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THE EFFECT OF A CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION ON DEFAMATION LAWS

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CONTENTS

ABSTRACT

In the case of *Hill v Church of Scientology* the Supreme Court of Canada declined to modify the common law of defamation in light of the Canadian Charter of Rights and Freedoms. This paper considers the implications of this decision by examining the relationship of a freedom of expression provision in a constitution and the laws of defamation. Although the laws of defamation directly restrict freedom of expression, it is possible for courts to retain traditional defamation laws even with a constitutional protection of freedom of expression.

This paper demonstrates the difficulty in providing for a relaxation of defamation laws in the constitution. However, despite the Supreme Court's decision not to modify defamation laws in light of the Charter, cases in provincial courts show that a change in these laws may come about through an expansion of qualified privilege without using the constitution as a vehicle.

Word Length

The text of this paper (excluding abstract, table of contents, footnotes, and bibliography) comprises approximately 13,100 words.

I INTRODUCTION

Over the past ten years there has been a relaxation in the common law of defamation in several commonwealth countries, namely England, Australia, and New Zealand.[1] Canada, however, has retained traditional defamation laws that give strong protection to reputation at the expense of freedom of expression. This is remarkable, for the reason that out of the above countries it is the only one with an entrenched protection of freedom of expression.

This essay considers the relationship of a freedom of expression provision in a constitution and the laws of defamation. The Canadian experience shows that a freedom of expression provision in a constitution does not guarantee a relaxation in the common law of defamation. A look at the decisions of courts in other jurisdictions shows that the converse is also true. An entrenched constitution is not necessary to change the common law of defamation.

The Canadian Charter did not compel the Court to change defamation laws in the case of *Hill v Church of Scientology*.[2] Part V considers whether it is possible to draft a constitution that would compel this change. It concludes that although there are various ways to make change more likely to occur, it is very difficult to guarantee a change. Constitutions are open to judicial interpretation, and therefore the decision as to whether to modify defamation laws is in the hands of the judiciary. Nonetheless, this does not mean that a freedom of expression provision is irrelevant to defamation laws. It provides an avenue for the Court to make dramatic changes to the common law of defamation, and allows it to strike down defamation legislation inconsistent with freedom of expression.

Although the Supreme Court did not change defamation laws in *Hill v Church of Scientology*, there is evidence that it would do so given a different fact situation. Some

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[1] England: *Reynolds v Time Newspapers* [1999] 4 All ER 609 (HL); Australia: *Lange v Australian Broadcasting Corporation* (1996) 145 ALR 96 (HC); New Zealand: *Lange v Atkinson* [1998] 3 NZLR 424 (CA) and [2000] 1 NZLR 385 (CA).

provincial courts have extended the defence of qualified privilege to the media in certain matters. However, this extension has been done through an expansion of the common law, rather than through a Charter challenge. This reinforces that a constitution is not a necessary vehicle to effect change.

II THE COMMON LAW OF DEFAMATION

A The History of Defamation

Defamation laws were developed in the Middle Ages in England to protect leaders and rulers.[3] In 1275 De Scandalum Magnutum (the scandal of magnates) was enacted, which prohibited criticism of public figures. This was extended by the Statute of Gloucester,[4] which provided for the imprisonment of "every devisor of false news, of horrible and false lies, of prelates, dukes, earls, barons and other nobles and great men of the realm". Ordinary citizens were left to resolve disputes with duelling. As the incidences of duelling increased, restrictive defamation laws were enacted to keep the peace of society.[5]

The history of defamation shows that the laws did not grow out of the government's wish to protect the reputation of the ordinary citizen and balance this with the right to express oneself freely.[6] It was originally a self-protection measure by the legislature, and later extended to others as a means of keeping the peace. The right to freedom of expression, which is so highly valued in modern society, was not given much consideration when the laws of defamation were developing.

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[2] *Hill v Church of Scientology* [1995] 2 SCR 1130.

[3] P F Carter Ruck and R Walker *Carter-Ruck on Libel and Slander* (3 ed, Butterworths, London, 1985) 19.
[4] 1378 (2 Ric, c 5)
[5] P F Carter Ruck and R Walker *Carter-Ruck on Libel and Slander* (3 ed, Butterworths, London, 1985) 20.
[6] Richard G Dearden "Constitutional Protection for Defamatory Words Published About the Conduct of Public Officials" in David Schneiderman (ed) *Freedom of Expression and the Charter* (Thomas Professional Publishing, Ontario, 1991) 287, 299.

B Defamation Laws in Canada

The aim of this section is to show that the restrictive nature of the common law of defamation does not adequately provided for freedom of expression in a modern society.

1 Policy values behind defamation

The purpose of defamation laws is to protect individuals from false and injurious attacks on their reputations. This protection is seen as important, as everyone has an interest in safeguarding or vindicating his or her reputation.[7]

Although most defamation cases refer to the value attached to reputation, there is little written on exactly what reputation is, and why it warrants protection.[8] An answer to the first question is that reputation is the perception others hold of a person. This can be compared to a person's character, which refers to the actual attributes or personality of a person, rather than the esteem the individual is held in by others.[9]

There are two main reasons as to why reputation warrants protection. The first is that reputation is an essential component of human dignity and is closely related to the 'innate worthiness of an individual'.[10] The second is that an attack on reputation may cause serious damage to a person's life. The damage may be either economic or social. It is considered just for the law to provide redress for damage caused by another person. In a defamation context, this is usually done by the award of monetary compensation.

When examining the common law of defamation it is necessary to keep in mind that the purpose of these laws to protect reputation. It is also necessary to consider whether the law achieves this purpose.

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[7] Eric Barendt "What is the Point of Libel Laws?" (1999) 52 CLP 110, 112.
[8] Barendt, above, 114.
[9] *Plato Films Ltd v Spiedel* [1961] 1 AC 1090, 1137-1139 (HL) Lord Denning.
[10] *Hill v Church of Scientology* [1995] 2 SCR 1130, para 110 Cory J for the Court.

2 *Elements of defamation*

The law of defamation in Canada is primarily a common law subject.[11] This means that the law of defamation across provinces is similar, and that any decision of the Supreme Court on the common law of defamation will affect all common law provinces. Although every province has a statute concerning defamation, these statutes merely modify and codify certain aspects of the common law.[12] They do not change the fundamentals of defamation law, which can still be found in case law. Therefore, defamation law in Canada is similar to that of other common law countries, which is based on English jurisprudence. It is significant that the law of defamation is predominately common law, as this means the development of the law remains up to the judiciary.[13] It is up to the courts to control the balance between freedom of expression and reputation.

Unlike most modern torts, defamation is a strict liability offence.[14] This means that the defendant may be found liable without fault. An action for defamation is established once the plaintiff shows three things: (1) that the statement is reasonably capable of being defamatory; (2) that the words refer to the plaintiff; and (3) that the words have been published (that is, made known to a third party).[15]

A statement is considered to be defamatory if it exposes a person to hatred, ridicule, or contempt,[16] causes that person to be shunned or avoided,[17] or tends to lower that person in the eyes of a right-thinking member of society.[18] The threshold for what is considered to be defamatory is set at a relatively low level.[19] It is unlikely for a plaintiff to fail on this element. For instance, in *Berkoff v Burchill* a description of the plaintiff as

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[11] Lewis Klar *Tort Law* (Thomas Professional Publishing, Alberta, 1991) 481.
[12] Klar, above, 481.
[13] Klar, above, 483.
[14] Allen Linden *Canadian Tort Law* (5ed, Butterworths, Toronto, 1993) 657.
[15] Linden, above, 638-655.
[16] *Parmiter v Coupland* (1840) 151 ER 340, 342 (ExC) Parke B.
[17] *Youssoupoff v MGM Pictures Ltd* (1934) 50 TLR 581, 587 (CA) Slesser LJ.
[18] *Sim v Stretch* [1936] 2 All ER 1237, 1240 (HL) Lord Atkin.
[19] Lewis Klar "If You Don't Have Something Good to Say About Someone..." in David Schneiderman (ed) *Freedom of Expression and the Charter* (Thomas Professional Publishing, Ontario, 1991) 261, 263.

'hideously ugly' was held to be defamatory.[20] However, it is questionable whether this statement would lower the plaintiff in the eyes of a right-thinking person. To be defamatory, the words are supposed to harm a person's reputation, not merely hurt or injure that person's feelings.[21] This case comes dangerously close to doing just that. This is also illustrated by the case of *Vander Zalm v Times Publishers*, where a political cartoon showing a minister gleefully pulling the wings off a fly was held to be defamatory by the trial judge.[22] The Court of Appeal did not overturn this finding. However, Craig JA questioned whether the estimation of the plaintiff in the eyes of a third party would be lowered merely because of the cartoon.[23] In general, political satire will not genuinely harm a person's reputation.

Proving that the words refer to the plaintiff is usually straightforward. However, the case of *Hulton v Jones* illustrates the harshness of strict liability.[24] In that case, a columnist wrote a fictional piece about a man called Artemus Jones. A man by that same name claimed that this piece could be seen as referring to him, and that it was defamatory. The Court upheld this proposition, and the defendant was found liable.[25] Therefore, it is possible for a person to accidentally defame someone, and be held responsible for it.

Once these three elements have been established, the plaintiff has a prima facie cause of action. It is presumed that damage to reputation has occurred, that the defendant acted with malice, and that the statement is false.[26]

The presumption that damage to reputation occurs automatically upon defamation is not supported by evidence from case law. In *Hill v Church of Scientology* the lawyer

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[20] *Berkoff v Burchill* [1996] 4 All ER 1008 (CA).
[21] Eric Barendt "What is the Point of Libel Laws?" (1999) 52 CLP 110, 119.
[22] *Vander Zalm v Times Publishers* (1980) 109 DLR (3d) 531 (BCCA).
[23] *Vander Zalm v Times Publishers*, above, 551 Craig JA.
[24] *Hulton v Jones* [1910] AC 20 (HL).
[25] *Hulton v Jones*, above, Lord Loreburn 23.
[26] Allen Linden *Canadian Tort Law* (5ed, Butterworths, Toronto, 1993) 638-655.

who was defamed went on to be appointed a judge in a provincial court.[27] It is therefore questionable whether his reputation actually suffered.

Serious harm may result from a defamatory statement. For instance, in *Norman v Westcomm International Sharing Corp.* the plaintiff had an employment contract cancelled due to a defamatory statement made by his previous employer.[28] However, the fact that damage may occur does not mean that it always will. Academic Eric Barent believes that the plaintiff should be required to prove that damage has occurred.[29] It has generally been stated that it is too difficult to prove that a person's reputation has been lowered.[30] However, it would be relatively easy for witnesses to testify whether they thought less of the plaintiff upon hearing the defamation. In *Botiuk v Toronto Free Press Publications Ltd* the Court stated that more than twelve years after the libels were published some people still believed the libels, which shows that evidence is available.[31] Alternatively, plaintiffs could point to the loss of professional opportunities, for instance by showing failure to gain a contract, or failure to be elected to a desired position.

Another peculiar feature about the presumption of damage is that it is not necessary for anyone who knew the plaintiff to have believed the defamatory statement. This was addressed in *Morgan v Odhams Press Ltd*, where witnesses stated that they did not believe the defamatory statements made about the plaintiff to be true.[32] In asserting this was of no consequence Lord Reid said "it is true that X's reputation is not diminished, but the person defamed suffered annoyance or worse when he learns that a defamatory statement has been published against him."[33] However, if a person's reputation has not suffered, then arguably no defamation has occurred. Certainly if the policy of defamation laws is to protect reputation, it is unnecessary to award compensation when no damage to reputation has occurred.

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[27] *Hill v Church of Scientology* [1995] SCR 1130, para 180.
[28] *Norman v Westcomm International Sharing Corp* [1997] OJ No 4774 (Ont CJ) Wilson J.
[29] Eric Barendt "What is the Point of Libel Laws?" (1999) 52 CLP 110, 123.
[30] *Ley v Hamilton* (1935) 153 LT 384, 386 (HL) Lord Atkin.
[31] *Botiuk v Toronto Free Press Publications Ltd* [1995] 3 SCR 3, para 72 Cory J (La Forest, L'Heureux-DubÉ, Gonthier, McLauchlin and Iacobucci JJ concurring).
[32] *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 (HL).
[33] *Morgan v Odhams Press Ltd*, above, 1246 Lord Reid.

If merely damage to reputation has been occurred, and not pecuniary loss, there are other remedies apart from monetary compensation could be used to rectify this. For instance, some scholars in the United States have called for an introduction of declarations of truth.[34] This would make a public statement that the defamation was untrue, and would thereby reinstate the person's reputation to a certain extent. This remedy would not mean that people would be encouraged to libel at will, as they too would want to retain good reputations. In the case of the media, their professional reputation depends on truthful and accurate reporting.

Although it is relatively easy for a plaintiff to establish a prima facie case, freedom of speech may not be unduly restricted if the defences available adequately protect people making defamatory statements.[35] A defamatory statement is presumed to be false, so it is up to the defendant to prove that it is not. Truth is a complete defence. In *Hill v Church of Scientology*, Cory J asked, "Surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish."[36] However, there is evidence to suggest that it may in fact be asking too much. It is not sufficient that a person believes the statement to be true. The person must prove that it actually is true. This can be difficult for the defendant to prove, as a high standard of proof is required, and evidence about the matter often lies with the plaintiff.

The United States Supreme Court recognised the difficulty of proving truth in *New York Times v Sullivan*.[37] As stated by Brennan J stated, "Even courts accepting this defence as an adequate safeguard have recognised the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars."[38]

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[34] David A Barrett "Declaratory Judgment for Libel: A Better Alternative" (1986) 74 Cal LR 847; Marc A Franklin "A Declaratory Judgment Alternative to Current Libel Law" (1986) 74 Cal LR 809.
[35] Lewis Klar "If You Don't Have Something Good to Say About Someone…" in David Schneiderman (ed) *Freedom of Expression and the Charter* (Thomas Professional Publishing, Ontario, 1991) 261, 265.
[36] *Hill v Church of Scientology* [1995] 2 SCR 1130, para 140.
[37] *New York Times v Sullivan* (1964) 376 US 254.
[38] *New York Times v Sullivan*, above, 279, Brennan J.

The difficulty of proving truth can be illustrated by the recent case involving Jeffrey Archer. Archer brought an action against the *Daily Star* for an article reporting that he was having an extra-marital affair. The paper raised the defence of truth, but did not succeed. (Although this was partially due to perjured evidence). It was ordered to pay damages of £500 000.[39] However, after the trial it was revealed that the allegations were in fact true. Archer returned the money to the paper, including legal costs.[40] Many defendants would not be in such a fortunate position.

The defence of fair comment offers reasonable protection to persons making statements of opinion. However, it can be difficult to distinguish between statements of opinion (which are protected), and statements of fact (which are not). For instance, the statement, "I think Politician Smith is a liar," would probably be considered a statement of fact. This is because the comment must be based on facts truly stated, unless it is reasonable to assume that the receivers of the statement will be aware of those facts.[41] In this example there are no facts provided on which this comment is based. The words 'I think' will not necessarily turn a statement of fact into a statement of opinion.[42]

The defence of qualified privilege allows for certain untruthful defamatory statements to be made. The law has held that in some circumstance it is in the best interests of society for communication to occur even when the statement may not be true, and may be defamatory.[43] The statement must be made on a 'qualifying occasion' which exists when a person has a duty to communicate certain information, and the recipient has a corresponding interest in receiving the information.[44] A classic example of this is when

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[39] Andrew Rawnsley "Archer Wins Record £500 000" (25 July 1987) *Guardian Unlimited* <http://www.guardian.co.uk/archer/article/0,2763,522734,00.html> last accessed 20 September 2003.
[40] Vikram Dodd "Archer to Repay £3 m to Newspapers" (5 August 2002) *Guardian Unlimited* <http://www.guardian.co.uk/archer/article/0,2763,769323,00.html> last accessed 20 September 2003.
[41] The Laws of New Zealand (Butterworths, Wellington, 1994) vol 10, Defamation, para 135.
[42] The Laws of New Zealand, above, para 134; *London Artists Ltd v Littler* [1969] 2 QB 375, 392 (CA) Lord Denning MR.
[43] Lewis Klar *Tort Law* (Thomas Professional Publishing, Alberta, 1991) 498. See *Toogood v Spyring* [1824-34] All ER 735, 738 Parke B. The "common convenience and welfare of society" may require such communication.
[44] *Adam v Ward* [1917] AC 309, 334 (HL) Lord Atkinson.

employers provide references about former employees to prospective employers.[45] Qualified privilege can be exceeded if the statement is published too widely, for instance if it is made to a party that has no interest in the matter.[46] The privilege can also be defeated if the plaintiff proves that the defendant was motivated by malice, as malice is not presumed when using this defence.

Traditionally this defence was not available to the media, as wide publication would exceed the privilege.[47] The rationale behind this was that the communication would be likely to reach some people who had no interest in receiving it.[48] In *Arnold v King-Emperor* the Court stated that no privilege attaches to the position of a journalist, and therefore journalists have no greater freedom to publish defamatory matter than ordinary citizens have.[49] However, the boundaries of this defence may be expanding, as discussed in Part VI.

The defence of absolute privilege allows untrue statements to be made about someone in situations where absolute freedom of speech has been deemed necessary, for instance in Parliamentary and judicial proceedings.[50]

These laws give strong protection to reputation at the expense of freedom of expression. This may have been an appropriate balance before the introduction of the Charter. However, the Charter protects and emphasises the importance of freedom of expression in modern society, and the laws need to be re-examined and modified in light of this.

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[45] John Burrows and Ursula Cheer *Media Law in New Zealand* (4 ed, Oxford University Press, Auckland 1999) 58-59.
[46] Stephen Todd (ed) *The Law of Torts in New Zealand* (3 ed, Brookers, Wellington, 2001) 865.
[47] *Boland v Globe & Mail Ltd* [1960] SCR 203; *Banks v Globe & Mail Ltd* [1961] SCR 494.
[48] This is the reason qualified privilege failed in Hill. The Court found that while a qualifying occasion did exist, it was exceeded by holding a press conference.
[49] *Arnold v King-Emperor* [1914] AC 644 (HL) Lord Shaw.
[50] Lewis Klar *Tort Law* (Thomas Professional Publishing, Alberta, 1991) 494-498.

III THE EFFECT OF A CONSTITUTION ON DEFAMATION LAWS

A Canada

The common law of defamation was challenged as unconstitutional in the case of *Hill v Church of Scientology*.[51] This was the first case that challenged the constitutionality of the common law of defamation since the Canadian Charter of Rights and Freedoms had been introduced in 1982.

The facts of the case were as follows. Pursuant to a search warrant, the Ontario Provincial Police entered the premises of the Church of Scientology and seized thousands of documents. The Church brought a motion to quash the warrant, and for the documents to be returned. The Crown defended this action using Crown Attorney Casey Hill as counsel. During this action, the Court ordered for many of these documents to be sealed, due to solicitor-client privilege.[52]

An unrelated government official applied to review some of these sealed documents. The Church, without any apparent evidence, believed that Casey Hill was involved in this application and brought contempt of court proceedings against him.[53] Through their lawyer Morris Manning, the Church held a press conference and read out the contempt motion alleging that Hill had mislead the Court and helped to open and inspect sealed documents.[54] The contempt charge was dismissed. Hill later brought proceedings in defamation. He was successful, and was awarded $1.6m in damages.[55]

The Court was invited by the defence council to change the common law of defamation in light of the Charter. The Court declined to do so, stating that the "common law of defamation complies with the underlying values of the *Charter*, and there is no

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[51] *Hill v Church of Scientology* [1995] 2 SCR 1130, Cory J for the Court.
[52] *Hill v Church of Scientology*, above, paras 4-7.
[53] *Hill v Church of Scientology*, above, paras 9-15.
[54] *Hill v Church of Scientology*, above, paras 23-27.
[55] *Hill v Church of Scientology*, above, para 53.

need to amend or alter it."[56] This is a contentious assertion, in light of the harshness of defamation laws, which directly restrict freedom of expression.

B United States of America

In 1964, the landmark case of *New York Times v Sullivan* constitutionalised the law of defamation in the United States.[57] The action arose when an elected official of the city of Montgomery in Alabama brought proceedings against the *New York Times* for an advertisement published that supported the civil rights movement. The jury in the Circuit Court of Montgomery County awarded the plaintiff damages of $500 000, which was upheld by the Supreme Court of Alabama.[58]

This was overturned on appeal to the Federal Supreme Court. The Court found that the common law of defamation, as applied in Alabama, failed to provide adequate protection for freedom of speech and of the press as required by the First Amendment.[59] The Court held that for a public official to succeed in a defamation action "actual malice" must be shown. This means the defendant must have knowledge that the statement was false, or have reckless disregard as to its falsity.[60]

This doctrine was extended in later cases to all public figures. In *Gertz v Robert Welch Inc* it was made clear that the doctrine applied to people who were involved in public affairs, and could include "limited purpose" public figures.[61] This was defined as those who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved".[62] Therefore, the rule attaches to the person, not to the issue. In *Gertz* the Court rejected applying the actual malice rule to all issues of public concern. However, this did not mean that strict liability was permissible. The Court held that states could allow private individuals to recover against

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[56] *Hill v Church of Scientology*, above, para 144.
[57] *New York Times v Sullivan* (1964) 376 US 254.
[58] *New York Times v Sullivan*, above, 256, Brennan J.
[59] *New York Times v Sullivan*, above, 264 Brennan J.
[60] *New York Times v Sullivan*, above, 279-280 Brennan J.
[61] *Gertz v Robert Welch Inc* (1974) 418 US 323.

a media defendant as long as liability without fault was not imposed.[63] It is unclear the extent to which this applies to a non-media defendant.[64]

The outcome of *Sullivan* and its progeny is the logical result from a country with a constitution that states, "Congress shall make no law abridging the freedom of speech, or of the press."[65] The Court held in *Sullivan* that the constitution *required* the introduction of the actual malice rule.[66] Defamation laws directly restrict freedom of speech. Therefore, a challenge to defamation laws under the constitution meant that the Court believed it was necessary to change defamation laws to conform to the constitution.

The United States approach is the intuitive response. The Constitution protects of freedom of speech, which is limited by the laws of defamation. Therefore, the laws of defamation should be changed. However, this was not the response of the Supreme Court of Canada in *Hill* to a constitutional challenge to the common law of defamation.

Pre-*Hill*, Canadian academics called for a change to defamation laws in light of the Charter, and were hopeful that this would be addressed.[67] However, their hopes were dashed when the Supreme Court failed to take the opportunity to relax defamation laws. This attracted much academic criticism.[68] Although it would appear that an entrenched Charter with a provision protecting freedom of speech demanded a reformulation of

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[62] *Gertz v Robert Welch Inc*, above, 345 Powell J.
[63] *Gertz v Robert Welch Inc*, above, 347 Powell J.
[64] W P Keeton (ed) *Prosser and Keeton on Torts* (5 ed, West Publishing Co, Minnesota, 1984) 807-808.
[65] US Constitution, amendment 1.
[66] *New York Times v Sullivan* (1964) 376 US 254, 279-280 (SC) Brennan J.
[67] Lewis Klar "If You Don't Have Something Good to Say About Someone…" in David Schneiderman (ed) *Freedom of Expression and the Charter* (Thomas Professional Publishing, Ontario, 1991) 261; Richard G Dearden "Constitutional Protection for Defamatory Words Published About the Conduct of Public Officials" in Schneiderman above, 287; Rodney A Smolla "Balancing Freedom of Expression and Protection of Reputation Under Canada's Charter of Rights and Freedoms" in Schneiderman, above, 272; Michael Doody "Freedom of the Press, the Canadian Charter of Rights and Freedoms and a New Category of Qualified Privilege" [1983] Can Bar Rev 124.
[68] Dennis W Boivin "Accommodating Freedom of Expression and Reputation in the Common Law of Defamation" (1997) 22 Queen's LJ 229; Grant Huscroft "Defamation, Damages, and Freedom of Expression in Canada" [1996] 112 LQR 46; Charles Tingley "Reputation, Freedom of Expression and the Tort of Defamation in the United States and Canada: a Deceptive Polarity" (1999) 37 Alberta L Rev 620; Edward Veitch "Scandalum Magnatum is Alive and Well in Canada?" (1999-2000) 11 NJCL 169; Jeremy Streeter "The 'Deception Exception': A New Approach to Section 2 (b) Values and its impact on Defamation Law" (2003) 61 U Toronto Fac Law Rev 79.

defamation laws as the American courts felt compelled to do, the Canadian Supreme Court did not feel this compulsion. This leads to the conclusion that a constitutional guarantee of freedom of expression does not guarantee a change in defamation laws.

While it is true that a constitution does not guarantee a change in defamation laws, it is also true that a constitution is not necessary for a change in defamation laws to occur. England, Australia, and New Zealand do not have entrenched constitutions, yet all of these countries have modified the common law of defamation, and taken a step in the direction of *Sullivan.*[69]

C United Kingdom

The common law of defamation in the United Kingdom was extended in the case of *Reynolds v Times Newspapers Ltd.*[70] A former Prime Minister of Ireland brought an action in defamation against the *Times* alleging he was defamed by an article which questioned his honesty as Prime Minister. At the time of the case, England had no constitutional guarantee of freedom of expression.[71]

In spite of this, the House of Lords saw fit to expand the common law of defamation. The Court held that qualified privilege may be able to be used when statements were published widely. This was not limited to statements of a political nature, as there could be other matters of serious public concern that would warrant protection. The Court would consider a number of factors to determine if statements made in the press would attract qualified privilege. These included factors such as the seriousness of the allegation, the steps taken to verify the allegations, the urgency of the matter, whether comment had been sought by the plaintiff, and the timing of the publication.[72]

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[69] *New York Times v Sullivan* (1964) 376 US 254.
[70] *Reynolds v Time Newspapers* [1999] 4 All ER 609 (HL).
[71] England has since enacted the Human Rights Act 1998, which incorporated the European Convention on Human Rights. Included in the convention is a provision protecting freedom of expression.

Rather than the change in law being based on a constitutional challenge to the law of defamation, the Court was able to expand the law by reference to the 'elasticity of the common law'.[73] This shows that a constitution is not a necessary vehicle for a change in favour of freedom of speech.

D Australia

Recent defamation cases in Australia are extremely interesting from a constitutional point of view. Australia has no freedom of expression provision in its constitution. However, in *Australia Capital Territory v Commonwealth* the High Court (Australia's highest appellate court) found that there was an implied right of freedom of communication on political matters in the constitution.[74] This right was used to modify defamation laws in the cases of *Theophanous v Herald & Weekly Times Ltd*[75] and *Lange v Australian Broadcasting Corporation*.[76]

In *Theophanous*, an action in defamation was taken by a member of the Federal Parliament in response to criticism about his fitness to hold office.[77] The Court held that there was a constitutional defence to publish defamatory matter in relation to political matters if certain requirements were met.[78] This theme was carried through to *Lange v ABC*.[79] The Court rejected the approach taken by *Theophanous* that there was a constitutional defence to a defamation action.[80] Instead it extended the common law of qualified privilege as a way of ensuring that the constitutional value of freedom of communication on political matters was protected.[81]

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[72] *Reynolds v Time Newspapers*, above, 626 Lord Nicholls.
[73] *Reynolds v Time Newspapers*, above, 625-626 Lord Nicholls.
[74] *Australian Capital Television Pty Ltd v Commonweath* (1992) 177 CLR 106.
[75] *Theophanous v Herald* [1994] 124 ALR 1 (HC).
[76] *Lange v Australian Broadcasting Corporation* (1996) 145 ALR 96 (HC).
[77] *Theophanous v Herald*, above, 8 Mason CJ, Toohey and Gaudron JJ (Joint Judgment).
[78] *Theophanus v Herald*, above, 25 Mason CJ, Toohey and Gaudron JJ (Joint Judgment).
[79] *Lange v Australian Broadcasting Corporation*, above.
[80] *Lange v Australian Broadcasting Corporation*, above, 119 Brennan CJ for the Court.
[81] *Lange v Australian Broadcasting Corporation*, above, 119 Brennan CJ for the Court.

Although different approaches were taken in these two cases, the outcome is essentially the same. In Australia untrue statements on political matters made to a wide audience may be afforded the defence of qualified privilege if the following conditions are met: the defendant must be unaware of the falsity of the statement; must not be reckless, (that is, not caring whether the statement was true or false); and the publication must be reasonable in the circumstances.[82]

These two cases illustrate that a court's willingness to modify defamation laws is a key factor in this happening. Although the constitution was used to justify a change in defamation laws, it clearly did not compel the Court to do so. There was no express freedom of expression provision in the constitution that could be relied on, nor was there an express provision of communication in relation to political matters. The right was derived from sections in the constitution that set out the system of a representative and responsible government, the rights of citizens to exercise a free and informed choice as electors, and the right to cast informed votes.[83] A change to the common law of defamation was seen as necessary to give effect to this. Had the Court been satisfied with the existing law of defamation, they could merely have declined to apply this implied right. It was open to the Court to find that the common law was satisfactory, and that it accorded with the constitution, as there was no express freedom of expression provision.

E New Zealand

Defamation laws in New Zealand were relaxed in the case of *Lange v Atkinson*.[84] Former Prime Minister David Lange alleged that an article in North & South Magazine written by Joe Atkinson contained defamatory remarks about him. The article was critical of Lange's performance as Prime Minister, commenting on a gap between promise and performance, his lazy attitude to work, and a selective memory (among other things).[85]

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[82] *Lange v Australian Broadcasting Corporation*, above, 116-118 Brennan CJ for the Court.
[83] *Lange v Australian Broadcasting Corporation*, above, 104-108 Brennan CJ for the Court.
[84] *Lange v Atkinson* [1998] 3 NZLR 424 and [2000] NZLR 385.
[85] Joe Atkinson "Getting What You Order" (October 1995) *North and South* Auckland 44.

This case was an application by the plaintiff to strike out the defence of qualified privilege from the defendant's pleadings. The case went from the High Court to the Court of Appeal, then to the Privy Council, and finally back to the Court of Appeal, after which it settled. The full case was never heard. However, in the Court of Appeal it was decided that qualified privilege might be available when a statement has been published generally.[86]

This opened the doors for the media to use qualified privilege. It was held that given the nature of New Zealand's democracy, the public has the requisite interest in statements about "the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to such office, so far as those actions and qualities directly affect of affected their capacity (including their personal ability and willingness) to meet their public responsibilities".[87]

Now that New Zealand has taken a step in the direction of a *Sullivan*[88] approach, the door has been opened to an extension of the categories to which wide publication is allowed. In *Vickery v McLean* the Court of Appeal refused to extend qualified privilege beyond what was held in *Lange v Atkinson*.[89] The case involved three employees of a district council, and was therefore held not to be political discussion.[90] In any event, the defamation was disseminated too widely by going to the media.[91] The general public was held not to have an interest in the matter.

However, it is questionable how long this distinction will survive. John Burrows expects the boundaries of *Lange* to expand in one of two ways. The privilege may extend to apply to include comments made on all those holding elected positions (which would

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[86] *Lange v Atkinson* [1998] 3 NZLR 424, 468 (CA) Blanchard J (Richardson, Henry and Keith JJ concurring).
[87] *Lange v Atkinson*, above, 468 Blanchard J (Richardson, Henry and Keith JJ concurring).
[88] *New York Times v Sullivan* (1964) 376 US 254.
[89] *Vickery v McLean* (20 November 2000) Court of Appeal 125/00; *Lange v Atkinson* [2000] 1 NZLR 385.
[90] *Vickery v McLean*, above, para 17 Tipping J for the Court.
[91] *Vickery v McLean*, above, para 17 Tipping J for the Court.

include local body politics); and/or to those whose salaries are paid by the taxpayer.[92] The latter category would mean that Crown attorneys, like Casey Hill, would be included.

Unlike Australia and England, New Zealand expressly protects freedom of expression in the Bill of Rights Act 1990.[93] However, unlike Canada, it is an ordinary statute. Parliament can alter the Act by a simple majority vote.[94] The New Zealand Court could have relied on this statute to alter defamation laws. In the High Court, Justice Elias found that the judiciary could use the Bill of Rights Act in applying the common law, as section 3 refers to acts of the judiciary.[95] However, the Court of Appeal gave little consideration to the Act. It was considered to be part of the relevant background against which the common law should be developed.[96]

This illustrates that an express protection of freedom of expression is not necessary to relax defamation laws. New Zealand, a country with a Bill of Rights Act protecting freedom of expression, chose not to use this as a vehicle to modify defamation laws, but instead chose to develop the common law.

F Summary

A look at other jurisdictions has shown that an entrenched constitution protecting freedom of expression is not a necessary precondition of relaxing defamation laws. Countries with little or no protection of freedom of expression have seen fit to relax defamation laws. It is understandable that countries without freedom of expression provisions can expand defamation laws, as the common law is constantly evolving and open to change.

However, it is harder to understand Canada, which has gone in the opposite direction. It does have an entrenched protection of freedom of expression, yet did not

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[92] John Burrows "Lange v Atkinson 2000: Analysis" (2000) NZLR 389, 391.
[93] Bill of Rights Act 1990, s 14.
[94] G Palmer and M Palmer *Bridled Power* (Oxford University Press, Auckland 1997) 265.
[95] *Lange v Atkinson* [1997] 2 NZLR 22, 32 (HC) Elias J.

modify its defamation laws. Although this was an option open to the Court, it is remarkable in its incongruity with other commonwealth countries, and in light of the Charter.

The next part of this essay considers the methods the Court employed in *Hill v Church of Scientology* to keep defamation laws at the status quo.[97]

IV APPLICATION OF THE CHARTER

A Direct Application

One of the reasons the Court was able to find that the common law of defamation did not require modification under the Charter is that section 32 states that the Charter applies to the legislature, executive, and administrative branches of the government. This means that the Charter only directly applies when there is 'government action' of some type. The Charter applies to the common law,[98] but only when the common law is the basis for some governmental action that is alleged to have infringed a guaranteed right or freedom.[99] It does not apply when there is an action between two private parties based on the common law.

The defendants[100] in *Hill* argued that the common law of defamation should be subjected to Charter scrutiny.[101] They claimed that as Hill was a government employee, his action was 'government action' within the meaning of section 32.[102] This was rejected. The Supreme Court held that the defendants impugned the character of Hill

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[96] Geoff McLay "Lange v Atkinson: Not a Case for Dancing in the Streets" [2000] NZLR 427, 436.
[97] *Hill v Church of Scientology* [1995] 2 SCR 1130.
[98] *RWDSU v Dolphin Delivery Ltd* [1986] 2 SCR 573, 592-593 McIntyre J (Dickson CJ, Estey, Chouinard and Le Dain JJ concurring).
[99] *RWDSU v Dolphin Delivery Ltd*, above, 599 McIntyre J (Dickson CJ, Estey, Chouinard and Le Dain JJ concurring).
[100] As the Church was appealing an earlier decision, they should technically be called the appellants. However, for clarity I will refer to them as the defendants.
[101] *Hill v Church of Scientology* [1995] 2 SCR 1130, para 67 Cory J for the Court.

himself, and not that of the government.[103] Hill instituted legal proceedings in his own capacity as a private citizen, not as the result of a request by the Ministry of the Attorney-General, or the Government of Ontario.[104] It was therefore a dispute between two private parties, and the Charter did not directly apply. By not applying the Charter directly, it made it easier for the Court to hold defamation laws at the status quo.

The fact that the Charter did not directly apply partially explains why the law of defamation was not changed. However, it does not fully explain it. Had the Court wanted to modify defamation laws, the Court could have found that the Charter applied directly for two reasons. Firstly, the Ministry of the Attorney-General funded Hill's action. This was held not to alter his Constitutional status, "[n]or cloak his action in the mantle of government action".[105] However, the Court could have used this fact alone to conclude that it was 'government action'. If Hill was not willing or able to proceed without government funds, then it is difficult to conclude that this was purely a private action. A truly private action would be supported by private funds.

Secondly, the Court stated that the defendants impugned the character of Hill himself, and not that of the government.[106] However, the defamation was directly related to Hill's performance of his statutory duties. It did not relate to a purely private matter. Defamatory remarks about the exercise of duties of a government official is so closely tied up in criticism of the government that in many cases it will be impossible to distinguish between the two. Criticism about the government will often reflect badly on one particular member of the government. It seems to be a slightly strange result that if criticism was made about the Prime Minister which related to the exercise of his functions, an action brought by him would be a private rather than government action.

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[102] The common law may be subjected to Charter scrutiny when government action is based on a common law rule. *Dolphin Delivery Ltd v RWDSU Local 580* [1986] 2 SCR 573, 598 McIntyre J (Dickson CJ, Estey, Chouinard and Le Dain JJ concurring).

[103] *Hill v Church of Scientology*, above, para 77 Cory J for the Court.

[104] *Hill v Church of Scientology*, above, para 77 Cory J for the Court.

[105] *Hill v Church of Scientology*, [1995] 2 SCR 1130 para 77 Cory J for the Court.

[106] *Hill v Church of Scientology,* above, para 77 Cory J for the Court.

The United States Supreme Court in *Sullivan* drew an analogy between seditious libel and allowing public officials to recover damages for defamation.[107] Academic Harry Kalven stated that the concept of seditious libel strikes at the very heart of democracy, and that a society which makes seditious libel an office is not a free society no matter what its other characteristics.[108] As Canada does allow public officials to recover damages, it is likely that it does not agree with this analogy to seditious libel.

B Charter Values

Even if the Charter is not directly applicable, the judiciary is required to apply and develop the common law in a way that is consistent with Charter values.[109] The Canadian courts have taken an interesting approach to looking at Charter values. Rather than focusing solely on the constitutional value of freedom of expression, the courts consider the values that justify the constitutional protection of freedom of expression.[110] Various attempts were made to identify these values, but the most accepted pronouncement was given by the Supreme Court in *Ford v Quebec*.[111] The values at the heart of freedom of expression were seen to be the quest for truth, the promotion of individual self-development, and participation in the community.[112]

Based on this analysis, it is easy to see how the Court found that these values were not advanced by defamatory statements. The Court stated:[113]

> Defamatory statements are very tenuously related to the core values which underlie s 2(b). They are inimical to the search for truth. False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to a healthy participation in the affairs of the

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[107] Geoffrey Palmer "Politics and Defamation – A Case of Kiwi Humbug?" [1972] 12 NZLJ 265, 267.
[108] Harry Kalven "The *New York Times* Case: A Note on the Central Meaning of the First Amendment" [1964] Sup Ct Rev 191, 205.
[109] *RWDSU v Dolphin Delivery Ltd* [1986] 2 SCR 573, 603 McIntyre J (Dickson CJ, Estey, Chouinard and Le Dain JJ concurring).
[110] Geoff McLay "Lange v Atkinson: Not a Case for Dancing in the Streets" [2000] NZLR 427, 430.
[111] *Ford v Quebec* [1988] 2 SCR 712.
[112] *Ford v Quebec*, above, 764-766, Judgment of the Court.
[113] *Hill v Church of Scientology* [1995] 2 SCR 1130, para 109 Cory J for the Court .

community. Indeed they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society.

However, the opposite approach could have been taken. Allowing defamatory statements may help in the search for truth. Mill pronounced this idea in 1947. He believed that even a false statement might bring a valuable contribution to public debate, as it brings about "the clearer perception and livelier impression of truth, produced by its collision with error".[114] This view was followed by the United States Supreme Court in *New York Times v Sullivan.*[115] It was also thought that the existing defamation laws would lead to self-censorship. People may not voice truthful allegations in case they would not be able to prove the truth of the statements in court.[116] Therefore, this would be harmful to the search for truth.

Contrary to the view of the Supreme Court of Canada, defamatory statements may lead to participation in the affairs of the community. If people did not have to fear defamation suits, they may feel freer to voice opinions about community affairs. For instance, it may encourage people to write letters to the editor in local newspapers, or participate in debates occurring in the local council, without having to be certain they could prove every detail of their statements.

Academic Jeremy Streeter believes that the problem lies not in the application of the values behind the Charter, but in the Court's formulation of what those values are.[117] In *Irwin Toy Ltd v Quebec*, the Court took a wide view as to what type of speech should be protected by section 2 (b) of the Charter.[118] It was held that "if the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee".[119] This was to avoid speech being prohibited on the grounds that

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[114] Mill *On Liberty* (Blackwell, Oxford, 1947) 15.
[115] *New York Times v Sullivan* (1964) 376 US 254.
[116] *New York Times v Sullivan*, above, 279 Brennan J.
[117] Jeremy Streeter "The 'Deception Exception': A New Approach to Section 2 (b) Values and its impact on Defamation Law" (2003) 61 U Toronto Fac Law Rev 79
[118] *Irwin Toy Ltd v Quebec* [1989] 1 SCR 927.
[119] *Irwin Toy Ltd v Quebec*, above, 969 Dickson CJ, Lamer and Wilson JJ (Joint Judgment).

it was unpopular. The Court was unwilling to exclude expression from protection based on its content.

However, Streeter claims that the three values underlying section 2 (b) do not protect all expression, but certain types of expression.[120] This is because it is difficult to apply these values in a content-neutral way. For instance, the search for truth and participation in the community are seen as important to the functioning of democracy. However, a viewpoint that threatens democracy does not enhance this value. Yet by not giving this opinion protection, unpopular speech is being prohibited based on its content.[121]

Streeter believes this demonstrates that these three values are not content-neutral. He believes the way ensure section 2 (b) values are applied in a content-neutral way is to focus on the importance of the expression to the expresser, rather than the value of that speech to society. This is based on the idea that freedom of expression is important for human autonomy. The only exception to protection of speech, is that of deliberate lies. This goes against the purpose of freedom of expression, namely the sharing of one's thoughts.[122] Therefore, based on this value, defamation laws would have to be modified to allow all statements unless the expresser knew the statements to be false.

The values used by the Court helps to explain why the law of defamation complied with the Charter values. However, as the Court could have applied the values in a different way, or reformulated the values, it does not fully explain why the Court did not change defamation laws.

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[120] Streeter, above, 91.
[121] Streeter, above, 91.
[122] Streeter, above, 90-95.

V DRAFTING A CONSTITUTION

A How Could the Canadian Charter be Drafted to Guarantee a Relaxation in Defamation Laws?

Constitutions are subject to judicial interpretation, which means it is very difficult to guarantee a particular outcome. The Supreme Court of Canada did not feel the constitution required them to alter the common law of defamation. However, had they been unsatisfied with those laws, they could equally have found that that the Charter compelled them to change the laws of defamation.

One possible way to guarantee a relaxation in defamation laws would be to draft the constitution in such a way that compelled the Court to apply the Charter directly. This could be done by either including the judiciary as a body that the Charter applies to, or by making the Charter available to disputes between private parties. The Government of New Zealand used the first mechanism.

Section 3 of the New Zealand Bill of Rights Act states that the Act applies to acts done by the legislative, executive and judiciary. In *Lange v Atkinson* Elias J found that this section meant that the Act could be used in applying the common law.[123] The parallel section in the Canadian Charter is section 32, which states that the Charter applies to the legislature, executive, and administrative branches of the government. This meant that the Charter did not apply directly to the common law, but instead Charter values should be used to develop the common law.

A direct application of the Charter would be likely to result in a finding that the common law of defamation restricts freedom of expression. *Irwin Toy* establishes that a wide view should be taken as to the type of expression that is protected by the constitution.[124] In *R v Zundel* the Court held that even deliberate lies and falsehoods are

[123] *Lange v Atkinson* [1997] 2 NZLR 22, 32 (HC) Elias J.
[124] *Irwin Toy Ltd v Quebec* [1989] 1 SCR 927.

protected by section 2 (b) of the Charter.[125] In *R v Lucas* the Court found that a statute imposing criminal sanctions for defamation contravened section 2 (b) of the Charter, as the purpose of the section was to limit a particular type of expression.[126] The purpose of the common law of defamation is also to restrict a certain type of expression.

However, if the Court did find that expression was restricted, they would not be compelled to alter defamation laws. This is due to the availability of section 1 of the Charter. Section 1 states that the rights and freedoms are subject only to such reasonable limits presented by law that can be demonstrably justified in a free and democratic society. Therefore, it would be open to the Court to find that the existing laws are justified. This was the section used by the Supreme Court in *R v Lucas* to hold that the statute was constitutionally compliant.[127] The Court found that the positive objectives of defamatory libel provisions and the resulting protection of reputation outweighed any negative effect on freedom of expression.[128]

B Would a Removal of Section 1 Guarantee a Relaxation in Defamation Laws?

If section 1 was not included in the constitution, it is unlikely that the Court would have taken such a wide approach to the type of expression that is protected by section 2 (b). The Court took a wide approach knowing that the savings provision of section 1 could be utilised.

Without section 1, the Court would be able to keep defamation laws at the status quo in two ways. Firstly, the Court could find that defamatory statements are not accorded constitutional protection. This was the approach taken by the United States Supreme Court until the decision in *Sullivan*.[129] Alternatively, the Court could hold that the law of defamation did not restrict free speech. This was the approach taken by the

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[125] *R v Zundel* [1992] 2 SCR 731, 753 McLauchlin J.
[126] *R v Lucas* [1998] 1 SCR 439, 456 Cory J (Lamer CJC, Gonthier, Iacobucci, Bastarche JJ concurring).
[127] *R v Lucas*, above.
[128] *R v Lucas*, above, 481 Cory J (Lamer CJC, Gonthier, Iacobucci, Bastarche JJ concurring).
[129] *New York Times v Sullivan* (1964) 376 US 254; Enunciated in *Herbert v Lando* (1979) 441 US 153, 185 White J.

Nova Scotia Supreme Court in the case of *Coates v The Citizen*.[130] This case considered the situation where the plaintiff was a public official, and where there was a direct application of the Charter. Coates was the Minister of National Defence for Canada. While in West Germany on official business he (and a number of his aids) visited a bar called the Cabaret Tiffany. *The Citizen* reported on this, stating that the visit may have posed a security risk, that the bar featured porn films, nude dancers and prostitutes, and that the Minister spent a considerable amount of time drinking and chatting with one of the strippers. Due to this negative publicity, Coasts resigned from his position as Minister, although retained his seat in the House of Commons.[131]

This was the principal action commenced by Coates. However, this case merely considered the application by the defendants for an order determining a preliminary question of law. The defendants asserted that the Nova Scotia Defamation Act violated section 2 (b) of the Charter, as the Act adopted the common law presumptions of falsity, malice, and damage.[132] Richard J held that the Charter did apply to this action, even though he found it to be a dispute between two private parties. There was a provincial statute, so the requisite government nexus existed.[133] As the Act codifies some of the common law rules of defamation, those too were held to be subject to Charter scrutiny, but only to the extent that they were included in the Act. The common law of defamation by itself generally could not be directly challenged.[134] Therefore two elements that were missing in *Hill* were present in this case. There was an elected official, and the Charter directly applied to the law of defamation.

However, Richard J found that the Act did not restrict the right to freedom of expression or freedom of the press as guaranteed under the Charter. He stated that the Defamation Act "does not restrict the publication of news. It does not prevent comment

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[130] *Coates v The Citizen* (1988) 44 CCLT 286 (NSSC).
[131] *Coates v The Citizen*, above, paras 4-5 Richard J.
[132] *Defamation Act* SNS 1960 c 4
[133] *Coates v The Citizen*, above, para 29 Richard J.
[134] *Coates v The Citizen*, above, para 29 Richard J.

on perceived government ineptitude. It does not stifle criticism of prominent political figures in the conduct of their duties."[135]

In essence, Richard J rejected the 'chilling effect' of defamation laws that has been recognised by nearly every other commonwealth court and by countless authors on the subject.[136] One author questions the need for absolute privilege for parliamentary proceedings, if defamation laws do not in fact chill political debate.[137]

However, as the case was a challenge to a statute, the Court did not consider whether the common law defence of qualified privilege could apply in this case (although Richard J expressed his doubts as to its applicability).[138] This was where English, Australian, and New Zealand courts extended the law of defamation. None of these courts saw fit to change the onus of proof, yet did make the law less strict in relation wide publication.

A constitution would have to be extremely explicit for a relaxation in defamation laws to be guaranteed. However, drafting such a provision would be an extremely difficult task. Generally worded provisions, of the nature usually included in constitutions, are subject to judicial interpretation. For example, the First Amendment to the United States Constitution states, "Congress shall make no law … abridging the freedom of speech, or of the press". There is no savings provision like the one included in the Canadian Charter. Yet even with such an explicit provision, it has not been interpreted as literally prohibiting all laws that do not allow absolute freedom of speech. For instance, although defamation laws are greatly relaxed, they do still exist, which shows there is not an absolute right to free speech.

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[135] *Coates v The Citizen*, above, para 59 Richard J.
[136] However, this has since been recognised in Canada, see *Derrickson v Tomat* (1992) 88 DLR (4th) 401, 408 Wood JA.
[137] Richard G Dearden "Constitutional Protection for Defamatory Words Published About the Conduct of Public Officials" in David Schneiderman (ed) *Freedom of Expression and the Charter* (Thomas Professional Publishing, Ontario, 1991) 287, 296.
[138] *Coates v The Citizen*, above, para 65 Richard J.

Specific provisions referring to defamation would be out of place in a constitution that protects fundamental rights and freedoms. Such provisions would fit more easily with legislation. However, legislation on defamation is within the jurisdiction of provincial governments.[139] Therefore, it is not the duty of the federal government to pass a law on defamation that affects the whole of Canada. In any event, given the litigious nature of politicians, the government is often unwilling to change the laws of defamation. This is illustrated by the fact that changes to defamation laws in other jurisdictions have come about through the courts, rather than Parliament. In New Zealand, Parliament refused to adopt the proposal of the McKay Committee on Defamation (1977) to give greater protection to the media when reporting on matters in the public interest.[140] However, the effect of the Courts' decision in *Lange v Atkinson* essentially gave this extra protection.

C Is a Freedom of Expression Provision Irrelevant to Defamation Laws?

This section has shown that it is very difficult to guarantee a relaxation in defamation laws though a constitution. However, it does not follow from this conclusion that a freedom of expression provision irrelevant to defamation laws. A freedom of expression provision is open to the courts to use, even if they choose not to. When a court is considering defamation laws, it has an extra provision to examine than courts in countries with no constitution. It gives citizens an extra means available for challenging the law.

For instance, if a provincial government passed a law stating the truth was no longer a defence to a defamation action, the court would have the power to examine this in light of the constitution and strike it down if it was thought to be unconstitutional. In jurisdictions without a constitution, courts would be powerless to take action against this legislation. They are subject to the will of Parliament, and may only develop the

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[139] Raymond E Brown *The Law of Defamation in Canada* (Carswell, Toronto, 1987) 9.
[140] *Recommendations on the Law of Defamation* Report of the Committee on Defamation (December 1997)

common law. Therefore, although a freedom of expression provision cannot guarantee a relaxation in defamation laws, it is not a hollow provision.

VI A CHANGE FOR CANADA?

A Wrong Fact Situation?

The decision in *Hill* appears to show that Canada is out of step with other commonwealth countries by refusing to change defamation laws. However, in every other jurisdiction examined, the plaintiff was (or had been) an elected official. In *Hill* however, the plaintiff was merely an attorney for the Crown.[141] Would the Court in *Hill* have extended the common law of defamation if the plaintiff had held an elected position?[142] There are arguments both for and against this proposition.

B Arguments Against This Proposition

1 Reasoning in Hill

Courts commonly consider fact situations that are not directly before them. The entire case of *Lange v ABC* is devoted to a discussion of the importance of political discussion. Such discussion as allows voters to have full information about candidates running for office.[143] The system of government was said to require a free flow of information to enhance this. This was discussed in depth by the Court, even though the plaintiff was a former Prime Minister of New Zealand, where discussion about such a person would not usually be necessary for enhancing the system of representative government in Australia.

Although it was not strictly necessary for the Canadian Court to consider situations where the plaintiff was an elected official, such a discussion could easily have

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[141] *Hill v Church of Scientology* [1995] 2 SCR 1130.
[142] *Hill v Church of Scientology*, above.
[143] *Lange v Australian Broadcasting Corporation* (1996) 145 ALR 96 (HC).

been included as obiter. The Supreme Court rarely hesitates to express its opinion on matters that are outside those in issue.[144] Therefore, the fact that there was no mention of the possibility of a change to the law in a different fact situation suggests that the Court would be unwilling to do so.

Hill was decided unanimously by seven justices of the Supreme Court, including Justice McLauchlin, who is now the Chief Justice.[145] The judgment extends over 87 pages, and thoroughly considers the interaction of the common law of defamation and the Charter. The Court then arrives at the conclusion that "the common law of defamation complies with the underlying values of the Charter and there is no need to amend or alter it".[146] After this detailed examination of the law, the Court would be unlikely to undertake another challenge to the law of defamation merely because the plaintiff's position changed from an unelected public official, to an elected public official.

The Court cited the 1960s case of *Boland v Globe & Mail Ltd* with approval.[147] This case *did* involve a candidate for a federal election. In this case it was held that the defence of qualified privilege was not open to a newspaper. The Court considered it would be "harmful to the common convenience and welfare of society" if such a wide publication of defamatory matter was allowed.[148]

Boland was decided four years before *Sullivan*, and thirty-seven years before the first *Lange v Atkinson* decision, at a time when there was less importance placed on freedom of expression generally, and there was no Charter.[149] So it is not surprising that *Boland* was decided the way it was.[150] However, it is surprising if the Court in a modern context was affirming this principle.

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[144] Dennis W Boivin "Accommodating Freedom of Expression and Reputation in the Common Law of Defamation" (1997) 22 Queen's LJ 229, 244.
[145] *Hill v Church of Scientology* [1995] 2 SCR 1130.
[146] *Hill v Church of Scientology*, above, para 144 Cory J for the Court.
[147] *Boland v Globe & Mail Ltd* [1960] SCR 203.
[148] *Boland v Globe Mail Ltd*, above, 208-209 Cartwright J for the Court.
[149] *Boland v Globe Mail Ltd*, above; *New York Times v Sullivan* (1964) 376 US 254; *Lange v Atkinson* [1997] 2 NZLR 22.

2 *The value placed on reputation in Canada*

Canada may not change its defamation laws given a different fact situation if it places a higher value on reputation than in other jurisdictions. This section will compare the value Canada places on reputation with that of England and New Zealand.

(a) Comparison with England and New Zealand

The importance of reputation is discussed in depth in *Hill*. Cory J stated, "to most people, a good reputation is cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual".[151] In *Reynolds*, Lord Nicholls gave similar consideration to reputation. He pronounced "reputation is an integral and important part of the dignity of the individual".[152] The High Court in *Lange v Atkinson* considered that both free speech and reputation are important values based on fundamental human rights.[153]

Although the latter two cases show that reputation is important in New Zealand and England, there is some indication that reputation is valued more highly in Canada. This is due to the fact that reputation was given constitutional status.[154] Cory J acknowledged that reputation is not included in the Charter, but stated that the concept of individual dignity underlies all Charter rights.[155] Good reputation was said to reflect individual dignity, and was therefore of fundamental importance. He also stated that reputation is closely related to the right to privacy, which is protected by the constitution.[156] These factors lead Cory J to the conclusion that reputation deserves protection and must be weighed against the *equally important* right to freedom of

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[150] *Boland v Globe & Mail Ltd*, above.
[151] *Hill v Church of Scientology* [1995] 2 SCR 1130, para 110.
[152] *Reynolds v Times Newspapers* [1999] 4 All ER 609, 622.
[153] *Lange v Atkinson* [1997] 2 NZLR 22, 30 (HC) Elias J.
[154] Jeremy Streeter "The 'Deception Exception': A New Approach to Section 2 (b) Values and its impact on Defamation Law" (2003) 61 U Toronto Fac Law Rev 79, 87.
[155] *Hill v Church of Scientology*, above, para 123.
[156] *Hill v Church of Scientology*, above, para 124.

expression.[157] This statement shows the importance of reputation in Canada. Freedom of expression is a constitutionally protected right, yet reputation, which has no express protection, is considered just as important.

Although New Zealand and England consider reputation to be important, it has not been stated by either of the highest courts to be of equal weight to freedom of expression.

(b) Criminal libel

Canada's criminal libel laws also show that reputation is valued more highly than in both England and New Zealand. Penal provisions for defamatory matter shows an extremely high value placed on reputation. New Zealand abolished the offence of criminal libel in 1992 when enacting the Defamation Act.[158] This shows a greater commitment to freedom of expression, and shows that bringing a person's reputation into disrepute is not worthy of criminal prosecution.

In England, defamatory statements may be a criminal offence under the Libel Act 1843, and also under common law.[159] Prosecution, however, is extremely rare.[160] The Law Commission has recommended abolishing criminal libel. However, this report has not been adopted.[161]

The Law Reform Commission of Canada has also recommended the removal of libel from the criminal code, which like England, has not been adopted.[162] However, unlike England, criminal libel laws received resounding endorsement by the Supreme Court. This occurred in the case of *R v Lucas* which challenged the constitutionality of

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[157] *Hill v Church of Scientology*, above, para 124
[158] *Lange v Atkinson* [1998] 3 NZLR 424, 464 (CA) Blanchard J.
[159] Halsbury's Laws of England (LexisNexis Butterworths, 2003) Libel and Slander 5.
[160] Practical Access to Democracy in Central and Eastern Europe "Criminal Defamation Laws and the Right to Freedom of Expression" <http://www.bghelsinki.org/fe/suggestions_en.html> (last accessed 1 September 2003)
[161] The United Kingdom Parliament <http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmhansrd/vo990126/text/90126w10.htm> (last accessed 26 August 2003).

certain provisions of the criminal code. [163] These provisions imposed criminal sanctions for deliberate publication of defamatory statements that the publisher knows to be false.[164] In this case Mr. and Mrs. Lucas picketed outside the Saskatchewan Provincial Court and a police headquarters with signs falsely accusing a police officer being a party to the rape an eight year old.

The Court found that the statute contravened section 2 (b) of the Charter, because the purpose of the sections were to prohibit expression.[165] However, it was held to be a justifiable limit under section one.[166] The case of *R v Oakes* set out the criteria to consider when evaluating if the infringement of a Charter right or freedom can be justified under section 1.[167] One of the questions that must be asked is whether the objective of the legislation is pressing and important enough to override a Charter right.[168] The Court considered that the aim of the Act was to protect reputation.[169] Cory J believed that this was a pressing and substantial objective in Canadian society.[170] In words very similar to those used in *Hill* the Court referred to the fact that protection of reputation recognises the innate dignity of the individual, and that there is a link between reputation and participation in society.[171] The Court also stated that reputation is an attribute that is "highly sought after, prized and cherished by most individuals. The enjoyment of a good reputation in the community is to be valued beyond riches".[172] This statement and the penalty imposed on the Lucas's shows the extremely high value given to reputation. (Mr. Lucas was sentenced to 2 years jail, and Mrs. Lucas to 22 months.)

Another requirement from *Oakes* is that the legislation must limit freedom of expression as little as possible.[173] This was held to be the case, as the Crown must prove

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[162] Raymond E Brown *The Law of Defamation in Canada* (Carswell, Toronto, 1987) 9.
[163] *R v Lucas* [1998] 1 SCR 439.
[164] *R v Lucas*, above, para 1 Cory J (Lamer CJC, Gonthier, Iacobucci, Bastarache JJ concurring).
[165] *R v Lucas*, above, para 28, Cory J (Lamer CJC, Gonthier, Iacobucci, Bastarache JJ concurring).
[166] *R v Lucas*, above, para 109, Cory J(Lamer CJC, Gonthier, Iacobucci, Bastarache JJ concurring).
[167] *R v Oakes* [1986] 1 SCR 103.
[168] *R v Oakes*, above, para 73 Dickson CJC (Chouinard, Lamer, Wilson and Le Dain JJ. concurring).
[169] *R v Lucas*, above, para 46 Cory J (Lamer CJC, Gonthier, Iacobucci, Bastarache JJ concurring).
[170] *R v Lucas*, above, para 48 Cory J (Lamer CJC, Gonthier, Iacobucci, Bastarache JJ concurring).
[171] *R v Lucas*, above, para 48 Cory J (Lamer CJC, Gonthier, Iacobucci, Bastarache JJ concurring).
[172] *R v Lucas*, above, para 46 Cory J (Lamer CJC, Gonthier, Iacobucci, Bastarache JJ concurring).
[173] *R v Oakes*, above, para 74 Dickson CJC (Chouinard, Lamer, Wilson and Le Dain JJ. concurring).

the matter is defamatory, and that the accused knew the defamation was false, and had intent to defame. Cory J stated that requirement was easy to fulfil, given the negligible value of defamatory expression.[174]

(c) The reputations of elected officials

The free flow of ideas has long been held to be important to the functioning of democracy. This was illustrated by Brennan J in *Sullivan* when he stated that debate on public issues should be "uninhibited, robust, and wide open".[175] The courts in New Zealand and England have also upheld this principle, which were the primary reasons for the relaxation of defamation laws in these jurisdictions.

This idea has also been recognised in Canada. The case of *Edmonton Journal v Alberta (Attorney General)* involved a section 2 (b) challenge to the Alberta Judicial Act regarding restrictions on publication of some matrimonial proceedings and pre-trial stages of civil actions.[176] The Court held these provisions to be unconstitutional. Cory J stated, "It is difficult to imagine a guaranteed right more important to a democracy than freedom of expression. Indeed, democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions".[177]

Cory J made similar statements in *R v Kopyto*, a case concerning contempt of court. At page 462 he stated "the very life-blood of democracy is the free exchange of ideas and opinions. If these exchanges are stifled, democratic government itself is threatened".[178]

However, recognition of this idea does not necessarily mean that defamation laws will change. Canadian courts appear to value the reputation of public officials more

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[174] *R v Lucas*, above, para 57 Dickson CJC (Chouinard, Lamer, Wilson and Le Dain JJ. concurring).
[175] *New York Times v Sullivan* (1964) 376 US 254, 270.
[176] *Edmonton Journal v Alberta (Attorney General)* [1989] 2 SCR 1326.
[177] *Edmonton Journal v Alberta (Attorney General),* above, 1336 Cory J (Dickson CJC and Lamer J concurring).
[178] *R v Kopyto* (1987) 62 OR (2d) 449, 462 (Ont SC) Cory JA..

highly than courts in other jurisdictions. It is clear that Canada values reputation more highly than the United States. This was illustrated by Richard J in *Coates* when he stated, "Our judges cherish free speech and free press no less than their American counterparts. They just happen to value personal reputation, particularly of their public servants more."[179] It was also shown by the Supreme Court's refusal to employ the *Sullivan* actual malice rule.

The courts in both New Zealand and England also refused to adopt the actual malice rule. They believed that politicians still have the right to protection of reputation, which is drastically reduced by the *Sullivan* rule. However, the relaxation of defamation laws that took place means that this protection has been sacrificed to a certain extent. There is evidence that Canada will not be willing to make this sacrifice, which shows the importance placed on the reputation of every individual, including those holding elected positions.

The classical formulation regarding the reputation of public officials was stated in *Boland*.[180] The judge held that more relaxed defamation laws for politicians would "tend to deter sensitive and honourable men from seeking public positions of trust and responsibility and leave them open to others who have no respect for reputation".[181]

In the case of *Goddard v Day* the Alberta Court of Queen's Bench directly considered the question of whether the common law of defamation regarding political discussion is inconsistent with the values of freedom of expression in section 2 (b) of the Charter.[182] The court held that it was not, and stated that "in balancing the interests of freedom of expression and protection of reputation the latter gains paramountcy when what is freely expressed is false, whether or not the speaker is aware of the fact".[183] It is interesting that the right to reputation could ever be considered *paramount* to the constitutionally protected right of freedom of expression.

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[179] *Coates v The Citizen* (1988) 44 CCLT 286, para 62 (NSSC).
[180] *Boland v Globe & Mail Ltd* [1960] SCR 203.
[181] *Boland v Globe & Mail Ltd*, above, 208, Cartwright J (for the Court).
[182] *Goddard v Day* (2000) 194 DLR (4th) 559 (Alta Ct QB)

Before *Hill* was decided, the British Columbia Court of Appeal considered the issue of the law of defamation in relation to an elected official in *Derrickson v Tomat*.[184] Wood JA believed that an introduction of the *Sullivan* rule "would be likely to discourage honest and decent people from standing for public office".[185] He considered the cases of *Snyder v Montreal Gazette Ltd*[186] and *MacKay v Southam Co*[187] that had been seen as authority for the proposition that higher damages should be awarded to those in public life, as compared to other cases. This was because society should show the esteem those involved in public affairs are held in to ensure the involvement of the best citizens. However, Woods JA held that this proposition could not stand in light of the Charter.[188] The judge found that the common law rules of defamation should remain, but when the plaintiff is an elected official non-pecuniary damages should be limited to an amount to bring to the public attention the fact that the defamatory statements were untrue.[189] This was due to a number of factors. Firstly, he referred to the importance of open discussion in a democracy. Secondly, that modern political debate is often exaggerated and inaccurate, and therefore citizens take this into account when assessing statements made about elected officials. Finally, those defamed have access to channels in which they can reply to the statement.[190]

This approach was followed in both *Tornberg v Worrell*[191] and *Neapotung v Whitehead*[192]. It was considered in *Newson v Kexco Publishing Co*[193] where the plaintiff was not an elected official, but a senior bureaucrat. The Court was unwilling to make a conclusive decision on this, as the trial judge found that there was actual malice on behalf of the defendant. It was held that there should be no cap on damages when malice is

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[183] *Goddard v Day*, above, para 54 Ritter J.
[184] *Hill v Church of Scientology* [1995] 2 SCR 1130; *Derrickson v Tomat* (1992) 88 DLR (4th) 401 (BCCA)
[185] *Derrickson v Tomat*, above, 408 Wood JA.
[186] *Snyder v Montreal Gazette Ltd* (1978) 87 DLR (3d) 5 (Que SC).
[187] *MacKay v Southam Co* (1955) 1 DLR (2d) 1 (BCCA).
[188] *Derrickson v Tomat*, above, 409 Wood JA.
[189] *Derrickson v Tomat*, above, 411 Wood JA.
[190] *Derrickson v Tomat*, above, 405 Wood JA.
[191] *Tornberg v Worrell* [1995] AJ No 1312 (Alta Ct QB).
[192] *Neapotung v Whitehead* [1994] 1 WWR 206 (Sask Ct QB).

found, as there is no public interest in malicious statements. However, Lambert JA expressed the opinion that reduced damages for public servants would not have the same justifications as for public officials. This was because public servants do not have the same opportunity to reply to criticisms, nor have they entered the public arena to the same extent as elected officials.[194]

The Supreme Court did not mention these decisions in *Hill*.[195] It was not strictly necessary to decide on the issue of damages for an elected official, as the plaintiff was merely an employee of the Crown. However, the issue could have been addressed as obiter dicta. The Court found that there should be no cap on general damages, and upheld an award of $1.6 million overall. This suggests that the Supreme Court may not follow the *Derrickson v Tomat* line of reasoning. Also, *Derrickson v Tomat* was referred to in another part of the judgment, which shows that the Court was aware of the case but chose not to express an opinion on this aspect of it.[196]

(d) Summary

Reputation is valued somewhat higher in Canada than in New Zealand and England. This has been shown by the constitutional value given to reputation, and the endorsement of criminal libel provisions by the Supreme Court. Dicta in Canadian cases also show the importance of the reputations of elected officials. However, this is tempered by the possibility of reduced damages, which shows recognition of the idea that freedom to discuss political ideas is essential to democracy. Therefore, while Canada appears to value reputation more highly than England and New Zealand, the overall difference is slight.

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[193] *Newson v Kexco Publishing Co* (1995) BCLR (3d) 176 (BCCA).
[194] *Newson v Kexco Publishing Co*, above, para 38 Lambert JA.
[195] *Hill v Church of Scientology* [1995] 2 SCR 1130.
[196] *Derrickson v Tomat* (1992) 88 DLR (4th) 401 (BCCA); *Hill v Church of Scientology* [1995] 2 SCR 1130, para 109 Cory J for the Court.

C *Arguments For This Proposition*

1 *Statements made in* Hill

The Court stated that the common law complied with Charter values 'in its application to the parties in this action'. Academic Denis Boivin suggests four factors that Cory J had in mind by this statement:[197]

(i) The fact that it was a private action meant the Charter did not directly apply.

(ii) The defendant was not part of the media.

(iii) The speech at issue was not of a political nature.

(iv) The defendant did not take reasonable steps to investigate the truth of the statement.

By limiting the judgment to the facts at hand, Cory J left the door open for modification of defamation laws at a later date. This could possibly happen when the plaintiff is in an elected position and the defamatory statement relates to the performance of his or her duties.

Many provincial courts *have* extended defamation laws beyond what was decided in *Hill*. However, there has been disagreement as to whether the laws can be modified, in light of *Hill* and if so to what extent.

2 *Provincial court decisions*

The Supreme Court in *Hill* devoted its attention to whether the *Sullivan* standard of actual malice should be adopted in Canada.[198] Like the rest of the Commonwealth, this standard was rejected. However, unlike other common law countries, the Supreme Court did not consider the other options available for extending the common law. Some

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[197] Dennis W Boivin "Accommodating Freedom of Expression and Reputation in the Common Law of Defamation" (1997) 22 Queen's LJ 229, 240.

consideration was given to the defence of qualified privilege, and a small inroad into its application was made. Pre-*Hill*, publication of a fair and accurate report of judicial proceedings was held to be an occasion of qualified privilege.[199] This included pleadings and court documents filed before trial. In *Hill*, the defendants made the report on the contempt charge before the documents were filed. The Supreme Court held that the occasion was still privileged, and should not be defeated by this technicality.[200]

However, the privilege was defeated for another reason, namely the legitimate purposes of the occasion were exceeded.[201] This was because the defendant Manning took no steps to verify the accuracy of the allegations made against Hill. The Court found that this was unreasonable, particularly as Manning was an experienced lawyer. Holding a press conference was an extremely wide publication of allegations that had not yet been tested by law. Manning's conduct was thought to be 'high handed and careless'.[202]

The Court did not consider the general question of whether wide publications were capable of attracting qualified privilege. However, the fact that a press conference was held did not appear to automatically defeat the privilege. The Court considered the surrounding circumstances, and concluded that on the facts privilege was exceeded. Therefore, it is possible that in a different fact situation the Court would extend the availability of qualified privilege to include wide publication. This would bring Canada into line with its commonwealth counterparts.

The provincial courts of Ontario and British Columbia have already shown a willingness to allow the use of qualified privilege when there has been a wide publication of untrue and defamatory statements. This has been done by taking a more expansive approach to the common law duty/interest test, rather than by use of the Charter.

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[198] *Hill v Church of Scientology* [1995] 2 SCR 1130, paras 125-145 Cory J for the Court; *New York Times v Sullivan* (1964) 376 US 254.
[199] Partrick Milmo QC and Professor WVH Rogers (eds) *Gatley on Libel and Slander* (9ed, Sweet & Maxwell, London, 1998) 325.
[200] *Hill v Church of Scientology*, above, para 157 Cory J for the Court.
[201] *Hill v Church of Scientology*, above, para 158 Cory J for the Court.

The traditional view has been that qualified privilege cannot be used when there has been a statement made 'to the world' which generally refers to any statement made by or through the media. The Supreme Court in *Jones v Bennett* enunciated this principle.[203] In that case, the Premier made defamatory statements about the chairman of a provincial commission, which were reported by the press. The Court of Appeal held that the occasion was privileged, but the Supreme Court disagreed, stating that the privilege cannot be used when a statement is published generally.[204]

Ten years later, in the 1979 case of *Stopforth v Goyer* the Ontario Court of Appeal allowed the defence of qualified privilege to be used when a statement was made by a minister to the media.[205] The Court held that the electorate had an interest in knowing why a senior civil servant was dismissed, and that the minister had a duty to give reasons for the dismissal.[206]

The British Columbia Court of Appeal allowed the defence to apply to a wide publication in the case of *Parlett v Robinson*.[207] In that case a Member of Parliament criticised a senior official involved with corrections at a news conference. The defendant believed the plaintiff was exploiting prisoners work for his own profit. The defendant failed to persuade the Minister to order a public inquiry. The Court held that the defendant had a duty to make these statements to persuade the Minister to order an investigation.[208] The statements were not considered to be too wide, as the electorate had an interest in knowing whether the corrections service was being properly administered.[209] The Court distinguished the case from *Jones* by stating that in *Jones* the defendant had no duty to publish the statement.[210]

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[202] *Hill v Church of Scientology*, above, para 159 Cory J for the Court.
[203] *Jones v Bennett* [1969] SCR 277.
[204] *Jones v Bennett*, above, para 26 Cartwright CJ for the Court.
[205] *Stopforth v Goyer* (1979) 97 DLR (3d) 369 (Ont CA) Jessup JA for the Court.
[206] *Stopforth v Goyer*, above, para 4 Jessup JA for the Court.
[207] *Parlett v Robinson* (1986) 30 DLR (4th) 247 (BCCA)
[208] *Parlett v Robinson*, above, 256 Nemetz CJBC, Hinkson and Hutcheon JJA.
[209] *Parlett v Robinson*, above, 256 Nemetz CJBC, Hinkson and Hutcheon JJA.

The extent of qualified privilege was considered in *Moises v Canadian Newspapers.*[211] The Court stated that the categories in which qualified privilege will apply are not closed.[212] It was noted that other decisions of the Court showed the principle in *Jones* was not absolute.[213] The Court then quoted a passage from *Sapiro v Leader Publishing Co* which set out factors to be considered in determining whether the occasion is privileged or not.[214] This includes the nature of the duty and interest, the urgency of the occasion, and whether what was published was relevant and reasonably appropriate to the occasion.

Moises was held not to be an occasion of qualified privilege.[215] The case involved a defendant newspaper, which had published an article referring to the plaintiff as an officer in a terrorist group. The Court found that even if the public did have a legitimate interest in receiving the information, the newspaper had no duty to publish the article, as the plaintiff was not a threat to anyone in Canada.[216]

Ontario courts have expressly extended the defence of qualified privilege to apply to widely published statements. The authority for this proposition is *Grenier v Southam Inc.*[217] The defendant newspaper had published an article about a religious cult that appeared to be holding some adherents in obsessive capacity. The trial judge held that there was a social and moral duty to publish the article, and it was therefore published on an occasion of privilege. The appeal court upheld this finding.[218]

This was followed in *Silva v Toronto Star Newspapers*, where two journalists wrote a series of articles about subsidised public housing.[219] The plaintiff was a building

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[210] *Parlett v Robinson*, above, 257 Nemetz CJBC, Hinkson and Hutcheon JJA.
[211] *Moises v Canadian Newspapers Co* (1996) 30 CCLT (2d) 145 (BCCA).
[212] *Moises v Canadian Newspapers Co*, above, para 18 Williams JA for the Court.
[213] *Moises v Canadian Newspapers Co*, above, para 24 Williams JA for the Court.
[214] *Moises v Canadian Newspapers Co*, above, para 19 Williams JA for the Court; *Sapiro v Leader Publishing Co* [1926] 2 WWR 268, 271, 20 Sask LR 449 (CA) Lamont JA.
[215] *Moises v Canadian Newspapers Co*, above, para 32 Williams JA for the Court.
[216] *Moises v Canadian Newspapers Co*, above, para 32 Williams JA for the Court.
[217] *Grenier v Southam Inc* OJ No 2193 (Ont CA).
[218] *Grenier v Southam Inc*, above, para 4 Judgment of the Court.
[219] *Silva v Toronto Star Newspapers Ltd* (1998) 167 DLR (4th) 554 (Ont CJ)

manager, who complained that an article was defamatory, as it referred to her hassling tenants, and providing favourable treatment to those who gave her expensive presents.[220] The article was held to have a social and moral purpose.[221] It is interesting to note that there is no mention of a reciprocal interest on the side of the public. The judgment focuses on the importance of giving those living in sub-standard accommodation a chance to speak, rather than considering whether the public had an interest in receiving the information.

However, the Ontario Court of Justice expressly refused to expand the defence of qualified privilege in the case of *Hodgson v Canadian Newspapers Co*.[222] In that case, a reporter from *The Globe and Mail* published articles about the regional commissioner of engineering alleging misuse of public office. The Court held that the Supreme Court's decision in *Boland v Globe & Mail Ltd* remain the law in Canada, and therefore a newspaper cannot raise the defence of qualified privilege at common law.[223] Lane J referred to the fact that in *Hill* the Court rejected the adoption of the 'actual malice' rule, and stated that an expansion of qualified privilege allowing newspapers to report on public officials and public matters would come too close to an adoption of this rule.[224]

Two years later, the case of *Myers v Canadian Broadcasting Corp* mentioned the ruling in *Hodgson,* yet cited *Grenier* and *Silva* as evidence that the availability of qualified privilege may be expanding.[225] The Court held that the overall approach of the House of Lords in *Reynolds* was consistent with the Canadian approach to qualified privilege, and that the factors mentioned in *Reynolds* were helpful in examining whether circumstances surrounding the publication made the occasion privileged.[226] However, Bellamy J held that the urgency of publication was necessary for the availability of qualified privilege. In both *Grenier* and *Silva* there was an urgent need to make the

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[220] *Silva v Toronto Star Newspapers Ltd*, above, para 18 Somers J.
[221] *Silva v Toronto Star Newspapers Ltd*, above, para 49 Somers J.
[222] *Hodgson v Canadian Newspapers Co* (1998) 39 OR (3d) 235 (Ont CJ).
[223] *Hodgson v Canadian Newspapers Co*, above, para 457 Lane J; *Boland v Globe & Mail Ltd* [1960] SCR 203.
[224] *Hodgson v Canadian Newspapers Co,* above, para 458 Lane J.
[225] *Myers v Canadian Broadcasting Corp* [1999] OJ No 4380, paras 71–72 (Ont SCJ) Bellamy J.

reports.[227] This factor was absent in *Myers*. A television news show ran a programme that gave a negative portrayal of a cardiologist for his views on the safety of a particular drug. Before the programme was aired four months were spent researching this topic, which shows that there was no urgency and the facts should have been checked more thoroughly. Therefore, there was no duty to broadcast the news item, and the occasion was not privileged.[228]

In *Leenen v Canadian Broadcasting Corp*, another cardiologist brought an action in defamation for the same programme as in *Myers*.[229] Leenen alleged the programme showed his support of a controversial type of drug was due to his relationship with a pharmaceutical company. The judge in this case accepted without question that the defence of qualified privilege was available to wide publications. At paragraph 114 he stated, "Until recently, there was some doubt as to whether publications to the world at large could ever give rise to an occasion of qualified privilege. However, that issue was definitively resolved by the Court of Appeal in *Grenier*." He went on to quote the factors listed by Lord Nicholls in *Reynolds* to determine whether there is a duty to convey the information, and whether there is a corresponding interest in receiving that information.[230] By listing these factors, the judge in essence accepts that *Reynolds* is good law in Canada.[231]

In *Ward v Clark*, the Court held that the defendant was entitled to use the defence of qualified privilege in respect of comments he made to a reporter for the *Vancouver Sun*, a paper widely circulated in the province.[232] The judge found that a reciprocal duty and interest had been established. The plaintiff, a marine engineer and consultant in the business of ship brokering, had made criticisms to the press of a fast-ferry project over which the defendant had control. The public was held to have an interest in hearing a

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[226] *Myers v Canadian Broadcasting Corp*, above, para 75; *Reynolds v Time Newspapers* [1999] 4 All ER 609 (HL).
[227] *Myers v Canadian Broadcasting Corp*, above, para 79 Bellamy J.
[228] *Myers v Canadian Broadcasting Corp*, above, para 81 Bellamy J.
[229] *Leenen v Canadian Broadcasting Corp* 50 CCLT (2d) 213 (Ont SCJ).
[230] *Leenen v Canadian Broadcasting Corp*, above, paras 109-119 Cunningham J.
[231] *Reynolds v Time Newspapers* [1999] 4 All ER 609.
[232] *Ward v Clark* (2000) BCSC 979.

response to the concerns raised. Therefore, the defendant had a duty as the responsible minister to reply to these criticisms to the same audience.[233]

In *Lee v Globe & Mail* the former President of Singapore allegedly made defamatory remarks about the former Prime Minister of Singapore, in an interview published in a newspaper.[234] This was an application to strike out the defence of qualified privilege. The Court refused to strike out this defence, as "it is an area where the law has been evolving and where the determination of the application of qualified privilege is fact-driven".[235] The Court mentioned that although urgency has been considered to be important in other cases, it is only one of the factors mentioned in *Reynolds*, and failure to meet one of the factors does not necessarily mean the defence will fail.[236]

This issue was considered in *Dhami v Canadian Broadcasting Corp.*[237] The plaintiffs were members of the executive of a Sikh Temple. They alleged the statements made by the defendant broadcasters implied that the plaintiffs had misappropriated funds from the Temple. This was an application by the plaintiffs to strike out various defences raised by the defence. The Court refused to strike out the defence of qualified privilege, even though there was wide publication of the material. The Court considered *Reynolds*, and held that it could apply in British Columbia to the extent that it does not conflict with the Court of Appeal reasons in *Moises*.[238] The Court disagreed with the plaintiff's contention that *Reynolds* only applies in government and political matters.[239]

The recent case of *Young v Toronto Newspapers Ltd* reinforced this extension.[240] The Chief Coroner for Ontario brought an action alleging defamatory statements were made about him in an article in the Toronto Star. Rouleau J followed the decision in

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[233] *Ward v Clark*, above, para 49 Owen-Flood J.
[234] *Lee v Globe & Mail* (2001) 52 OR (3d) 652 (Ont SCJ).
[235] *Lee v Globe & Mail*, above, para 21 Swinton J.
[236] *Lee v Globe & Mail*, above, para 21 Swinton J.
[237] *Dhami v Canadian Broadcasting Corp* (2001) BCSC 1811.
[238] *Dhami v Canadian Broadcasting Corp*, above, para 88 Slade J.
[239] *Dhami v Canadian Broadcasting Corp*, above, para 89 Slade J.
[240] *Young v Toronto Newspapers Ltd* (2003) WL 21787002 (Ont SCJ).

Grenier v Southam Inc, and asserted that qualified privilege is available to newspapers where there was a social or moral duty to publish.[241] The judge considered each of the factors set out in *Reynolds* as they applied to this case to determine whether qualified privilege was available.[242] He found qualified privilege did not apply in this case, as reasonable steps had not been taken to verify the information.[243]

However, the Nova Scotia Supreme Court has not followed this approach, as shown by the recent case of *Campbell v Jones*.[244] In the course of an investigation of a theft at a school, a police officer subjected three twelve year-old African-Canadian girls to a search involving the removal of some of their clothing. Lawyers were retained to make a complaint under the Police Act. The lawyers held a press conference, where it was stated that Campbell had 'strip-searched' the girls (when in fact her actions fell short of this), and that she was motivated by racial factors.

The Court examined the defence of qualified privilege, and considered the approach taken in *Reynolds* and by the courts in other Canadian provinces. It held that qualified privilege did not apply in this case.[245] Moir J was reluctant to extend the defence of qualified privilege, as he felt constrained by authority. He cited the case of *Jones v Bennett*, and referred to the importance of reputation as stated in *Hill,* as reasons against allowing the defence to apply to a publication made to the world at large.[246]

He did acknowledge, however, that while publication to the world at large is a factor strongly indicating against qualified privilege, it does not necessarily defeat the application of the defence. It may still be available where the "duty is so strong, interest so compelling and circumstances so justified that the public should be told even if the information may turn out to be defamatory and untrue."[247] Nonetheless, he stated that

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[241] *Young v Toronto Newspapers Ltd*, above, para 175 Rouleau J.
[242] *Young v Toronto Newspapers Ltd*, above, para 186 Rouleau J.
[243] *Young v Toronto Newspapers Ltd*, above, para 188 Rouleau J.
[244] *Campbell v Jones* (2001) NSSC 139.
[245] *Campbell v Jones*, above, para 51 Moir J.
[246] *Campbell v Jones*, above, para 43 Moir J.
[247] *Campbell v Jones*, above, para 44 Moir J.

this is a high standard, and that the grounds would have to be different to those in *Jones v Bennet*.[248]

It is interesting to note that the Court mentioned that *Reynolds* and *Sullivan* concerned press publications about politicians, while both *Hill* and *Campbell* concerned publications to the press about officials who were not politicians.[249] Although this distinction was mentioned, it was not pursued as a reason for disallowing qualified privilege in this case.

D Summary

Although the reasoning in *Hill* suggests that Canada has taken a different approach to the balancing of freedom of expression and protection of reputation than other jurisdictions, decisions of provincial courts suggest that Canada is not such an oddity.[250] The approach taken by some of the provincial courts has shown that there is willingness in Canada to expand the application of the defence of qualified privilege. These courts have gone further than Australia and New Zealand by finding that an occasion may be privileged for matters outside of political situations. If an issue came before the Supreme Court where a media defendant had a strong duty to publish, and the public had a corresponding interest, decisions of provincial courts show that the Supreme Court would be likely to find that qualified privilege existed. The Court now has the benefit of the decisions in *Lange v Atkinson, Lange v ABC,* and *Reynolds v Times Newspapers Ltd*, which would be likely to influence its decision.[251] The experience of the provincial courts show that this would be likely to be done through a common expansion, rather than through a Charter challenge.

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[248] *Campbell v Jones*, above, para 44 Moir J; *Jones v Bennett* [1969] SCR 277.
[249] *Campbell v Jones*, above, para 40 Moir J.
[250] *Hill v Church of Scientology* [1995] 2 SCR 1130.
[251] *Lange v Atkinson* [2000] 1 NZLR 385 (CA); *Lange v Australian Broadcasting Corporation* (1996) 145 ALR 96 (HC); *Reynolds v Times Newspapers* [1999] 4 All ER 609 (HL).

VII CONCLUSION

This essay has explained and illustrated that a freedom of expression provision in a constitution does not guarantee a relaxation in defamation laws. Although a relaxation of the law was the response of a constitutional challenge in the United States, it was not considered necessary by the Supreme Court of Canada. The experiences of England, Australia, and New Zealand have shown that the converse is also true, in that a constitutional guarantee is not necessary to relax defamation laws.

As constitutions are subject to judicial interpretation, it is difficult to draft a provision that would guarantee a relaxation in defamation laws. In *Hill* it was held that the Charter did not apply directly to the common law of defamation.[252] However, even if the Charter did apply directly, it would still have been open to the Court to find that the common law of defamation did not require modification.

Although *Hill* appears to show that Canada has struck the freedom of expression / protection of reputation balance in a different way to other common law countries, this essay has shown the difference would not necessarily persist with a different fact situation.[253] Provincial courts have extended the defence of qualified privilege in a similar manner to that of the United Kingdom, and beyond that of Australia and New Zealand. This means that qualified privilege may be available to the media when reporting on a wide range of issues, including political matters.

Although the Charter is an available tool to reassess the law of defamation, the Supreme Court has so far declined to do so. In the future, it may choose to follow the route of provincial courts. Provincial courts have developed the law, but have done so on the basis of common law rather than constitutional principles.

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[252] *Hill v Church of Scientology* [1995] 2 SCR 1130, para 81.
[253] *Hill v Church of Scientology*, above.

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