Publication Bans and Freedom of Expression : A Debate

Mr. W. Ian Binnie, Q.C.*

Jack[1] began his remarks with the comment that "our courts must be free to administer justice without obstruction or interference". Later, he announced that he would be prepared to do away with both newspapers and government to keep "an independent judiciary". He then expressed the hope that the "Charter and all its rights" should not become "instruments of oppression". So far as I can tell, none of this *in terrorem* hyperbole has anything to do with what Gloria[2] instructed us to talk about, which is how to get the proper balance between freedom of expression and fair trial interests, and whether *Dagenais*[3] was rightly decided.

The issue of a proper balance did not originate with the Charter, it goes back far into the history of the common law. A free press and fair trials have lived together for a long time. The *Dagenais* case just presented an old problem in constitutional garb.

Jack knows all about this. As a young lawyer, in 1977, when he was at the height of his intellectual power, Jack appeared for the *Vancouver Sun* and *The Province* to resist the information-gathering activities of a combines inquiry into the B.C. fishing industry. The case was called *Re Pacific Press*.[4] Jack won a big victory for the media. My clients still talk about it. That case really established all the foundational elements of *Dagenais.* Jack's argument, and Jack I am looking at page 492, was reproduced by Chief Justice Nemetz as follows :

> [...] *As I understand Mr. Giles, he is not submitting that the Press is exempted from the search provision of the* Criminal Code. *What he says is that the Justice, in exercising his judicial discretion is obliged to consider* inter alia *before issuing the warrant, the special position of an organ of the free press set out in the Canadian Bill of Rights* [...] (emphasis added).

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1. Mr. Jack M. Giles, Q.C., Farris Vaughan Wills & Murphy, Vancouver, BC., co-debater on the pannel, (from now on referred to as "Jack").

2. The Honourable Madam Justice Gloria Epstein, Ontario Court of Justice (General Division), Toronto, Ontario, Chair of the panel.

3. *Dagenais* v. *Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835.

4. *Re Pacific Press* (1978), 37 C.C.C. (2d) 487.

Jack anticipated the *Dagenais* requirement of the need to balance interests by almost two decades :

> [...] *when a search warrant is sought against an organ of the free press of this country, the issuing Justice, before exercising his judicial discretion, should weigh the competing interests of the free press, on the one hand, and the administration of justice on the other.* (emphasis added)

I thought Jack made pretty persuasive arguments in *Pacific Press.* First of all if a judge is exercising a common law discretion or a discretion conferred under statute, then one of the relevant considerations is the rights of *all* of the people who are affected by the decision, including the press. Secondly, as Jack liked to argue in the old days, there is no necessary conflict between fair trials and freedom of the press. Jack now says the conflict is inevitable and must always be resolved in favour of fair trials. Nobody argues in favour of unfair trials. *Dagenais* just followed *Pacific Press* in seeking ways whereby conflict can be minimized.

The Charter added little to the *Pacific Press* paradigm except to create a structure in which free speech and fair trial values can be reconciled. Far from saying that the burden is on those who are trying to get a fair trial, the Supreme Court of Canada said *there is no hierarchy within the Charter.* The Court didn't suggest that an unfair trial could or would ever ge acceptable.

The particular aspect of *Dagenais* that we are to discuss is its application to private litigation. This is an odd question since *Dagenais* itself is a private law case. There were no orders sought in the course of criminal proceedings. *Dagenais* was a civil case begun by four persons who happened to be accused elsewhere in the justice system of sexual assaults against children. They applied for a civil injunction against the media. No relief was sought by or against the state. The principles of *Dagenais* were pronounced in a civil case, but *Dagenais* did not say, as Jack sometimes seemed to suggest,that the media can destroy the subject matter of the litigation and the courts are powerless to stand by. The conclusion in *Dagenais* is that, if at the end of the day, there are no alternate means to protect a fair trial because, for example, media exposure would destroy the subject matter of the case, the public ban may properly be issued.

This leaves the question of whether *Dagenais* was rightly decided.

One of the objections to *Dagenais* is precisely that it involved private actors, not government actors, and thus, it is argued, the principles of Charter law should not apply. *Dagenais* let the Charter genie out of the bottle where it had been incarcerated since one of Jack's victories in the Supreme Court, *Dolphin Delivery*,[5] which decided that the Charter does not apply to private litigation. The Charter can only be used, said in another case, to fight City Hall. How then could the media resort to the Charter against a claim for an injunction by the four Christian Brothers?

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5. *R.W.D.S.U.* v. *Dolphin Delivery Ltd.,* [1986] 2 S.C.R. 573.

One of the good things about *Dagenais* is that it tended to mitigate some of the adverse effects and problems created by *Dolphin Delivery*. Jack persuaded the Supreme Court of Canada in *Dolphin Delivery* to focus on s. 32[6] of the Charter, to limit the *in personam* application of the Charter to governments and legislatures. As you know, the Supreme Court interpreted s. 32 to exclude judicial orders, saying that while "government", in the political science sense, may include the courts, judges exercising the powers of the State through the delivery of judicial orders are not "government" within the scope of s. 32. This raised some controversy about the interpretation of s.32 itself, but more to the point seemed to make s. 32 paramount to s. 52,[7] which has been considered the key section in the Constitution. Section 52(1) says that any law, which presumably included the common law, inconsistent with the provisions of the Constitution (including the Charter) is, to that extent, of no force or effect.[8] It was never very clearly explained in *Dolphin Delivery* how a negative inference could be drawn from s. 32 to read down s. 52 so that it was limited to state action. In a sense, *Dagenais* restored the primacy of s. 52 through the back door, and with limited effect, by saying that even though the Charter does not itself directly apply to private litigation because of *Dolphin Delivery*, nevertheless Charter values may apply.

Some of the judges who worry about such things are uncomfortable with the logic that says the Charter values do apply, at least to some extent, in shaping the evolution of the common law. But I think the Charter values approach, logical or not, is a useful qualification to the restriction of the Charter in *Dolphin Delivery* to state conduct.

This became apparent in Jack's next major outing against the Charter. This was a battle between courthouse workers and the Chief Justice of the Supreme Court of British columbia. Chief Justice McEachern turned up at the Vancouver Court House one day and found it being picketed because of a labour dispute between the B.C. government and its employees. The Chief Justice determined to make an application to himself for an injunction and, having given proper notice he determined, *ex parte*, that an injunction should issue. The rule of law, he held, requires that the court be open for business.[9] The pickets who were parading up and down under the Chief Justice's window, being given notice that an injunction had issued, attempted to have the injunction dissolved. The

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6. Section 32 (1). This charter applies :

   (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories;

   and

   (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

7. Section 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.

8. *B.C.G.E.U.* v. *British Columbia (Attorney General)*, [1988] 2 S.C.R. 214.

9. *Re British Columbia Government Employee's Union* [l983] 6 W.W.R. 640, at 641.

Union pickets asserted their rights of freedom of expression but they were out-Chartered by Jack who persuaded all of the courts up to the Supreme Court of Canada that the pickets were being enjoined for their own good. Jack's point was that the Charter is first and foremost about the rule of law and access to the courts. *Of what value are the rights and freedoms guaranteed by the Charter*, wrote Chief Justice Dickson, *if a person is denied or delayed access to a court of competent jurisdiction* [...]? [10]

So we ask ourselves, how can Jack, who thus used the Charter to sweep the workers away from the hanging greenery at the Vancouver court house, present himself here as a Charter sceptic?

Haw can Jack, after persuading Chief Justice Nemetz to read freedom of expression values into search warrant in 1977, complain about Chief Justice Lamer in *Dagenais* reading freedom of expression values into publication bans in 1994?

I think *Dagenais* responded very appropriately to Jack's concerns. The difference between applying the Charter and applying Charter values is that where the Charter applies directly, its effect is mandated by the Constitution, and the Court has to deal with the Charter claim as a matter of right. On the one hand, where the Court is just applying Charter value to "evolve" to common law. The application is altogether discretionary. *Salituro*[11] provides a number of escape hatches. Those opposing the application of Charter values can argue that the proposes changes to the common law is more than merely incremental, or that the ramifications of such a change cannot clearly be foreseen, and any modification should therefore be left to the Legislature and so on.

Some would say the *Dagenais* approach to Charter values is a subjective Chancellor's foot type of limitation, but I think it solved a number of problems. Publication bans and other judges' orders to not altogether escape Charter scrutiny, but at the end of the day, the Court retains a large measure of discretionary control. The Court avoids the scary spectre raised in *Dolphin Delivery* about giving indeterminate Charter rights to an indeterminate number of people in an indeterminate number of situations. The Court has given itself the discretion to strike the appropriate balance between the demands of justice and the demands of the media, and I suspect the line will ordinarily be drawn just about where Jack has put it.

Nobody questions the need for a contempt power. Jack won that battle in the BCGEU case. Nobody doubts that, in a case of threatened disclosure by the media of a trade secret, where such disclosure would destroy the subject matter of the litigation, protective orders are appropriate. The problem before the Supreme Court of Canada in *Dagenais* was entirely different.

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10. *Supra* note 8 at 229.

11. *R.* v. *Salituro*, [1991] 3 S.C.R. 654.

The Supreme Court was faced with an award-winning National Film Board docu-drama. It was all about sodomy in Newfoundland. It was a co-venture with the CBC. Its broadcast was not going to attract a national audience. There are a lot of people who have better things to do, on Sunday night, than watch sodomy in Newfoundland. (In fact, when# the show was ultimately put on the air, its ratings were thumbed by rival channels carrying *America's Favourite Videos*.) The argument that there was an irreconcilable "clash of the titans" between free speech and fair trial interests just would not fly. Ninety-five percent of the population was never going to sit through the trauma of *The Boys of St. Vincent.* All the trial court had to do was to allow a simple challenge for cause on the sole question : "Did you or did you not watch The Boys of St. Vincent?. Those who didn't watch it, the overwhelming majority of the population, were untainted even by Jack's standard of credulity, and could bring an open mind to the jury pool. Mr. Justice Soubliere, the trial judge in Eastern Ontario, reacted to the accused's claim of pre-trial prejudice by *The Boys of St. Vincent* by telling to the members of the jury : *Go home, but don't watch the program*. He thought that was a sufficient and adequate response to this challenge. He saw no need to sequester the jury. The threat to free trial interests was minuscule, but the threat posed by the publication ban to the free exchange of ideas on matters of public interest was immense. The Supreme Court had to look at the interest of millions of potential watchers of this program across the country as well as the handful of individuals scattered somewhere in a corner of southeastern Ontario who were, or could become, jurors. Even the Conference of Catholic Bishops had called for more open public debate on the apparently rising tide of alleged child abuse.

Even if the Supreme Court seriously believed what it said in cases like *Vermette*[12] and *Corbett*[13] about the discipline of the jurors' oath, the judge's charge, the solemnity of the Court proceedings and the seriousness and integrity with which jurors approach their job, how could it say that watching a television program about sodomy in Newfoundland, would deflect Ontario jurors from their sworn duty to deal with alleged crimes at a residential school in Ontario? If you thing jurors can't do their job in such circumstances, you have a much bigger problem with juries than you have with the comparatively narrow issue of publications bans. In fact, Chief Justice Lamer addressed this specifically in *Dagenais* where he quotes *Corbett* and the statement by Chief Justice Dickson that says :[14]

[...] *It is of course, entirely possible to construct an argument disputing the theory of trial by jury. Juries are capable of egregious mistakes and they may at times seem to be ill-adapted to the exigencies of an increasingly complicated and refined criminal law. But until the paradigm is altered by Parliament, the Court should not be heard to call into question the capacity of juries to do the job assigned to them*.

12. *R.* v. *Vermette*, [l998] 1 S.C.R. 985.

13. *R.* v. *Corbett*, [l998] 1 S.C.R. 670.

14. *Supra* note 3 at 885.

The hypocracy of the Christian Brothers' position in *Dagenais* was that prior to any talk of The Boys of St. Vincent, they had made a public settlement of sixty million dollars to kids who were at the residential schools In Ontario where the offenses were alleged to have taken place. I would have thought that any rational person would conclude that such a settlement, initiated by the Christian Brothers themselves, and broadly publicized in the Press, was a good deal more prejudicial than the showing of a television program about a fictional school in Newfoundland.

Jack's argument that *Dagenais* was wrongly decided is based on a court-centered universe where the world has to stop until their Lordships and Ladyships form an opinion about the sometimes marginal legal consequences of matters of high public importance and interest. The Hughes Inquiry into Mount Cashel presumably should have been stopped until all the prosecutions had finished. The media should be banned from reporting the controversial plea bargains between the Crown and Karla Homolka[15] even though the information about it was all over the Internet. This is the sort of traditional mind set that ordered the police to guard Peace Bridge at Niagara Falls to stop copies of the "Buffalo Evening News" from coming into Ontario to ban news about Bernardo and Homolka that were already being broadcast every hour on the hour from border city TV and radio stations.

In *Dagenais*, the Supreme Court said that somehow, in the present age of information highways and all the rest of it, we have to make the administration of justice work. It no longer works effectively with judges hurling contempt citations like thunderbolts against the press. The solution to adverse pre-trial publicity has to be found largely within the four corners of the courtroom itself. *Dagenais* was rightly decided and I hope Jack will take this opportunity to come back to his spiritual home and make his peace with Chief Justice Nemetz and *Pacific Press.*

15. *R.* v. *Bernardo* (1995), 95 C.C.C. (3d) 437 (Ont. C.A.).