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The Charter of Rights now tells us we have constitutionally guaranteed "free speech". This is the only anti-inflationary aspect of the Charter. Talk use to be cheap and now, praise the Lord, we are told it is free. But, like so many other promises of modern government this is mostly puffery. "Reasonable and justifiable" restrictions on free speech are still permitted. These will invariably include the libel and slander laws, contempt proceedings and publication bans in crimminal matters much like those in the law from the bad old days. Much like, but not quite, identical. ~~The changes are worth scrutiny.~~

Our law presently says that the principle defence of allegedly libelous statements is fair coment.
Comments must be fair and based on true facts. The speaker has the legal burden of proving the truth of those facts. You cannot make an innocent mistake in your facts. The jury has the exclusive right to decide what is fact and what is comment. If your facts are proved true, then the plaintiff who claims to have been libelled has the burden of proving the comments were unfair. A comment need not be correct. It can be wrong-headed.

The theory is that you should spell out the facts so that a conclusion is evidently a comment based on them. The bald allegation "He's a crook!" is a fact. But if you first set out the dishonest acts, then make the same allegation, the same words may be a comment. May be! You never know what the jury will say. How many facts, if any, do you have to set out before a statement is seen as a comment? "She's a liar"; "He's a fool"; "She's politically dishonest". ~~He's an opportunist~~

Just a moment's thought indicates how difficult and unpredictable is this distinction.

The point is the vast majority of political debate takes the form of mutual allegations that are asserted as much as fact as comment. If the jury treats your comments as facts, you have the burden of proving them true, not just reasonable. This is onerous indeed. The normal cautious person is well-advised (unfortunately) not to enter political debate at all. The average Joe can't afford to prove his facts because legal costs are so high he can't afford to fight the case even if he wins. The threat of a lawsuit stiffles much political criticism and debate. This has been the law so long we tend to forget its pernicious effect.

The American rule is different. About public officials there is no libel unless the other side proves you spoke with malice. In other words, you can be, innocently, wrong about your facts. Innocently, remember, because if you deliberately lie, or speak with reckless regard for the truth, that would prove malice. And you don't need to worry about the difference between fact and comment. Of course, if the words are so outrageous to indicate malice, then watch out! See New York Times v Sullivan 376 US. 255

And so when American reporters are doing a controversial story on a public figure their research is often geared as much to be able to prove the absense of malice as it is to get the facts. Because that is all that is necessary to successfully defend a legal

action. In the movie Abense of Malice we saw the reporter played by Sally Field straining to find a credible second source to a rumour in order that it can be reported without danger of libel. In All the Presidents Men we saw Woodward and Burnstein giving the person they were accusing the chance to deny the allegation. Again, they were creating evidence of no malice. The provable truth of the allegation was a remote consideration.

The different laws is Canada and the United States have a visible effect in the press. We could never have had a Watergate here because we wouldn't permit accusatorial reporting by aggressive reporters who really couldn't prove their facts when put to the test.

Our press generally covers controversy only under the cover of reporting what's happening in Court or in Parliament where there is a privilege providing the reporting is fair. Our muckracking reporters are excellent, but few and far between, because as the law stands now they really have to be able to prove their stuff. The question is whether the Charter of Rights will make a difference.

Professor Hogg and most other observers agree that the Charter does not apply to proceedings between private individuals. Section 32 seems to say it applies only against the government. (There are plausible though limited arguments to the contrary, but they are beyond the scope of this brief article.) There is no reason to believe the courts would make a general exception for the common law of libel. But the Sullivan case provides a wide exception to this rule.

In that case the U.S. Supreme Court gave First Amendment protection to the New York Times with respect to allegations made in the paper regarding illegal activities of an Alabama sheriff against Martin Luther King. The allegations were clearly false, but the Court said that there must be the right to be wrong in public debate about government officials. The same protection has been applied about candidates for public office, See Monitor Patriot Co. v. Roy, 401 U.S. 265. ~~Similar protection has been granted~~ and to comments about the private lives of public officials, See Curtis Pub. Co. v Butts, 388 U.S. 130. The decisions are interesting because they represent a break from the traditional U.S. rule that defamation by definition is not speech and has no First Amendment protection.

The American rule is not unlimited in scope. Senator Proxmire recently learned that lesson. He was sued by one of the recipients of his Golden Fleece award which he was in the habit of giving monthly to the latest and greatest government boon-doggle discovered by his staff. An indignant recipient, who obviously thought more of his obscur and peculiar government research grant than did the good Senator, sued for libel. The Senator pleaded the American rule - no malice on a matter of government. The Supreme Court ruled against him saying one obscure government-sponsored researcher was not a "public figure". So now the Senator has to prove his facts and justify his comments to a jury.

Canadians tend to think of American politics as wide-open, wild and irresponsible. If this greater freedom results in the

occasional publication of false allegations on political issues so be it. Absense of Malice made the case against accusatorial journalism, most eloquently. But, is it not more important that every citizen have the right to be wrong, though not malicious. ~~on the~~ Politicians ~~and officials~~ should welcome well-intentioned criticism even if occasionally factually wrong.

We need the American rule. Political debate and criticism of public officials should not be stifled by our difficult and obscure laws. We have never understood that our duty of public and political criticism be qualified by the proviso that one must be able to finance the proof of facts upon which criticism is based. After all government officials are protected from liability regarding their defense of government actions except where malice is shown. Why should critics of the government be in any different position.

It remains to be seen what force and effect is given to the Charter provisions in the realm of libel and slander. Suffice it to say that there is an urgnet need for a more liberal test, and cogent American authority in support of it.