The recent threatened libel action against the Globe and Mail by Attorney-General Roy McMurtry (and the entire staff of his department!) raises a fundamental issue of what, for want of better words, we call "free speech". It indicates the crying need for legislative reform in our law of libel and slander. As much as I hate to say it, the Americans have the answer and we should copy it.

The merits of the Globe and Mail's legal face-off with the Attorney-General is not for comment while it is before the Court. But, the case illustrates a larger political point. The paper voiced a criticism of the government on a matter of obvious public political interest (the Toronto Island evictions and the Attorney-General's role in the process). Why should the Globe and Mail, or anyone, have to face a lawsuit, with its horrendous expense, for entering the political fray in good faith? Most people would think that responsible criticism of the government, or public officials, should be protected by the doctrine of "free speech". But that is <u>not</u> the case in Canadian law. The failing of our law, and the virtue of the American rule, is subtle. But the American approach is reasonable and represents what is surely the necessary to protect "free speech".

The essence of free speech is the defence of fair comment. 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 fact as much as comment. If the jury treats your comments as facts, you have the burden of proving them true, not just reasonable. The normal cautious person is well-advised not to enter political debate at all. The averagle Joe can't afford that kind of trouble. Legal costs are so high he can't afford to fight the case even if he wins. Bye-bye critical debate. Bye-bye "free speech". The threat of a lawsuit will silence political criticism and debate.

The American rule is different. About persons in the public eye, there is no libel unless the other side proves you spoke with malice. In other words, you can be, innnocently, 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! The American rule would be better yet if it protected topics of public interest, so as not possibly to include irrelevant personal gossip about politicians.

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, and the legal embranglement to prove it is a comment.

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 rather peculiar government research grant than did the good Senator, challenged the award in Court. The Senator pleaded the American rule - no malice on a matter of political interest. 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. But the corruption and personal scandal-mongering which we abhor is not the result of the more liberal libel law which I am suggesting we import. It has often been noted by English and Canadian libel lawyers that Watergate could never happen under our laws. Our papers could never take the chance of such aggressive confrontation because they would bear the impossible burden of proving their allegations. If this greater freedom results in the occasional publication of false allegations on political issues, so be it. It is more important that every citizen have the right to be wrong, though not malicious, on the political issues of the day. Surely contemporary politicians and officials welcome well-intentioned criticism even if occasionally factually wrong.

The ancient libel rule of which I complain dates from an age when our rulers were not truly accountable for their actions. Even if elected, they governed by some remnant of the divine grace once claimed by George III. Criticism was viewed as personal, as a matter of honour. This hoary conceit is still available to throttle responsible political debate. It should be terminated. Canadian politics would be a little freer, more contentious, and a whole lot healthier.