Publication Bans and Freedom of Expression : A Debate

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The issue in this debate brings to mind a remark by the late Princess Grace of Monaco. She said : *I don't mind the freedom of the press, provided they leave enough freedom for the rest of us*.

When one right conflicts with another, the question implicit in her observation is which freedom must make room for the other, and what is enough.

In this debate, the right that conflicts with the right to freedom of expression is the right that our courts be left free to administer justice without obstruction or interference. And it is my submission that that is a right to which all other rights, including the right to freedom of expression must defer without qualification.

With that point in view, let me turn to the specific questions in the resolution. There are two.

First, was *Dagenais*[1] wrongly decided? It is the question which divides Ian and I. He was winning counsel in *Dagenais*, and is understandably attached to the result. The second question is what does that have to do with commercial disputes? Let me start with a word about the second question. In *Dagenais* the Supreme Court set aside a publication ban ordered by a trial judge in the exercise of her discretion in a criminal trial. In my submission, in doing so, the Supreme Court held in effect that the administration of justice was entitled to no preference of emphasis over freedom of expression. So that the burden of proof of any relevant point of fact fell on those supporting the administration of justice while the benefit of any doubt was given to those supporting freedom of expression. If I am right in that, it is no surprise that the case is being cited as authority in civil cases for restricting protective and other such orders without which important commercial disputes could not and would not be resolvable in the ordinary courts at all. And in that connection, I respectfully adopt the concerns Professor Alexander expressed this morning about the privatization of civil litigation.

Let me give you but two examples, one familiar, one not so familiar. We are all well acquainted with the use of protective orders, sealing the file in trade secrets cases. Without such an order there would be no secret to fight about. Unlike the patent holder, the secret keeper has no protection from competition except the secret itself.

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1. *Dagenais* v. *Société Radio Canada,* [1994] 3 S.C.R. 835 [hereinafter *Dagenais*].

Less familiar is what is known as a Norwich order. The courts in British Columbia have recently followed a decision of the English Court of Appeal in the Norwich case, holding a cause of action exists against a party that is innocent of any wrong, but has facilitated a wrong by another. The case in point was a bank which had innocently acted as a conduit for millions in stolen money. In B.C. the court held an action could be maintained against the innocent bank for an order requiring it to open its books so that the victim of an international fraud could see where its money came from and, more importantly, where it went after it had gone through the defendant bank. I acted for the victim, a New York bank, and the action disclosed that a Canadian bank had transmitted the money to a bank in the Cayman Islands, where my client seized it. The key point is that without absolute secrecy, the fraudster could have moved the money again in an instant, with the touch of a computer key. In the result, the opening of the court file is confidential, the existence of the file is confidential, in fact the *ex parte* order against the bank was confidential, and accompanying it was an order enjoining the bank from making any public disclosure, particularly to its own customers, of the existence of the order or the action. It is obvious the secrecy was essential at every stage if justice is to be available to answer information highway robbery.

So I reverse the question and ask what do these cases have to do with the *Dagenais* case? The answer is simply this. If the *Dagenais* case is a basis for saying, as is now being contended, the administration of justice has no preference over freedom of expression is such cases, then effective resort to such orders is placed in jeopardy.

What makes the matter particularly serious is the fact that *Dagenais* was a criminal case. So it can be said that even in a criminal case it was held that the media's interest in publicity was not to take second place to the interest of an accused in a fair trial. It can be said, of course, that there is a distinction that goes to standing between an order restricting a specific broadcast and one limiting public access to court proceedings.

In the case of a publicity ban, a specific organ of the media is directly affected. Accordingly it ought to have standing to challenge the law, but not to appeal except to the Supreme Court of Canada. In the case of a protective order, the media are affected no differently from any other member of the public so, for that reason, they ought not to be entitled to notice, to be heard, or to any appeal.

However, putting standing aside, the justification for both kind of orders is the same, namely a fair and effective court system. If that value is not to be emphasized over freedom of expression in criminal publicity ban cases, then why should orders in civil commercial cases preventing media access to court proceedings be treated differently? Hence the reliance on the *Dagenais* case to restrict such an order.

So I come back to the question, was *Dagenais* wrongly decided? Dagenais was a Christian brother accused of abusing children at a religious school. The CBC was proposing, prior to the trial, to broadcast a film called "The Boys of St. Vincent's" based on circumstances similar to those giving rise to the prosecution. In the film it appears that a majority of the brothers abused the children. The trial judge made an order banning this broadcast until after the trial. This was upheld by the court of appeal, but set aside by the Supreme Court of Canada.

The common law rule which governed the trial judge's discretion was one which emphasized the right to a fair trial over the free expression interests of those affected by the ban. The Supreme Court held that this rule should be modified so that a ban will not be ordered unless it is established by the accused that there are no alternative measures sufficient to prevent a real and substantial risk to the fairness of his trial. Measures mooted included adjourning trials (i.e. delaying the trial, not the television show), changing the venue of the trial (but not the television show), and sequestering the jury, which the Court of Appeal had referred to as a monstrous suggestion. At the bottom[2] the effect of this decision was to take the benefit of any doubt as to the sufficiency of an alternative measure away from the accused and give it to the media.

Now I ask : can that be right? I, for one, faced with a choice between risking an unfair trial on the one hand and an unnecessary restriction of free speech on the other, would risk the unnecessary restriction of free speech every time. Thomas Jefferson said that given a choice between government without newspapers and newspapers without government, he would choose the newspapers. I would gladly abandon both if that was the price for keeping an independent judiciary. I say this for the simple reason that without a fair trial and the kind of court system it requires, the Charter[3] and all its rights are worse than worthless. They can be used as they were in the Soviet Union, to give one dreadful example, as instruments of oppression. So when it comes to preventing acts — including disclosing and spreading information — which are liable to interfere with the administration of justice I urge on you the injunction of the young man from Brazil who received a wire advising that his mother in law had died and asking for instructions. He wired back : "embalm, cremate, bury — take no chances".

Take no chances is, I suggest, the principle which governed the decision of the Supreme Court on a previous occasion when it upheld a trial judge's decision to ban an exercise of free expression that interfered with the administration of justice by the lawful picketing of courthouses. In that case the purpose of the expression was not motivated by a television company's profit, but instead was expression employed to prosecute employment grievances. A matter, I venture to say, of greater social significance than whether the CBC loses money from a delayed broadcast. Nevertheless, no one suggested that the order should not have been made unless the Attorney General established that there were no sufficient alternatives such as settlement, mediation, arbitration and the like.

I suggest this was so because in that case, unlike *Dagenais*, the order was clearly characterized as an exercise of the contempt power — the power to prevent acts liable to interfere with the administration of justice. As de Tocqueville said, the purpose of the courts is not to give satisfaction, but to suppress evil. A publication ban is the exercise of the same power — as are civil sealing and protective orders. They are all orders defending and protecting the authority of the court, the efficacy of its process, and the universal availability of both. The Supreme Court of Canada, in the court house picketing case, expressly stressed the following language :

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2. *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

3. *Ibid.*

> *Every member of the public has an inalienable right that our courts shall be left free to administer justice without obstruction or interference from whatever quarter it may come. Take away that right and freedom of speech together with all the other freedoms would wither and die, for in the long run it is the courts of justice which are the last bastion of individual liberty.*[4]

So in summary it is my position first, when the order is one which affects the media no differently from any other member of the community, no one should have standing outside the parties, and of course the Attorney General representing the community. Second, even where a member of the media is directly affected, as in *Dagenais*, then as all of these orders constitute an exercise of the contempt power they ought, as such, to enjoy a preference of emphasis over freedom of expression, so that the benefit of doubt about any relevant point of fact should go to the administration of justice.

Finally, having relied on the fact Ian was winning counsel in *Dagenais*, I must disclose that I was winning counsel on the court house picketing case. So in saying *Dagenais* was wrongly decided, I am only throwing roses at the power of Ian's advocacy.

4. BC Government Employee's Union [1983] 6 W.W.R. 640.