without just cause. Review of a dismissal for denominational cause does not affect a school board's constitutional rights, as the parties agreed to the collective agreement clause prohibiting discharge without just cause and arbitration of grievances. There was no statutory obligation to include such provisions.

35. All film before being exhibited in Ontario shall be submitted to the Board for approval, accompanied by the prescribed fee.

Section 38 states:

38. No person shall exhibit or cause to be exhibited in Ontario any film that has not been approved by the Board.

The word "exhibit" is defined by s. 1(*c*) as follows:

1. In this Act,

. . . . .

(*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;

It should also be noted that s. 63(1), para. 9 of the *Theatres Act* authorizes the making of regulations "prohibiting and regulating the use and exhibition of film or any type or class thereof" but none have been prepared. Section 63(1), para. 14 authorizes the making of regulations "prescribing the terms and conditions under which film or any type or class thereof may be sold, rented, leased, exhibited or distributed", but none have been issued.

The relevant provisions of the *Theatres Act* have been in place in this province since 1911 and we are advised that the present application is the first court challenge to be made upon these provisions or upon the board's operation thereunder. This must speak well of the conduct of the board members in carrying out the board's legislated duty, which undoubtedly involves difficult and controversial matters. We should point out that the application before us did not involve criticism of the board except to the extent that it is said the statutory provisions and the standards and procedures of the board were inconsistent with the guaranteed freedom of expression and did not meet the test set out in s. 1. The issue is essentially legal and not factual.

Over the years the board has issued several versions of a document entitled "Standards for classification and/or Censorship of Films" to which it purports to adhere in exercising its authority. These standards set out descriptions of the type of material that would be classified as "general", "adult entertainment" or "restricted" as well as the type of material that it would recommend to be eliminated. It is explained that a film might be rejected altogether, something it says is "very rare", if the required eliminations were "so extensive as to ruin the continuity of the film". Most of the offensive types of material deal with sexual explicitness, violence or the exploitation of children, but "blasphemous" and "sacrilegious" matter is also mentioned. It has also circulated to the public and any interested persons several

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versions of a pamphlet entitled "Film Classification and Censorship", which sets out much of the same material contained in the standards. All of these publications, however, are conceded by the Crown to have no legal status; they are distributed merely for the assistance of the public in order to indicate the general approach of the board. It is clear that the standards are not legally binding on the board, although it is asserted that they are generally used by the board as guide-lines.

When Her Majesty proclaimed into force the new Charter of Rights and Freedoms, all Canadians were *guaranteed* certain fundamental freedoms set out in s. 2, such as "freedom of . . . expression, including freedom of the press and other media of communication". This section is mainly declaratory of the freedoms which have long existed in Canada (see *Nova Scotia Board of Censors et al. v. McNeil*, *supra*, *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*, and *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, 43 N.R. 451 (S.C.C.)), for we Canadians have always enjoyed a full measure of freedom of expression, as well as the other freedoms. Nevertheless, our political leaders concluded that these freedoms should be entrenched in a Charter in order to guarantee these rights for all Canadians, including future generations, and, possibly, to permit expansion over the years ahead.

These 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 interest of society. Consequently, it is possible for our governments 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" [emphasis added].

It is not in dispute that 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: see *Quebec Ass'n of Protestant School Boards et*

al. v. A.-G. Quebec et al. (No. 2), 140 D.L.R. (3d) 33 (September 8, 1982); *Federal Republic of Germany v. Rauca* (1982), 38 O.R. (2d) 705, 141 D.L.R. (3d) 412, 70 C.C.C. (2d) 416; Tarnopolsky & Beaudoin, *The Canadian Charter of Rights and Freedoms: Commentary* (1982), at p. 70.

We are all of the view that ss. 3(2)(*a*) and (*b*), 35 and 38 impose a limitation on the freedom of expression of the applicant as guaranteed by s. 2(*b*) of the Charter. It is clear to us 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 us on the balance of probabilities that the requirements of s. 1 of the Charter have been met, and "[t]he standard of persuasion to be applied by the court is a high one if the limitation in issue is to be upheld as valid": see Evans C.J.H.C. in *Rauca*, *supra* [at p. 716 O.R., p. 423 D.L.R.]. By placing such an onus on governments, the Charter inhibits the courts from permitting the dilution of the guaranteed fundamental freedoms. Hence, any limit placed on these freedoms must be shown to be *demonstrably justifiable in a free and democratic society;* it must be a *reasonable limit;* and it must be a limit that is "*prescribed by law*". Let us examine each of these three items in turn.

Demonstrably justifiable in a free and democratic society

As for being demonstrably justifiable in a free and democratic society, it has been held that there must be a reasonable ground upon which a limitation can be based for it to be "justifiable": see Chief Justice Evans, *Rauca*, *supra*. Chief Justice Deschênes has suggested that we must focus on the "validity" of the "objective" of the legislation: *Quebec Ass'n of Protestant School Boards* case, *supra*. It is obvious that 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: see *Report of the Committee on Obscenity and Film Censorship*, U.K. Cmnd. 7772 (1979). 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. We are satisfied, therefore, that some prior censorship of film is demonstrably justifiable in a free and democratic society. (No one questioned that Canada and each of its constituent provinces and territories are free and democratic.)

Reasonable limits

a The next issue to consider is whether the limits placed on the freedom of expression by the *Theatres Act* are reasonable ones. Counsel for 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. He points out that any one can make films, show them privately, rent them and sell them. Hence, it is said b the freedom of expression is only curtailed to the extent that a person wishes to exhibit film to the public or for profit. It would be fair to assume that 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 c 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 with making a profit from one's art or one's d ideas. In addition freedom of expression extends to those who wish to express someone else's ideas or show someone else's film. It also extends to the listener and to the viewer, whose freedom to receive communication is included in the guaranteed right.

Another argument advanced by the Crown is that a prohibition e 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. We cannot agree. The Charter, in allowing reasonable limits, does not countenance the total eradication of freedom of expression for those who use a particular form of f 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 really involves the question of fair treatment between various forms of communication. Hence, although one particular form of expression may not g 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.

As to whether the standards issued by the board of censors h would be considered to be reasonable limits, we express no views. They may or may not be acceptable, but in the light of the position we take on the next issue, it is not necessary for us to express a view. One thing is sure, however, our courts will exercise considerable restraint in declaring legislative enactments, whether they be statutory or regulatory, to be unreasonable.

Prescribed by law

The next issue is whether the limits placed on the applicant's freedom of expression by the board of censors were "prescribed by law". It is clear that statutory 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 has argued that the board's authority to curtail freedom of expression is prescribed by law in the *Theatres Act*, ss. 3, 35 and 38. In our view, although there has certainly been a legislative grant of power to the board to censor and prohibit certain films, the reasonable limits placed upon that 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". It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on the 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 utilized by the Ontario Board of Censors do contain certain information upon which a film-maker may get 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. We draw comfort in this conclusion from the views of Professor Beckton, in *The Canadian Charter of Rights and Freedoms: Commentary* (1982), p. 107 (Tarnopolsky & Beaudoin, editors), where she wrote:

> Clearly statutes which create censorship boards without specific criteria would be contrary to the guarantees of free expression, since no line is drawn between objectionable and non-objectionable forms of expression. Now standards will have to be created to measure the limits to which obscene expressions may be regulated.

This does not mean that the censorship scheme set out in the *Theatres Act* is invalid. Clearly the classification scheme by itself does not offend the Charter. Nor do we find that ss. 3, 35 and 38 are 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.

We turn now to the several other constitutional and administrative law issues to be addressed relating to the specific request made to the board. The decision of the board that the two films could be shown at one time and one place is a valid exercise of the board's power to "regulate" pursuant to s. 3(2)(*b*).

The decision concerning "Not A Love Story" is defensible as a refusal by the board to engage in an academic exercise. The applicants were seeking permission to show a film they did not own and which they had no right to exhibit. The board does not have to spend its time engaging in theoretical activity. Although no copy of the film was submitted to the board as required by the Act, this ground was not relied upon by the board. While it is said that the reason the board gave, that the National Film Board had not released the film for public commercial showing, was an improper interference with freedom of expression because there is no specific legislative authority for doing so, in view of the above, we need not decide this issue.

The decision to prohibit the public exhibition of "Amerika" must be quashed because it was an interference with the freedom of expression of the applicant that was not based on a legally binding standard.

As for the denial of natural justice, procedural fairness, and the need for a hearing pursuant to the *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484, this much can be said. It is not clear on the evidence before us that there was any infringement of the right to be heard. The Standard Procedures for Classification and Censorship of Film distributed by the board provides for a written report by the board without a hearing. However, if there is an objection, the distributor may, within 15 days, make submissions in writing, which the board will consider. The board may request a meeting with the distributor to discuss the submission. After