Application of Charter Values to Defamation Actions

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[***] The authors are grateful to their colleagues, Wendy M. Matheson and John B. Laskin for their helpful ideas and comments.

This paper discusses the intersection of defamation law and freedom of expression. It focuses on the application of Charter values to private defamation actions and assesses whether such application is consistent with law that says the Charter does not apply to private litigation.

The *Canadian Charter of Rights and Freedoms*[1] was not intended to apply to private actions. Early on, the Supreme Court of Canada affirmed that proposition.[2] Some recent cases suggest that Charter "values" can, and should, be applied to private actions. This points to a potential dichotomy: Charter rights cannot, but Charter values should be applied to private actions. This dichotomy has unfolded in an interesting way in the context of defamation law. The cases that discuss the application of the Charter to defamation actions both highlight the seeming conflict and point the way to the resolution of the conflict.

In 1995, the Court discussed the application of Charter values in private defamation actions. In *Hill* v. *Church of Scientology of Toronto*,[3] a Crown Attorney sued Scientology for defamation. One of Scientology's defences was that the Charter should be applied to defamation law. Scientology argued that the section 2(b) freedom of expression right was not given sufficient weight in the common law of defamation. The Court, in assessing this argument, affirmed the traditional position that the Charter does not apply to private litigants.

The court also went on to write:

> [I]*n the context of civil litigation involving only private parties, the Charter will "apply" to the common law only to the extent that the common law is found to be inconsistent with Charter values*.[4]

The Court, in effect, said that the application of Charter rights to private actions is completely excluded, but the application of Charter values is encouraged. Can this apparent conflict be reconciled?

Application of Charter values to private actions is not the unexpected development that it may seem. There is authority prior to *Hill* supporting the application of the Charter in developing and applying the common law to private actions. The use of the Charter is simply a refinement of the courts' traditional duty to reflect changing societal values in the common law. This is especially true in the field of defamation.

Freedom of expression and the right to human dignity are societal ideals the courts dealt with prior to the Charter. Considering Charter values permits the courts to continue to develop the common law in keeping with societal values, recognizing that the rights and freedoms protected by the Charter form a significant part of the fabric of most societal

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1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

2. See discussion of *RWDSU* v. *Dolphin Delivery Ltd*., [1986] 2 S.C.R. 573, [hereinafter *Dolphin Delivery*], *infra*, Part B.

3. [1995] 2 S.C.R. 1130 [hereinafter *Hill*].

4. *Ibid.* at 1170-1171.

values. This process should thus not be forestalled by the presence of the Charter, which was certainly not intended to prevent consideration of long-recognized values in the development of the common law simply because those values are now enshrined in the Charter.

In fact, the Court's holding that Charter values should be taken into account when considering the common law may be an impetus for re-evaluation of the common law of defamation. In time the application of Charter values could change the way defamation defences are pleaded and proved.

I.
HISTORY OF THE APPLICATION OF THE CHARTER TO PRIVATE ACTIONS

The application of the Charter to private litigants[5] was the subject of some debate when the Charter first came into force. The Court addressed the issue in *RWDSU* v. *Dolphin Delivery Ltd.*[6] The defendant union wanted the Court to overturn an injunction, which prevented the union from engaging in secondary picketing. The union argued that the Charter applied to the common law, and that the injunction infringed their section 2(b) right to freedom of expression. The Court disagreed. It found that the Charter did not apply to private litigants. Further, it held that even if the Charter had applied, the prohibition on secondary picketing was justified as a reasonable limit.

Mr. Justice McIntyre[7] engaged in a detailed discussion of the scope of the application of the Charter to common law as well as private litigation. He concluded that the Charter applied to the legislative, executive and administrative branches of government, whether the government action provoked public or private litigation. The Charter clearly applied to legislation. In addition, the Charter applied to the common law, but only where a government nexus existed. In this regard, Mr. Justice McIntyre wrote:

> *The action will also be unconstitutional to the extent that it relies for authority or justification on a rule of the common law which constitutes or creates an infringement of a* Charter *right or freedom. In this way the* Charter *will apply to the common law, whether in public or private litigation. It will apply to the common law, however, only in so far as the common law is the basis of some*

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5. D. Gibson, "Distinguishing the Governors from the Governed: The Meaning of Government under s.32(1) of the Charter" (1983) 13 Man. L.J. 505 advocated the position that the Charter should apply to private actions. K. Swinton, "Application of the Canadian Charter of Rights and Freedoms", in W. Tarnopolsky & G. Beaudoin eds., *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982) 41 took the opposite position.

6. *Supra* note 2.

7. Dickson C.J., and Estey, McIntyre, Chouinard and Le Dain J.J. concurring.

> *governmental action which, it is alleged, infringes a guaranteed right or freedom*.[8]

He confirmed that a government actor was required to invoke Charter causes of action and that the Charter does not apply to private litigants when he said:

> *Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply*. [...][9]

Following *Dolphin Delivery*, *McKinney* v. *University of Guelph*[10] discussed in greater detail the scope of the application of the Charter. The Supreme Court of Canada was divided on the test to use in determining whether an entity is a government actor. However, the judges were clear that a government actor was, indeed, needed and that private activity was excluded from Charter scrutiny. According to Mr. Justice LaForest:

> *To open up all private and public action to judicial review could strangle the operation of society*. [...] *It would mean reopening whole areas of settled law in several domains.* [...] [T]*o apply the Charter to purely private action would be tantamount to setting up an alternative tort system*.[11]

Dolphin Delivery was seen as a definitive statement of the law and relied on to exclude application of the Charter.[12] The Court, itself, subsequently reaffirmed *Dolphin Delivery* as authority that the Charter does not apply to private litigation. For example, in *Tremblay* v. *Daigle*,[13] Mr. Tremblay argued that a foetus is included in the term "everyone" and is therefore protected by section 7 of the Charter, as a basis to sustain an injunction preventing Ms. Daigle from having an abortion. The Court refused to address

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8. *Supra* note 2 at 599.

9. *Supra* note 2 at 603.

10. *McKinney* v. *University of Guelph,* [1990] 3 S.C.R. 229 [hereinafter *McKinney*].

11. *Ibid.* at 262-263.

12. For example in *Skidmore* v. *Blackmore*, [1990] 5 W.W.R. 634, 47 B.C.L.R. (2d) 112 (Co.Ct.) the judge explicitly cited *Dolphin Delivery* as authority for not applying section 15(1) of the Charter to private litigants. The judge clearly believed the common law rule he was forced to apply (since enunciated by a higher court), disentitling a lay litigant to costs, was wrong. He nevertheless felt bound by the common law rule and not capable of using the Charter to change it. Other examples include: *Charters* v. *Harper* (1987), 79 N.B.R. (2d) 28 (Q.B.) which held there was no right of action against a trial judge who contributed to delay contrary to section 11(b); *Phillips* v. *Moose Jaw (City of) Board of Police Commissioners* (1988), 67 Sask. R. 49 (Q.B.) which held that section 15(1) cannot support a private action; *Lemky* v. *Lemky* (1990), 18 A.C.W.S. (3d) 1114 (B.C. Co. Ct.) and *P.(D.)* v. *S.(C.)* (1993), 108 D.L.R. (4th) 287, [1993] 4 S.C.R. 141, 58 Q.A.C. 1 which held that the Charter does not apply to judicial orders to resolve private disputes in the family law context.

13. [1989] 2 S.C.R. 530.

this issue because the case involved a civil action between two private parties and no state actor was being impugned. State action was required to ground a claim under the Charter.

A. Application of the Charter in Private Defamation Actions

The courts were initially unwilling to extend Charter scrutiny to private defamation actions. However, as set forth above, Charter values have recently been introduced into private defamation litigation.

1. The Charter Excluded

In *Coates* v. *Citizen (The)*,[14] the Minister of National Defence sued the newspaper, *The Citizen*, for defamation. *The Citizen* applied to have Nova Scotia's *Defamation Act*[15] struck down, in its entirety, as contrary to section 2(b) of the Charter. The Court found that the provincial statute provided the necessary governmental connection to allow application of the Charter to what was otherwise litigation between private parties. However, in *obiter* the Court went on to add that if "Coates relies on the common law rules of defamation, then, the Charter has no application due to the absence of the requisite government nexus".[16]

A factually similar case to *Hill*, but with a very different result, is *Getty* v. *Heise*.[17] The then Premier of Alberta brought an action against the *Calgary Herald* for defamation. The newspaper in its original pleadings admitted the defamation. It subsequently applied to amend its statement of defence. The amendment read in part:

> 4. *By virtue of section 2(b) and section 32 of the* Canadian Charter of Rights and Freedoms *and section 52(1) of the* Constitution Act, 1981 *and the Defendants' right to freedom of expression, communication, and freedom of the press, the words complained of were published without malice on an occasion of absolute privilege concerning matters of public interest of and concerning a public figure and the Defendants state that they or any of them enjoy a constitutional liberty and privilege concerning the words complained of.*[18]

The Court noted that a proposed amendment must raise an issue worthy of consideration. If the amendment has no merit it will not be allowed. The Court, relying on *Dolphin Delivery*, decided that the newspaper could not raise the Charter as a defence to a common law action where there was no exercise or reliance upon government action. There was no government involvement in the common law tort of defamation in this case. In conclusion, the Court stated that:

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14. (1988), 85 N.S.R. (2d) 146, 44 C.C.L.T. 287 (N.S. S.C.) [hereinafter *Coates* cited to C.C.L.T.].

15. *Defamation Act*, R.S.N.S., 1967, c.72.

16. *Coates*, *supra* note 14 at 302 (C.C.L.T.).

17. (1990), 104 A.R. 308 *sub nom. Getty* v. *Calgary Herald* (Q.B.).

18. *Ibid.* at 311.

> *This proposed amendment is just an argument that everyone, including the press, has an unconstrained right or freedom to defame others*.[19]

The Court decided that the proposed amendment had no merit at law.

2. The Dichotomy Arises

British Columbia's Court of Appeal applied Charter values in a defamation action in 1992. The case is *Derrickson* v. *Tomat*.[20] The Court, in discussing the damages awarded in the Court below, stated that the courts have a duty to develop the common law in a manner consistent with constitutional values. It decided that authority for the proposition that higher damages should be granted to those defamed in connection with their public duties must be questioned in light of the Charter. It went on to add that the freedom of expression essential to the democratic process is endangered if an atmosphere of intimidation develops when large punitive awards are granted. This concern was balanced by the fact that the reputation of public people must not be sacrificed on the altar of freedom of expression. The balance was to be achieved by awarding damages sufficient to indicate to the community that the allegations were unwarranted. Beyond that, courts must be careful not to stifle free expression. The remarks are *obiter*. The case was sent back to trial on other grounds. However, the Court clearly accepted that changes to the common law, even without a government actor, should be consistent with the Charter.

This issue of applying Charter values was addressed tangentially by the Court in *Dagenais* v. *Canadian Broadcasting Corp*.[21] The Court was dealing with publication bans issued under common law or legislated discretionary authority. In this case, the C.B.C. was asking the court to overturn an injunction prohibiting the C.B.C. from broadcasting a docu-drama, "The Boys of St. Vincent". The injunction had been granted because the criminal trials of a number of Catholic brothers, charged with the physical and sexual assault of children, were ongoing. The trial judge who issued the injunction accepted that broadcasting the docu-drama would affect the fairness of the trials. The C.B.C. argued that the ban limited its freedom of expression. The majority of the Court agreed.

Chief Justice Lamer[22] decided that a common law rule which confers a discretion on judges cannot confer the power to infringe the Charter. The common law rule, granting a publication ban when the person seeking the ban demonstrates a real and substantial risk of interference with the right to a fair trial, did not provide sufficient protection to freedom of expression. The Court changed the rule so that judges, when exercising their discretion, must consider (1) whether alternative measures to a ban will prevent the risk to a fair trial,

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19. *Ibid.* at 318.

20. (1992), 88 D.L.R. (4th) 401.

21. [1994] 3 S.C.R. 835 [hereinafter *Dagenais*].

22. Sopinka, Cory, Iacobucci and Major J.J. concurring.

and (2) whether the salutary effects of the ban will outweigh the deleterious effects to the free expression of those affected.

In *Dagenais*, the issuance of the injunction occurred where individuals were charged with criminal offences. Thus a government nexus existed. The Court was not dealing with private parties. However, Chief Justice Lamer did not seem to limit the principle to the criminal context when he said that a common law rule granting judicial discretion is limited by Charter principles. Defendants in defamation cases have used this reasoning to attempt to have the common law develop to their advantage. *Dagenais* certainly suggests that the Court is willing to give significant weight to freedom of expression when assessing fundamental freedoms.

In 1995, the issue of applying Charter values in defamation actions again arose for the British Columbia Court of Appeal in *Bank of British Columbia* v. *Canadian Broadcasting Corp.*[23] The Bank of British Columbia alleged that a news broadcast carried a number of defamatory meanings, for example that the Bank was in danger of failing and that its financial statements were deceptive and misleading. The C.B.C. sought to use the Charter to resist producing the tapes and work product created in producing the news broadcast. It argued that these documents were protected by privilege based on the freedom of expression right in section 2(b) of the Charter. In addition, the C.B.C. wanted a trial of the "issue of truth" prior to the discovery of the documents. In relation to this claim, C.B.C. argued that the common law onus of proof of the truth of the statement in a libel action should be reversed; it argued that making the defendant bear the onus was contrary to the Charter right of freedom of expression.

Madam Justice Prowse, for the majority, reiterated that the Charter has no application in a private dispute. She further stated that "the challenge to the common law burden of proof with respect to the issue of truth does not engage any governmental action".[24] Madam Justice Prowse, in dealing with the alternative argument that placing the onus on the defendant was inconsistent with Charter values, further stated that the onus of proof was not contrary to Charter values.

The Court was not unanimous in its approach. In a concurring decision, Mr. Justice Hutcheon rejected the C.B.C.'s arguments on the basis that:

> *The appeal against the order for disclosure at this stage of the proceeding depended entirely on the proposition that the constitutional values expressed in s. 2(b) of the* Charter *have been infringed or not recognized. I have not been able to develop a meaningful distinction between the application of the* Charter *and the application of* Charter *values. Because, in my view, the* Charter *does not apply, the appeal on this issue must fail.*[25]

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23. (1995), 10 B.C.L.R. (3rd) 201 (B.C.C.A.).

24. *Ibid.* at 216.

25. *Ibid.* at 231.

When the Supreme Court of Canada was faced with whether to apply the Charter in a private defamation action in *Hill* v. *Church of Scientology of Toronto*,[26] all seven members of the panel were unanimous that the application of Charter values was appropriate. Scientology argued that, because Mr. Hill was a Crown Attorney, the necessary government nexus was present and sufficient to attract Charter scrutiny. In the alternative, Scientology argued that, even if the action were a purely private matter, the common law should, nevertheless, be interpreted in a manner consistent with the Charter.

The Court rejected Scientology's argument that Mr. Hill was a government actor. The Court reiterated the statement from *Dolphin Delivery* that the Charter will apply to the common law only to the extent government action infringes a guaranteed freedom. Mr. Justice Cory wrote:

> *Private parties owe each other no constitutional duties and cannot found their cause of action upon a Charter right. The party challenging the common law cannot allege that the common law violates a Charter right because, quite simply, Charter rights do not exist in the absence of state action*. [...][27]

Cory J. also adopted Mr. Justice La Forest's comments, writing for the majority in *McKinney*, that "subjecting all private and public action to constitutional review would mean reopening whole areas of settled law and would be 'tantamount to setting up an alternative tort system'".[28]

However, the Court also decided that it was appropriate to develop the common law in a manner that was consistent with Charter values. Mr. Justice Cory stated that the obligation to develop the common law in a manner which is consistent with Charter principles was:

> *simply a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values*.[29]

The dichotomy raised in *Hill* is more apparent than real. Prior to *Hill*, courts had already applied Charter values to private actions.

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26. *Supra* note 3.

27. *Ibid.* at 1170.

28. *Ibid.* at 1160. The Court refused to adopt Scientology's proposal to incorporate the "actual malice" standard of liability into Canadian law.

29. *Ibid.* at 1169.

II. RESOLVING THE DICHOTOMY

A. Judicial Acceptance of the Application of Charter Values to Private Litigation

An interesting starting point is to return to *Dolphin Delivery*[30], where the Court held that the Charter does not apply to private actions. Yet Mr. Justice McIntyre also stated:

> *I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law.*[31]

The language of Charter values is apparent in this passage.

It is informative to analyze, not only what *Dolphin Delivery* says, but how the decision is structured. Mr. Justice McIntyre first engaged in a Charter analysis. He concluded that the injunction preventing secondary picketing was an infringement of section 2(b). He went on to find that the injunction was, nevertheless, justified under section 1 of the Charter. Only after Mr. Justice McIntyre went through the Charter analysis did he deal with the issue of to whom the Charter applied. As discussed previously, he concluded that the Charter applied to the common law, but only if there was a government nexus. On the facts of the case, the required element of government intervention could not be found. He noted that, had there been a statutory provision outlawing secondary picketing, the Charter would have applied. In this case, there was merely a rule of the common law which rendered secondary picketing tortious; there was no reliance on governmental action.

Mr. Justice McIntyre nevertheless stated that the judiciary ought to develop the principles of the common law in a manner that is consistent with the Charter. The effect of the decision was to show the common law was consistent with the Charter. It is logical to speculate that, had the Court been unable to uphold the injunction under section 1, it would have decided to change the common law rule so as to be in keeping with Charter values.

In *R.* v. *Swain*,[32] the Court discussed how to apply section 1 of the Charter to a common law rule found to infringe a Charter right. In this case, the necessary governmental nexus existed. However, the Court also commented that:

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30. *Supra* note 2.

31. *Ibid.* at 603.

32. [1991] 1 S.C.R. 933.

> *it is not strictly necessary to invoke section 52(1) of the* Constitution Act, 1982, *in order to challenge a common law, judge-made rule on the basis of the rights and values guaranteed by the Charter* [...].[33]

Hence a judge is entitled to reformulate the common law to attain the objectives of the Charter.

In *R.* v. *Salituro*,[34] the Court was considering deciding whether to change the common law rule of spousal incompetency. The Court decided to change the law to permit a spouse to testify for the Crown where the spouses were irreconcilably separated. The Court held the law needed to change to reflect changing circumstances in society at large. Mr. Justice Iacobucci, writing for the Court, used the Charter as a justification for making an incremental change to the common law. He wrote:

> *The grounds which have been used in support of the rule are inconsistent with respect for the freedom of all individuals, which has become a central tenet of the legal and moral fabric of this country particularly since the adoption of the Charter. In* R. *v.* Big M Drug Mart Ltd., *Dickson J. (as he then was) defined freedom in this way (at p.336): "Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person".*[35]

The Court did not find that the common law infringed a Charter right *per se*. Rather, it found that the Charter reflected societal values of dignity and individuality; it was the Court's duty to make the common law reflect societal values. Of course this case is not as potentially problematic as *Hill* since it occurred in the context of a rule affecting a criminal defendant, a situation generally considered to attract Charter scrutiny. However, Mr. Justice Iacobucci added that the Charter will be influential even in the absence of legislation or government action:

> *Where the principles underlying a common law rule are out of step with the values enshrined in the Charter, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with Charter values, without upsetting the proper balance between judicial and legislative action that I have referred to above, then the rule ought to be changed.*[36]

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33. *Ibid.* at 979.

34. [1991] 3 S.C.R. 654.

35. *Ibid.* at 673.

36. *Ibid.* at 675.

B. Applying Charter Values to Defamation Law

While there is authority that the courts should apply Charter values to the law relating to private actions, this does not mean that a whole new and parallel tort law will develop. In *Hill*, the Court discusses the approach to take when the common law is in conflict with Charter values and concludes:

1. courts should adopt a cautious approach and not make far-reaching changes; and

2. a traditional section 1 analysis is not called for; Charter values framed in general terms should be weighed against the principles that underlie the common law.[37]

These guidelines provide the framework in which Charter values should be assessed, and differ from the direct application of Charter rights.

First, courts should not deviate from their usual practice of making slow incremental changes to the common law. When the courts apply the Charter to legislation they must sometimes change the law dramatically. They may strike down or read in. They sometimes force the government to change policies. When Charter values are applied to the common law, whether or not the litigants are private or public, the courts will not make far-reaching changes.[38]

Second, the courts have experience using important societal values as a basis for changing private law. The Charter provides the courts with a more explicit statement of important values to refer to. In the field of defamation law, for example, the courts have dealt with both freedom of expression and human dignity values prior to the advent of the Charter. Recent defamation cases that rely on *Hill* indicate that the law of defamation is unlikely to change dramatically when Charter values are applied. However, a gradual change may occur over time. As discussed below, the impact of the *Hill* case on

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37. *Supra* note 3 at 1171-1172.

38. In *Watkins* v. *Olafsen*, [1989] 2 S.C.R. 750, the Court stated that the legislature is the best place for law reform, and the job of the courts is to apply the law found in precedents and legislation. The courts should only make slow and incremental changes to the law, as they are not in the best position to assess deficiencies in the existing law. The courts, in applying the Charter to the common law, (even where a government nexus existed) have relied on this statement of judicial function.

    In *R.* v. *Salituro* (1991), *supra* note 34, the Court decided that the common law rule of spousal incompetency was out of step with the societal value of individual choice, as reflected in the Charter. Based solely on the principle of individual choice, it was appropriate to make spouses competent to testify for the Crown under any circumstances. However, because he was dealing with a change to the common law, Mr. Justice Iacobucci took a more cautious approach. He said far reaching change should be left to the legislature. He decided to change the common law rule only to the extent of making irreconcilably separated spouses competent to testify.

defamation practice and the conduct of defamation trials may be more dramatic than the immediate impact on the substantive law of defamation.

1. Slow and Incremental Change to the Common Law

In *Hill,*[39] the Court decided that the law of defamation generally did comply with the values underlying the Charter. The substantive change made by expanding the availability of the defence of qualified privilege, is precisely the type of change the courts have traditionally felt comfortable making to the common law. It is not a re-writing of the law, but an expansion of existing common law.

In *Moises* v. *Canadian Newspaper Co.*,[40] the newspaper ran a defamatory article about Mr. Moises with a headline that read "Ottawa still questioning why terrorist official living in Victoria". The paper's submission was that the common law rule, which holds the media responsible for republishing libellous statements on matters of public interest, is an unjustified restriction on freedom of expression. This freedom is restricted because the difficulty in verifying the truth of allegations made by others results in a "chilling effect". The newspaper argued that the common law defence of qualified privilege should be extended to publications that are a "fair report".

The British Columbia Court of Appeal accepted that *Hill* meant that Charter values could be used to assess whether such an extension of the common law was merited. It also adopted this statement from *Hill*:

> *Courts have traditionally been cautious regarding the extent to which they will amend the common law. Similarly, they must not go further than is necessary when taking Charter values into account. Far-reaching changes to the common law must be left to the legislature.*[41]

The Court concluded, as will be discussed below, that the common law of defamation is not inconsistent with Charter values and refused to extend the defence of qualified privilege.

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39. *Supra* note 3.

40. *(c.o.b. Times-Colonist)* (1996), 30 C.C.L.T. (2d) 145, 76 B.C.A.C. 263, 125 W.A.C. 263, 24 B.C.L.R. (3d) 211 (C.A.).

41. *Ibid.* at 226 (B.C.L.R.) (adopting a statement from *Hill, supra* note 3 at 1171).

2. Defamation Law Consistent with Charter Values[42]

As the Court said in *Dagenais*:

> *The impact of the Charter will be minimal in areas where the common law is an expression of, rather than a derogation from, fundamental values. The common law pertaining to publication and broadcast bans is an example of one such area*.[43]

The law of defamation is another such area. The courts developed the law of defamation in societies in which freedom of expression and the importance of reputation were both important values. The Charter recognizes that fact. When the courts apply Charter values to the law of defamation, in theory, the result should not be very different than if they had relied on the traditional approach of incremental changes that reflect societal values.

Certainly implicit in the reasoning of a number of early cases is a weighing of personal reputation and freedom of the press, just as one would expect if the courts apply Charter values. For example, in the 1960 decision, *Globe and Mail Ltd.* v. *Boland*,[44] the Court was deciding whether to grant the defence of qualified privilege to a newspaper that published defamatory remarks in regard to a political candidate's fitness for office. The Court decided that to do so would be contrary to the "common convenience and welfare of society".[45] It concluded that the "interest of the public and that of publishers of newspapers would be sufficiently safeguarded by the availability of the defence of fair comment".[46] The court was weighing the value of reputation against the need for political discussion and criticism which is fostered by freedom of the press.

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42. Applying Charter "values" to areas other than defamation law is also unlikely to result in dramatic change. In *Forbes* v. *Thurlow*, (March 15, 1996), Doc. Barrie G8848 (Ont. Gen. Div.), C.C.L. [1996] 4755, 6632, 6633 the defendant, on the basis of *Hill*, argued that a stay of a civil trial should be granted so as to be consistent with Charter values. The court first found that a stay should not be granted at common law because it would be unjust to the plaintiff. The court accepted that it could consider Charter values. It stated that "denying a stay whether temporary or otherwise is not contrary to the Charter values as I have found it would be prejudicial and unjust to the plaintiff were the motion granted" (at para. 15). I think this is the pattern likely to emerge as the courts apply Charter values. The courts attempt to reflect societal values in the law; the Charter is a legislated statement of the values Canadian society considers important. It is therefore unlikely that the courts will find that entire areas of the common law are inconsistent with Charter values.

43. *Supra* note 21 at 929 (stated by Gonthier J. in the minority but adopted by Lamer C.J. for the majority).

44. [1960] S.C.R. 203.

45. *Ibid.* at 208.

46. *Ibid.* at 209.

Another example of this weighing process, outside Charter scrutiny, appears in *Snyder* v. *Montreal Gazette Ltd*.[47]. The Quebec Superior Court, in upholding the large amount of damages awarded against the *Montreal Gazette* by a jury in a defamation action, emphasized that reputation is one's most valuable possession. In assessing freedom of expression concerns, it stated that:

> *those who would imprudently risk, by a stroke of the pen, to destroy the reputation of such dedicated men ought to pay the high price that such a misdeed deserves. The freedom of the press can only be justified so long as the press itself shows its sense of responsibility*.[48]

In this case, the court concluded the newspaper had not shown a sufficient sense of responsibility. Similar sentiments are reflected in two other media cases.

In *Coates* v. *Citizen (The)*,[49] the Court, after ruling that the Charter was applicable to Nova Scotia's *Defamation Act*[50], nevertheless, concluded that the act did not impinge on freedom of the press under section 2(b). The Court, in deciding there was no infringement of section 2(b), stated that:

> *Our judges cherish free speech and a free press no less than their American counterparts. They just happen to value personal reputation, particularly the reputation of their public servants, more*.[51]

In *Bank of British Columbia* v. *Canadian Broadcasting Corp*.[52] the C.B.C. argued that if it reported on a public figure without malice, it should not be liable for defamation. Madam Justice Prowse rejected the C.B.C.'s argument that the Court should adopt the "actual malice" standard used in the United States. She did not accept that this would be more consistent with the values of freedom of expression and freedom of the press. The court primarily relied on the reasoning found in *Coates* to reject the American approach. The Court emphasized that, though free speech is valued in Canada, an equally important value is personal reputation. For this reason, the press is not entitled to a privilege of free speech greater than that enjoyed by a private individual.

In *Hill*, despite holding that Charter values apply to defamation law, the Court concluded:

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47. (1978), 87 D.L.R. (3d) 5 (Que. S.C.).

48. *Ibid.* at 19.

49. *Supra* note 14.

50. *Supra* note 15.

51. *Supra* note 14 at 313 (C.C.L.T.).

52. *Supra* note 23.

> *in its application to the parties in this action, the common law of defamation complies with the underlying values of the Charter and there is no need to amend or alter it.*[53]

The Court accepted that in libel cases, the values of reputation and freedom of expression clashed. The Court first recognized the great importance of freedom of expression. It went on to say that it was not an absolute right; it was a freedom governed by law. The Court adopted the statement that "the underlying values [of the Charter] are sensitively weighed in a particular context against other values of a free and democratic society [...]".[54] Finally, the Court stated that defamatory statements are only tenuously related to the core values which underlie section 2(b) since they are inimical to truth, cannot enhance self-development, and do not lead to healthy participation in the affairs of the community.

The Court then noted that the other value to be balanced was the protection of reputation of the individual. The Court reviewed the history of defamation law and noted that "a central theme through the ages has been that the reputation of the individual is of fundamental importance".[55] Reputation is viewed as the fundamental foundation upon which social interaction occurs. It also serves to foster our self-image and self-worth. Mr. Justice Cory added that:

> *Although it is not specifically mentioned in the Charter, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the Charter rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society.*[56]

The Court concluded that given the two competing fundamental values, the common law of defamation, as it applied in the case, was consistent with Charter values.

In *Newson* v. *Kexco Publishing Co.*,[57] the British Columbia Court of Appeal dealt with the defendant's argument that the reflection of Charter values in the common law should have the effect of extending the defence of qualified privilege to a wider class of political statements. In this case, the defendant published a statement to the effect that the Chief Provincial Firearms Officer was a "fascist swine" for not issuing a licence. The Court rejected the defendant's argument. Relying on *Hill* and *Derrickson* v. *Tomat*, Lambert J.A. said "I do not think that Charter values, properly understood, either demand or encourage that extension".[58]

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53. *Supra* note 3 at 1188.

54. *Ibid.* at 1173 (from *United States of America* v. *Cotroni*, [1989] 1 S.C.R. 1469 at 1489).

55. *Ibid.* at 1177.

56. *Ibid.* at 1179.

57. (1995), 17 B.C.L.R. (3d) 176 (C.A.) [hereinafter *Newson* v. *Kexco*].

58. *Ibid.* at 183.

Similarly in *Moises* v. *Canadian Newspaper Co.*,[59] the Court accepted that *Hill* meant that Charter values could be used to assess whether such an extension of the common law was merited. However, the Court relied on *Hill*, *Coates*, and *Newson* v. *Kexco* for the proposition that the courts are justified in holding that the law of defamation is consistent with Charter values. Mr. Justice Williams agreed with Mr. Justice Cory's conclusion in *Hill* that, because freedom of expression and the protection of reputation are both important values, the common law need not be modified in order to reduce "libel chill". Williams J. concluded that:

> *Freedom of expression is of fundamental importance in Canada, but so is the dignity of the individual and his or her right to protect and preserve a good reputation.*[60]

The Court refused to extend the defence of qualified privilege because defamation law balances these two values in an acceptable way. The Court concluded that "whatever the trend elsewhere, Canadian courts should not blindly sacrifice individual reputation on the altar of freedom of expression".[61]

3. Impact of Applying Charter Values to Defamation Actions

As can be seen from the cases cited above, although the courts have long weighed the competing values of freedom of expression and protection of reputation, greater importance has been given to protection of reputation in the context of defamation cases. This is understandable when one thinks of the way in which defamation cases are tried. The plaintiff typically leads evidence concerning his pre-existing good reputation. Other witnesses may be called to support this and also to prove the damage to the reputation done by the press coverage in issue. The emphasis is entirely on the effect on the individual and the loss suffered as a result.

When the defence case is put forward, the emphasis is on the journalist's conduct. What did (s)he do? Who did (s)he speak to? What research was done? How careful was (s)he? The focus, more often than not, is on a mistake made by the journalist. The defence typically and of necessity concentrates on the specific issue at hand — the press coverage in question and the effect on the plaintiff.

At this point in Canada, in defamation cases, rarely do defendants lead evidence concerning the larger issue — namely the effect of defamation law on freedom of expression. Perhaps the reasons of the Nova Scotia Court in *Coates*[62] had a chilling effect on such attempts. Mr. Justice Richard gave short shrift to the eleven affidavits filed in support of the argument regarding the effect of the *Defamation Act* on news gathering and

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59. *Supra* note 40.

60. *Ibid.* at 227 (B.C.L.R.).

61. *Ibid.* at 230 (B.C.L.R.).

62. *Supra* note 14 at 150.

news reporting. He described these particular affidavits as containing "all sorts of opinion, hearsay, speculation and editorial comment". He labelled as "bizarre" an affidavit which concluded that "the rich and powerful have too much leeway to bully a newspaper into silence".

To be sure, the evidence appeared to be less than scientific and, to the extent quoted in the case, somewhat emotional. Yet these were early days in attempting to argue Charter principles in relation to defamation cases.

Whether the comments of the Court in *Coates* account for defence counsel's cautious approach to building a constitutional record or whether the signals were just not clear enough from the Supreme Court that such evidence would be relevant in a defamation case between private parties, we have yet to see a case where the reputation evidence is matched by the freedom of expression evidence. The reputation evidence is inevitable in the plaintiff's defamation case. The freedom of expression evidence is rarely, if ever, advanced at trial even though pleadings invoking the Charter are often seen in defences filed by the press.

It may be that the articulation in *Hill* will result in defence counsel pleading Charter values in a more focused way so as to support the leading of evidence concerning the effect on freedom of expression of certain aspects of the common law of defamation.

Such evidence has been seen in Supreme Court of Canada motions and motions like the *Coates* case but it is not commonly led at a defamation trial.

It is conceivable that a case could arise where credible evidence concerning the effect of defamation law on freedom of expression could persuade the Court to weigh differently than have the existing cases, the competing values of freedom of expression and protection of individual reputation. It would take the right case[63] and the right evidence but the articulation of the application of Charter values in the *Hill* case may prove the impetus, in that right case, to change the complexion of the defamation trial involving the press.

A possible target for this type of approach could be the line drawn between comment and fact. Defamation law gives great latitude to comment -- there is no such thing as a false opinion. Even the most outrageous view, if honestly held, has the right to be expressed. This is consistent with the importance of the Charter guarantee of freedom of expression.

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63. The right case could be one which involved a public figure, on a matter of public importance in which the value of the public debate, even if involving some incorrect information, was generally seen as being important. One can speculate that there could be situations where the debate itself uncovered other important information which would not have surfaced, but for the investigative report. One can speculate that evidence could be garnered showing the effect on editorial policies and pressroom conduct of successful claims by plaintiffs in other cases. In the right case, a challenge could be mounted to the appropriateness of some of the presumptions and onus provisions in the common law of defamation. The starting point, however, has to be the record which counsel develops at trial.

Where defendants get caught, in defamation cases, is in that grey area between fact and comment. Some expression of comment may also be viewed as a statement of fact. The characterization of the words as fact rather than as comment places the defendant in a much more vulnerable position. Of necessity, he or she must prove the factual statements to be true or establish an occasion of privilege.

Perhaps courts could be persuaded to characterize such words as comment rather than fact, if the right to expression were given greater weight than is now the case. Perhaps this shift in characterization could be achieved if evidence were led showing the importance of the debate on the matter in issue. This type of evidence is not yet typical in defamation cases but could be permitted under the principle articulated in *Hill* that urges application of Charter values.

Similarly, the Court in *Hill* left it open for media defendants to come forward with specific evidence on the effect of substantial awards on freedom of expression. When effective evidence is presented at trial, courts will be in a better position to consider the issue of damages in defamation cases in light of the Charter values of freedom of expression and protection of reputation.

Any new approach to defamation cases will, no doubt, be slow to take hold. Thus such changes, if they occur, will only gradually affect the substantive law of defamation. But the opportunity is there to move the common law of defamation forward in a manner consistent with Charter values.

CONCLUSION

There has been great debate about, and some say inconsistency, in the approach taken by the Supreme Court to the interaction between the Charter and defamation. There is, however, a principled approach to these issues which is founded both in the long-standing approach of courts to the development of the common law and in a recognition of the proper role of the Charter. Courts should apply Charter values in the development and reconsideration of the common law. The Charter is a distillation of many of the values Canadian society deems fundamental. The courts have always had a duty to make incremental adjustments to the common law so as to reflect changing societal values. Applying Charter values in private litigation is merely another tool to help fulfilling this duty.

In defamation cases, the application of Charter values may, over time, spur defence counsel to lead (and courts to permit) evidence directly relating to constraints and limitations on freedom of expression. This way, through the traditional development of the common law on a case by case basis, there may be a shift in the current weighting of the competing values of freedom of expression and protection of individual reputation.