

FREEDOM OF THE PRESS,
THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS,
AND A NEW CATEGORY OF QUALIFIED PRIVILEGE

MICHAEL R. DOODY*
Toronto

On public policy grounds, the defence of qualified privilege, in the absence of malice, allows an appropriate defendant in a defamation action to escape liability even when he has published defamatory and untrue statements of the plaintiff. Under pre-Charter law, it was well established that a member of the media could not invoke the defence of qualified privilege where the only basis for invoking the defence was the existence of a public interest in the subject matter.

This article makes two basic arguments. It suggests firstly that the Charter of Rights applies to regulate purely private transactions between individuals, and secondly, following the reasoning of the United States Supreme Court, that the application of the fundamental freedom of "freedom of the press and other media of communication" would create a new category of qualified privilege for media defendants when they publish information about people in public life.

Pour des raisons d'ordre public, l'immunité partielle permet à un défendeur poursuivi en diffamation de se soustraire à toute responsabilité, lorsque de sa part il n'y a eu aucune intention de nuire, alors même qu'il a fait publiquement des déclarations diffamatoires et mensongères sur le plaignant. En vertu du droit en vigueur avant la Charte, il était bien établi qu'un membre des "media" ne pouvait invoquer en défense l'immunité partielle basée exclusivement sur l'intérêt public de la déclaration.

Cet article contient deux arguments fondamentaux. L'auteur propose d'abord que la Charte des droits ne s'applique que pour régler les rapports privés entre individus; et ensuite que, conformément aux raisons adoptées par la Cour suprême des États-Unis, l'application de la "liberté de la presse et autres moyens de communication" qui est une liberté fondamentale, entraîne la création d'une nouvelle catégorie d'immunité partielle à l'égard des défendeurs faisant partie des "media", lorsqu'ils publient des informations ayant trait à des personnes appartenant à la vie publique.

Introduction

This article suggests that the application of the Charter of Rights may lead to an alteration of part of our law of qualified privilege as a defence for the media in libel actions. Pre-Charter categories of qualified privilege have

* Michael R. Doody, of the Ontario Bar, Toronto.

been established as a defence either by statute,¹ or at common law² (which continues to coexist with and supplement the particular areas of qualified privilege provided by statute³).

¹ Alberta: The Defamation Act, R.S.A. 1980, c. D-6, ss 10, 11; British Columbia: The Libel and Slander Act, R.S.B.C. 1979, c. 234, ss 3, 4; Manitoba: The Defamation Act, R.S.M. 1970, c. 60, ss 10, 11; New Brunswick: The Defamation Act, R.S.N.B. 1973, c. D-5, ss 9, 10; Nova Scotia: The Defamation Act, R.S.N.S. 1967, c. 72, ss 12, 13; Ontario: The Libel and Slander Act, R.S.O. 1980, c. 237, ss 3, 4; Prince Edward Island: The Defamation Act, R.S.P.E.I. 1974, c. D-3, ss 9, 11; Saskatchewan: The Libel and Slander Act, R.S.S. 1978, c. L-14, ss 10, 11.

² The general law of qualified privilege recognizes categories at common law where the statements under attack pertain to carrying out a duty, protection of an interest, reports of judicial, parliamentary and similar proceedings, and professional communications. See Duncan and Neill, *Defamation* (1978); Gatley on Libel and Slander (8th ed., 1981); Williams, *The Law of Defamation in Canada* (1976).

³ Gatley, *op. cit.*, *ibid.*, p. 3, n. 2, states: "The English law of defamation is basically common law with some statutory modifications, which are set out in App. 2. Most of the Canadian provinces and Australian states, as well as New Zealand, have a very similar law, and legislation rather than the course of decisions has caused some divergences."

S. 3 of the Ontario Libel and Slander Act, *supra*, footnote 1, establishes certain grounds of qualified privilege. S. 3(6) expressly preserves any defences of qualified privilege existing outside the statute, which would have originally referred only to the common law, but would now also refer to the Charter: 3(6). Nothing in this section limits or abridges any privilege now by law existing

All other provinces except Newfoundland (which relies totally upon the common law except for such limited amendments as have been made for slander actions by its Slander Act, R.S. Nfld 1970, c.352) have enacted provisions very similar to Ontario's s. 3(6): see *supra*, footnote 1, ss 10(5) (Alta); 4(3) (B.C.); 10(5) (Man.); 9(5) (N.B.); 12(7) (N.S.); 10 (P.E.I.); 10(4) (Sask.).

See also, *Wesolowski v. Armadale Publishers Ltd and Canadian Press* (1980), 112 D.L.R. (3d) 378 (Sask. Q.B.). Without making any mention of s. 10(4) of the Saskatchewan Libel and Slander Act, the court here held at p. 380, with respect to the defendant Canadian Press (which is a news service supplying daily news to newspapers and radio and television stations across Canada), that: "As the defendant is not a newspaper it is not entitled to rely on statutory privilege in respect of reporting court proceedings; however, the existence of the statute does not preclude the defendant from asserting a similar common law privilege."

It is unclear whether the court felt, as is suggested by Gatley, *ibid.*, that the statute simply continues to coexist with the common law except in cases of direct conflict (there being no statutory provision specifically excluding the common law), or whether the court was simply applying s. 10(4) of the Saskatchewan Act.

And *Tedlie v. Southam Co. (No. 2)*, [1950] 1 W.W.R. 1009 (Man. C.A.). S. 10(5) of the present Manitoba Defamation Act, *ibid.*, was in the Defamation Act, S.M. 1946, c. 11, in identical form. The court was considering, in part, whether qualified privilege was available as a defence; without referring in any way to s. 10(5), the court's majority made the strange statement at p. 1015, which, at least insofar as it refers to defences of qualified privilege under our present statutes, should probably be considered as being made *per incuriam*, that: "Counsel for the respondents submitted that, as there was no malice and the occasion was privileged, there was no cause of action. Many cases were cited in support of that argument. That submission and the cases cited are inapplicable. The Defamation Act constitutes a code and, insofar as it deals with a matter, the previous law is inapplicable."

Essentially, the value of this defence is that the person sheltering behind it need not prove the truth of the facts alleged. This is in contrast to the defence of fair comment, in which the facts alleged must be proved by the defendant to be true before he can be relieved of the liability for defamatory opinion. It has long been recognized that this very substantial defence is based upon reasons of public policy inherent in the nature of our democratic system of government:⁴

In such cases no matter how harsh, hasty, untrue, or libellous the publication would be but for the circumstances, the law declares it privileged because the amount of public inconvenience from the restriction of freedom of speech or writing would far outbalance that arising from the infliction of a private injury. Therefore, upon principles of public policy, such communications are protected.

Examples of situations in which the media defendants can invoke the defence of qualified privilege are, without being definitive, fair and accurate reports (not motivated by malice) of the proceedings of a legislative body, the proceedings of a municipal council, and any proceeding of a judicial or quasi-judicial tribunal. These heads of qualified privilege, and others, have existed at common law, and many of the provinces have enacted statutes to clarify the situation for those jurisdictions. However, our defamation statutes have specifically preserved common-law defences with respect to qualified privilege, and it remains arguable that, insofar as the statutes are not inconsistent with other aspects of the common law, the latter continues to apply. That, however, is outside the scope of this article.

The narrow point discussed here is the availability of qualified privilege as a defence for the media when the story in question is on an issue of public interest and when the defendant member of the media is unable to rely upon any of the established categories of qualified privilege. Although it is well established in pre-Charter law that the mere existence of a public interest in the subject matter of a story will not ground a defence of qualified privilege for the media, there has to date been some judicial chipping at the edges of this principle, and this article suggests that more substantial alterations to the doctrine, based upon the Charter of Rights, may well be coming.

I. *Pre-Charter Law Regarding Qualified Privilege Defence for Newspapers.*

Although the evolution of the pre-Charter law is set out in Part II of this article, the result of that evolution is the firm ruling by the Supreme Court

Apart from the court's error in ignoring s. 10(5), it remains to be decided, in matters other than qualified privilege, whether a self-contained code has been created in the absence of a section similar to s. 8 of the Criminal Code of Canada, R.S.C. 1970, c. C-38 (which abolishes all common law offences except contempt of court), and whether the words ". . . insofar as it deals with a matter . . ." in *Tedlie* really only mean that the common law continues to exist unless specifically displaced.

⁴ *Huntley v. Ward* (1859), 6 C.B.N.S. 517, 141 E.R. 557, at p. 558.

of Canada that the mere existence of a public interest in the subject matter, in the absence of anything further, will not be sufficient to give rise to a defence of qualified privilege for the media.

In 1960, the *Globe and Mail* published an editorial strongly attacking Harold Banks, the President of the Seafarers International Union, for the widespread disruption his union had caused to Canada's shipping, and ultimately to Canada's economy. There was no question that the comments were defamatory, or that the matter was one of widespread public interest. At trial in *Banks v. Globe and Mail Limited*,⁵ the judge had ruled that the words complained of were published on an occasion of qualified privilege, and there being no evidence of malice to go to the jury, he dismissed the action. With respect to that ruling, Cartwright J. of the Supreme Court of Canada made the following statement:⁶

With the greatest respect, it appears to me that in his reasons quoted above the learned trial judge has fallen into the same error as was pointed out in the judgment of this court in *Globe and Mail v. Boland*, [1960] S.C.R. 203, at 207, and has confused the right which the publisher of a newspaper has, in common with all Her Majesty's subjects, to report truthfully and comment fairly upon matters of a public interest, with a duty of this sort which gives rise to an occasion of privilege.

In 1974 in the Ontario Court of Appeal, in *Littleton v. Hamilton*, Mr. Justice Dubin for the court took the same approach:⁷

In order to hold that words are published on an occasion of qualified privilege, something more is necessary than the mere fact that the words are being addressed to a matter of public interest. Before an individual can be said to have published words on an occasion of qualified privilege, some circumstances must be shown from which it can be concluded for valid social reasons that an individual can with impunity publish defamatory statements of others provided he does so without malice. Although it has been stated that there is no confined catalogue of such occasions, it is clear that the mere fact that the publication relates to matters of public interest is not sufficient.

Thus, it was established that there must be a reciprocal relationship between the interest in the public to receive the information, and a duty on the newspaper to provide the information. This reciprocal relationship must exist in fact, and it is irrelevant that the parties initiating the comments (that is the media) think that there is such a duty.⁸

Another way of looking at the rule as set out in *Banks v. Globe and Mail Limited*, is to analogize it to the principle that a qualified privilege will be lost if there has been an excess of publication. A qualified privilege defence may be lost, not only by malice on the part of the publisher, but also if the words were published to an audience inappropriately large for the

⁵ (1961), 28 D.L.R. (2d) 343 (S.C.C.).

⁶ *Ibid.*, at p. 349.

⁷ (1974), 47 D.L.R. (3d) 663, at p. 665 (Ont. C.A.).

⁸ *Halls v. Mitchell*, [1928] S.C.R. 125, at p. 134; *Wing Lee v. Jones*, [1954] 1 D.L.R. 520, at p. 528 (Man. Q.B.); *Beach v. Freeson*, [1972] 1 Q.B. 14, at p. 25.

nature of the privilege. The courts have almost invariably held that publication in a newspaper is to an inappropriately large audience.⁹

In applying *Globe and Mail v. Boland* in the 1979 case of *Doyle v. Sparrow*,¹⁰ the Ontario Court of Appeal reiterated that:

Newspapers are in no different position from any other citizen and their right to report and comment fairly does not give rise to a duty to report to the world such as is required to make the occasion one of qualified privilege.

The question which the Charter now poses is whether newspapers are still and at all times in a comparable position to the ordinary citizen, notwithstanding freedom of the press.

II. *Historical Development of this Defence.*

The seminal decision in this area of modern libel law is that of Parke B. in *Toogood v. Spyring* in 1834.¹¹ This was a slander case in which a tenant of a farm had stated to his landlord's agent that a workman on the farm, who had been hired by the agent, had stolen some cider from the tenant. Parke B. discussed the social policy supporting the defence of qualified privilege and established the requirements:¹²

The law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice.

If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.

Again, from the 1891 decision of *Stuart v. Bell*,¹³ Lord Justice Lopes of the English Court of Appeal, although dissenting with respect to the application of the law to the facts in the case then at bar, has often been quoted as accurately stating the law to be:

When the circumstances are such as to cast on the defendant the duty of making the communication to a third party, the occasion is privileged. So, again, when he has an interest in making the communication to the third person, and the third person has a corresponding interest in receiving it. The duty may be legal, social, or moral.

In 1908, the Privy Council, in the case of *Macintosh v. Dun*,¹⁴ an appeal from the High Court of Australia, approved the decision of *Toogood v. Spyring*, and affirmed that the underlying policy for this defence was the

⁹ *Globe and Mail Ltd v. Boland*, [1960] S.C.R. 203; Gatley, *op. cit.*, footnote 2, para. 560.

¹⁰ (1979), 27 O.R. (2d) 206, at p. 208, 106 D.L.R. (3d) 551 (C.A.).

¹¹ (1834), 1 C.M. & R. 181, 149 E.R. 1044 (Exch.).

¹² *Ibid.*, at pp. 193 (C.M. & R.), 1050 (E.R.).

¹³ [1891] 2 Q.B. 341, at p. 354 (C.A.).

¹⁴ [1908] A.C. 390, at p. 399 (P.C.).

“common convenience and welfare of society—not the convenience of individuals or the convenience of a class, but the general interest of society”.

The House of Lords decision in 1917 in *Adam v. Ward*¹⁵ is an example of one of the rare occasions in pre-Charter law when it was held that to publish through the press was to use an appropriate vehicle, and that qualified privilege was not lost. The plaintiff, who was formerly an officer in a cavalry regiment and was subsequently elected a member of Parliament, in a speech in the House of Commons charged his former commanding general with untrue and defamatory acts. The general referred the matter to the Army Council which directed its Secretary, the defendant, to write the general vindicating him of all charges, and to send copies of the letter to the press for publication. Although this letter in response contained allegations defamatory of the plaintiff, it was held that the publication was protected by qualified privilege. The original speech of the plaintiff in Parliament was considered to be a statement to the world, and thus a response through the press was not directed to an unreasonably wide audience.

In 1928 in *Halls v. Mitchell*,¹⁶ Duff J. for the Supreme Court of Canada approved the principles of *Toogood* and *Macintosh*,¹⁷ and *Stuart v. Bell*,¹⁸ and once again recognized that this defence was established for the greater good of society as a whole, and not for the particular interests of the litigants:¹⁹

The privilege rests not upon the interests of the persons entitled to invoke it but upon the general interests of society, and protects only communications “fairly made” (the italics are those of Parke B. himself) in the legitimate defence of a person’s own interests, or plainly made under a sense of duty, such as would be recognized by “people of ordinary intelligence and moral principles”.

In 1960 and 1961, the Supreme Court of Canada, in *Boland* and *Banks*, confirmed the narrow view regarding whether the press has a duty or interest to publish certain information.

It has been held that the “interest”, which a person receiving information may have, is a very broad one:

The word “interest”, as used in the cases, is not used in any technical sense. It is used in the broadest popular sense, as when we say that a man is “interested” in knowing a fact—not interested in it as a matter of gossip or curiosity, but as a matter of substance apart from its mere quality as news.²⁰

¹⁵ [1917] A.C. 309 (H.L.).

¹⁶ *Supra*, footnote 8.

¹⁷ *Ibid.*, at p. 132.

¹⁸ *Ibid.*, at p. 134.

¹⁹ *Ibid.*, at p. 133.

²⁰ *Howe and McColough v. Lees* (1910), 11 C.L.R. 361, at p. 398 (H.C. Aust.).

In the *Banks* and *Boland* cases, the Supreme Court was unwilling to give full weight to the traditional requirement that the publisher of information need have *either* a duty to publish *or* an interest in publishing the information if he wished to claim qualified privilege. If this approach had been taken and if a broad meaning had been given to "interest"—such as the interest of the press because of its role in maintaining our democratic system—, it is at least possible that a different result would have occurred.

In 1969, the Supreme Court considered the case of *Jones v. Bennett*,²¹ in which the plaintiff was Chairman of the Purchasing Commission established by a statute of British Columbia, and the defendant was the Premier of British Columbia. A dispute arose between Jones and the government regarding whether he should continue in his employment, and during this dispute Premier Bennett gave a speech to a meeting of supporters of his political party in which defamatory words were spoken of the plaintiff. Bennett tried to claim qualified privilege, which was rejected by the trial judge, recognized by the Court of Appeal, and rejected again by the Supreme Court of Canada. Chief Justice Cartwright for the court refused to recognize the proposition advanced by the defence that whenever the holder of high elective political office sees fit to give an account of his stewardship and of the actions of the government of which he is a member to supporters of the political party to which he belongs, he is speaking on an occasion of qualified privilege.²²

This case might be compared to the more recent decision of the Ontario Court of Appeal in *Stopforth v. Goyer*,²³ which also concerned a dispute between a Minister of the Crown and a senior Crown employee, and in which the court was much more willing to recognize that the public interest in the matter gave rise to qualified privilege.

It is clear that the concept of qualified privilege is a flexible one depending upon the requirements of public policy of the society at the time, and that the categories are never closed.

Lord Justice Lindley as a member of the majority in the Court of Appeal in *Stuart v. Bell*, noted that:²⁴

The reason for holding any occasion privileged is common convenience and welfare of society, and it is obvious that no definite line can be so drawn as to mark off with precision those occasions which are privileged, and separate them from those which are not.

Again, in 1916, in *London Association for Protection of Trade v.*

²¹ [1969] S.C.R. 277.

²² *Ibid.*, at p. 284.

²³ (1979), 23 O.R. (2d) 696, 97 D.L.R. (3d) 369 (C.A.); rev'g (1978), 20 O.R. (2d) 262, 87 D.L.R. (3d) 373 (H.C.).

²⁴ *Supra*, footnote 13, at p. 346.

Greenlands Limited,²⁵ the House of Lords explicitly recognized the flexible nature of the doctrine when they held that:

The circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact. New arrangements of business, even new habits of life, may create unexpected combinations of circumstances which, though they differ from well known instances of privileged occasion, may nonetheless fall within the plain, yet flexible language of [*Toogood v. Spyring*].

III. *Recognition in Pre-Charter Law of the Special Position of the Press.*

The landmark judicial opinions recognizing the special position of the press in our constitutional system appear in the judgment of the Supreme Court of Canada in the 1937 *Alberta Press Bill* case.²⁶ This case is discussed in greater length in Part VI below, but it should be noted here that the opinions of Chief Justice Duff (with whom Davis J. concurred), and Cannon J., recognized the crucial role of an unfettered press in our democratic system, and established one of the foundations of what has sometimes been called the Implied Bill of Rights.

In 1961 the Diefenbaker government passed, as a Dominion statute, The Canadian Bill of Rights,²⁷ which declared in section 1:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
(f) freedom of the press.

Because the Bill of Rights was merely a Dominion statute which could not, solely on the basis of its own authority as a Dominion statute, be enforced against provincial legislation in our federal system, it is an understatement to say that it has not, to date, achieved the prominence heralded at the time of its passage.

Although it was not applied against provincial legislation, section 1(f) of the Bill of Rights was given some effect by the British Columbia Supreme Court in 1977 in *Re Pacific Press Limited and the Queen*.²⁸ In this case, a search warrant was sought to search a newspaper office for information gathered by the newspaper staff. The premises of the newspaper were not the premises of the persons accused of the offence, and the court held that the justice of the peace, in exercising his discretion whether or not to issue the warrant, must consider and weigh the guarantee of freedom of the press in the Canadian Bill of Rights. The search warrant was quashed because section 1(f) was not considered. The guarantee of freedom of the

²⁵ [1916] 2 A.C. 15, at p. 22 (H.L.).

²⁶ *Reference re Alberta Legislation*, [1938] 2 D.L.R. 81, [1938] S.C.R. 100; aff'd, [1938] 4 D.L.R. 433, [1939] A.C. 117 (P.C.) *sub nom.* *A.G. Alberta v. A.G. Canada*.

²⁷ R.S.C. 1970, Appendix III.

²⁸ (1977), 37 C.C.C. (2d) 487, 38 C.R.N.S. 295 (B.C.S.C.).

press required that there should have been material produced before the justice to show:

1. Whether a reasonable alternative source of obtaining the information was available, and
2. If such an alternative source was available, whether reasonable steps had been taken to obtain information from the alternative source.²⁹

In 1979, in *Stopforth v. Goyer*,³⁰ the Ontario Court of Appeal seemed to waiver somewhat from the traditional stand that the press does not have a duty to report information to the world, and thus someone speaking through the press cannot invoke qualified privilege if no other basis is available. In that case, a federal Minister of the Crown made defamatory statements in Parliament regarding a senior civil servant who had recently been fired by the federal government. The Minister then repeated these statements to the press outside the parliamentary chamber. The Court of Appeal held that qualified privilege was applicable to these statements made outside Parliament, purportedly on the basis of the required traditional reciprocity between the duty of the publisher to make the statement and the interest in the hearer to receive the statement. The court held, overturning the trial judge, that qualified privilege did apply in these circumstances because:³¹

The electorate, as represented by the media, has a real and *bona fide* interest in the demotion of a senior civil servant for an alleged dereliction of duty. It would want to know if the reasons given in the House were real and the only reasons for the demotion. The appellant had a corresponding public duty and interest in satisfying that interest of the electorate. Accordingly, there being no suggestion of malice, I would hold that the alleged defamatory statements were uttered on an occasion of qualified privilege.

It seems that the court could easily have simply followed the traditional doctrine by refusing to find a qualified privilege, but it declined to do so.

In 1979, the issue arose in the Supreme Court of Canada as to whether a newspaper's claim to editorial control of the matter which it prints was in conflict with the British Columbia Human Rights Code. In *Gay Alliance Toward Equality v. Vancouver Sun*,³² the Supreme Court considered whether the refusal by the *Vancouver Sun* to print advertisements for an avowedly homosexual newspaper was in violation of section 3(1) of the Human Rights Code of British Columbia³³ which provided that:

- 3(1) no person shall:
- (a) deny to any person or class of persons any accommodation, service, or facility customarily available to the public; or

²⁹ *Ibid.*, at p. 495 (C.C.C.).

³⁰ *Supra*, footnote 23.

³¹ *Ibid.*, 23 O.R. (2d), at p. 699.

³² (1979), 97 D.L.R. (3d) 577 (S.C.C.).

³³ R.S.B.C. 1979, c. 186.

- (b) discriminate against any person or class of persons with respect to any accommodation service, or facility customarily available to the public, unless reasonable cause exists for such denial or discrimination.

A board of inquiry appointed under the Human Rights Code found that the *Sun* had violated the Code. The *Sun's* appeal to a judge of the Supreme Court of British Columbia was dismissed³⁴ but its appeal to the Court of Appeal succeeded by a majority decision.³⁵ In speaking for the majority on a six-three division of the Supreme Court of Canada, Martland J. found that the *Vancouver Sun* had not violated the Human Rights Code.

Although the judgment makes some reference to the Bill of Rights, it appears that the decision is based upon the right of a newspaper at common law to control what is printed on its pages.³⁶

The case in question here deals with the refusal by a newspaper to publish a classified advertisement, but it raises larger issues, which would include the whole field of newspaper advertising and letters to the editor. A newspaper exists for the purpose of disseminating information and for the expression of its views on a wide variety of issues. Revenues are derived from the sale of its newspapers and from advertising. It is true that its advertising facilities are made available, at a price, to the general public. But the *Sun* reserved to itself the right to revise, edit, classify, or reject any advertisement submitted to it for publication and this reservation was displayed daily at the head of its classified advertising section.

The law has recognized the freedom of the press to propagate its views and ideas on any issue and to select the material which it publishes. As a corollary to that, a newspaper also has the right to refuse to publish material which runs contrary to the views which it expresses. A newspaper published by a religious organization does not have to publish an advertisement advocating atheistic doctrine. A newspaper supporting certain political views does not have to publish an advertisement advancing contrary views. In fact, the judgment of Duff C.J.C., Davis and Cannon, J.J., in the *Alberta Press* case, previously mentioned, suggests that provincial legislation to compel such publication may be unconstitutional.

In my opinion the service which is customarily available to the public in the case of a newspaper which accepts advertising is a service subject to the right of the newspaper to control the content of such advertising. In the present case, the *Sun* had adopted a position on the controversial subject of homosexuality. It did not wish to accept an advertisement seeking subscription to a publication which propagates the views of the Alliance. Such refusal was not based upon any personal characteristic of the person seeking to place that advertisement, but upon the content of the advertisement itself. Section 3 of the Act does not purport to dictate the nature and scope of a service which must be offered to the public. In the case of a newspaper, the scope and nature of the service which it offers, including advertising service, is determined by the newspaper itself. What Section 3 does is to provide that a service which is offered to the public is to be available to all persons seeking to use it, and the newspaper cannot deny the service which it offers to any particular member of the public unless reasonable cause exists for so doing.

It is interesting to note that Martland J. found it instructive to consider the manner in which the United States Supreme Court had approached the

³⁴ [1976] W.W.D. 160.

³⁵ [1977] 5 W.W.R. 198, 77 D.L.R. (3d) 487.

³⁶ *Supra*, footnote 32, at pp. 590. 591.

issue of whether or not the state could dictate the content of newspapers. Although he concluded by acknowledging the existence of section 1(f) of the Canadian Bill of Rights, it is unclear what weight this was given:³⁷

The Supreme Court of the United States, in 1974, in *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, had to consider whether a Florida statute violated the First Amendment guarantee of freedom of the press. This statute granted to a political candidate the right to equal space in a newspaper to answer criticism and attacks on his record by a newspaper. This right is somewhat similar to that defined in Section 3 of Bill No. 9 entitled "an Act to ensure the Publication of Accurate News and Information", which had been reserved by the Lieutenant Governor of Alberta, and which was under consideration in this court. . . [The *Alberta Press* case].

The Supreme Court of the United States held that the statute under consideration was a violation of the First Amendment. In the course of his reasons for judgment, Chief Justice Burger, who delivered the opinion of the court, said that the statute failed to clear the barriers of the First Amendment because of its intrusion into the functions of editors. He went on to say at page 258:

"A newspaper is more than a passive receptacle or conduit of news, comment and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulations of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved at this time."

The Canadian Bill of Rights, Section 1(f), recognizes the freedom of the press as a fundamental freedom.

The last decision to be considered in this Part does not relate to the media, but it is another indication that the courts may be willing to consider a broader view of the duty to make information available to the public. In *Upton v. Better Business Bureau of British Columbia*,³⁸ the Supreme Court of British Columbia, Trial Division, considered a plea of qualified privilege made by the Better Business Bureau with respect to admittedly defamatory statements made by it concerning the plaintiffs. The defendant was unsuccessful in the plea of justification but was successful in claiming qualified privilege. Gould J. noted with approval the comments of Lord Buckminster L.C. in *London Association for Protection of Trade v. Greenlands Inc.*,³⁹ that the categories of qualified privilege are never closed. The Privy Council decision on similar facts in *Macintosh v. Dun*,⁴⁰ was distinguished, and Gould J. held that it was in the public interest to allow qualified privilege to be established:⁴¹

The Better Business Bureau of Vancouver was incorporated as a society in 1939. It is a well known institution in the business life of Vancouver and I take judicial notice of the well known fact of its existence and its availability for inquiry as to the standing of

³⁷ *Ibid.*, at pp. 589, 590.

³⁸ (1980), 114 D.L.R. (3d) 750, 23 B.C.L.R. 228, [1980] B.C.D. Civ. 2455-08 (B.C.S.C.).

³⁹ *Supra*, footnote 25.

⁴⁰ *Supra*, footnote 14.

⁴¹ *Supra*, footnote 38, at p. 755 (D.L.R.).

individual suppliers of goods and services. I hold that it is in the public interest that information from such an institution should be available, and that pursuant to its objects the bureau is under duty to supply such information.

Thus, notwithstanding the extremely broad distribution of the defamatory comment which was effected through the circulation of a monthly bulletin to the defendant's members and to associate Better Business Bureaus across the country, it was held that this distribution was not so broad as to destroy the basis for qualified privilege. Although the judge suggested that publication was not to the public as a whole, such a broad publication was almost the case because of the sending of the statement to Better Business Bureaus across the country, and the access of the public to these records.

The cases cited above suggest some willingness on the part of pre-Charter courts to consider firstly that publication of material to the public is not so broad a publication as to vitiate qualified privilege, and secondly that the position of the press within our system is of sufficiently special a nature to warrant special protection for it in some circumstances where it would not be granted to another type of defendant.

IV. The Canadian Charter of Rights and the American Constitution.

The relevant sections of the Charter of Rights and of the American Constitution are set out below:

Canadian Charter of Rights.

Guarantee of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:
 - b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Enforcement

- 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Application of Charter

- 32(1) This Charter applies:

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

- 33(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in Section 2 or Sections 7 to 15 of this Charter.

General

- 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.
- 52(2) The Constitution of Canada includes:
- (a) the Canada Act, including this Act;
 - (b) the Acts and orders referred to in Schedule 1; and
 - (c) any amendment to any Act or order referred to in paragraph (a) or (b).

*Constitution of the United States.**Amendment 1 (adopted December 15th, 1791)*

Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .

Amendment 10 (adopted December 15th, 1791)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment 14 (adopted July 28th, 1868)

Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Two issues which arise are:

1. Does the Charter of Rights affect only statutes passed by Parliament and the legislatures, or does it extend also to private disputes between individual parties?
2. If the Charter does affect private disputes between individuals, should the courts use it to extend the defence of qualified privilege in circumstances where the only justification which could be raised by the media for such defence would be the existence of a public interest in the subject matter.

I suggest that the answer to question 1 above is that private disputes are affected, and that, based upon the American experience, and other considerations, the answer to question 2 should be a qualified yes.

V. Application of Charter to Private Disputes.

A serious question arises as to whether or not the rights and obligations established by the Charter can be taken advantage of and imposed upon purely private individuals with private disputes, or whether or not the strictures of the Charter apply only to statutes and acts of government and authorities related thereto.

It has been strongly argued by some that, on the basis of sections 32(1) and 52(1) of the Constitution Act, the Charter is intended to apply only to

disputes in which government is somehow involved. However, for various reasons, the better argument would appear to be that obligations in the Charter apply to all dealings within the country, including those between purely private individuals. Surely if what we are interpreting is our constitution, particularly one which has effected such a dramatic amendment in our system of government—it is beyond debate that at least in some circumstances Parliament and the legislatures are no longer supreme—then the analysis must cover the entire system, and not restrict itself in a sterile way to only the words used, as if they existed in a vacuum. These are not words in the Income Tax Act which we seek to apply. Of course the fundamental freedoms are subject in section 1 “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. The limitations must themselves respect our democratic system of government, which, case law suggests, is enhanced by freedom of the press, one of our fundamental freedoms.

Although not determinative of the issue, it is noteworthy that section 32 does not restrictively commence “This Charter applies only to . . . the legislatures and Parliament”. It actually merely states “This Charter applies to . . .”.

The existence of section 32(1) can be analogized to the canon of statutory construction with respect to whether or not the Crown is bound by a statute. It has long been held that, because of the Crown’s historically supreme position in our system, it is not bound by any statute unless the statute expressly so declares. In like manner, in our constitutional system in pre-Charter days, Parliament and the legislatures were supreme. Because the new Constitution was intended to contain a Charter which would constrain the supremacy of Parliament, it was necessary to specifically include a section making very clear that in certain cases the supremacy of Parliament no longer existed.

Moreover, in our pre-Charter system, private parties who were in dispute were not supreme in any sense. They were all subject to the general law. Likewise, during the post-Charter era, private parties continue to be simply bound by the general law, and thus there was no need to specifically insert a section in the Constitution asserting that the benefits and obligations of the Charter apply to them. The individual party need simply invoke some section of the general law, such as the fundamental freedoms in section 2, and then invoke the enforcement section (section 24(1)) in an attempt to obtain a remedy. I suggest that such a consideration of the role played by *individual* parties in our old and new legal and constitutional systems, indicates that sections 32(1) and 52(1) are simply irrelevant to such parties.

This view is strengthened by the decision of the United States Supreme Court in *New York Times Company v. Sullivan*,⁴² given in 1964, at

⁴² (1964), 376 U.S. 254.

the height of the civil rights confrontation in the southern United States. The plaintiff was the Commissioner of Public Affairs in the City of Montgomery, Alabama, whose duties included supervision of the police department. The *New York Times* published a paid advertisement decrying the maltreatment in Montgomery County, Alabama, of Black students protesting segregation. A full page advertisement described in some detail the "wave of terror" that the police were bringing to bear against the desegregationists. Certain specific outrages were alleged, some of which never occurred. The *New York Times* had accepted the completed advertisement from a reputable advertising agency, but the newspaper did nothing to check the accuracy of the alleged facts. Although the newspaper had no knowledge of any falsehoods, none of its employees even checked the stories already in its files regarding the supposed events, to see if the facts might or might not be true.

At trial it was held that the statements were libellous *per se*, and although no actual damages were proved by the plaintiff, the jury awarded \$500,000.00 in a combined judgment for both compensatory and punitive damages. On appeal, the Supreme Court of Alabama confirmed this judgment, including the finding of malice to support punitive damages, on the grounds that:⁴³

. . . malice could be inferred from the Times' irresponsibility in printing the advertisement while the Times in its own files had articles already published which would have demonstrated the falsity of the allegations in the advertisement.

The Alabama Supreme Court also found malice based upon the *Times'* failure to retract the allegations after a demand by the plaintiff (the *Times* having retracted its allegations with respect to another potential plaintiff), and from the assertion by the *Times* at trial that the matters were substantially correct.

An initial ground raised by the respondent against the appeal was that the protection of the First Amendment did not apply to this lawsuit, because the Fourteenth Amendment only acted to bring government-related activities of the states into the ambit of the First Amendment. The Supreme Court refused to accede to this argument, largely on the grounds that to do so would be to render nugatory the protections of the First Amendment in many circumstances:

We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama Court from constitutional scrutiny. The first is a proposition relied on by the State Supreme Court—that "the Fourteenth Amendment is directed against State Action and not private action." That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a State rule of law which petitioners claim to impose invalid restrictions on their constitutional freedom of speech and press. It matters not that this law has been applied in a civil action and that it is common law only, though supplemented by statute. See, e.g., Alabama Code, Tit 7, s. 908-917. The test is not the form in which

⁴³ *Ibid.*, at p. 263.

state power has been applied but, whatever the form, whether such power has in fact been exercised. . . .⁴⁴

What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute.⁴⁵

Although the Charter of course provides in section 33(1) that Parliament or a legislature may opt out of certain sections of the Charter, a close reading of the actual terms of section 33(1) indicates that, if the philosophy of *New York Times v. Sullivan* is applicable in Canada, this ability to opt out may be only with respect to certain kinds of statutes, and that actions which are fundamentally based on the common law (even if modified by statute), or those which rely partially on common law and partially on the protections of the Charter are simply unaffected by the section.

As noted above,⁴⁶ an action for defamation can involve causes of action and defences under statute and at common law. Because the preservation sections in the various statutes for qualified privilege defences are broadly worded—section 3(6) Ontario:⁴⁷ “Nothing in this section limits or abridges any privilege now by law existing . . .”—, qualified privilege flowing from the Charter of Rights is now specifically allowed. If a province wished to establish its Libel and Slander Act as a complete code of libel law, it would arguably have to do so in a very specific manner, as was done in section 8 of the Criminal Code,⁴⁸ which abolishes all offences at common law except contempt of court. It is questionable whether the mere deletion of the “preservation sections” would be sufficient to create a code. The establishment of a code could lead to a much more rigid body of libel law generally, (an Income-Tax-Act style of lawmaking), which many feel that society would do well to avoid.

Furthermore, if the effect of creating a code was to then allow the province to force private litigants, in a dispute in which the provincial Crown was not involved, to be deprived of the protections of the Charter with respect to a particular body of law, a court might be impressed by the argument that the province was indirectly trying to subvert the public policy of the country, as expressed in the Charter of Rights.

VI. *Extension of Qualified Privilege Defence for Media on Constitutional Grounds.*

In *New York Times v. Sullivan*, the Supreme Court considered the importance to the democratic system of the constitutional guarantees of

⁴⁴ *Ibid.*, at p. 265.

⁴⁵ *Ibid.*, at p. 277.

⁴⁶ *Supra*, footnote 3.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

“freedom of speech, or of the press” and how these guarantees related to the ability to criticize government and government representatives:⁴⁹

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for vigorous advocacy no less than abstract discussion. The First Amendment, said Judge Learned Hand, “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.”

The court then considered the question of whether the press should be forced to prove the truth of its allegations in circumstances where some supposed governmental folly is being exposed:⁵⁰

The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent. Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker. The constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered. As Madison said, “some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press”.

In recognizing that constitutional guarantees did not grant the press an unbridled licence to print anything it pleased without regard to the publisher's knowledge of the truth or falsity of the statements, the court demanded some offsetting balance to allow the constitutional system to operate harmoniously. However, the court felt that restraint should not be placed on the press in all circumstances where it might have been possible for it to determine the truth or falsity of the statements, for this would inevitably lead to such a degree of self-censorship as to undermine the very policy reasons for establishing the constitutional guarantees in the first place:⁵¹

The state rule of law is not saved by its allowance of the defence of truth. A defence for erroneous statements honestly made is no less essential here than was the requirement of proof of guilty knowledge which, in *Smith v. California*, 361 U.S. 147, we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale. We said:

⁴⁹ *Supra*, footnote 42, at pp. 269, 270.

⁵⁰ *Ibid.*, at p. 271.

⁵¹ *Ibid.*, at pp. 278, 279.

“For if the bookseller is criminally liable without knowledge of the contents, . . . he will tend to restrict the books he sells to those he has inspected; and thus the state will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature . . . and the bookseller’s burden would become the public’s burden for by restricting him the public’s access to reading matter would be restricted. . . . His timidity in the face of his absolute criminal liability thus would tend to restrict the public’s access to forms of the printed word which the state could not constitutionally suppress directly. The bookseller’s self-censorship, compelled by the state, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded.”

The court thus finally came to the rule which it established for the American press, and which has survived to this date, with varying interpretations from time to time as to the plaintiffs who are affected:⁵²

The constitutional guarantees require, we think a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

The court then went on to discuss the level of malice which would be sufficient to offset the new type of qualified privilege, and found that the facts of this particular case did not establish the required level of malice.⁵³

The mere presence of the stories in the files does not, of course, establish that the Times “knew” the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times’ organization having responsibility for the publication of the advertisement.

The court found that it was legitimate for the advertising people at the *Times* to rely upon the general reputation of the advertising agency which provided the advertisement, and on the general good public reputation of the names of the citizens who were included as signatories to the advertisement:⁵⁴

We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice.

Apart from these reasons of freedom of the press, the court also felt that there was an equitable and reciprocal basis for the establishment of this new privilege, because many verbal and written pronouncements by public officials are themselves protected by qualified privilege:⁵⁵

Such a privilege for criticism of official conduct is appropriately analogous to the protection awarded a public official when he is sued for libel by a private citizen.

The words of the United States Supreme Court, regarding the absolutely essential nature of an unfettered free press to the maintenance of a

⁵² *Ibid.*, at pp. 279, 280.

⁵³ *Ibid.*, at p. 287.

⁵⁴ *Ibid.*, at p. 288.

⁵⁵ *Ibid.*, at p. 282.

thriving democracy, to some extent echo the opinions of Chief Justice Duff (with whom Davis J. concurred), and Cannon J., in the decision of the Supreme Court of Canada in the *Alberta Press Bill* case.⁵⁶ The court, consisting of six members, considered various pieces of the Alberta legislation establishing the Social Credit scheme in Alberta, including the Accurate News and Information Act,⁵⁷ which gave a government official certain controls over the contents of newspapers. Three members of the court (Hudson, Kerwin and Crocket J.J.) struck down the Press Bill as being necessarily ancillary to other *ultra vires* statutes which were part of the Social Credit Scheme. These three judges expressly refrained from giving an opinion on the wider constitutional issues argued with respect to the Press Bill, which were specifically addressed by the other three judges.

Chief Justice Duff found the Press Bill to be *ultra vires* on the simple ground of its indivisible association with other pieces of *ultra vires* legislation. However, he then proceeded to discuss generally the position of a free press in our constitutional system, and although he refrained from stating that the Press Bill was also *ultra vires* on this ground, it is strongly arguable that if the easier ground for decision had not been available to him, he would have grasped these general constitutional considerations as grounds for striking down the Press Bill. He stated that:⁵⁸

The constitution of the Dominion is to be similar in principle to that of the United Kingdom. The statute contemplates a Parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.

The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in *James v. Commonwealth*, "freedom governed by law".

Even within its legal limits, it is liable to abuse and grave abuse, and such abuse is constantly exemplified before our eyes; but it is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions. . . .

The question, discussed in argument, of the validity of the legislation before us, considered as a wholly independent enactment having no relation to the Alberta Social Credit Act, presents no little difficulty. Some degree of regulation of newspapers everybody would concede to the provinces. Indeed there is a very wide field in which the provinces undoubtedly are invested with legislative authority over news-

⁵⁶ *Supra*, footnote 26.

⁵⁷ Bill 9.

⁵⁸ *Supra*, footnote 26, at p. 133 (S.C.R.).

papers; but the limit, in our opinion, is reached when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada as contemplated by the provisions of The British North America Act and the statutes of the Dominion of Canada. . . .

The legislation now under consideration manifestly places in the hands of the Chairman of the Social Credit Commission autocratic powers which, it may well be thought, could, if arbitrarily wielded, be employed to frustrate in Alberta these rights of the Crown and the people of Canada as a whole.

Mr. Justice Cannon, who was prepared to strike down the Press Bill solely on the grounds of its interference with the proper functioning of a democratic society, stated that:⁵⁹

Freedom of discussion is essential to enlighten public opinion in a democratic state; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest. There must be untrammelled publication of the news and political opinions of the political parties contending for ascendancy. . . . Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the state within the limits set by the Criminal Code and the common law.

Thus, the Accurate News and Information Act was struck down as being *ultra vires* the province, and very strong statements were made by half the court about the national dimensions of the existence of the free press. Since the passage of the Charter, the country now finds itself in a situation where, in appropriate circumstances, restriction of the press even by the federal government is *ultra vires* that government. The question, of course, is what circumstances are appropriate.

The history of the American treatment of this issue since 1964 has been one of varying degrees of court eagerness or reticence to make this new defence of qualified privilege available to the media with respect to various types of plaintiffs.

In 1966, the Supreme Court in *Rosenblatt v. Baer*,⁶⁰ while not setting a rigid rule for those public officials caught by the net of *New York Times*, decided that, at a minimum, the affected officials would be "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs".⁶¹ The court felt that the plaintiff, who was supervisor of a county recreation area, might be a public official, but that further evidence was necessary.

Of course the original *New York Times* plaintiff was merely a City Commissioner, who might well not have met the *Rosenblatt* test if that had been restrictively definitive, and other relatively minor types of officials who have fallen under the sway of this rule are a director of public

⁵⁹ *Ibid.*, at pp. 145, 146 (S.C.R.).

⁶⁰ (1966), 383 U.S. 75.

⁶¹ *Ibid.*, at p. 85.

welfare,⁶² a County Attorney and a Chief of Police,⁶³ an elected Court Clerk,⁶⁴ and a Mayor and candidate for County Tax Assessor.⁶⁵

In 1967, in *Curtis Publishing Company v. Butts*,⁶⁶ the Supreme Court expanded the *New York Times* rule to include not only public officials, but also public figures. The plaintiff was the Athletic Director of the University of Georgia, and was a well-known and respected figure in coaching ranks. He was accused by the *Saturday Evening Post* of conspiracy to "fix" a football game. Although Butts was not a public official under *New York Times*, the court found that he should be considered in the same light, because he was a public figure who met the requirement of having:⁶⁷

. . . as ready access as "public officials" to mass media of communication, both to influence policy and to counter criticism of their views and activities.

A classic example of a public figure would be a Johnny Carson or a Walter Cronkite. The plaintiff's action in *Butts* was allowed by the Supreme Court, because of a finding of *New York Times* malice.

In 1971 the Supreme Court temporarily shied away from its previous distinction between public officials and public figures, because it held that such a distinction was an artificial one in terms of the protections of the First Amendment, and that the focus of the court's attention should be not on the actors, but on the significance of the event itself to society.⁶⁸ The *Rosenblatt* decision is taken as the high-water mark of the public figure doctrine.

After the decision in *Rosenblatt*, the Supreme Court in the later 1970's decided that it had placed too great a burden upon private plaintiffs by extending the *New York Times'* rule to them in various situations. The decisions in *Gertz v. Robert Welsh, Inc.*⁶⁹ and *Time, Inc. v. Firestone*⁷⁰ were a retreat from the expansionist tendency of the court in earlier years.

In *Gertz*, the court held that it would allow a state system of libel law which would permit private individuals who were not public figures to obtain judgment against the media without having to prove the express malice required by *New York Times*, as long as the state law did not allow liability without fault. In other words, the Supreme Court required that a private individual establish some degree of negligence against the media defendant, although not that such a plaintiff discharge the extremely

⁶² *Bienvenu v. Angelle* (1968), 211 So. 2d 395 (La.).

⁶³ *Henry v. Collins* (1965), 380 U.S. 356.

⁶⁴ *Beckley Newspapers Corp. v. Hanks* (1967), 389 U.S. 81.

⁶⁵ *Banner Co. v. Damron* (1971), 401 U.S. 295.

⁶⁶ (1967), 388 U.S. 130.

⁶⁷ *Ibid.*, at p. 164.

⁶⁸ *Rosenbloom v. Metro Media, Inc.* (1971), 403 U.S. 29, at p. 43.

⁶⁹ (1974), 418 U.S. 323.

⁷⁰ (1976), 424 U.S. 448, 47 L. Ed. 2d 154.

onerous burden or proving express malice. This can be contrasted with the Anglo-Canadian situation at common law, in which defamation is in effect a strict liability tort. Negligence has never been relevant to a finding of liability.⁷¹

In the *Gertz* case, the plaintiff, who was held not to be a public figure, was a lawyer who, after a Chicago policeman had been convicted of murder, had been retained by the victim's family to represent them in civil litigation against the convicted policeman. The Supreme Court defined a "public figure" as being someone who met the following tests:⁷²

For the most part those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.

In the 1976 *Firestone* decision, the plaintiff, a member of the socially prominent family which had established the tire company, was involved in an extremely messy divorce with her husband, in which allegations were tendered by both sides relating to adultery and extreme cruelty. During the divorce trial, the libel plaintiff, Mrs. Firestone, had held press conferences to expound her position, and the husband was ultimately granted his divorce on grounds which were not exactly clear in the trial judge's decision. In its account of the entire proceedings, *Time Magazine* had been slightly inaccurate on the exact grounds on which the divorce was granted, and Mrs. Firestone sued for defamation. The Supreme Court held that she was not a "public figure" under the *New York Times* rule, notwithstanding the extreme notoriety of the trial and the fact that Mrs. Firestone had stimulated discussion of the issues herself by the press conferences which she had held. The court distinguished between a participant in a legitimate public controversy, and a person involved in matters of mere titillating interest. It appears, as a result of the *Firestone* decision, that the public figure who must contend with the *New York Times* rule will be a very rare individual.

The result of this succession of cases in the United States Supreme Court appears to be that the court is now recognizing that the original social basis for the rule in *New York Times v. Sullivan* was to require the maintenance of a free and open government, and that in most cases this underlying social policy can be met without burdening a non-government-official with the heavy onus of actual malice required by *New York Times*. With respect to government officials, the tendency in the court has been to keep the application of the rule broad, consonant with the underlying social policy, but it is difficult to argue with the court's more recent extreme

⁷¹ *Shepherd v. Whittaker* (1875), L.R. 10 C.P. 502.

⁷² *Supra*, footnote 69, at p. 345.

reluctance to use the rule in cases where the plaintiff was at best a "public figure".

VII. *Malice.*

Normally in any defamation action, the plaintiff is not required to prove malice, because the law assumes its presence where the words are defamatory. The existence of an occasion of qualified privilege rebuts the presumption of malice, and thus on such an occasion a plaintiff can succeed only if he proves express malice.⁷³

We have seen that the *New York Times* rule requires that an American "public official" plaintiff prove that the defendant had acted with:⁷⁴

. . . "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

The Anglo-Canadian courts have held that to act out of malice means to act for a purpose which is irrelevant to the underlying basis of public policy which gives rise to the establishment of the category of qualified privilege. A crucial issue is what the court will consider to be evidence of malice.

From time to time, courts have derived sufficient evidence of malice from the words alone, apart from the actual motives of the publisher,⁷⁵ and a suggestion was made by the Supreme Court of Canada in 1965⁷⁶ that a consideration of only the words themselves could be sufficient to establish malice.

However, in the 1975 decision of the House of Lords in *Horrocks v. Lowe*,⁷⁷ the public policy for allowing malice to displace qualified privilege, and the very nature of malice, were extensively canvassed. Their Lordships, in shifting the focus from the actual words used, acknowledged that malice is something intrinsic to the nature and circumstances of the publisher, and that these matters must be considered before any malice can be found. The effect of the recent decisions is that it will be extremely difficult for any plaintiff to prove malice if the publisher of the statement honestly believed its truth, and conversely, malice will almost invariably be found if the publisher believes the statement is false.

In *Horrocks v. Lowe*, Viscount Dilhorne gave a separate concurring judgment, and Lord Diplock spoke for himself and the other three law lords. Viscount Dilhorne discussed the virtually unassailable position, with

⁷³ *Supra*, footnote 11; *Schultz v. Porter and Black Brothers Realty (Calgary) Limited* (1979), 10 Alta L.R. (2d) 381 (S.C.).

⁷⁴ *Supra*, footnote 52.

⁷⁵ *Wlodek v. Koska* (1974), 7 O.R. (2d) 611, at p. 613, 56 D.L.R. (3d) 187 (C.A.).

⁷⁶ *Sun Life Assurance Co. of Canada v. Dalrymple* (1965), 50 D.L.R. (2d) 217, at p. 223 (S.C.C.).

⁷⁷ [1975] A.C. 135 (H.L.).

respect to malice, which a publisher would create for himself if he honestly believed in the truth of the statement.⁷⁸

Can a man who believes what he says on a privileged occasion to be true and which if true would not be an abuse of the occasion, be held to have made his statements "recklessly whether they are true or false?" Gross and unreasoning prejudice may have lead him to have uttered them recklessly whether they were true or false, but if he believes the truth of what he said, can he at the same time be said to be reckless of the truth or falsity of his statements? May be that others with more judgment and more wisdom would not have formed the same belief, but if, in fact, he believes what he says, he cannot, at the same time, in my opinion, be reckless whether it is true or false. . . .

While it is true that a man may believe in the truth of what he says and yet be reckless whether his belief is well founded or not, recklessness whether the belief is well founded, while relevant to the question whether the defendant believed what he said, is not, if the defendant in fact believed, evidence of malice. If it were, then the man who honestly and out of a sense of duty made observations based on information found to be inaccurate or incorrect would have his freedom of speech on a privileged occasion unduly restricted. . . .

A man who honestly believes what he says may yet be actuated by malice and such malice may be established by other evidence than the inference to be drawn from the falsity of the statement. It is that inference which is negated by belief.

Lord Diplock discussed something of the social policy which gave rise to the creation of qualified privilege, and stated the rule that, if a man honestly believes what he says, then the only malice which the court will allow to be established is that in the popular sense of spite or ill will towards the plaintiff. An honest belief by the publisher creates a very heavy onus on the plaintiff to prove the extent to which the defendant was actuated by malice.⁷⁹

[Qualified privilege] is lost if the occasion which gives rise to it is misused. For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit—the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege.

So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. "Express malice" is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff set out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication. Knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interest.

⁷⁸ *Ibid.*, at pp. 145, 146.

⁷⁹ *Ibid.*, at pp. 149, 150, 151.

The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interest can justify a man in telling deliberate and injurious falsehood about another, saving the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person.

Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published, or, as it is generally though tautologously termed, "honest belief"

Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it. It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that "express malice" can properly be found.

Mr. Justice McIntyre of the Supreme Court of Canada, for a unanimous court, applied *Horrocks v. Lowe*, and particularly the reasoning of Lord Diplock, in *Davies and Davies Limited v. Kott*, decided in 1979.⁸⁰

A recent decision of the British Columbia Supreme Court, *Vogel v. Canadian Broadcasting Corporation, Bird and Good*,⁸¹ while not expressly using the analysis of *Horrocks v. Lowe*, arrived at the same result and, through the use of the concept of malice, found itself easily able to apply sanctions against the activities of a representative of the media which had gone too far in a crusading attack on a government official. Although the court here was specifically considering whether the defence of fair comment was displaced by malice, it has been held that the malice to rebut fair comment is the same as the malice which displaces qualified privilege.⁸² In *Vogel*, Mr. Justice Esson found that the representatives of Canadian Broadcasting Corporation management who served in the function of editors on a newspaper did not have an honest belief in the accusations. The court also found that express malice was established because the motive of the defendant in publishing the material was improper. Although the purported motive of the defendant was to serve the public interest by exposing corruption in high places, the real motive was to enhance the reputation of those involved in the story by producing a sensational programme.⁸³

Conclusion

It is clear that the reason for the establishment and the continued support of qualified privilege by the courts has always been that it has been required

⁸⁰ [1979] 2 S.C.R. 686, at pp. 697, 698, 98 D.L.R. (3d) 591.

⁸¹ [1982] 3 W.W.R. 97 (B.C.S.C.).

⁸² *Merivale v. Carson*, [1906] 2 K.B. 627, at p. 640 (C.A.).

⁸³ *Supra*, footnote 81, at p. 174.

by public policy. It is also clear that the courts have never considered the categories of qualified privilege to be closed, and that this defence must be reviewed from time to time by the courts in light of any change in public policy.

It is submitted that public policy in Canada has undergone a radical change with the adoption of our new Constitution, which change is already receiving judicial recognition, as in *Reference Re Constitutional Validity of Section 12 of the Juvenile Delinquents Act*,⁸⁴ in which freedom of the press under the Charter was invoked by Mr. Justice Smith of the Supreme Court of Ontario to strike down a section of the Juvenile Delinquents Act⁸⁵ which required closed trials as the result of a Supreme Court of Canada decision:⁸⁶

Nor can I accept the statement made to this court that the Charter changes nothing; that it merely recognizes existing rights. In my view, sovereignty of parliament has been dealt a mild blow. The courts and parliament are no longer the repositories of constitutional law rights. The Charter will prevail subject only to the non-obstante provisions embodied in Section 33 of the Charter. The desire expressed in the preamble to the British North America Act to be federally united "with a constitution similar in principle to that of the United Kingdom" is still a part of the Canadian Constitution. An important difference has been added which may be said to temper to some degree the sovereignty heretofore enjoyed by parliament. With the advent of an entrenchment of basic rights and freedoms, the court now has a constitutional responsibility to deny effect to a measure adopted by parliament that contravenes the Charter. This measure would very simply be unconstitutional and beyond its competence.⁸⁷

In this case, which is now under appeal, section 12(1) of the Juvenile Delinquents Act was declared unconstitutional and inoperative.

We have seen some indications in pre-Charter law that the courts were disposed to grant special status to the media. Although these indications would not in themselves justify any new legal categories of privilege, nonetheless, the creation of a new category on the basis of the Charter provisions would not be such a total divergence from our earlier law as would be the case if a special status had never existed at all.

Another hurdle which a media defendant will have to overcome is the question of whether or not the Charter can be invoked by private individuals where the dispute does not involve a government party. It is suggested here that the Charter should be extended to purely private disputes for the following reasons:

1. To do otherwise would be to create a patchwork application of the Charter and to render illusory many of the new protections.
2. A consideration of the wording of the Charter, taken in the context of the change in our constitutional system of government, suggests

⁸⁴ (1982), 38 O.R. (2d) 748 (H.C.).

⁸⁵ R.S.C. 1970, c. J-3.

⁸⁶ *C.B. v. The Queen* (1981), 127 D.L.R. (3d) 482 (S.C.C.).

⁸⁷ *Supra*, footnote 84, at p. 754.

that sections 32 and 52 of the Constitution Act were included, not to suggest that purely private disputes were not within the Charter of Rights, but because it was necessary to include these sections in order to make it perfectly clear to our previously supreme legislative bodies that they are no longer supreme.

3. The analysis of *New York Times v. Sullivan* suggests that, at least in this area, the Charter should be extended to private disputes.

If a *New York Times* type of privilege is created in Canada, the courts will have to consider how far it should be extended, and it may very well be that they will decide that a public policy which supports a democratic and open government, constantly subject to challenge by a free and unfettered press and other forms of the media, does require that public officials should have restraints placed on their right to bring a defamation action, but does not require that persons other than public officials be so constrained.

The courts retain the ultimate control over a media defendant through the concept of malice. It is suggested here that the recent judicial trend to focusing on the peculiar attributes and circumstances of the publisher, and particularly his honest belief in the statement published, is a valuable approach which should be continued. It is very unlikely and probably undesirable that a separate concept of malice would or should be developed for this particular type of qualified privilege, and there is no reason to believe that the manner in which the courts have recently been considering malice would be in any way inappropriate to this new type of qualified privilege.

A rule along the lines of *New York Times*, stated in our traditional terms of qualified privilege, even if not given the "public figure" extension of *Curtis Publishing Company v. Butts*, could be as follows:

The guarantee of freedom of the press and other media of communication in the Charter of Rights requires a rule that allows the press, and other media defendants in a defamation action brought by a public official on the basis of alleged defamation relating to his public capacity, to establish the defence of qualified privilege, unless the plaintiff proves that the defamatory matter was published by such defendant with actual malice.

The malice contemplated by *Horrocks v. Lowe*, and *Davies and Davies Limited v. Kott*, would be an appropriate measure of malice.

The public policy underlying our system of law and government has changed, and the law of qualified privilege must be prepared to change as well.
