

# Landmark Case

## FREEDOM OF EXPRESSION; THE RIGHT TO A FAIR TRIAL AND THE *CHARTER OF RIGHTS AND FREEDOMS*

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### *Dagenais v. Canadian Broadcasting Corporation (1994)*

#### Background

Dagenais, Monette, Dugas and Radford were four members of a Catholic order, the Christian Brothers, who were charged with sexually assaulting young boys while they were teachers at an Ontario Catholic school. Following the arrests of the four men, but before the completion of their trials, the Canadian Broadcasting Corporation (CBC) and the National Film Board (NFB) attempted to air a docudrama, entitled "The Boys of St. Vincent", which was inspired by events in Newfoundland similar to those allegedly committed by the Brothers.

On a motion brought by defence counsel, the lower court judge ruled that the airing of "The Boys of St. Vincent," could violate the rights of the four men to have a fair trial as protected by section 11(d) of the *Charter of Rights and Freedoms, 1982*, and that it was therefore banned from being aired until the end of the criminal trials. The CBC and the NFB appealed the lower court decision arguing the ban violated the right to freedom of expression enshrined in section 2(b) of the *Charter of Rights and Freedoms, 1982*.

#### The *Charter of Rights and Freedoms*

##### The Right to a Fair Trial

As part of the Constitution Act 1982, the *Charter of Rights and Freedoms* outlines the individual rights and freedoms of Canadians. Section 11(d) of the *Charter* outlines rights protected for anyone who is charged with an offence. It states that everyone has the right:

11 (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

In addition to the protections afforded by s. 11 (d), individuals are also protected by Section 7 of the *Charter*, which reads:

7. Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

To fully protect the right of an accused to a fair hearing by an independent tribunal, courts are concerned that juries may be improperly influenced by certain information. As a result, courts have decided, under some circumstances, that they must prevent juries from reading or hearing certain information. There are various ways of ensuring juries may not be improperly influenced, such as sequestering (keeping the jury in a protected environment away from uncensored information), allowing for more in-depth jury selection questioning (to find out if a potential juror has already been influenced by publicity), and providing strong directions to the jury to disregard certain information.

## The Right to Freedom of Expression

The *Charter of Rights and Freedoms* also ensures that Canadians have a right to freedom of expression. This freedom is listed in s. 2(b) where it states:

*2(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media communication;*

This freedom ensures that individuals and organizations can express their thoughts and ideas without government intervention. In practice this means that individuals and organizations can publish their thoughts and not be prevented from doing so without good reason.

## The Issue: How to Recognize both Rights

The issue in the *Dagenais* case was how to protect the right to freedom of expression and the right to a fair trial, each of which is found in the *Charter*, without unnecessarily disturbing the other. The motion for an injunction preventing the broadcast of “The Boys of St. Vincent” was granted as was a ban on publicizing the request for the ban on the program. This decision was appealed to the Ontario Court of Appeal.

## Appeal to the Ontario Court of Appeal

On appeal the injunction was upheld, but the court only banned publication in Ontario and Montreal. The publication ban on the court’s proceedings was overturned, as the court found the trial judge’s publication ban to have been unnecessarily broad.

The CBC and the NFB were not satisfied with this decision and sought leave to appeal the decision to the Supreme Court of Canada.

## Appeal to the Supreme Court of Canada

The CBC and NFB argued the appeal on January 24, 1994, and the decision was given on December 8, 1994. The majority decision of the Court, written by Chief Justice Lamer, found that the publication ban violated the right to freedom of expression outlined in section 2(b) of the *Charter*. The ability of a court to award publication bans, they noted, is a discretionary power that comes from the common law, meaning that judges can consider the circumstances of each case. The majority decision stated that the common law rule requires that the party seeking the publication ban demonstrate that there is a “real and substantial risk” of interference with the right to a fair trial. If the presiding judge finds that the test is met, it is within the judge’s power to grant a ban.

In an effort to reconcile the common law with the *Charter*, the majority decided that a “clash” approach to rights, as is seen in the United States, would not be appropriate in Canada. The “clash” approach leads to a hierarchy of rights; making some rights more important than others. The Majority found that such an approach was not appropriate and that the Canadian approach should be to find a “balance” between both rights so that both rights can be fully respected.

Application of this balancing model and the Court’s findings about the effects of the *Charter* resulted in a modified rule for publication bans: publication bans should only be ordered where a) it is necessary to prevent a real and substantial risk to the fairness of a trial, and reasonable alternatives will not be able to reduce that risk, and b) the beneficial consequences of the ban outweigh the negative effects on the freedom of expression of the other party.

## Publication Bans

The Court clarified the rules regarding publishing bans. The party wanting the ban must: - justify the limitation on freedom of expression, - show that the ban is necessary, - that it relates to an important objective that can’t be achieved reasonably in another way, - that it is as limited as possible, and - that the benefits of the publication ban are greater than the negative effects on the freedom of expression. When striking a balance between the good and bad effects of a publication ban, the judge must consider whether another *Charter* right is protected by the ban.

In applying these principles to the facts in the *Dagenais* case, the Supreme Court of Canada held that the publication ban preventing the publication of “The Boys of St. Vincent” was unconstitutional and therefore should not be upheld. The Majority decided that although the ban was meant to prevent a “real and substantial risk” to the fairness of the Respondents’ trials, it was too broad in its application, and that there had been no consideration of alternatives that might have protected the defendants’ rights to a fair trial.



## Classroom Discussion Questions

1.
  - a) What type of document is the *Charter of Rights and Freedoms*?
  - b) What makes the *Charter of Rights and Freedoms* different from other laws?
  - c) Who has protection under the *Charter*?
  - d) Whose actions are constrained by the *Charter*?
2. What do s. 2(b) and s. 11(d) of the *Charter* mean? What do they try to protect?
3.
  - a) What does the Supreme Court of Canada mean when they talk about the “clash” model?
  - b) How is the Canadian model different?
  - c) How do you think the history of the U.S.A. has influenced or led to its model of rights and freedoms?
4. How might this Supreme Court of Canada decision affect the right to freedom of expression in Canada?
5. What is the role of the media in protecting rights and strengthening the justice system?
6. Do you think that the outcome of this case is affected by the fact that the CBC is a publically funded broadcaster?
7. Divide students into two groups. Have the groups develop creative arguments for debate on the following two topics:
  - a) Dagenais’ right to a fair trial WAS NOT violated.
  - b) Dagenais’ right to a fair trial WAS violated.



## *Dagenais v. CBC: Worksheet 1*

### Balancing Two Equal Principles

According to the Supreme Court of Canada the appropriate way to deal with two conflicting *Charter* rights is to balance the interests they protect so that each right is protected as much as possible.

Using the new principle for publication bans outlined by the Supreme Court of Canada in *Dagenais* assess the following scenarios. Outline the interests at stake and the arguments for and against the publication. Propose a solution.

#### **Scenario #1**

A young man is arrested and brought to trial for driving recklessly (without hurting anyone). The police have asked media outlets to publicize his description so that more eyewitnesses can be found.

#### **Scenario #2**

A prime-time news show wants to do a special on convicted pedophiles that have served their jail time and are living quietly, with no contact with children.

#### **Scenario #3**

A very well known hockey player, Tie Domi, is going through a divorce. The media has published several excerpts from the court documents regarding his divorce. In particular the media published details of the couple's troubled relationship.

#### **Scenario #4**

A highly respected surgeon is being sued for malpractice. The court documents include personal information from his patients' files.



## *Dagenais v. CBC: Worksheet 2*

### Availability of Other Options to Publication Bans

The Supreme Court of Canada decided that before a judge can order a publication ban he/she must first consider whether or not there are any other options available to protect the defendant from an unfair trial. By forcing judges to consider alternatives, the Supreme Court is hoping that in most cases the legal system will not have to infringe on freedom of expression in order to protect the rights of the accused.

#### Small Group Questions:

1. Think about some possible alternatives to publication bans. Create a list ordering your options from least to most “intrusive” on the right to freedom of expression.
2. Might certain options be unavailable depending on the type of information being argued about?
3. List the interest of the various people affected by media coverage of a legal case (criminal or civil).

\*\*In a large group, discuss each group’s responses.



## *Dagenais v. CBC: Worksheet 3*

### Displacing or Changing Common Law Rules

When the Constitution Act 1982 came into effect it made the Canadian constitution the “supreme law of Canada.” A “supreme” law in the constitutional context is one that takes precedence over other forms of law. This is stated in section 52(1) of the Constitution Act, 1982:

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.

In practice this means that if the Parliament of Canada, or one of the provincial legislatures passes a piece of legislation, and it is inconsistent with the Constitution, it can be struck down.

Similar to other Commonwealth nations, Canada also operates under the “common law”. The “common law” is the body of judicial decisions that have resulted from applying laws to different situations. Similar to written legislation, the “common law” has to be consistent with the Canadian Constitution.

In the *Dagenais* decision the Supreme Court of Canada held that the old common law rules on publication bans had to be changed to keep in line with the principles outlined in the Charter of Rights and Freedoms.

### Activity

Are the following rules in line with the right to freedom of expression and the right to a fair trial? If not, how would you re-write them so that they are?

1. Any person who wants to write political commentary that is contrary to the interests of Canadians can be arrested under the Criminal Code of Canada.
2. An accused person has the right to participate in his or her defence.
3. Students in high schools are not allowed to wear shirts that have curse words on them.
4. Every religious group can publish their own newspapers.



## *Dagenais v. CBC: Worksheet 4*

### “Dissenting” or Minority Opinions

There are nine judges on the Supreme Court of Canada, and they don’t always vote the same way. In the *Dagenais* case there was a significant minority (4 judges), meaning that four of the judges on the Court decided against the majority decision. Although the majority decision of each case becomes the binding law for future cases, the minority opinions can be very important in discussing objections or rationales to the application of the rules in a particular case. Therefore, when applying old principles to new cases lawyers will often read “dissenting” or “minority” opinions to help give them new ideas or to help them formulate good arguments.

### Activity

Write one paragraph **disagreeing** (dissenting) with the following statements.

1. Courts should try to *balance* conflicting rights.
2. Freedom of expression is just as important as the right to a fair trial.

### *Expanded Activity*

Have students argue for or against the above statements, providing supporting examples. Have students devise a hypothetical situation and apply their reasoning to show how their position would result in rights protection.