THE CHARTER AND PUBLICATION BANS: A COMMENT ON *DAGENAIS* V. *C.B.C.*

Patrick Nugent

In late 1992 Lucien Dagenais and three other Christian Brothers were on trial, or about to go on trial, in Ontario for the physical and sexual abuse of young boys who had been in their care at Catholic boarding schools. *Dagenais* v. *C.B.C.*[1] concerned a publication ban issued in the course of Dagenais' trial which prevented the C.B.C. from broadcasting the docudrama, *The Boys of St. Vincent*, until the completion of all four trials.[2] The case received considerable attention from the popular media which is seldom as indignant as when its own interests are threatened. In its decision, the majority of the Supreme Court agreed with the Ontario Court of Appeal and found the publication ban in the case to be overly broad and unwarranted in light of available alternative measures. The analysis the Court adopted to reach its conclusions raises several important issues. The Court determined that the *Charter* did indeed apply to the common law rule concerning publication bans. The Court also outlined the proper procedure to be followed by third parties appealing interlocutory orders, such as publication bans, in criminal matters. In addition, the common law rule regarding publication bans was refashioned in a *Charter*-friendly form and, in the course of its analysis, the Court reformulated the "deleterious effects" branch of the *Oakes* test.

The question of exactly who and what is bound by the provisions of the *Canadian Charter of Rights and Freedoms* has occupied legal scholars since the document's proclamation. Not until 1986, however, did the Supreme Court of Canada have an opportunity to pronounce on the question. The case of *R.W.D.S.U.* v. *Dolphin Delivery* [3] provided the backdrop for the Court's attempt to define the scope of *Charter* application. However, since the Court rendered its decision in 1986, Canadian jurists and legal academics alike have been struggling to make sense of it.

Most puzzling among the various holdings found in McIntyre J.'s decision for the Court were the assertions: 1) that courts were not "government" for the purposes of section 32(1) of the *Charter* and, thus, were not subject to the application of the *Charter*;[4] and 2) that the *Charter* applied to the common law only "insofar as the common law is the basis of some governmental action."[5] The combined effect of these two holdings is that court orders issued pursuant to the common law are not subject to *Charter* application if the parties to the litigation are non-governmental. In the course of private litigation, then, court orders issued pursuant to the common law could infringe any of the rights and freedoms contained in the *Charter*. Seemingly attempting to soften the implications of this holding, McIntyre J. suggested that the "judiciary *ought* to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the constitution."[6] As Peter Hogg has pointed out, this is what McIntyre J. seemed to do when he went on in the decision to measure the common law rule concerning secondary picketing against sections 2(b) and 1 of the *Charter*.[7] It is instructive that McIntyre J. undertook such an evaluation despite the fact that the case involved two private litigants and a common law rule. The weight to be accorded McIntyre's *ought* (in "ought to apply and develop the principles of the common law ..."), however, was not clear from his judgment and remains unclear after the *Dagenais* decision.

The majority decision in *Dagenais* was delivered by Lamer C.J.[8] McLachlin J. delivered a separate concurring opinion while LaForest, L'Heureux-Dubé and Gonthier JJ. each wrote separate dissents. The

Court divided on the issues of application of the *Charter*, the common law test for publication bans, and the procedure to be followed for appealing a publication ban.

Lamer C.J.'s majority judgment seems to tip-toe around the issue of *Charter* application. At one point he adopts McIntyre J.'s position from *Dolphin Delivery* when he quotes Iacobucci J. approvingly from *R.* v. *Salituro*:[9]

> When the principles underlying a common law rule are out of step with the values enshrined in the *Charter* , the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with *Charter* values ... then the rule ought to be changed.

This is clearly not a strict test: "*values,*" "*if possible,*" "*ought to be changed.*" According to this conception the common law is obviously not to be subjected to the full rigours of *Charter* scrutiny. Elsewhere, however, Lamer C.J. states that "the common law rule governing the issuance of orders banning publication *must* be consistent with the *principles* of the *Charter.*"[10] How these two statements are to be squared is not made clear.

Nowhere in the *Dagenais* decision does Lamer C.J. mention *Dolphin Delivery* or the possible implications of its holdings for the case at hand. Instead, extending the Court's reasoning in *Slaight Communications Inc.* v. *Davidson*,[11] Lamer C.J. holds that in *Dagenais* and in other cases involving common law rules conferring discretion, the rules cannot confer the power to infringe the *Charter* without meeting the section 1 justification test.[12] Lamer C.J. makes no distinction between common law rules in the criminal context and those in strictly private litigation, leaving one to believe that no such distinction is required. If carried to its logical conclusion, the Chief Justice's reasoning seems to turn *Dolphin Delivery* on its head since it at least implies, and may even be construed as explicitly stating, that the *Charter* applies to the common law in *all* contexts.

Apparently cognizant of the broad implications of the Chief Justice's decision, McLachlin and La Forest JJ. attempt to refine the majority's holding in the area of *Charter* application. La Forest J. distinguishes *Dagenais* from *Dolphin Delivery* on the grounds that the court order in *Dagenais* "is one exercised pursuant to a discretionary power directed at a governmental purpose, i.e., ensuring a fair trial" and "not the invocation of the law by a private individual."[13] The fact that the infringement was a by-product of criminal proceedings, which themselves arose at the behest of the Crown, provides for La Forest J. a sufficient governmental nexus to warrant the application of the *Charter* to the publication ban. La Forest J. also states that he agrees with the comments of McLachlin J. on the point of *Charter* application.

McLachlin J. explicitly recognizes the implications of the majority judgment, stating that "the practical effect of the Chief Justice's approach ... may mean that all court orders would be subject to *Charter* scrutiny."[14] The result in *Dolphin Delivery* would have been completely different, states McLachlin J., if the Chief Justice's reasoning in *Dagenais* had been applied, since the ban on secondary picketing at issue in that case was exercised pursuant to a common law rule which conferred discretion to infringe the *Charter*.[15] A more tenable approach, McLachlin J. claims, would be a narrower one which would begin with the proposition that "court orders in the criminal sphere which affect the accused's *Charter* rights or procedures by which those rights may be vindicated must themselves conform to the *Charter*."[16] McLachlin J. also leaves open the possibility of *Charter* application beyond the criminal sphere, suggesting, however, that the determination of the limits of *Charter* application in such contexts be made on a case-by-case basis.[17]

In support of her position, McLachlin J. draws upon the Court's previous decisions in *R.* v. *Rahey* [18] and *B.C.G.E.U.* v. *British Columbia (Attorney General)*.[19] *Rahey* involved an appeal based on the accused's section 11(b) right to be tried within a reasonable time and the assertion that the trial judge in the case, by ordering 19 adjournments, had violated this right. In *Rahey*, La Forest J., without addressing the implications of *Dolphin Delivery*, found that "the courts, as custodians of the principles enshrined in the *Charter*, must themselves be subject to *Charter* scrutiny in the administration of their duties."[20] Also called upon to support McLachlin J.'s position, but adding to the confusing jurisprudence in the area, was the *B.C.G.E.U.* case. At issue was an injunction prohibiting picketing outside the British Columbia court house. Dickson C.J.'s majority decision distinguished *Dolphin Delivery* on the ground that the motivation for the court's action in *B.C.G.E.U.* was "entirely public in nature," namely the protection of access to the courts by the public, and held that, as such, the *Charter* should apply to

the court's action. The public nature of the action in *Dagenais* then (criminal proceedings), would also seem to attract *Charter* application.

Although not mentioned by McLachlin J., in the period between *Dolphin Delivery* and *Dagenais* the Supreme Court has several times applied the *Charter* to the common law in the criminal context. In *R.* v. *Bernard*[21] the Court evaluated the common law rule which held that intoxication provided no defence to general intent offences with reference to sections 7 and 11(d) of the *Charter*. At issue in *R.* v. *Swain*[22] was the common law rule permitting the Crown to adduce evidence of the accused's insanity, irrespective of the wishes of the accused. This rule was found to infringe section 7 of the *Charter*. In neither of these cases did the Court address the holdings in *Dolphin Delivery*. One is left to presume that since criminal proceedings by definition involve the state, common law rules in such a context must comply with the *Charter*, further supporting La Forest and McLachlin JJ.'s positions.

Justice L'Heureux-Dubé, however, rejects the majority holding that the publication ban under consideration should be subjected to *Charter* scrutiny.[23] L'Heureux-Dubé J. takes a strict approach to McIntyre J.'s assertion in *Dolphin Delivery* that the *Charter* does not apply to court orders *per se*, since the courts do not constitute government under section 32(1). Referring to her own approach in *Young* v. *Young*,[24] where even a court order made pursuant to *statutory* authority was held to be immune from *Charter* scrutiny, it is not surprising that L'Heureux-Dubé J. reached the conclusion she did. It is troublesome, however, that L'Heureux-Dubé J. approvingly identifies exceptions to the rule about *Charter* application to judicial activity (*Rahey* and *B.C.G.E.U.*) without articulating why, courts not being "government," the *Charter* would apply to their activity.[25] Also, drawing on the token remarks about the *Charter's* application to the common law in *Dolphin Delivery* and *Salituro*, L'Heureux-Dubé J. repeats the Court's vague assertion that the common law must be developed in a manner consistent with the *Charter*.[26] If the common law is to be developed consistent with the *Charter* and, of course, statutes must be consistent with the *Charter*, and court orders are only made under the authority of one of these sources, unless a judge oversteps the authority conferred by the law it is difficult to imagine how a court order could legitimately result in a *Charter* infringement.

Judging, however, from the reasoning evinced in the recently released *Hill* v. *Church of Scientology of Toronto*[27] the Court is determined to apply the mushy "consistent with *Charter* values" approach to the common law in cases involving only private litigants. Cory J. for the majority in that case stressed that, when evaluating the common law, "[i]t is important not to import into private litigation the analysis which applies in cases involving government action."[28] The appropriate analysis, however, still remains shrouded in a fog of vague language. Of course this vagueness allows the courts to maintain a great deal of discretion since they are not bound by the relatively strict doctrines of the *Charter* when dealing with the common law.

Dagenais also raises an interesting procedural question about which there is as much divergence on the Court as with the *Charter* application issue. The question concerns the right of appeal of the publication ban (and presumably other interlocutory orders) by third parties, in this case the C.B.C..

Lamer C.J.'s majority judgment is an appropriate starting point for an analysis of the procedural issue in this case. The question which arose concerned the avenues available to the C.B.C., or any other third party to an interlocutory criminal order, after having been denied in their attempt to dissuade the court from issuing a publication ban at the trial level. At its most basic,[29] the judgment of Lamer C.J. on this question may be summarized as follows: If the publication ban is issued by the superior court of a province then the appropriate avenue of appeal is directly to the Supreme Court of Canada by way of section 40 of the *Supreme Court Act*;[30] alternatively, if the order is issued by the provincial court of a province then the appeal should be made to the superior court of the province for a remedy of *certiorari*.[31] Both of these avenues required the majority to proffer more expansive readings of the respective statutory and common law enabling provisions than existed previously. The majority provided these expanded interpretations with the admonition that neither was entirely satisfactory and that legislation was required to deal effectively with the question.[32] Other than an unstated but apparently assumed inherent right of appeal, Lamer C.J. did not offer an explanation of why third parties were entitled to an appeal of the initial publication ban hearing. McLachlin J., in her judgment, suggests that the third party's right of appeal flows from the notion that courts must be able to provide a "full and effective remedy for any *Charter* infringement."[33] Further,

McLachlin J. states that the right of appeal and the procedures for pursuing an appeal outlined by the Chief Justice satisfy the "effective remedy" requirement.[34]

Dissenting on this point were Justices La Forest and L'Heureux-Dubé.[35] Addressing the axiom which seems to inform the judgments of the Chief Justice and McLachlin J. ("where there is a right there is a remedy") L'Heureux-Dubé J. asserts that the only remedy to which the C.B.C. was entitled was being given standing at the trial hearing to decide on the issuance of the publication ban.[36] L'Heureux-Dubé J. was unable to find any grounds in the *Supreme Court Act*, in the *Criminal Code*, or in the common law which would provide an avenue of appeal for a third party from the order of a trial judge in a criminal proceeding. She did state, however, that "[w]ere this a case where the appellants had no access whatsoever to an initial remedy then section 24(1) [of the *Charter*] might confer jurisdiction to provide an initial remedy, such as giving the appellants standing to raise the issue."[37] L'Heureux-Dubé J.'s position on this issue is somewhat problematic since it presumes that a remedy (the publication ban hearing) would *precede* the *Charter* infringement (the actual court order).[38] It would be more reasonable to conclude that the requirement for a remedy would not be fulfilled unless the remedy were available after the *actual* alleged infringement instead of before the *possible* infringement. On the procedural point then, the course described by Lamer C.J. and McLachlin J. would seem more in accordance with the axiom.

The substantive portion of the *Dagenais* case concerns the common law rule governing the issuance of publication bans. On this issue too, the Court is polarized. Gonthier J. , with whom L'Heureux-Dubé J. is in agreement on this point, asserts that the existing common law rule is consistent with the *Charter* and need not be varied.[39] Gonthier J. argues that the structure of the existing rule need only be modified in accordance with existing *Charter* analysis.[40] Agreeing with the majority that once *prima facie* violations of the competing rights (fair trial and free expression) have been established, Gonthier J. states that the burden of both parties has been discharged and that the ensuing balancing should not privilege or disadvantage either of the rights.[41] Presuming that a publication ban violates freedom of expression, and that the right to a fair trial constitutes a pressing and substantial objective, Gonthier J. focuses his analysis on the last two steps of the *Oakes* test.

Under the minimal impairment branch, possible alternatives to the ban should be considered, but, counsels Gonthier J., "the mere existence of alternatives to publication bans ... does not of itself support the denial of a publication ban."[42] Gonthier J. urges a consideration of the costs and burdens of alternative measures and asserts that alternatives must be considered within the Anglo-Canadian legal tradition.[43] About this tradition, Gonthier J. suggests that it has been to "accept the propriety of bans even though it cannot be said with certainty that the fairness of a trial will be denied."[44] Also part of the Anglo-Canadian tradition, states Gonthier J. approvingly, is a reluctance to engage in the extensive jury challenges, *voire dires* or jury sequestrations which are so prevalent in the American context and which would constitute the bulk of the effective alternatives to publication bans.[45] Further revealing his obvious privileging of the fair trial rights of the accused over the free expression rights of third parties, Gonthier J. cites with approval the Alberta Court of Appeal decision in *R.* v. *Keegstra (No.2)*[46] in which the court banned the showing of a small play about holocaust revisionism. The play was showing in Edmonton, 160 kilometres away from the trial venue. That case was an egregious example of the most remote speculation about risks to trial fairness trumping free expression rights — an outcome that flows naturally from Gonthier J.'s formulation of the publication ban rule.

The majority decision of Lamer C.J. certainly seems to take free expression rights more seriously when considering the publication ban rule. In the view of the Chief Justice, "the pre-*Charter* common law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those affected by the ban."[47] As such, the rule must be modified. Lamer C.J. states the test for publication bans as follows:[48]

(a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial because reasonably available alternative measures will not prevent the risk; and

(b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.

Elaborating on first part of the rule, Lamer C.J. states that while the *Charter* guarantees a fair trial, "it does not require that all conceivable steps be taken to remove even the most speculative risks" and that "publication bans are not available as protection

against remote and speculative dangers."[49] As examples of reasonably available alternatives the Chief Justice includes "changing venues, sequestering jurors, allowing challenges for cause and *voir dires* during jury selection, and providing strong judicial direction to the jury."[50]

The second part of the newly formulated rule requires a consideration of the effects of the publication ban. As such it is analogous to the "deleterious effects" analysis in the *Oakes* test. The Chief Justice, in fact, suggests that this portion of the *Oakes* test be reformulated to conform with the second part of the publication ban rule. Whereas the original "deleterious effects" portion of the *Oakes* test required the consideration of the *objectives* of the impugned measure in light of its deleterious effects, the new test would require that both the objectives and the salutary *effects* of the measure be weighed against its deleterious effects.[51] Under this new formulation, the deleterious effects analysis may yet emerge from its status as a mere vestigial appendix to the functionally important organs of the *Oakes* test.

On the point of the practical implications of the second part of the publication ban rule, Lamer C.J. notes that technological advances in communication (electronic mail and bulletin boards for example) have eroded the actual potential effects of publication bans on jury impartiality and that these advances must be considered when determining the probable efficacy of a ban.[52] Further, the Chief Justice even questions whether future jurors are in fact irremediably adversely affected by the majority of pre-trial publicity, since judicial direction with regard to certain sources of information should enable jurors to focus only on juridically acceptable evidence.[53] Given these observations, and the newly formulated rule, it is likely that free expression will receive more serious consideration from the judiciary when future publication bans are contemplated.

The *Dagenais* decision would appear to be yet another confusing foray by the Supreme Court into the area of *Charter* application. The Court continues to evince contradictory tendencies when discussing the application of the *Charter* to the common law and, as yet, no clear position on the issue has emerged. While it would be more desirable to have the Court confront and deal directly with the incoherence of the *Dolphin Delivery* decision, *Dagenais* may nevertheless represent an incremental step towards a more sustainable and principled approach to determining the *Charter's* application to the common law. Further, a clearly positive aspect of the *Dagenais* decision is the fact that the majority of the Court has given significant weight to the consideration of free expression interests in applying the common law rule governing the issuance of publication bans, an element clearly missing from previous decisions in the area.❑

Patrick Nugent
Law Student, University of Alberta and Summer Research Associate, Centre for Constitutional Studies.

Endnotes

1. [1994]1 S.C.R. 835.
2. The trial judge banned the broadcast of the program throughout Canada and banned the publication of details of the ban and the proceedings leading to it until the completion of the trials of the four accused. The Ontario Court of Appeal narrowed the ban to include only a prohibition of the broadcast of the program within the province of Ontario and on one Montreal network.
3. [1986]2 S.C.R. 573.
4. *Ibid.* at 600.
5. *Ibid.* at 599.
6. *Ibid.* at 603, emphasis added.
7. Peter Hogg, "Who is Bound by the Charter?" in Gerald-A. Beaudoin ed. *Your Clients and the Charter - Liberty and Equality* (Cowansville (Que.): Yvon Blais Inc., 1987) at 24-25.
8. With Sopinka, Cory, Iacobucci and Major JJ. concurring.
9. [1991] 3 S.C.R. 654 at 675 in *Dagenais, supra* note 1, at 876.
10. *Ibid.* at 865, emphasis added.
11. [1989] 1 S.C.R. 1038. This case stands for the proposition that *legislation* cannot be interpreted as conferring the discretion to infringe the *Charter* - unless the infringement can be justified under section 1.
12. *Dagenais, supra* note 1 at 875.
13. *Ibid.* at 892-93.
14. *Ibid.* at 941.
15. *Ibid.*
16. *Ibid.* at 944.

17. *Ibid.*

18. [1987] 1 S.C.R. 588.

19. [1988] 2 S.C.R. 214.

20. *Rahey, supra* note 18 at 633 in *Dagenais, supra* note 1 at 943.

21. [1988] 2 S.C.R. 833.

22. [1991] 1 S.C.R. 933.

23. *Dagenais, supra* note 1 at 908-10.

24. [1993] 4 S.C.R. 3.

25. *Dagenais, supra* note 1 at 909-10.

26. *Ibid.* at 911-12.

27. [1995] preliminary version S.C.J. No. 64.

28. *Ibid.* para. 93.

29. And for the purposes of this comment this issue will only receive a relatively superficial analysis.

30. R.S.C., 1985, c. S-26, s.40(1) [rep. & sub. 1990, c.8, s.37].

31. *Dagenais, supra* note 1 at 859-66. *Certiorari* in this case would allow superior court judges to provide a remedy from provincial court judges in cases of excess of jurisdiction or errors in law. (*Ibid.* 864-65)

32. *Ibid.* at 858. The minority judgments also called for legislation to deal adequately with the procedural issue.

33. *Ibid.* at 945.

34. *Ibid.*

35. La Forest J. in his judgment generally affirmed the holdings of L'Heureux-Dubé J. on the procedural question (*Ibid.* at 892).

36. *Ibid.* at 898.

37. *Ibid.* at 907.

38. Although, given that L'Heureux-Dubé J. does not agree that the *Charter* applies to court orders at all, one might argue that if the common law itself, as regards publication bans, may be said to infringe the *Charter* the infringement existed prior to the trial, and the hearing at which the C.B.C. challenged the ban could then be said to follow the existing infringement (thereby providing a remedy after the infringement).

39. McLachlin J. also states that the existing common law rule is satisfactory and that, if properly applied, it meets the standards of justification required by s.1 of the *Charter*. McLachlin J. warns however against "the facile assumption that if there is any risk of prejudice to a fair trial, however speculative, the ban should be ordered." (*Ibid.* at 949-50).

40. *Dagenais, supra* note 1 at 922-23.

41. *Ibid.* at 922.

42. *Ibid.* at 924.

43. *Ibid.*

44. *Ibid.* at 921.

45. *Ibid.* at 927-28.

46. (1992)127 A.R. 232.

47. *Dagenais, supra* note 1 at 877.

48. *Ibid.* at 878.

49. *Ibid.* at 879-90.

50. *Ibid.* at 881.

51. *Ibid.* at 888-89.

52. *Ibid.* at 885-87.

53. *Ibid.* 884-85.