FILM CENSORSHIP: THE ONTARIO EXPERIENCE

*H. J. Kirsh**

I. BACKGROUND INFORMATION

Public screening of films is under the control of provincial governments in Canada. In Ontario, like seven other provinces,[1] a censorship board has been organized pursuant to the provisions of The Theatres Act,[2] which regulates and supervises the film industry (including advertisement regulations and the licensing of film exchanges, theatres and projectionists).

Section 3(2) of the act outlines the powers of the board:

> 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;
> (b) subject to the regulations, to approve, prohibit or regulate the exhibition of any film in Ontario;
> (c) to censor any advertising matter in connection with any film or the exhibition thereof;
> (d) subject to the regulations, to approve, prohibit or regulate advertising in Ontario in connection with any film or the exhibition thereof;
> (e) to classify any film as adult entertainment;
> (ee) to classify any film as restricted entertainment; and
> (f) to carry out its duties under this Act and the regulations.

These powers are often delegated by the board[3] to inspectors who have the mechanical function of inspecting "theatres, buildings or premises occupied by film exchanges, projectors, and film,"[4] and to thereby assure the public that standards of quality and safety are maintained. Mr. Silverthorne, Chairman of the Ontario Board, stated: "Inspections are now carried on night and day, seven days a week, to maintain standards in theatres."[5] Theatres which meet these standards are then allowed to renew their yearly licence, but those which fall below the standards are liable to have their licence suspended or cancelled.[6]

---

*B.A., 1967, University of Toronto; LL.B., 1970, Osgoode Hall Law School. Presently enrolled in the LL.M. program, Harvard.

[1] Movies seen in P.E.I. and Newfoundland are censored by the New Brunswick Censor Board.

[2] ONT. REV. STAT. c. 396 (1960), *as amended* 1960-61 c. 99.

[3] *Id.* § 3(3).

[4] *Id.* § 4(2)(*a*).

[5] Letter from O. J. Silverthorne to Hon. J. A. C. Auld, April 30, 1968, at 3.

[6] ONT. REV. STAT. c. 396, § 17 (1960).

One of the most important functions of the board is the examination of each film and the elimination, co-existent with forethought, of film sections which the board members believe to be harmful to the Ontario public, excluding from the basic standards, scenes of violence, extended scenes of nudity and references to sexual intercourse. This type of excerpt becomes particularly inadmissible when "considered to be excessive and used for the sake of sensation rather than art." [7]

Over the last six year period, the Ontario Board, in its review of over 3000 feature length films, has made only 154 editorial eliminations and rejected only two films in their entirety, with 1967 being devoid of any changes. "To have gone through a year's work without having made any cuts," reports Silverthorne, "is an achievement not reached by this Board before, nor by any other classification board on this continent." [8]

During 1967, classification became the trend in the field of film censorship. The pressures from a permissive society have caused an expansion of the metaphysical definition of art, and as a result of this, the system of classification is now designed to protect children from possible harmful influences, yet leave adults free to choose their movie entertainment. Therefore, the emphasis has shifted from cutting out pieces of film to categorizing the features as a unit. Indeed, Mr. Kildare Dobbs stated: "The essence of classification is that it should take the place of censorship. The Canadian compromise has been to add classification to censorship . . . . But the censor has not been able to break himself of the habit of snipping out scenes, and bits of dialogue." [9]

There are three distinctive classes of categorization:

(1) There is what is called in England, the universal class, which is suitable for everybody. This classification was first adopted in 1946.

(2) The adult class is intended as a non-coercive guide, that is, people of all ages may view the film, but the classification is meant to inform parents that this film is deemed to be more suitable for adults.

(3) Finally, there is the restricted class of films, admittance being restricted to those who are eighteen years of age or over. [10]

However, the greatest boon that classification brought about, regardless of its subjective failings, was that it seemed to reduce the number of complaints that the board received from members of religious pressure groups and legions of decency. Toronto lawyer Norman Griesdorf commented: "If a movie is restricted, your kids should not be there; so if they do happen to go, you've got no grounds to complain that the movie is corrupting

---

[7] Letter from O. J. Silverthorne to Hon. J. A. C. Auld, April 26, 1966, at 2.

[8] Letter from O. J. Silverthorne to Hon. J. A. C. Auld, April 18, 1967, at 1.

[9] STAR WEEKLY MAGAZINE, February 23, 1963, at 5, col. 1.

[10] An immediate problem apparent to this system is the lack of precision in the standards to be used. Mr. A. E. Thompson, a provincial M.P., commented that "this really becomes a subjective decision by the censor rather than an objective criterion that he has to go by . . . . We rely on the good taste of the censor and on his personal decision on this." ONT. LEG. DEB. at 2102 (April 15, 1964).

them." [11] However, complaints have not ceased entirely. A scene may be accepted without question within the context of the film, but may present a problem when taken out of that framework and exhibited on a billboard, theatre front, or preview. It is for these reasons that all advertising matter used or displayed in connection with any film must be approved by the board. [12] In Ontario, the board is assisted in its efforts by the co-operation of the press which will reject questionable copies of advertising and consult the board with regard to borderline cases. [13]

II. The Constitutional Issue

The federal government has not passed legislation relating to cinema or film censorship. In the Canadian Criminal Code, section 152 applies the only federal comment upon censorship in the following manner: "(1) Every one commits an offence who, being the lessee, manager, agent or person in charge of a theatre, presents or gives or allows to be presented or given therein an immoral indecent or obscene performance, entertainment or representation." [14] Whether the federal government considers the remainder of the matter to fall totally within the provincial spectrum of powers designated by section 92 of the B.N.A. Act is a matter of speculation.

The question therefore arises: Should censorship fall under the criminal law power (section 91(27)) or should it fall within one of the provinces' enumerated heads (section 92(13)) as it now appears to do? Perhaps Mr. Justice Kelly answered this question when he stated: "It has been said that Parliament alone can define crime and enumerate the acts which are to be prohibited and punished in the interests of public morality . . . . And where Parliament has dealt with a matter under criminal law, a provincial Legislature has no power to amend or supplement such criminal law by removing a ground of defence or otherwise." [15] He further stated that "any law that prohibits the doing of an act subject to penalties for breach of the prohibition is criminal law . . . . The protection of the public morals is not a matter of local or private nature." [16]

A similar approach was taken by the Saskatchewan Sub-Committee on Civil Liberties. They concluded that both the Theatres and Cinematographs Act [17] and the Queen's Bench Act [18] were ultra vires the provincial legis-

[11] Mr. Griesdorf was consulted because of his involvement in the *Woman in the Dunes* controversy in Ontario.

[12] Ont. Rev. Stat. c. 396, § 43(1) (1960). The paucity of rejections as compared with the large number of submissions indicates the increasingly liberal attitude towards all forms of advertisement.

[13] Right of appeal from a decision of the board is to the Minister of Tourism and Information who may hear the appeal and who may then uphold, reverse or vary the board's decision. *Id.* § 60(1).

[14] *See also* Crim. Code § 152(2) which deals with performers.

[15] Attorney-General for Ontario v. Koynok, [1941] 1 D.L.R. 548, at 551 (Ont.).

[16] *Id.* at 554.

[17] Sask. Rev. Stat. c. 342 (1953).

[18] Sask. Rev. Stat. c. 67 (1953).

lature: "For not only do these provisions appear to be in relation to 'criminal law' but Parliament has, by sections 150, 150A and 150B of the Criminal Code, enacted legislation in respect of the same subject matter." [19]

The constitutional validity of Canadian film censorship and the operation of provincial censorship boards was challenged judicially by the Superior Operating Co. Ltd. of Montreal which charged that Quebec censorship law was ultra vires the provincial jurisdiction. However, in 1944, Odeon Theatres Canada Ltd. purchased the former company and further action in the matter ceased. The validity of censorship law has not since been so challenged and therefore no constitutional comment has been set down by the Supreme Court of Canada.

Based on the reasoning in the cases of *Saumur v. Quebec*, [20] *Switzman v. Elbling* [21] and *Ouimet v. Bazin*, [22] it could be argued that censorship of films should fall within the federal jurisdiction. Mr. Justice Rand, in *Switzman v. Elbling*, indicated that censorship ought to come under Dominion jurisdiction because of the quality of the diffusion of ideas. He stated: "[P]ublic opinion . . . demands the condition of a virtually unobstructed access to and diffusion of ideas . . . . The freedom of discussion in Canada, as a subject-matter of legislation, has a unity of interest and significance extending equally to every part of the Dominion." [23]

On the other hand, it is not inconceivable that the developing principles of civil liberties would cause courts to declare that the right of film censorship is actually not even within federal power. In *Switzman v. Elbling*, Mr. Justice Abbott, in discussing the right of free speech and diffusion of ideas, said: "I am also of the opinion that as our constitutional Act now stands, *Parliament itself* could not abrogate this right of discussion and debate." [24] One must also consider that, even if the federal government did have the power to enforce a unified and uniform system of film censorship, the government might not be willing to enter such a controversial field.

III. Ex Post Facto Criminal Prosecution

If the constitutional issue eventually is settled by the Supreme Court of Canada in favour of the federal jurisdiction, what will be the position of the provincial censorship boards? Perhaps instead of reviewing and making a

---

[19] Canadian Bar Association, A Report of the Saskatchewan Sub-Committee on Civil Liberties *on Censorship & Obscenity*, in 25 Sask. B. Rev. 80, at 86 (1960).

[20] [1953] 2 Sup. Ct. 299.

[21] [1957] Sup. Ct. 285.

[22] [1912] 3 D.L.R. 593 (Sup. Ct.).

[23] [1957] Sup. Ct. at 306.

[24] *Id.* at 328 (emphasis added). However, there are cases that indicate all domestic legislative authority is distributed either between the provinces or the Dominion. *See* Attorney-General for Ontario v. Attorney-General for Canada, [1912] A.C. 571, at 581 (P.C.) and Saumur v. Quebec and the Attorney-General for Quebec, *supra* note 20, at 324 (Kerwin, J.). *See also* Tollefson, *Freedom of the Press, in* Contemporary Problems of Public Law in Canada 61 (O. Lang ed. 1968).

final judgment upon a movie prior to exhibition, there will be an *ex post facto* criminal prosecution for obscenity. Thus, the film would be presented for public viewing before the content was controlled, which could render the board either obsolete or alter its duties. Another possibility is the delegation of authority by the federal government to the presently existing provincial boards of censorship.

If the former method were to be introduced, the exhibitor would have the burden of deciding whether the film is likely to be considered proscribable, hopefully avoiding possible prosecution and trial expenses. This could cause exhibitors to be somewhat hesitant in the display of a controversial film for public comment. This result could be detrimental to the mechanisms of the film industry as a whole. In addition, the use of *ex post facto* criminal prosecutions would be directed at the exhibitor, who has the fewest resources with which to defend himself on a criminal charge. He is also likely to be a local resident, and, thus, someone who depends in large measure on personal goodwill for his economic and social well-being in the community. On the other hand, the distributor, who is likely to have greater material resources, and who is seldom a local person, is rarely involved in the use of the criminal process to control obscenity in films. Consequently, reliance on the criminal process for controlling "film erotica" is more likely to result in law enforcement officials using the criminal law as a means of intimidating local exhibitors, rather than as a means of adjudicating the obscenity issue.

IV. *Heironymous Merkin*—An Abuse of the Process

It seems that during the obscenity trial of the stage play, *Futz*, Toronto lawyer Julian Porter testified that he thought *Futz* should not be adjudicated as "obscene." He stated that there was a movie in town, *Can Heironymous Merkin Ever Forget Mercy Humppe and Find True Happiness?*, which was passed by the board for public viewing and which was considered by Mr. Porter to be worse than *Futz*. Upon hearing the evidence, Toronto detectives immediately seized the film and, even though it was previously authorized as viewable, issued summonses to the manager of the theatre and the two film distributing companies (Odeon Theatres Canada Ltd. and Universal Films Canada Ltd.). The Toronto Daily Star commented: "Like Batman and Robin at the mere mention of crime in Gotham City, the police scribble down an approximation of the movie title and race off to defend Virtue in Toronto." [25]

The film seizure indicated that whatever merits prior censorship may have, the reassurance of theatre managers is not one of them. It would appear that an exhibitor is in a position of double jeopardy; he is subject to the discretion of the police in dealing with censorship, as well as to that of the board and its actions. Only a few weeks prior to the seizure, the Minister

[25] Toronto Daily Star, July 3, 1969, at 6, col. 1.

of Tourism and Information, under whose watchful eye the Ontario board functions, reassured the legislature that "[a]ll the films reviewed by the board . . . which are exhibited in Ontario must be approved by the board, or else the projectionist would lose his licence if he projected it." [26] Apparently, the police do not rely on the board's approval. [27]

V. CONCLUSION

It would appear that there is a strong argument for saying film censorship is not within provincial legislative power. If anything, it is within the federal government's legislative power. It is even arguable that Parliament itself has no power to restrict freedom of discussion. It seems that *ex post facto* criminal prosecutions, though at first glance preferrable, are not the answer for the censorship-obscenity question.

However, many persons have a compulsive need to prevent others from uttering thoughts which are disturbing to them; governments have an interest in preserving stability, and in preventing free-forms from upsetting their policies; parents have an interest in ensuring that their children are exposed only to desirable influences; and, finally, well-meaning citizens have an interest in the preservation of a society devoid of criminal or deviant conduct. But we all know too well, as Dr. Johnson verbalized, that the road to Hell is paved with good intentions.

Against these aforementioned causes is the philosophic and traditional concept of freedom, perhaps based on uncertainty, and the wilful encouragement of experiment and change in a continual search for improvement. If this philosophy is adopted, perhaps we will eventually see the Supreme Court of Canada adopt Justice Abbott's dictum and, applying it in conjunction with the Bill of Rights, deem, for the first time, film censorship of any type unconstitutional regardless of whether it is federal or provincial.

---

[26] ONT. LEG. DEB. at 5748 (June 17, 1969).

[27] Following this action, Metropolitan Police Commissioner, Hugh Crothers, asked the commission to institute a policy that would prevent police from seizing films shown in licensed theatres, thereby acknowledging that the police were at fault.