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Abstract

This Note argues that Canada should recognize a privilege for media defendants similar to the United States actual malice standard in order to guarantee fully the freedom of the press set forth in the new Charter of Rights and Freedoms. Part I examines the recently adopted Charter, and the similarity between its free press provision and the first amendment of the United States Constitution. Part II demonstrates how current Canadian libel law curtails freedom of the press by burdening media defendants. Part III argues that the United States constitutional privilege better protects freedom of the press as guaranteed in the First Amendment than has the Charter in Canada. This Note concludes that in order for Canada to ensure media defendants the right of free speech as guaranteed in the Charter, the Canadian courts should adopt a more protective libel standard for media defendants, similar to the actual malice standard in the United States.

LIBEL LAW AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: TOWARDS A BROADER PROTECTION FOR MEDIA DEFENDANTS

INTRODUCTION

In 1982, Canada enacted its Charter of Rights and Freedoms[1] (Charter), which for the first time guaranteed certain fundamental freedoms to the Canadian people. In many respects, the Charter resembles the United States Bill of Rights. The Charter's guarantee of a free press, in particular, is closely modelled on the first amendment of the United States Constitution.[2] However, Canada's common law of libel has not paralleled modern developments in United States libel law.[3] Under Canadian libel law, if a statement is proven defamatory, it is presumed to be false.[4] In contrast, the actual malice standard[5] of United States law provides special protection for the press by presuming the truth of a statement about a public figure or on a matter of public interest.[6]

This Note argues that Canada should recognize a privilege for media defendants similiar to the United States actual malice standard in order to guarantee fully the freedom of the press set forth in the new Charter of Rights and Freedoms. Part I examines the recently adopted Charter, and the similiarity between its free press provision and the first amendment of the United States Constitution. Part II demonstrates how current Canadian libel law curtails freedom of the press by burdening media defendants. Part III argues that the United States constitutional privilege better protects freedom of the

1. Canadian Charter of Rights and Freedoms, Constitution Act, 1982, sched. B, pt. I, in 1982 R.S.C. 5 [hereinafter Charter].

2. *Compare* U.S. CONST. amend I ("Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .") *with* Charter, *supra* note 1; *see* R. McMurty, *The Canadian Charter of Rights and Freedoms: An Ontario View*, in THE U.S. BILL OF RIGHTS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 151, 152 (W. McKercher ed. 1983) [hereinafter BILL OF RIGHTS AND CHARTER]).

3. *See infra* notes 70-77 and accompanying text.

4. Shanoff, *Introduction to Libel Law*, 6 ADVOCS. Q., 1, 15 (1985); *see* Note, *Freedom of the Press: Availability of Defences to a Defamation Action*, 45 SASK. L. REV. 287, 299 (1981).

5. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

6. *Id.*; Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-48 (1974).

press as guaranteed in the first amendment than has the Charter in Canada. This Note concludes that in order for Canada to ensure media defendants the right of free speech as guaranteed in the Charter, the Canadian courts should adopt a more protective libel standard for media defendants, similiar to the actual malice standard in the United States.

I. *THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

The enactment of the Charter[7] was a long awaited response to calls for the heightened protection of individual rights in Canada.[8] Prior to the Charter, fundamental freedoms, such as freedom of the press, were protected primarily by traditions of liberty embodied in Anglo-Canadian common law.[9] Provincial and federal legislation also afforded some protection for civil liberties by prohibiting discriminatory practices.[10] However, the absence of a constitutionally entrenched standard for protecting fundamental freedoms and the dearth of jurisprudence pertaining to freedom of expression caused much apprehension about the state of civil liberties in Canada.[11]

In the early 1960's, the Canadian Parliament attempted to address this problem by enacting the Bill of Rights,[12] which specifically recognized freedom of the press as a "fundamental freedom."[13] However, the Bill of Rights was merely a Dominion statute, which could not be enforced against provincial legislation.[14] Thus, it fell far short of the goal of ensuring uni-

7. *See supra* note 1.

8. *See* Castel, *The Canadian Charter of Rights and Freedoms*, 61 CAN. B. REV. 1, 1 (1983); McKercher, *The United States Bill of Rights: Implications for Canada*, in BILL OF RIGHTS AND CHARTER, *supra* note 2, at 11-12. *But see* Smiley, *The Canadian Charter of Rights and Freedoms with Special Emphasis on Quebec-Canada Relations*, in BILL OF RIGHTS AND CHARTER 218, *supra* note 2, at 218-25 (discussing the events leading to the passage of the Charter and what the author considers to be the document's inadequacies).

9. Castel, *supra* note 8, at 1.

10. *Id.*

11. McWhinney, *The Canadian Charter of Rights and Freedoms: The Lessons of Comparative Jurisprudence*, 61 CAN. B. REV. 55, 60 (1983).

12. R.S.C. 1970, app. III.

13. Doody, *Freedom of the Press And The Canadian Charter of Rights and Freedoms: A New Category of Qualified Privilege*, 61 CAN. B. REV. 124, 134 (1983).

14. *Id.* at 131.

form protection for individual rights on a national level.[15]

After many years of debate,[16] the Canadian Parliament enacted the Charter as an amendment to the Canadian Constitution, which was binding on the provinces.[17] The Charter provides, for the first time, a constitutional guarantee of fundamental freedoms, including that of a free press.[18]

It is interesting to note the similiarities between the Charter and the Bill of Rights to the United States Constitution.[19] Although adopted under significantly different circumstances,[20] the United States Bill of Rights was "immensely influential" in the creation of the Charter.[21] Indeed, even before the Charter was adopted, the Canadian judiciary found American first amendment jurisprudence instructive in cases involving the press's right to freedom of expression.[22] One commentator has suggested that, as the drafters of the Charter have benefitted from American constitutional law, the Canadian judiciary should look to the American experience in implementing the Charter's provisions in the Canadian context.[23]

The Canadian parliament reserved for the courts the

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15. *Id.*

16. *See* Russell, *The Political Purposes of the Canadian Charter of Rights and Freedoms*, 61 CAN. B. REV. 30, 32-33 (1983).

17. *Id.* at 35.

18. *See* Charter, *supra* note 1, pt. I, sec. 2b. The Charter section on fundamental freedoms provides that:

> 2. Everyone has the following fundamental freedoms:
>
> a) freedom of conscience and religion;
>
> b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> c) freedom of peaceful assembly; and
>
> d) freedom of association.

Id. sec. 2.

19. *See* Doody, *supra* note 13, at 135-36. *See generally* BILL OF RIGHTS AND CHARTER, *supra* note 2 (various Canadian and United States scholars discussing the Charter, and comparing it with the Bill of Rights).

20. *See* Westin, *The United States Bill of Rights and the Canadian Charter: A Socio-Political Analysis*, in BILL OF RIGHTS AND CHARTER, *supra* note 2, at 39.

21. *See* McKercher, *Introduction*, in BILL OF RIGHTS AND CHARTER, *supra* note 2, at 3-4.

22. *See* Doody, *supra* note 13, at 139; Schmeiser, *Entrenchment Revisited: The Effect of the Canadian Charter of Rights and Freedoms*, in BILL OF RIGHTS AND CHARTER, *supra* note 2, at 158, 161.

23. McKercher, *The United States Bill of Rights: Implications for Canada*, in BILL OF RIGHTS AND CHARTER, *supra* note 2, at 19.

power to implement the Charter.[24] Thus, the Canadian judiciary must give authority and meaning to the specific provisions of the Charter.[25] The Charter enables courts to enunciate a broader privilege for media defendants reporting on public affairs.[26] Unfortunately, Canadian courts have failed to consider the Charter in recent libel cases.[27] Clearly, however, the courts must assume a more active role in developing judicial standards to effectuate the protection of fundamental freedoms envisioned in the Charter.[28]

Although the Canadian Charter and the United States Bill of Rights purport to uphold the same fundamental freedoms of speech and press, the substantive differences in United States and Canadian libel law lead to significantly different results. This is most apparent in the case of media defendants, who, because of the unavoidable transmission of broadcast signals across national boundaries, find themselves subject to libel suits in Canada under legal standards much less favorable to the media[29] than those provided by United States law.[30]

It is technologically impossible for the United States to prevent signals transmitted by United States stations from travelling through the airwaves into Canada.[31] In addition, the Canadian Radio and Television Commission (CRTC) permits Canadian cable television stations to receive United States signals and retransmit them throughout Canada,[32] despite the

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24. McKercher, *The United States Bill of Rights: Implications for Canada*, in BILL OF RIGHTS AND CHARTER, *supra* note 2, at 19.

25. McWhinney, *supra* note 11, at 64-68.

26. *See* Doody, *supra* note 13, at 150.

27. *See, e.g.*, Good v. North Delta-Surrey Sentinel, [1985] 1 W.W.R. 166 (B.C. Sup. Ct. 1984); Moffat v. British Columbia Television Sys. Ltd., [1985] 1 W.W.R. 271 (B.C. Sup. Ct. 1984); Camporese v. Parton, 47 B.C.L.R. 78 (1983); Sussman v. Eales, 1 Carswell's Prac. Cas.2d 14 (Ont. Sup. Ct. (1985)); Tait v. New Westminster Radio Ltd., 58 B.C.L.R. 194 (1984).

28. *See* Knopff & Morton, *Judicial Statesmanship and the Canadian Charter of Rights and Freedoms*, in BILL OF RIGHTS AND CHARTER, *supra* note 2 at 184, 186.

29. *See infra* notes 37-69 and accompanying text.

30. *See infra* notes 71-77 and accompanying text.

31. Affidavit of Anthony Cervini, Vice President, Affiliate Relations, NBC, at 4-6, Pindling v. National Broadcasting Corp. [sic], No. 17549/84 (Ont. Sup. Ct., filed May 4, 1984) [hereinafter Cervini Affidavit] (papers on file in the offices of the *Fordham International Law Journal*).

32. The United States and Canada are both signatories to a treaty that is designed to prevent this type of rebroadcast. Inter-American Radiocommunications

protests of United States broadcasters.[33] The result of these two facts is that there is a large amount of United States programming present in Canada without the approval of the United States networks.

United States broadcasters create programming believing that such programming will be subject only to United States libel law. Thus, it is unfair to subject United States broadcasters to the broader liability standards of Canadian law simply because of the unintentional and undesired presence of their programming in Canada.[34] However, *Pindling v. National Broadcasting Co.* demonstrates that United States broadcasters are subject to libel suits in Canada as a result of programs that are broadcast and intended to be viewed only in the United States. The *Pindling* suit is a libel suit pending in Canada, brought by the Prime Minister of the Bahamas, Lynden O. Pindling.[35] The suit arose from six separate broadcasts by a United States television broadcaster which originated in the United States and were seen in Canada by the two methods previously described.[36]

II. *THE INADEQUACY OF CANADIAN LIBEL LAW WITH REGARD TO FREEDOM OF THE PRESS*

In all Canadian libel actions, if the plaintiff can prove that a defamatory statement was published, then falsity is presumed, and the defendant has the burden of asserting the de-

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Convention, December 13, 1937, *reprinted in* MULTILATERAL AGREEMENTS 1931-1945, at 468.

Article 21 of the Inter-American Radiocommunications Convention provides that: "The contracting Governments shall take appropriate measures to ensure that no program transmitted by a broadcasting station may be retransmitted or rebroadcast, in whole or in part, by any other station without the previous authorization of the station of origin."

33. Cervini Affidavit, *supra* note 31, exhibit "A" (letter from NBC's Canadian attornies, Herridge & Tolmie, to the Secretary General of the Canadian Radio and Television Commission, registering the networks' objection to unauthorized Canadian retransmission of their broadcasts).

34. *See supra* notes 31-32 and accompanying text

35. Pindling v. National Broadcasting Corp. [sic] No. 17549/84 (Ont. Sup. Ct., filed May 4, 1984) (papers on file in the offices of the *Fordham International Law Journal*).

36. Statement of Claim, Pindling v. National Broadcasting Corp. [sic], at 6-8 (Ont. Sup. Ct., filed May 4, 1984) (papers on file in the offices of the *Fordham International Law Journal*)

fense of truth.[37] In order to avoid liability in a libel suit, a defendant usually will try to raise a defense of qualified privilege or fair comment.[38] Generally, media defendants are unsuccessful with these defenses.[39] Thus, media defendants are inadequately protected from libel suits brought by public figure plaintiffs, thereby undercutting the rights guaranteed by the Charter.[40]

A. *The Qualified Privilege Defense*

In Canada, the defense of qualified privilege provides that defamatory statements may sometimes be published without liability if the statements regard a matter of public interest.[41] The plaintiff must prove that the publisher knew that the statement was false in order to overcome this defense. However, the media do not automatically obtain the protection of qualified privilege merely because the subject matter of the state-

37. Christie v. Geiger, 35 A.L.R.2d 316, 329 (Q.B. 1984); Thomas v. Canadian Broadcasting Sys., 16 C.C.L.T. 113, 142 (N.W.T. Sup. Ct. 1981); Thompson v. NL Broadcasting Ltd. 1 C.C.L.T. 278, 285 (B.C. Sup. Ct. 1976)

38. Shanoff, *supra* note 4, at 6, 17-18; *see infra* notes 39-69.

Two other defenses to libel in Canada are justification and absolute privilege. *Id.* at 17-18. Justification is an affirmative defense in which the burden lies on the defendant to prove the truth of the words in their natural and ordinary meaning. "The defendant must strictly confine his evidence to the particulars of justification set out in his defence." *Id.* at 17.

> Absolute privilege provides absolute protection against tort liability and is not defeasible even on proof of express malice. It applies primarily to statements made between executive officers of government in the performance of their duties, and to parliamentary and judicial proceedings. Obviously it is a defence that is unavailable to the media.

Note, *supra* note 4, at 303.

A more complete discussion of justification and absolute privilege is beyond the scope of this Note. For a discussion of these defenses, *see* P. LEWIS, GATLEY ON LIBEL AND SLANDER (8th ed. 1981).

39. *See, e.g.*, Cherneskey v. Armadale Publishers Ltd., 90 D.L.R.3d 321 (1979 S.C.C.) (defense of fair comment rejected); Snider v. Calgary Herald 34 C.C.L.T. 27 (Alta. Q.B. 1985) (defense of qualified privilege rejected); Christie v. Geiger, 35 A.L.R.2d 316 (Q.B. 1984) (no justification established); Whitaker v. Huntington, 15 C.C.L.T. 19 (B.C. Sup. Ct. 1980) (defense of qualified privilege fails); Thompson v. NL Broadcasting Ltd. 1 C.C.L.T. 278 (B.C. Sup. Ct. 1976) (defense of fair comment fails); Vogel v. Canadian Broadcasting Corp., 21 C.C.L.T. 105 (B.C. Sup. Ct. 1982) (defense of fair comment rejected); Thomas v. Canadian Broadcasting Corp. 16 C.C.L.T. 113 (N.W.T. Sup. Ct. 1981) (defenses of justification, fair comment, and qualified privilege all fail).

40. Doody, *supra* note 13 at 126.

41. *See* Banks v. Globe & Mail, 1961 S.C.R. 474, 482-83 (discussing fair comment and qualified privilege and when each may be invoked).

ment is of public interest.[42] Rather, the defense is raised only after the case goes to trial.[43] Thus, at the time of publication, the newspaper cannot predict whether the story will be protected or not.

In two influential decisions, the Supreme Court of Canada reversed findings of a qualified privilege at the trial court level. *Globe & Mail Ltd. v. Boland*[44] involved statements published by a newspaper during an election campaign concerning a candidate's fitness for office.[45] The trial court found that a national election was a matter of public interest on which the press had a duty to report.[46] The Supreme Court reversed, holding that while the press has the same right as all citizens to report on public issues, they do not have a duty to do so.[47] In the absence of a duty to report, there was no privilege.[48]

A similiar situation occurred in *Banks v. Globe & Mail Ltd*,[49] where the trial court found that a comment on the topic of industrial relations was privileged as a matter of public interest.[50] Once again the Supreme Court of Canada reversed, finding the idea of a newspaper holding a special privilege on a matter of public interest to be "untenable."[51]

Boland and *Banks* are the only Canadian Supreme Court

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42. Shanoff, *supra* note 4, at 17; *see, e.g, Cherneskey*, 90 D.L.R.3d, 321 (1979 S.C.C.).

43. *See generally* Shanoff, *supra* note 4, at 18.

44. 1960 S.C.R. 203

45. *Id.* The libellous editorial read, in relevant part:

SHABBY TACTICS

One of the less creditable episodes of the election campaign occurred on Thursday . . . when Mr. John Boland, self-styled independent Conservative candidate, introduced an issue which does not exist in this election. McCarthy-style, he put forward an ex-Communist in an attempt to show the Liberals are "Soft on Communism". The results were far from edifying.

Id. at 205.

46. *Id.* at 204-05.

47. *Id.* at 207 (emphasis in original).

48. *Id.*

49. [1961] S.C.R. 474.

50. *Id.* at 480-81. The editorial in question, in relevant part, reads as follows:

MISSION ACCOMPLISHED

It would seem in retrospect that Mr. Harold C. Banks, Canadian director of the Seafarer's International Union, was brought to this country for the specific purpose of scuttling Canada's deep sea fleet. If this was indeed the case, he has succeeded admirably."

Id. at 475.

51. *Id.* at 484.

decisions regarding the qualified privilege of media defendants, but some provincial courts have recognized "the freedom of the press to propogate its views and ideas on any issue."[52] In particular, the Ontario Court of Appeals has held that the press has a duty to report information which is safeguarded by the defense of qualified privilege.[53]

Generally, the media has not been successful in avoiding liability in suits involving matters of public interest.[54] However, there is reason to believe that a special privilege for the press on matters of public interest increasingly is being recognized. The Canadian Parliament recognized the importance of this right by including freedom of the press language within the Charter.[55] Some Canadian lower court decisions also seem to be moving in this direction.[56] It would appear that the Charter mandates a reappraisal of the qualified privilege de-

52. Gay Alliance Towards Equality v. Vancouver Sun, 97 D.L.R.3d 577, 591 (S.C.C. 1979) This case arose as a result of the refusal of the *Vancouver Sun* to print advertisements for an avowedly homosexual newspaper.

53. *Id.* In Stopforth v. Goyer, 97 D.L.R.3d 369 (C.A. 1979), a federal Minister of the Crown in Canada made defamatory statements in Parliament about a civil servant who had recently been fired. The Minister then repeated these statements to the Canadian press. The Court of Appeals held the qualified privilege applicable in regard to the statements made to the press, stating:

> "[T]he electorate, as represented by the media, has a real and *bona fide* interest in the demotion of a senior civil servant for an alleged dereliction of duty. . . . The appellant had a corresponding public duty and interest in satisfying that interest of the electorate. Accordingly, there being no suggestion of malice, I would hold that the alleged defamatory statements were uttered on an occasion of qualified privilege.

Id. at 372.

54. *See, e.g.*, Snider v. Calgary Herald, 34 C.C.L.T. 27 (Alta. Q.B. 1985) (Defendants invoked qualified privilege based on what they believed to be a legitimate public interest in receiving information on the construction of a transportation system in Calgary. The defense failed because of the court's finding of actual malice); Whitaker v. Huntington, 15 C.C.L.T. 19 (B.C. Sup. Ct. 1980) (Defendants sought to invoke qualified privilege based on a duty to report. The court refused to acknowledge that such a duty existed). *But see* Camporese v. Parton, 47 B.C.L.R. 78 (1983) (The defendants' report that a home canning lid was unsafe is protected because of the newspapers duty to report important information to the public.)

55. *See supra* note 18.

56. *See* Gay Alliance Toward Equality v. Vancouver Sun, 97 D.L.R.3d 577, 591 (S.C.C. 1979) (recognizing "the freedom of the press to propogate its views and ideas on any issues and to select the material which it publishes"); Stopforth v. Goyer, 97 D.L.R.3d 369 (C.A. 1979) (the public has a legitimate interest in the demotion of a senior servant for deriliction of duty and that the defendant had a corresponding interest to satisfy that interest).

fense so as to promote free speech on matters of public interest.[57]

B. *The Fair Comment Defense*

Fair comment is the most important defense for the media because the defense provides that free, and even harsh comments, on matters of public interest are permissible.[58] However, the defendant must clearly distinguish between comment and fact because only comment that is the honestly-held belief of the writer is protected.[59] The distinction between fact and opinion is one with which the courts have consistently had difficulty.[60]

In *Cherneskey v. Armadale Publishers Ltd.*,[61] the Supreme Court of Canada held a newspaper liable for the defamatory contents of a letter it published because the comment contained within the letter could not be proven to be the honestly-held belief of the writers.[62] Fair comment did not apply since the newspaper could not produce the writer and the opinion was not the belief of the editors of the newspaper.[63]

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57. Cherneskey v. Armadale Publishers, 90 D.L.R.3d 321 (S.C.C. 1979); Doody, *supra* note 48 at 139; *see also* Note, *supra* note 4, at 299.

58. *See generally* Rogers, *Some Problems of Fair Comment and the Press*, 10 ANGLO-AM. L. REV. 225 (1981); Note, *supra* note 4, at 307.

59. Rogers, *supra* note 67 at 236; Note, *supra* note 4 at 310. *See generally* Case Comment, *Burnett v. C.B.C. and MacIntyre*, 7 DALHOUSIE L.J. 432, 436-37 (1983).

60. Holt v. Sun Publishing Co., 83 D.L.R.3d 761, 763-64 (B.C. Sup. Ct. 1978). *See generally* Titus, *Statement of Fact Versus Statement of Opinion: A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203, 1215, 1235 (1962). In *Holt*, a member of Parliament sued the *Vancouver Sun* for printing an editorial criticizing her for interviewing Lynette "Squeaky" Fromme and stating in front of the reporter her intention to ask the warden's permission to carry a message from Fromme to convicted murderer Charles Manson. *Id.* at 762. She ultimately decided not to carry the message. *Id.* at 763. The plaintiff was present at the California prison as a member of the Commons Committee on prisons. *Id.* at 762.

61. 90 D.L.R.3d 321 (S.C.C. 1979).

62. *Id.* at 321. The plaintiff in *Cherneskey* was a lawyer and city alderman. The defendants were the owner and publisher of a newspaper. *Id.* at 342. The defendants published a letter to the editor, in response to an article in the newspaper regarding a meeting of the city council. The writers of the letter accused the plaintiff of taking a "racist" position on a matter. *Id.* at 321.

Prior to trial, the defendants application to have the two writers of the letter joined as parties was denied. *Id.* at 328. At trial, counsel agreed that the writers of the letter were out of the jurisdiction and neither was called as a witness. *Id.* at 328. Therefore, it was never established that the letter was the honest belief of the writers.

63. *Cherneskey*, 90 D.L.R.3d at 325-26.

Cherneskey contravenes the function of the fair comment defense, that being the creation of a free and open forum for debate on public issues.[64] The decision adds another restriction to the freedom of newspapers to comment on public issues because they must be able to prove the opinion is the honestly held belief of the writer.[65] The practical effect of the decision is that newspapers will only print letters with which they agree.

It is more logical to base a defendant's liability with regard to matters of public interest on fault,[66] rather than on a distinction between fact and comment. The fault standard requires a defendant to prove that his statement is reasonably justified, and that the basis of the statement is reasonably investigated.[67] A fault standard is appropriate for fair comment and conforms with the intent of the Charter[68] to provide protection for a publication made on a matter of public interest.[69]

III. *GUARANTEEING A FREE PRESS UNDER THE CANADIAN CHARTER: THE UNITED STATES EXAMPLE*

The Canadian common law of libel, arising before the adoption of the Charter, inadequately protects media defendants because it places on them the heavy burden of proving the truth of a defamatory statement. Because the guarantee of a free press has achieved the status of a constitutional right, this libel standard should be re-evaluated and broadened to achieve the goals of the Charter. It is useful to consider the American experience in developing standards regarding a free press since *New York Times v. Sullivan*. This landmark case marks the point of divergence between United States and Canadian libel law.[70]

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64. *See* Rogers *supra* note 58, at 225; Note, *supra* note 4, at 310.

65. Rogers, *supra* note 58, at 227.

66. Titus, *supra* note 60, at 1235; Note, *supra* note 4, at 317.

67. Note, *supra* note 4, at 317.

68. *Id.*

69. Doody, *supra* note 13, at 135.

70. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS, 831-35 (1984) [hereinafter PROSSER ON TORTS]. This treatise discusses United States common law fair comment and qualified privilege, which were changed by New York Times Co. v. Sullivan, 376 U.S. 254 (1963). The common law is still the current law in Canada.

A. *The United States Actual Malice Standard*

The United States Supreme Court has enunciated a media privilege based on the first amendment to the United States Constitution, designed to encourage dissemination of information related to public issues.[71] The privilege requires a distinction between public officials as opposed to private individuals.[72] The public person must meet the higher standard, that of "actual malice," in order to recover for libel.[73] The actual malice standard does not allow a public plaintiff to recover for libel from a media defendant absent a showing of reckless disregard for the truth, or actual knowledge of falsity.[74] The reasoning behind the standard is that statements made about public people generally relate to matters of public interest, and are made about people whose actions affect the lives of others.[75] In addition, public plaintiffs often have access to the media to refute false statements, and therefore do not require as much protection against defamatory statements as private citizens.[76] Whether a plaintiff is a public or private person, some degree of fault is necessary and strict liability is never permissible.[77]

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71. New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1963) ("The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions.").

72. Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974).

73. St. Amant v. Thompson, 390 U.S. 727, 731 (1967) (The test is not . . . whether a 'reasonably prudent man' would have published. Rather, there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.); *Sullivan*, 376 U.S. at 279-80.

74. *Sullivan*, 376 U.S. at 279-80.

75. *Gertz*, 418 U.S. at 343-45. "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* at 344.

76. *Id.*; *see also* Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967).

In Pindling v. National Broadcasting Corp. [sic], No. 17549/84 (Sup. Ct. Ontario, filed May 4, 1984) (papers on file in the offices of the *Fordham International Law Journal*), Bahamian Prime Minister Lynden O. Pindling was invited to appear on a United States television program carried by the defendant in order to respond to an allegedly libellous NBC news report. Transcript of "Today" interview with Lynden O. Pindling, September 12, 1983, exhibit "A", Statement of Claim, Pindling v. National Broadcasting Corp. [sic], No. 17549/84 (Sup. Ct. Ontario, filed May 4, 1984) (papers on file in the offies of the *Fordham International Law Journal*). Surely, this is an opportunity that would not be available to a public plaintiff. This additional possibility for rebuttal justifies the higher burden a public plaintiff must bear in the United States.

77. *Gertz*, 418 U.S. at 347-48.

B. *Adoption of the Actual Malice Standard in Canada*

The extent of the United States privilege for media defendants is not clearly defined,[78] but essentially it eliminates the common law notion of "publish at one's own peril," and substitutes a requirement of fault as a prerequisite to liability.[79] This is not true in Canada, where libel is essentially a strict liability tort.[80] The United States privilege grants extensive protection to media defendants reporting on "public officials,"[81] and innaccuracies are tolerated as long as the plaintiff cannot establish "actual malice" on the defendant's part.[82]

The language of the Charter demonstrates that Canada has also recognized the importance of free discussion on public issues, but the failure of the media to succeed in applying the defenses quashes public debate.[83] A constitutionally-based privilege in Canada similiar to the United States actual malice standard would protect media defendants far more adequately than current Canadian libel defenses,[84] thus conforming with the intent of the Charter.

The Charter provides the Canadian judiciary with the opportunity to change this area of libel law.[85] The *Pindling* case provides the Canadian courts with the chance to assume a more activist role in reforming this area of libel law. Thus, the courts should create a privilege that allows the press greater freedom to report honestly and fairly, even harshly at times, on matters involving public officials. In light of the Charter and its commitment to a free press, Canada should recognize a fault-based standard of liability in cases involving media defendants. This standard, similiar to that currently available in the United States, entails shifting the burden of proof of actual malice from defendant to plaintiff.[86] Insofar as the United States and Canada purport to uphold the same values of free

78. *See* PROSSER ON TORTS, *supra* note 70, at 805.
79. *Gertz*, 418 U.S. at 347-48.
80. Note, *supra* note 4, at 316.
81. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1963).
82. *Id.*
83. Note, *supra* note 4, at 299.
84. *See generally* BILL OF RIGHTS AND CHARTER, *supra* note 2; *supra* notes 37-70 and accompanying text.
85. *See supra* notes 7-36 and accompanying text.
86. *See* Note, *supra* note 4, at 317.

speech, adoption of the actual malice standard seems appropriate.

CONCLUSION

The Canadian Charter of Rights and Freedoms, which establishes a constitutional guarantee of a free press, signals a new chapter in the history of Canadian libel law. The close analogy between the Charter and the Bill of Rights of the United States Constitution suggests that American first amendment jurisprudence may be instructive for the Canadian courts. A qualified privilege for media defendants, such as that provided by the United States actual malice standard, would further the goals of the Charter by offering heightened protection for a free press.

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