NEW YORK LAW SCHOOL

NYLS Law Review

Volume 50
Issue 1 *International and Comparative Perspectives on Defamation, Free Speech, and Privacy*

Article 3

January 2006

# Free Speech, Reputation, and the Canadian Balance

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# FREE SPEECH, REPUTATION, AND THE CANADIAN BALANCE

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## INTRODUCTION

There is a fundamental tension in defamation law between preserving free speech and protecting reputation. Because rights and freedoms are not absolute, courts must strike the proper balance between them. The purpose of this article is to: 1) describe how Canadian courts balance freedom of expression against an individual's right to protect his or her reputation; and 2) compare the balance struck by courts under Canadian common law, Quebec civil law, and American law. We shall see that Canadian common law has tended to favor the protection of reputation at the expense of free speech, and that the American and Quebec laws of defamation have adopted a balance more protective of freedom of expression.

Under the Canadian Constitution, the Charter of Rights and Freedoms (Canadian Charter) provides that "[e]veryone has the following fundamental freedoms: . . . freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication . . . ."[1] The protection afforded to free speech under this provision, however, applies only to acts of Parliament, the Legislatures, and the federal and provincial governments.[2] Nevertheless, in interpreting the common law, courts must be guided by and comply with the values set out in the Canadian Charter.[3]

In Quebec, the Charter of Human Rights and Freedoms (Quebec Charter) also protects fundamental freedoms.[4] It provides:

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1. Canadian Charter of Rights and Freedoms, Part I of Schedule B of the Canada Act 1982, ch. 11 § 2(b) (U.K.) [hereinafter Canadian Charter].

2. *Id.* § 32. Note that the Canadian Charter may be applied to statutes in the field of private law because it applies to all legislative enactments.

3. *See* Hill v. Church of Scientology, [1995] S.C.R. 1130, 1132 ("The common law must be interpreted in a manner which is consistent with Charter principles.").

4. Charter of Human Rights and Freedoms, R.S.Q., ch. C-12 (2002) [hereinafter Quebec Charter].

"[e]very person is the possessor of the fundamental freedoms, including . . . freedom of opinion, freedom of expression . . . ."[5] The Quebec Charter has quasi-constitutional status in the sense that although it may be amended by way of an ordinary statute passed by the Legislature of Quebec, it renders constitutionally void any action taken by Quebec public authorities that are inconsistent with the rights and freedoms guaranteed therein.[6] In addition, the protections of the Quebec Charter may be claimed by individuals in private dealings, unlike the protections afforded by the Canadian Charter, which apply only to public acts.

In Canada, how conflicts that arise between free expression and reputation are resolved will vary significantly depending on whether a party is challenging the constitutional validity of a public act or claiming defamation in a private action against another party. In the case of private dealings, the resolution of the issue will differ as well in Canadian common law as in Quebec civil law.

Part II of this article discusses the general framework for Canadian constitutional analysis in determining the constitutionality of a given law and discusses the inherent tension between freedom of expression and protection of reputation. Part III focuses on the balance between freedom of expression and the right to the protection of one's reputation in Canadian common law. Part IV focuses on the same balance of expression and reputation, but in the context of Quebec civil law. Occasionally, some comparisons with American law will also be drawn. Part V argues that the Canadian common law of defamation has tended to favor the protection of reputation at the expense of certain aspects of free speech, and that the American and Quebec private laws of defamation have adopted a balance more favorable to freedom of expression. Finally, Part VI concludes that at least in cases of political speech, the Canadian common law should be as speech protective as either the Quebec or American standards for defamation law.

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5. *Id.* § 3.

6. HENRI BRUN & GUY TREMBLAY, DROIT CONSTITUTIONNEL 912 (Yvon Blais ed., 2002).

## II. The Canadian Analytical Framework for Constitutional Questions and the Tension Between Freedom of Expression and Protection of Reputation

When the constitutionality of a public act is challenged, Canadian courts apply the same two-step legal analysis regardless of whether the alleged victim claims entitlement to protection pursuant to the Canadian or the Quebec Charter. The first step is to establish whether a Charter right has been breached by a state act.[7] The second step focuses on the justification for the breach of the Charter right and comes from section 1 of the Canadian Charter,[8] which provides that the protected rights and freedoms can be limited if the limits are "prescribed by law," "reasonable," and "demonstrably justified in a free and democratic society."[9] The burden of proof in the first step lies with the party challenging the constitutionality of the law, and, in the second step, with the party seeking to uphold the validity of the challenged law.[10] Each of the following requirements must be fulfilled in order for a breach to be considered "reasonable and demonstrably justified." First, the objective of the challenged legislation must relate to concerns which are "pressing and substantial in a free and democratic society"; and second, the means chosen must be proportional to this "pressing and substantial" need. In determining proportionality, three criteria must be met: 1) the means taken must be rationally connected to the objective; 2) the means must also "impair as little as possible" the right or freedom in question; and 3) there must be a proportionality between the positive effects of the means used to achieve the objective and the negative effects on the right or free-

7. *See* Irwin Toy Ltd. v. Québec, [1989] S.C.R. 927, 967 (asking first whether a Charter right has been breached by state regulations before considering whether the breach is justified).

8. *See* R. v. Oakes, [1986] S.C.R. 103, 136-37 ("[Section 1] provides criteria of justification for limits on the rights and freedoms guaranteed by the Charter.").

9. Canadian Charter, Part I of Schedule B of the Canada Act 1982, ch. 11 § 1 (U.K.) ("[T]he rights and freedoms set out in [§1 are guaranteed and] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.").

10. *Oakes*, [1986] S.C.R. at 136-37. *See* RJR-Macdonald Inc. v. Canada, [1995] S.C.R. 199, 209-10 (analyzing the second step, the Supreme Court interpreted Section 1 of the Canadian Charter as involving a balancing act between the right breached and a pressing and substantial public interest).

dom.[11] If every detail of this two-step analysis is satisfied, then the public statute is deemed to pass constitutional muster as applied.[12]

The Canadian and the Quebec Charters both safeguard freedom of expression.[13] The latter also expressly guarantees a person "[the] right to the safeguard of his dignity, honour, and reputation."[14] Although it is not expressly referred to in the Canadian Charter, the Canadian Supreme Court has stated that the right to preserve one's reputation is nevertheless entitled to constitutional protection because it is closely connected to the notion of human dignity.[15]

The issue of defamation calls for a balancing between freedom of expression and the right to safeguard one's reputation.[16] Canadian courts have acknowledged the importance of the latter:

> Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.[17]

Hence, the right to reputation is part and parcel of the rights of personhood, which each democratic society must protect if it is to

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11. *Oakes*, [1986] S.C.R. at 106; Dagenais v. Canadian Broad. Corp., [1994] S.C.R. 835, 839; Thomson Newspapers Co. v. Canada, [1998] S.C.R. 877, 882-83.

12. Ford v. Quebec, [1988] S.C.R. 712, 769-70 (citing R. v. Edwards Books & Art Ltd., [1986] S.C.R. 713, 768-69).

13. The Canadian Charter, Part I of Schedule B of the Canada Act 1982, ch. 11 § 2(b) (U.K.) provides in part the following fundamental freedoms: "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication . . . ." The Quebec Charter, R.S.Q., ch. C-12, § 3 (2002) provides: "Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association."

14. Quebec Charter, R.S.Q., ch. C-12, § 4 (2002).

15. *See Hill*, [1995] S.C.R. at 1175 ("A good reputation is closely related to the innate worthiness and dignity of the individual.").

16. *Id.* at 1172.

17. *Id.* at 1175.

be mindful of safeguarding the person and his or her inherent dignity.

The Canadian courts have also long acknowledged the fundamental importance of freedom of expression in a democratic society.[18] In Canada, as in the United States, the theoretical foundation for protecting freedom of expression is generally understood to be based on three fundamental premises: participation in the political and social debate (democracy); the search for truth (the marketplace of ideas); and self-fulfillment and individual autonomy.[19] In light of these rationales for protecting freedom of expression — particularly the self-fulfillment theory, which is capable of accommodating all forms and contents of expression — the courts have adopted a very broad definition of its scope that protects a variety of human actions intended to convey a message,[20] ranging from advertising,[21] hate promotion,[22] pornography,[23] and defamatory statements.[24] The content of all types of expression,

18. *See, e.g.*, R. v. Sharpe, [2001] S.C.R. 45, 70 ("Among the most fundamental rights possessed by Canadians is freedom of expression."); R. v. Guignard, [2002] S.C.R. 472, 482 ("Since the *Charter* came into force, it has on many occasions stressed the societal importance of freedom of expression and the special place it occupies in Canadian constitutional law.").

19. *See Ford*, [1988] S.C.R. at 769-70; *Irwin Toy*, [1989] S.C.R. at 932.

20. *See Irwin Toy*, [1989] S.C.R. at 969.

21. *See Ford*, [1988] S.C.R. at 788-89 (finding that a law that required the sole use of the French language for public signs, posters, and commercial advertising infringed on freedom of expression); *Irwin Toy*, [1989] S.C.R. at 969-71 (finding that prohibiting commercial advertising directed at persons under the age of thirteen infringed on freedom of expression); R. v. Guignard, [2002] S.C.R. 472, 485 (finding that a law prohibiting the erection of advertising signs outside of industrial zones infringed on freedom of expression).

22. *See* R. v. Keegstra, [1990] S.C.R. 697, 868 (stating that suppression of communications that willfully promoted hatred infringed on freedom of expression); Canada v. Taylor, [1990] S.C.R. 892, 954 (finding that suppression of anti-Semitic speech infringed on freedom of expression); Ross v. New Brunswick Sch. Dist. No. 15, [1996] S.C.R. 825, 863-64 (finding that suppression of anti-Semitic speech by an off-duty public school teacher infringed on freedom of expression).

23. *See* Little Sisters Book and Art Emporium v. Canada, [2000] S.C.R. 1120, 1198 (stating that the restriction of gay and lesbian literature infringed on freedom of expression); *Sharpe*, [2001] S.C.R. at 72 ("prohibiting the possession of child pornography restricts the rights protected by s. 2(b) and the s. 7 liberty guarantee."); R. v. Butler, [1992] S.C.R. 452, 488-90 (finding that suppression of hardcore pornography infringed on freedom of expression).

24. *See* R. v. Lucas, [1998] S.C.R. 439, 484 (finding that a criminal law statute that punished defamatory statements infringed on freedom of expression).

"however unpopular, distasteful or contrary to the mainstream,"[25] is initially entitled to the protection of the Charters.

Although fundamental, freedom of expression is nevertheless not absolute. Its exercise may be restricted by the rights and freedoms of others — in particular, the interest in protecting one's reputation. To strike the most appropriate balance in these cases, the courts have adopted a contextual approach that attempts to define the extent to which a particular exercise of freedom of expression can be understood to further one or more of its larger theoretical purposes.[26] In other words, even if all expressions which tend to convey a message were to benefit from the Charters' protection, restrictions on a type of expression which stands further away from the core values of freedom of expression would be easier to justify than limitations on a type of expression lying at the core of these values.[27]

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25. *Irwin Toy,* [1989] S.C.R. at 968.

26. *See* Rocket v. Collège Royal des Chirurgiens Dentistes de l'Ontario, [1990] S.C.R. 232, 242 ("the value of the limitation and the value of free expression [are] weighed in the context of the case."); *RJR-MacDonald Inc.*, [1995] S.C.R. at 205 ("Context, deference and a flexible and realistic standard of proof are essential aspects of the s. 1 analysis.").

27. *Canadian Broad. Corp.*, [1996] S.C.R. at 513 ("Where, on the other hand, the expression in question lies far from the "centre core of the spirit" of s. 2(b), state action restricting such expression is less difficult to justify."). For an example of the application of the proportionality test in matters of defamation, see *Lucas*, [1998] S.C.R. 439. In that case, the Supreme Court first ruled that the provisions of the Criminal Code infringed the right to freedom of expression guaranteed by paragraph 2(b) of the Canadian Charter. *Id.* at 456. The Court then held that this limitation on freedom of expression was reasonable and justifiable, and hence proportional. *Id.* at 484-85. The Court stated that the offense was rationally connected to the legislative objective of protecting the reputation of individuals, and that the requirement that the Crown establish beyond a reasonable doubt the intent to defame with knowingly false statements satisfied the requirement of minimal impairment. *Id.* at 466-67. The Court noted that because "defamatory libel is far from and indeed inimical to the core values of freedom of expression," the beneficial effects which the provisions relating to defamatory libel had on the goal of the protection of a person's reputation outweighed their negative effects on freedom of expression. *Id.* at 480. The Supreme Court therefore confirmed the constitutional validity of the provisions of the Criminal Code on the grounds that they represented a reasonable and justifiable restriction on freedom of expression. Compare this Canadian case with the decision of the U.S. Supreme Court in *Garrison v. Louisiana*, 379 U.S. 64, 77-78 (1964), in which the Court reversed a criminal defamation conviction and significantly limited the reach of criminal defamation statutes.

In this respect, political discourse is of particular significance.[28]

## III. The Balancing Act in Canadian Common Law

In matters between private parties, defamation law provides two different schemes of liability depending on whether the offense takes place in Quebec or in another Canadian province. Indeed, notwithstanding the British Conquest of 1760, the Province of Quebec retained its private law of French origin,[29] codified for the first time in 1866[30] and re-codified in 1994.[31] Only Quebec's public law can trace its origins to British law. In contrast, all the other Canadian provinces are governed by the common-law system of British origin, both as to public law and private law. The reasoning in matters of civil liability as it relates to defamation differs significantly within those two schemes.

Under Canadian common law, the falsity of defamatory statements is presumed. It is essentially a strict liability scheme: the plaintiff does not have to establish that the defendant has perpetrated any wrongdoing. The plaintiff must show that the statements were objectively of such a nature as to disparage his or her reputation.[32] A defamatory statement is one that would have the effect of lowering esteem or respect for the person in the minds of people described as "right-thinking members of society generally"[33] or,

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28. *See Guignard*, [2002] S.C.R. at 484 (stating that the right to counter-advertise has important social implications and should be treated with the same deference as certain types of political discourse); *Keegstra*, [1990] S.C.R. at 727 (stating that political expression is deserving of protection because of its important social implications).

29. *An Act for Making More Effectual Provision for the Government of the Province of Quebec in North America*, 14 Geo. III, c. 83, section VIII (R.-U., 1774), *available at* http://www.solon.org/Constitutions/Canada/English/PreConfederation/qa_1774.html.

30. Canadian Legal Information Institute, Quebec, http://www.canlii.org/qc/index_en.html.

31. *Id.*

32. *See* Philip H. Osborne, Law of Torts 372-74 (2d ed. 2003) (explaining that the plaintiff must prove that 1) the defamatory statement may reasonably be understood as referring to him; 2) it was published to a third person who heard it or read it and understood it; and 3) the publication was intentional or due to a lack of care); Allen M. Linden, Canadian Tort Law 683-94 (6th ed. 1997).

33. Sim v. Stretch, (1936) 2 All E.R. 1237, 1240 (H.L.). *See* Byrne v. Deane, (1937) 1 K.B. 818 (C.A.); Murphy v. La Marsh, [1970] W.W.R. 114.

more recently, "reasonable or ordinary member[s] of the public."[34] If the statement is found to be defamatory, it is no excuse that the defendant did not intend to defame the plaintiff or that reasonable care was taken to ascertain its truth.[35] Such evidence of the defamatory nature of the statement, on the balance of probabilities, gives rise to a prima facie cause of action in defamation.

Once the cause of action for defamation has arisen, the defendant may then raise defenses. These defenses include the defense of truth, absolute privilege, qualified privilege, and fair comment on matters of public interest. The defense of truth is established by proving that the defamatory statement is indeed true. As Professor Fleming writes, "At common law, truth is a complete answer to a civil action for defamation and the only defence known generally by the name of 'justification.' It is not that libel must be false but that truth is in all circumstances an interest paramount to reputation."[36] The burden of proving the truth rests on the defendant. In other words, the falsity is presumed in favor of the plaintiff.[37] We will later see in this paper that casting the burden of truth on the defendant may have the effect of inhibiting speech.

The defense of absolute privilege applies only to narrow circumstances. Under this defense, defamatory statements are not actionable even if they are false and may even have been published maliciously. In cases where absolute privilege applies, "freedom of speech prevails entirely over the protection of reputation."[38] In general, absolute privilege is restricted to those situations in which the privilege acts as an "aid to the efficient functioning of our governmental institutions: legislative, executive, and judicial."[39] It covers judicial and parliamentary proceedings, and, to some degree, executive communications.[40]

The defense of qualified privilege is a conditional immunity which attaches to certain occasions generally defined by the correlative concepts of duty and interest between the parties to the com-

34. Color Your World Corp. v. Canadian Broad. Corp., [1998] O.R.3d 97, 106.
35. OSBORNE, *supra* note 32, at 370. **R**
36. JOHN G. FLEMING, THE LAW OF TORTS 610 (9th ed. 1998).
37. LINDEN, *supra* note 32, at 698. **R**
38. LEWIS N. KLAR, TORT LAW 687 (3d ed. 2003).
39. FLEMING, *supra* note 36, at 615.
40. LINDEN, *supra* note 32, at 699-703. **R**

munication. The defense applies "whenever a person who makes a communication has an interest or a legal, social or moral duty, to make it to another person who has a corresponding interest or duty to receive it."[41] For example, this may be so in the case of elected municipal officials and journalists.[42] As Professor Osborne wrote, "Ultimately, . . . the question is whether or not the interest in free speech ought to be given priority over the interest in individual reputation."[43] If the defendant is able to demonstrate that the criteria for application of the defense of qualified privilege are met, it is then incumbent upon the plaintiff to establish the bad faith or the malicious intent of the defendant (by showing, for example, spite, ill-will, or some indirect motive not connected with the privilege.)[44] If there is no evidence of malice, the defendant is entitled to a nonsuit.[45]

The last defense is the one of fair comment on matters of public interest. For Professor Osborne "it is the dominant concept in restoring the balance between free speech and a free media on the one hand and reputation on the other."[46] There are a number of elements that the defendant must prove to win the protection of this defense: the defamatory statement must be one of comment or opinion based on facts (the defense does not extend to statements of facts); it must be on a matter of public interest; and it must be fair. Matters of public interest fall within two main categories: "first, those in which the public has a legitimate interest, such as government activity, political debate, proposals by public figures, and public affairs generally; and second, works of art displayed in public, such as theatrical performances, music and literature."[47] To establish that the comment is a fair one, the defendant must show that the facts upon which the comment rests are true and that the com-

41. Prud'homme v. Prud'homme, [2002] S.C.R. 663, 691 (citing Adam v. Ward, [1917] A.C. 309, 334).

42. *Id.*

43. OSBORNE, *supra* note 32, at 378. **R**

44. Sun Life Assurance Co. of Canada v. Dalrymple, [1965] S.C.R. 302, 309-10 (citing Jerome v. Anderson, [1964] S.C.R. 291, 299).

45. LINDEN, *supra*, note 32, at 712 (citing Dewe v. Waterbury, [1881] S.C.R. 143, 155). **R**

46. OSBORNE, *supra* note 32, at 380. **R**

47. LINDEN, *supra*, note 32, at 714. **R**

ment "represents a legitimate opinion honestly held."[48] This defense, contrary to that of qualified privilege, may be raised by any person sued for defamation. As with the defense of qualified privilege, the defense of fair comment is lost if the plaintiff proves malice on the part of the defendant.

In 1995, the Supreme Court of Canada ruled on the compliance of the common law of defamation in light of the values guaranteed by the Canadian Charter in the case of *Hill v. Church of Scientology of Toronto*.[49] The Court's legal reasoning did not involve the application of the reasonableness test discussed in Part II because the matter at issue was not the constitutionality of a governmental act as such, but rather the compliance of the common law with Charter values.[50] In such a case, the balancing of the conflicting values must be more flexible. The burden of proof lay in this case entirely on the shoulders of the person challenging the constitutionality of the common law. Plaintiffs were required to demonstrate not only that the common law was repugnant to the values protected by the Charter, but, further, that it could not be justified.[51]

In *Hill*, the case involved allegations made during a press conference by the attorney for the Church of Scientology against a prosecutor in the Attorney General's Office, to the effect that the latter had misled a judge and had breached orders sealing certain documents belonging to the Church. Sued for defamation, the attorney and the Church of Scientology pleaded that the common law of defamation unjustifiably infringed the right to freedom of expression guaranteed by the Canadian Charter. The question at issue, therefore, was whether the common law struck the proper balance between the values of freedom of expression and of good repute.[52] The defendants argued that the Court should strike the balance in favor of free speech by adopting the actual malice stan-

48. *Id.* at 715.

49. [1995] S.C.R. 1130.

50. In Canada, although the common must be aligned with constitutional values, the Constitution does not directly apply to the common law. *See Hill*, [1995] S.C.R. at 1132, 1155 ("Although the Charter does not directly apply to the common law, it must be interpreted in a manner which is consistent with Charter principles.").

51. *Id.* at 1171.

52. *Id.*

dard set forth by the U.S. Supreme Court in the case of *New York Times* v. *Sullivan*.[53]

In this famous ruling, the U.S. Supreme Court held that the common law of defamation infringed the right to freedom of speech guaranteed by the First Amendment of the Constitution when the information was broadcast by means of mass media.[54] The common law of defamation prior to *Sullivan* drew presumptions of falsity and malice of the defendant from the evidence of the defamatory nature of the statements. According to the Court, this strict liability scheme, in cases where the defamatory statements were directed at public officials, could have a chilling effect on truthful speech as well as false speech.[55] Due to the fundamental importance in a democratic society of the right of the citizens to be able to freely express themselves and criticize the representatives of the government, a plaintiff who is a "public official" must demonstrate actual malice (sometimes referred to as constitutional malice); that is, the defamatory statement must be proved to have been made "with knowledge that it was false or with reckless disregard of whether it was false or not."[56] Today, this burden of proof has been extended to apply not only to public officials, but also to public figures.[57] In the case in which the plaintiff is a private person, however, the plaintiff need only demonstrate mere negligence, a far less degree of fault.[58] A finding of negligence is made when it is shown that the defendant has failed to exercise ordinary or reasonable

53. 376 U.S. 254 (1964).

54. *Id.* Although a state statute was at issue in this case, that statute was derived from the common law.

55. *Id.* at 279.

56. *Id.* at 280.

57. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967) ("We consider and would hold that a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.").

58. *See* Gertz v. Robert Welsh, Inc., 418 U.S. 323, 347 (1974) ("We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."). *See also* JOHN D. ZELEZNY, COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS, AND THE MODERN MEDIA 126-29 (3d ed. 2001); Joseph Kary, *The Constitutionalization of Quebec Libel Law, 1848-2004*, 42 OSGOODE HALL L. REV. 229, 235 (2004) (stating that most state jurisdictions have adopted the negligence standard).

care. Under this standard, one must determine if he or she acted as a reasonable person would have under the same circumstances, rather than inquire into what the defendant knew or did not know at the time of publication.[59] In short, the determination of the applicable criteria relating to fault is based on the question of whether the plaintiff is a public or private person. This distinction is apparently based on the materiality of the expression in question (for instance, a political message) and the influence of the persons defamed.[60] In all instances, however, mere evidence of the falsehood of the statements does not result automatically in the civil liability of the defendant: a certain degree of fault must also be demonstrated (actual malice or mere negligence).

In *Hill*, the Supreme Court of Canada rejected the actual malice standard.[61] The Court first noted the criticism of *Sullivan* by American observers (such as the thorough investigation conducted with respect to issues of media procedure, the increased costs of litigation, the depreciation of the truth of public discourse, etc.)[62] and stated that "the law of defamation is essentially aimed at the prohibition of the publication of injurious false statements."[63] Once the defamatory nature of the statements has been established, the defendant can rely on different defenses, notably the defense of qualified privilege, fair comment, or in appropriate circumstances the defense of truthfulness. The Court concluded that the common law of defamation was in keeping with the values of the Charter and it was therefore not necessary to amend it.[64]

## IV. The Balancing Act in Quebec Civil Law

In comparison with the Canadian common law of defamation, the Quebec civil law favors free speech over reputation. The Quebec Civil Code provides that "good faith is always presumed, unless the law expressly requires that it be proved."[65] In civil matters, the

59. Zelezny, *supra* note 58, at 128-29.
60. *Id.* at 129.
61. *Hill*, [1995] S.C.R. at 1180-86.
62. *Id.* at 1182-85.
63. *Id.* at 1187.
64. *Id.* at 1188.
65. Civil Code of Québec, ch. 64 S.Q. § 2805 (1991).

plaintiff is therefore required to establish that the defendant has committed a fault.

The relationship between the Quebec Charter and the Civil Code is hierarchical. Section 52 of the Quebec Charter provides that "no provision of any Act . . . may derogate from sections 1 to 38" of the Charter. Consequent to section 52, the Quebec Charter could render constitutionally void any section of the Civil Code which is inconsistent with the rights and freedoms guaranteed therein. The Supreme Court of Canada stated that the law of defamation in Quebec was grounded in Quebec's Charter as well as in the Civil Code, and that the standard of care was one of fault, rather than the strict liability standard of the Canadian common law.[66]

The Quebec scheme of civil tort liability requires that the plaintiff prove, according to the balance of probabilities, the existence of fault, prejudice, and a causal link between the fault and the prejudice.[67] In matters of liability for defamation, an assessment of the fault and the prejudice must take into consideration the contradictory values which, in this context, are freedom of expression (guaranteed by the Quebec Charter)[68] and the right to the protection of one's reputation (guaranteed by the Charter and the Civil Code).[69]

When a right guaranteed by the Quebec Charter is set up against an Act of Parliament or of the Government of Quebec, the two-step reasoning process described in Part II must be applied: the alleged victim must demonstrate that the public act infringes on his or her guaranteed rights, in which case the public actor must show that this infringement is reasonable and justifiable in a free and democratic society.[70] In civil matters between private parties, the plaintiff is similarly required to show an illegal or unjustified interference with his right, and that the interference was wrongful. In determining the wrongful nature of the interfering act, courts bal-

66. *Prud'homme*, [2002] S.C.R. at 688, 694-95, 698.

67. Civil Code of Québec, 1991 S.Q. ch. 64, § 1457; *Prud'homme*, [2002] S.C.R. at 683.

68. Quebec Charter, R.S.Q., ch. C-12, § 3 (2002).

69. Société Radio-Canada v. Radio Sept-Îles Inc., [1994] R.J.Q. 1811, 1818; *Prud'homme*, [2002] S.C.R. at 686.

70. Quebec Charter, R.S.Q., ch. 1, § 9.1 (2002); *Ford*, [1988] S.C.R. at 769-70.

ance the right to free speech with the right to safeguard one's reputation. The burden of proof rests on the plaintiff, both with respect to evidence of interference with his right and to the illegal or unjustified nature thereof.[71] In defamation proceedings, there will be an unjustified, and therefore wrongful, interference with the right to reputation of a person if the defendant did not act as a reasonable person would have under the same circumstances.[72]

The assessment of fault in matters of defamation is a question of the facts and circumstances viewed in the context in which it arises.[73] The following discussion illustrates the manner in which the courts have balanced the right to freedom of expression against that of protection of reputation under Quebec's fault-based framework of defamation law, in circumstances involving proceedings against journalists, elected officials, and persons who do not discharge any particular duties.

The role played by the media is of primary importance in a democratic society. The media, by collecting and broadcasting information, enable citizens to keep abreast of events and, as a result, form enlightened opinions on matters of public interest.[74] The right of the public to be informed is included in the constitutional guarantee of freedom of expression.[75] The fact that freedom of the press is of fundamental importance does not, however, mean that the media are entitled to immunity from civil proceedings.[76] Freedom of the press, like freedom of expression, may be restricted by the need to protect the rights of third parties or legitimate public interests, in particular the right to the protection of one's reputation.

In 1994, a case was brought before the Court of Appeal of Quebec dealing with an action in civil responsibility for defamation

71. JEAN-LOUIS BAUDOUIN & PATRICE DESLAURIERS, LA RESPONSABILITÉ CIVILE 197-05 (Yvon Blais ed., 2003).

72. *Prud'homme*, [2002] S.C.R. 663, 698; *Société Radio-Canada*, [1994] R.J.Q. at 1820. *See* Kary, *supra*, note 58, at 266-69. R

73. Néron Commc'n Mktg., Inc. v. Chambre des Notaires du Québec, [2004] S.C.R. 95, 127-28.

74. Beaudoin v. La Presse Ltée, [1998] R.J.Q. 204, 212.

75. Aubry v. Vice-Versa, [1998] S.C.R. 591, 616; *Canadian Broad. Corp.*, [1991] S.C.R. at 475.

76. *Beaudoin*, [1994] R.J.Q. at 212. *See* NICOLE VALLIERES, LA PRESSE ET LA DIFFAMATION 119 (1985).

commenced by a radio station and one of its main shareholders against a journalist and the television station of where she worked.[77] In her televised news feature, the journalist had claimed that the radio station was experiencing financial problems with the Quebec Department of Revenue and also referred to the personal bankruptcy of its main shareholder. The shareholder and the radio station initiated a defamation suit, alleging that the facts to which the journalist referred were false and that no public interest whatsoever was served by broadcasting them.[78] With respect to the assessment of fault, the court stated that the publishing or transmission of false information will not always be wrongful and, conversely, that its accuracy will not be automatically sufficient to discard any possibility of civil responsibility.[79] In the view of the court, the liability of a media corporation and of a reporter was akin to professional liability.[80] Hence, in order to determine if the injury to the reputation of a person is wrongful, one must compare the behavior with that which a reasonable person working in the same field would have exhibited. The assessment of whether or not the behavior was wrongful will be conducted in light of the professional standards governing the activities of the media.[81] In so doing, one must take into consideration the realities and difficulties of the journalist's trade (in particular the space and time constraints).[82] Therefore, the fault does not arise from an obligation of result, but rather from a duty of care or an obligation of means.[83] The truth of the statements and the notion of public interest are other factors that must be taken into consideration in the assessment of fault in the field of journalism.[84]

In this case, the court held that the preparation of the female journalist had been "reasonably careful and conscientious," and that the information broadcast was "fundamentally accurate." Further, in light of the economic significance the radio station repre-

77. *Société Radio-Canada*, [1994] R.J.Q. 1811.
78. *Id.*
79. *Id.* at 1818-19.
80. *Id.* at 1820-21.
81. *Id.* at 1820.
82. *Id.*
83. *Néron Commc'n Mktg.*, [2004] S.C.R. at 131-32.
84. *Id.* at 130-31.

sented for the region, information relating to any financial difficulties of the radio station was of public interest.[85] The court therefore dismissed the action for defamation.

Recently, in *Néron Communication Marketing Inc. v. Chambre des Notaires du Québec*, the Supreme Court was called upon to render a decision in a defamation suit involving the media.[86] This decision is of particular interest because, although the truth of the information as well as the public interest in broadcasting had been established, the Court nevertheless held the reporter liable for defamation due to the journalist's failure to observe the principles of integrity and fairness in journalism.[87]

In a letter requesting a meeting with a journalist, a communications consultant working for the *Chambre des Notaires du Québec*[88] notified the journalist of certain inaccuracies in her televised feature.[89] The journalist contacted him and, during their conversation, the consultant indicated to the journalist that his letter was not intended for publication.[90] At the same time, the journalist mentioned to the consultant that he himself had made two mistakes in his letter.[91] The consultant replied that he would check this information and that he would contact her within three days at the latest.[92] Without waiting for the three days to pass, the reporter aired a new televised feature in which she only focused on the erroneous portions of the letter.[93] The consultant sued the journalist and the television station for damage to his reputation.[94]

The majority of the Justices of the Canadian Supreme Court confirmed the state of the law to the effect that truth and public interest were not the only criteria in assessing the wrongful nature

85. *Société Radio-Canada*, [1994] R.J.Q. at 1821-22. For another application of the same principles, see *Beaudoin* v. *La Presse Ltée*, [1998] R.J.Q. 204, 212.

86. *Néron Commc'n Mktg.*, [2004] S.C.R. 95.

87. *Id.* at 101.

88. The Professional Association of Notaries in Quebec (translation provided by author).

89. *Néron Commc'n Mktg.*, [2004] S.C.R. at 102-04.

90. *Id.* at 104-05.

91. *Id.* at 105.

92. *Id.*

93. *Id.* at 105-07.

94. *Id.* at 108-09.

of an injury to reputation.[95] In the field of journalism, one must also examine whether an individual adhered to professional standards of the reasonable journalist placed in the same circumstances.[96] In this instance, the Court stated that the reporter, by dealing in her second feature only with the inaccuracies contained in the consultant's letter, and by refusing to allow the consultant to verify the accuracy of his allegations, had not followed the principle of equity that applies in matters of journalism.[97] The Court therefore allowed the action in civil liability for defamation.[98]

In another recent decision, *Prud'homme v. Prud'homme*, the Supreme Court was called upon to apply the notion of fault as part of a defamation suit brought by citizens against an elected municipal official.[99] During a regular meeting of the municipal council, an alderman publicly criticized a decision of the council not to appeal a judicial decision voiding one of his bylaws, which provided that only residents of a part of the city would have to cover the cost of a loan to pay for the construction of a school.[100] In his criticism, the alderman made statements regarding two of the citizens who had initiated the proceedings for repeal of the bylaw.[101] He explained that the two citizens had profited financially from the plan to build the school. These two citizens, claiming to have been injured by this statement, sued the alderman for defamation.[102]

The Supreme Court first applied the general criterion in the assessment of fault to the behavior of an elected municipal official.[103] Essentially, the alderman's behavior was compared to that of a reasonable person under the same circumstances: "[W]hile elected municipal officials may be quite free to discuss matters of public interest, they must act as a reasonable person would. The reasonableness of their conduct will often be demonstrated by their good faith and the prior checking they did to satisfy themselves as

95. *Id.* at 130-31.
96. *Id.* at 131-32.
97. *Id.* at 137.
98. *Id.*
99. *Prud'homme*, [2002] S.C.R. 663.
100. *Id.* at 670-71.
101. *Id.* at 672.
102. *Id.* at 673.
103. *Id.* at 677.

to the truth of their allegations."[104] The Court then pointed out the futility of importing into the Quebec civil law of defamation the defenses of qualified privilege and fair comment originating from the common law.[105] By taking into consideration the requirements relating to the duties of a municipal official and the specific constraints arising from the administration of municipalities, the criteria pertaining to the defenses of qualified privilege and fair comment were already an integral part of Quebec civil law.[106] The Court held that the alderman had not committed a tort because he "acted in good faith, with the aim of performing his duties as an elected municipal official," and because his statements were made in the public interest.[107] The Court also noted, at the very end of its ruling, the dangers to the vitality of municipal democracy which could have resulted from a conviction.[108]

In two recent judgments, the Appeal Court of Quebec was called upon to balance the rights of freedom of expression and the protection of one's reputation in civil defamation suits brought by elected officials. In the first matter, two federal members of Parliament from Quebec brought proceedings against the *Société Saint-Jean-Baptiste de Montréal*, an organization whose mission is to defend the national interests of Quebec, in respect to statements made in a letter published by a Quebec newspaper.[109] In this letter, the *Société* characterized the federal members of Parliament and ministers from Quebec, including the plaintiffs, as "traitors" and "collaborators" for voting in favor of the repatriation and amendment of the Canadian Constitution without obtaining the prior consent of the Province of Quebec through the Parliament.[110] The court reversed the decision rendered at trial by the Superior Court and dismissed the suit.[111] According to the majority of the judges, the statements, albeit defamatory, were made in the public interest, in good faith, and stated a reasonable opinion — namely, a point of view that is

104. *Id.* at 688.
105. *Id.* at 699.
106. *Id.*
107. *Id.* at 709.
108. *Id.*
109. Société Saint-Jean-Baptiste de Montréal v. Hervieux-Payette, [2002] R.J.Q. 1669.
110. *Id.* at 1670-71.
111. *Id.* at 1683.

reasonably arguable.[112] The conduct of *Société* and the author of the text could be equated with that of a reasonable person placed in the same circumstances.[113] The court stressed that the political arena gives rise to the use of "strong and colorful vocabulary," and that elected officials, although they are entitled to protect their reputations to the same extent as any other person, should expect to be subjected to severe criticism by citizens.[114]

The Court of Appeal did not reach the same conclusion in the defamation suit brought by Jacques Parizeau, then Chairman of the Parti Québécois and Opposition Leader at the National Assembly (Parliament of Quebec), and by Lucien Bouchard, then Federal Member of Parliament from Quebec and leader of the Bloc Québécois political party.[115] A financial analyst who managed an important investment advisory corporation compared the political actions of the plaintiffs to those of Adolf Hitler in a monthly newsletter of analysis. The majority of the judges of the court, recalling the teachings of the Canadian Supreme Court on the requirement of Quebec civil law to focus the analysis of civil responsibility on the notion of fault, held that the defendant had not acted as a reasonable person would under the same circumstances.[116] The defamatory statements, even though they dealt with matters of public interest (the political situation in Quebec) and were made in good faith, expressed opinions that were not reasonably arguable and had not been subjected to any preliminary research or verification.[117]

The difference in the results reached by the Court of Appeal in these last two matters can be attributed to the contextual, case-by-case analysis of the civil wrong.[118] In the first matter, the defamatory statements were made within a particular political context in relation to issues that, in Quebec, gave rise to very passionate and hot debates. Further, their dissemination was restricted to a Quebec audience. In the second, the defamatory statements were not

112. *Id.* at 1674-75.
113. *Id.*
114. *Id.* at 1676.
115. Lafferty, Harwood & Partners v. Parizeau, [2003] R.J.Q. 2758.
116. *Id.* at 2766.
117. *Id.* at 2768-69.
118. *Prud'homme*, [2002] S.C.R. at 686.

made in such circumstances and, further, were aimed at an international audience probably less capable of assessing the truth or falsehood of the statements. This latter case is presently on appeal before the Supreme Court of Canada.[119]

## V. Comparisons among the Canadian, Quebec, and American Laws of Defamation

A comparison among the laws of defamation in American law, Canadian common law, and the Quebec civil law reveals some significant differences with respect to the perception of the appropriate balance between the rights of freedom of expression and the protection of one's reputation. In general, one can argue that the Canadian common law of defamation has tended to favor the protection of reputation at the expense of certain aspects of free speech, and that the American and Quebec laws of defamation have adopted a balance more favorable to freedom of expression. This conclusion first follows from the difference in the standard of liability that exists between them: the Canadian common law of defamation is governed by one of strict liability for falsehood, whereas the American and Quebec laws of defamation are governed by principles of negligence.

In the Canadian common law, the courts have chosen a low threshold for the establishment by the plaintiff of a prima facie cause of action in defamation,[120] offering considerable protection to his right to reputation. The balance in favor of free speech is restored by a number of defenses, but the burden of proof rests on the defendant. In comparison, Quebec and American laws both seem to show a certain bias towards freedom of expression and freedom of the press; the burden of proof of the wrongful nature of the injury to reputation lies in both cases with the person defamed.

In the United States, the additional requirement of evidence of a certain degree of fault to the criteria of defamatory nature and, in some circumstances, the falsehood of the statements,[121] results in a

119. Leave to appeal granted: No. 30103, (2004) Bull. of the S.C.C. 776. Since then, the parties have reached an out-of-court settlement.

120. Osborne, *supra* note 32, at 368. R

121. In *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 777 (1986), the U.S. Supreme Court held that, when a newspaper published matters of public concern, a private plaintiff cannot recover damages without proving that the statements are false:

heavier burden of proof resting on the shoulders of the defamed American than that which is incumbent on the defamed Canadian. The freedom of speech enjoyed by American citizens who use mass media communications, particularly when they publish defamatory statements regarding public officials and public figures, seems to prevail over the right to the preservation of the reputation of the latter. The opposite appears to be true in Canadian common law, wherein the plaintiff is not required to prove the wrongdoing of the defendant for the latter to incur civil liability. Note also that Canadian law does not categorically change the threshold of proof depending on the public or private status of the person defamed, as in American defamation law.[122]

In Quebec civil law, the courts have rejected the strict liability of common law defamation and instead have applied a standard of care that is closer to the American negligence or actual malice standards. In Quebec civil law, as in the United States, the falsehood of defamatory statements does not necessarily give rise to the liability of the author. The inaccuracy or accuracy of the defamatory statements only represents one of the factors considered in assessing whether or not the conduct of the party sued is wrongful in nature, regardless of whether the latter belongs to the world of journalism.[123] In this aspect, Quebec law is to be distinguished from Canadian common law, which opts for a strict liability scheme in matters of defamation. It also differs from American common law, which does not consider the issue of the truth or falsehood of the defama-

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"The common law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." It is also logically required that "the complained-of statements be allegations of facts, not mere judgment or opinion that cannot be proven true or false." ZELEZNY, *supra* note 58, at 113.

122. *See Hill*, [1995] S.C.R. at 1161 ("Reputation is an integral and fundamentally important aspect of every individual. It exists for everyone quite apart from employment.").

123. *See Prudhomme*, [2002] S.C.R. at 698, 703, 708-09 (stating that fault is determined according to what a reasonable person would have said in the circumstances; in deciding what is reasonable, the court can also consider whether the individual acted with malice, the degree to which the individual checked the facts before speaking, as well as the nature of the forum, the time, and the opportunity the individual had to tell the full story). *See also Néron Commc'n Mktg.*, [2004] S.C.R. at 137 (stating that the notion of public interest is another factor that must be taken into consideration in the assessment of fault in the field of journalism).

tory statements to be a factor in determining the existence of a wrong, and applies two separate thresholds of proof depending on the public or private status of the defamed person. Despite these differences, Quebec and American law both seem to show a certain bias towards freedom of expression and freedom of the press: the burden of proving the wrongful nature of the injury to reputation lies in both cases with the defamed person.

At least in cases of political speech, the Canadian common law of defamation should be modified because of the hidden chill that it creates for the media. As Professor Osborne has written, "[t]he Canadian media is free to print or broadcast only the news it can *prove* to be true. This may lead to the suppression of matters of public interest and other issues that ought to receive public scrutiny and debate."[124] The American and the Quebec schemes of liability further to a greater extent the value of speech in a democratic society. Aware that they will not be necessarily held civilly liable for the dissemination of inaccurate defamatory statements, citizens and the media are less inclined to self-censorship.

Recently, the Supreme Court of Canada took a further step when it assimilated the liability of the media and journalists to one of professionals.[125] Hence, whether the information conveyed is true or false, a natural person or a body corporate working in the field of journalism is always required to discharge his duties in keeping with the standards of the profession. Some may argue that this ruling of the Canadian Supreme Court could be difficult to apply because of the great plurality of sources relating to journalistic standards.[126] This ruling, however, brings to light that the difficult task of acting as the watchdogs of democracy, which falls upon journalists and the media, entails duties as well as rights.

## VI. Conclusion

Defamation law is constantly struggling to strike an acceptable balance between freedom of expression and the protection of reputation, both of which are important values in a democratic soci-

124. Osborne, *supra*, note 32, at 384-85. **R**

125. *Néron Commc'n Mktg.*, [2004] S.C.R. at 97.

126. Louis-Philippe Gratton, *Les Droits du Journaliste. Et ses Devoirs? in* Développements Récents en Droit du Divertissement 97, 111-18 (Yvon Blais ed., 2000).

ety.[127] In Quebec and in the United States, the courts have tended to stress the importance of free speech in a democratic society, perhaps at the expense of some aspects of the right to protection of reputation, particularly in the case of public figures in the American law of defamation. In contrast, the interest of persons in protecting their good reputations was recognized early in the development of the common law, and continues to receive strong protection under the tort of defamation in Canada. In recent times, this has been called into question and it has been argued that the balance drawn by the Canadian common law between the competing values of individual reputation and free speech is in need of some readjustment in favor of the latter.[128] As we have seen, to date there has been little change in conventional principles regarding this balance in Canadian common law.

One cannot say that there is only one right balance that must be reached in matters of defamation. Because of the fundamental importance of free speech and free press in democratic societies, however, these values must be favored at least when political speech is at stake. The proper balance must also be established while keeping in mind the tremendous influence and power the media have in modern societies.

127. *See generally* Kary, *supra* note 58 (providing explanations for the differences between the Canadian, American, and Quebec laws of defamation).

128. OSBORNE, *supra* note 32, at 368.