The Quebec Moving Pictures Act: Some Constitutional Notes

Brahm L. Campbell *

"To subject the press to the restrictive power of a Licenser is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government."**

The Quebec Moving Pictures Act [1] and the Board of Film Censors created therein again became the focal point of public attention some weeks ago, when the Quebec-produced film *La Terre à Boire* was refused a permit to be shown in local theatres without certain changes and excisions. The Censors' action raised anew the question of the very constitutionality of the legislation itself at a time when the products of most of the avant-garde of Europe's nouvelle vogue producers were being given free rein in the Province's cinemas. The above quotation, although penned in an age when the art of film-making was not yet conceived, certainly is most relevant to the question and principle of censorship itself which is hereinafter discussed.

Pith and Substance

Lord Watson's Pith and Substance test [2] for the constitutionality of any given legislation reveals that the essence of the *Moving Pictures Act* is the creation of a Board the principal function of which is to exercise an arbitrary and unlimited power over virtually all films exhibited in Quebec. The basis of such thinking was that this new and potentially dangerous medium of expression and communication could be properly controlled and channelled. After all, it was reasoned, radical and indeed downright immoral thoughts and views were always seeking new methods of propagation. Thus, if the state through its chosen arbiters could ultimately screen all films before they were shown, then the very fabric of the society itself would best be protected.

---

* Of the Bar of Montreal.

** Blackstone, *Commentaries*, 1769, Vol. IV, pp. 151-152.

[1] R.S.Q. 1941, ch. 55.

[2] First stated in *Union Colliery* v. *Bryden* [1899] A.C. 580.

Background

The Act in question has been on our statute books since film production, distribution, and screening were in their infant stages. A cursory examination of some of the recommendations made to the Board of Censors by the government of Alexandre Taschereau in 1931 [3] clearly reveals the criteria which were supposed to guide its thinking.

It was instructed to forbid all scenes which "amoindre ou abaisse la morale dans l'esprit de ceux qui le voient". It must guard against any "claire et explicite" treatment of adultery. All portrayals of infidelity had to contain moral lessons showing that such unfaithfulness was evil and was always punished. Sexual perversion, vulgarity, nudity, all were, without exception, forbidden. Further, the more heinous portrayals of crime and criminal methods were not to be permitted. What an idyllic society our Censors were advised to created for us! The result, however, was that any potential Quebec film industry could not possibly bloom in such an ominous atmosphere and did not take root until the new Liberal government appointed a most progressive and liberal Board (small "l" intended) after it came to power in June 1960.

Public Rights and Civil Rights

We now have a general picture of the all-embracing powers which the Board so freely exercised over a number of decades. It is quite evident, this writer submits, that these powers clearly and unequivocably trenched upon the realm of public rights.

What are public rights ? Mignault J., in *Bédard* v. *Dawson* [4] dealt at length with Lord Bacon's definition. It was suggested that public rights, Jus Publicum, encompassed those which interested the whole of a free society. Thus the rights of free speech, assembly, religion, expression were basic to the nation itself and were matters of national concern to be affected only by national legislation. Such legislation provided sanctions for violations of the social order or disturbances to the security of the state, such as libel, obscenity, blasphemy, and sedition.

Conversely, civil rights or the Jus Privatum were those which an individual exercised for a monetary consideration when his own personal rights were transgressed. Thus the defamation of a person's character by slanderous speeches gave rise to a civil action in damages. The society itself had not been harmed, but the individual only has suffered, and he is provided with the proper recourse.

---

[3] Mémoire du Comité Provisoire pour l'Etude de la Censure du Cinéma, p. 85.

[4] [1923] S.C.R. 681.

The Criminal Law

The common law, from which our Criminal Code is derived, implicity recognizes this distinction. Any definition of criminal law, be it Lord Atkin's [5] "an act which is prohibited by appropriate penal provisions under the authority of the state," or Lord Haldane's [6] "an act which by its very nature belongs to the domain of criminal jurisprudence" enunciates this distinction which is apparent throughout the field of criminal law and in all acts constituted crimes by the Legislator.

Substantive criminal law has at its base concepts of public good and public morality the infringements of which are considered to be of significant danger to the very society itself. This legislation is designed to protect the public interest. This writer contends that the pith of the *Quebec Moving Pictures Act* places it squarely among those acts designed to protect this broad public interest. When the Censors forbade the film *Martin Luther King* from being exhibited (it has been shown in post-Duplessis Quebec) they were apparently sincerely concerned with the protection of the common good and the thwarting of any danger to an overwhelmingly Catholic body politic. All well and good, but actions founded on such objectives are not within the purview of provincial legislative power.

A close examination of our Criminal Code appears to provide a number of openings for some bright young Crown prosecutor to successfully charge the producers, distributors and exhibitors of an allegedly obscene film with the commission of an offence. Part *IV* of the Code, especially section 150 concerning obscenity, makes it an offence for everyone who "publicly exhibits a disgusting object or an indecent show".[7] Section 152 states that everyone who is responsible for the presentation in a theatre of an "immoral, indecent or obscene performance, entertainment or representation" commits an offence. "Theatre" is defined in Section 130 (c) as "any place that is open to the public where entertainments are given, whether or not any charge is made for admission."

The citations have been made solely to emphasize the tone and colour of those Criminal Code provisions dealing with indecent or immoral exhibitions. It is striking to note the similarities between these sections and the criteria which the Board was advised to use in the decisions and which are hereinabove discussed.

---

[5] *In Re Proprietary Articles Trade Association* [1931] A.C. 310.

[6] *In Re Board of Commerce Act* (1922) 1 A.C. 191.

[7] 150 (2) (b).

Analogous Legislation

The proponents of provincial legislation which comes under constitutional fire are naturally wont to buttress their case by advancing various heads of Section 92 under which they allege the Act squarely falls. The defenders of the *Moving Pictures Act* often refer in their arguments to Section 92(13), property and civil rights, and Section 92 (16), matters of a purely local or private nature. Even Section 93, education, has been successfully used to keep an amendment to the *Moving Pictures Act* itself on the statute books. In the latter instance, it was held by the Quebec Court of Appeal [8] that the under-16 amendment passed by the Quebec Legislature after the disastrous Laurier Palace fire of 1927 was a legitimate exercise of provincial education powers. What an unusual interpretation of education ! The fewer films a youngster could see, the more educated he became !

The Supreme Court of Canada has generally been most direct and quite unequivocal in its decisions concerning provincial attempts to intrude upon the field of public rights. In *Switzman v. Elbling*, more popularly known as the Padlock Law case [9] Lucien Tremblay, counsel for the Quebec government (now Chief Justice of the Quebec Court of Appeal) submitted that the Act in question was a necessary limitation on the spread of free speech similar to the ordinary civil restrictions of slander and libel.

Rand J. disagreed. He reasoned that the ban on the dissemination from particular premises of so-called "Bolshevist propaganda" was directed at the very *civil liberty* of the actor himself, and that "*no civil right* was affected nor was any *civil remedy* created". Abbott J. added that any abrogation of free speech by a provincial legislature could only be to protect *purely private rights*. The Supreme Court in this instance strongly reaffirmed the necessity of preserving the free expression of opinion, in order to maintain the very freedom of the society itself. Rand J. further stated that once one accepts the view that government by the free public opinion of an open society is government in its best form, then "a virtually unobstructed access to and diffusion of ideas" is required.

The Supreme Court similarly dealt with the *Alberta Accurate News and Information Act*.[10] In this instance, legislation was introduced in Alberta by its fledgling Social Credit Government compelling newspapers to publish statements issued to them by the government explaining the allegedly true and exact objects of the

[8] *Duhamel* v. *Semple* (1928) 66 S.C. 563; (1929) 47 K.B. 17.

[9] [1957] S.C.R. 285.

[10] *Reference Re Alberta Statutes* (1938) S.C.R. 100.

administration's policies. They could also be obliged to reveal their sources of information. The sanction for violating these provisions was outright banning of the transgressing newspaper.

The Supreme Court did not doubt that this legislation was ultra vires. Cannon J. noted inter alia that the individual's *civil rights* were not dealt with here in the hope of providing recourse for their infringements. Rather, the Act invaded the field of *public rights* and duties which was in the federal sphere. He then enunciated his theory that a province could not reduce the political rights of its citizens compared to the enjoyment of similar rights in other provinces. These rights, he felt, had an aura of unity in a free society which was in fact one of the pillars of the very society itself.

The question of censorship per se has also been closely examined both by the Quebec Courts and the Supreme Court.

In *Saumur v. The City of Quebec* [11] appellant, an ardent salesman of Witnesses of Jehovah tracts, attacked the constitutionality of a Quebec City by-law empowering the Police Chief to censor the sale of such journals on the public roads. It was held that the by-law entered the federal domain of public law and was thus "ultra vires". Locke J. contended that the true purpose of the by-law was to "... impose a censorship on the written expression of religious views and their dissemination, a constitutional right of all the people of Canada."

Chief Justice W. B. Scott, as he then was, of Quebec's Superior Court, decided in a similar case in 1956 [12] that a Montreal by-law vesting the Police Director with the right to approve all pamphlets before they were exhibited in public places did not in any way concern the maintenance of order on the public roads. He stated that "in its essence it establishes an aristocratic and unfettered censorship of the contents of placards, advertisements, prospectuses, circulars, or papers carried or distributed in, near, or upon the streets. . in its pith and substance by-law 2077 manifestly encroaches upon and usurps a field reserved exclusively for the authority of Parliament... this is a question of criminal law..."

Conclusion

The comparison made above between the basic principles of public law which are solely reserved to the federal power in Canada and those which underlie the *Quebec Moving Pictures Act* raise grave

[11] (1953) 2 S.C.R. 299.

[12] *Dame Gabrielle Dionne v. The Municipal Court of the City of Montreal and His Honour Judge H. Monty* (1956) 60 R.P. 299.

doubts as to the constitutionality of this legislation. It is true, as has already been pointed out, that the Lesage regime has opened the door to a relatively unhindered production, distribution, and exhibition of myriad types of films in our province's theatres; nevertheless, the experience of *La Terre à Boire* denotes the sword of Damocles which is suspended over our cinema organizations and which represents a distinct threat to the development of a creative and unhampered film industry in Quebec.

One might express the hope that it will not be necessary to challenge the Act in our Courts in order to obtain that which any progressive government would be expected to bestow on its people. The very principle of censorship itself is repugnant to the loftiest traditions of the Rule of Law. It is a prior restraint of the worst kind and only succeeds in stifling the normal development of a free society. To erase it from the statute books of this province would be to render a distinct service to the people of Quebec.